PATNA HIGH COURT

Mahendra Raut

Vs

Darsan Raut

A.F.A.D. No. 228 of 1948

(Reuben, Das and Sarjoo Prosad, JJ.)

30.04.1952

JUDGMENT

Das, J.

1. This second appeal has had a chequered career. It arises out of a suit for redemption of two mortgage bonds dated the 29th of September, 1920, executed by one Rikhai Raut in favor of the defendants first party. On the 25th of February, 1924, Rikhai Raut, it is alleged, sold to one Ganesh Raut an area of 14 bighas and odd kathas which included an area of seven bighas and odd kathas, being the property under mortgage. The consideration (for the sale-deed was stated to be Rs. 1,500/- out of which a sum of Rs. 1,175/- was kept in deposit with Ganesh Raut for redeeming the two mortgages, and the balance of Rs. 325/- was stated to have been set off towards previous dues. Ganesh Raut was the father of two of the plaintiffs, and grandfather of the other plaintiffs. Rikhai Raut, it was stated, died in 1933 in a state of separation from his agnates, leaving behind four daughters, who were defendants third party. In Baisakh 1351 Fasli, the plaintiffs tendered the amount of the two mortgage bonds to the defendants first party who refused to accept the amount on the ground that they had transferred their rights to the defendants second party. The plaintiffs thereupon tendered the money to the defendants second party who refused to accept the same. Thereupon, the plaintiffs brought the suit on the 1st of September 1945. The suit was valued, for purposes of jurisdiction and court-fees, at Rs. 1,200/-, the sum of Rs. 1,175/-being the mortgage money and the remaining sum of Rs. 25 was stated to be the approximate mesne profits which the plaintiffs claimed.

2. The suit was decreed by the learned Additional Subordinate Judge on the 24th of March, 1947, and the learned District Judge on appeal affirmed the decision of the learned Subordinate Judge on the 8th of October, 1947. The present second appeal was then preferred to this Court by the defendants second party on the 2nd of March 1948 and was admitted on the 13th of September 1948.

3. Under the Rules of the Court as published in 1938, a single Judge is competent to hear and dispose of a second appeal, when the value of the subject-matter of the appeal does not exceed Rs. 1,000/-; see Rule 1 (ii) in Chapter II at page 5 of the Rules of the High Court at Patna. On the

28th of February 1952 was passed Standing Order No. 2 of 1952, which reads as follows :

> "The Single Judge's Jurisdiction in appeal from appellate Decrees and orders is raised from Rs. 1,000/- to Rs. 5,000/- and all such appeals standing on the Weekly Cause list shall be heard by a Single Judge. The rules at present in vogue for the preparation of paper-book in Second Appeals below Rs. 1,000/- in value and in appeals exceeding Rs. 1,000/- in value shall be followed until further orders.

This order will take effect from 3rd March, 1952." This Standing Order was passed by our Lord the Chief Justice. In pursuance of the said Standing Order, this appeal was listed for hearing before a single Judge. As the value of the appeal exceeded Rs. 1,000/-, the question whether a single Judge was competent to hear and dispose of the appeal was raised, and Narayan, J., before whom the appeal was placed for hearing passed an order on the 20th of March, 1952, directing that the appeal be placed before a Division Bench. The appeal was then placed before a Division Bench consisting of myself and Sarjoo Prosad, J. As the question raised was of considerable general importance and was likely to arise in all second appeals above the value of Rs. 1,000/- we directed on the 21st of March 1952, that the appeal be placed before our Lord the Chief Justice for constituting a larger Bench for determination of the question whether a single Judge is now competent to hear and dispose of such appeals by reason of the aforesaid Standing Order.

4. We have had the advantage of hearing arguments, both for and against the view that a single Judge is now competent to hear second appeals exceeding Rs. 1,000/- in value. It has not been disputed before us that this larger Bench is competent to dispose of the appeal on merits, without going into the question of the competence of a single Judge to hear second appeals exceeding Rs. 1,000/- in value. This Bench was, however, constituted specially for determining the legal validity and effect of the Standing Order. As I have already said, the question is of considerable general importance and has to be decided so as to set at rest the controversy whether such appeals should or should not be placed before a single Judge for hearing. I propose, therefore, to deal first with the question whether a single Judge is, by reason of the Standing Order, competent to hear second appeals exceeding Rs. 1,000/- in value and then dispose of the present second appeal on merits. It is necessary to decide the second appeal on merits; because the appeal itself, being an appeal from an appellate decree, has been referred to us, under the rules of the Court, for final decision and not merely the particular question of the competency of a single Judge to hear such appeals.

5. The first question really involves three points : (1) whether Standing Order No. 2 of 1952 can be said to have validly effected an amendment, pro tanto, of Rule 1 (ii) in Chapter II of the Rules of the Court; (2) if so, has it retrospective effect; in other words, does it apply to appeals arising out of suits or cases which were instituted before the 3rd of March 1952, on which date the Standing Order is expressly stated to have come into effect and (3), is it open to this Court, by an amendment of the rules, to take away what has been described as a vested right of appeal to the Supreme Court? I think that the first point can be dealt with independently, but the second and third points are closely connected and will be dealt with together.

6. I proceed now to consider the first point. Article 225 of the Constitution lays down, 'inter alia', that the jurisdiction of any existing High Court and the respective powers of the Judges thereof in

relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of the Constitution. There is a proviso to the Article with which we are not concerned. It is clear that the power to make rules which this Court had before the commencement of the Constitution is preserved by Article 225 of the Constitution, the only limitation being that the power is subject to other provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by the Constitution. The Government of India Act, 1935, contained a similar provision in Section 223 which also stated that the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as before. These provisions take us back to the Government of India Act, 1915, Section 108 of which was in these terms :

> "(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by division Courts constituted by two or more Judges, of the High Court, of the original and appellate jurisdiction vested in the Court.
> (2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several division Courts."

The first sub-section deals with the exercise of the jurisdiction of the High Court, for which each High Court may make its own rules; the second sub-section deals with the powers of the Chief Justice to designate Judges for cases, or in other words with the power to settle the roster of the Court. The Letters Patent of the Patna High Court also contain provisions enabling the Court to make rules to regulate its own practice. Clause 29 of the Letters Patent says :

> "And we do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court....."

Clause 28 of the Letters Patent states :

> "And we do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915...."

It is, I think, sufficiently clear that the rules of the Court, which are material for our present purpose, are statutory rules made by the Court under the powers conferred on it by Section 108 of the Government of India Act, 1915, and the Letters Patent. The material rule is Rule 1 (ii) in Chapter II which reads :

> "1. The following matters may be heard and disposed of by a single Judge :

* * * *

(ii) A second appeal, or an appeal from a decree or order passed in the execution of a decree where the value of the subject-matter of the appeal and of any cross-objection therein under Order 41, Rule 22, as stated in the memorandum of appeal or cross-objection, does not exceed Rs. 1,000 and which is not an appeal under Order 43, Rule 1."

There is, I think, no doubt that the rule is a statutory rule, which the Court has power to amend. The question is if Standing Order No. 2 of 1952 has the effect of amending the rule in so far as it enlarges the jurisdiction of a single Judge with effect from a particular date and in respect of all pending appeals. The answer to the question depends on whether the Standing Order itself has been made by the Court. In form and on the face of it, the Standing Order purports to be an order of the Chief Justice. We examined the relevant administrative files on the subject and found that there was a decision by the Full Court for enlarging the jurisdiction of a single Judge to hear second appeals up to Rs. 5,000/- in value. That decision was reached on the recommendations made by the Committee which was appointed some time ago, to consider the arrears of work in different High Courts. There was, however, no decision by the Court as to other matters incorporated in the Standing Order; such as, the date from which the change shall take effect, whether the change shall govern appeals standing in the Weekly Cause List or not. It seems clear to me that under Sub-section (1) of Section 108 the rules have to be made by the Court itself; it follows that any change in the rules must also be made by the Court. As I have already stated the power of the Chief Justice under Sub-section (2) of Section 108 of the Government of India Act, 1915, is to designate Judges for cases and to constitute division Courts of two or more Judges. I do not, therefore, think that an amendment of the rules of the Court can be made by means of administrative action embodied in a Standing Order passed by the Chief Justice. I must, however, make one point clear. Rule 10 at page 9 of the Rules of the Court says :

"Save as provided by law or by these rules or by an order of the Chief Justice every other case shall be heard by a Bench of two Judges."

Rule 10A at the same page reads :

"Subject to the provisions of these rules, the Chief Justice shall direct what case or classes of cases shall be placed before each Judge or Bench."

7. Within the limit and boundary of the rules, it has been the practice in this Court, within my experience, for the Chief Justice to direct what case or class of cases shall be placed before each Judge or Bench. For example, under Rule 1 (XV) a single Judge has power to hear all criminal appeals other than an appeal in which a sentence of death or of transportation for life has been passed. Within the framework of this rule, it has been the long standing practice of this Court for the Chief Justice to direct that appeals involving a lesser sentence, such as six months', three years' or even five years' imprisonment, shall only be placed before a single Judge and appeals involving a higher sentence shall be placed before a Division Bench. Similarly, though Rule 1(ii) lays down that a single Judge may hear and dispose of a second appeal which does not exceed Rs. 1,000/- in value, it is open to the Chief Justice to direct that a single Judge shall deal with second appeals of a lesser value, namely, Rs. 500/- only, and second appeals exceeding Rs. 500/-

in value shall be placed before a Division Bench. Such practice is, I think, sanctioned by and is consistent with Rules 10 and 10A quoted above. I do not, however, think that R. 10 or 10A, empowers the Chief Justice to go beyond the limit of the rules or amend the rules of the Court by administrative action embodied in a Standing Order. There is room for administrative action within the framework of the rules; but there can be no fundamental change of the rules by administrative action only.

8. My view, therefore, is that Standing Order No. 2 of 1952, as it stands, cannot be held to have validly effected an amendment of Rule 1(ii) in Chapter II at page 5 of the Rules of the Court, in so far as the Standing order enlarges the jurisdiction of a single Judge with effect from a particular date and in respect of all pending appeals. The proper way to change the rule is by means of an amendment, to be made by the Court in exercise of the power conferred on it under Section 108 of the Government of India Act, 1915 and the Letters Patent.

9-10. I now proceed to consider the other two points which present greater difficulty and have led to a divergence of views in some of the High Courts in India. It would, perhaps, have been enough for us to say, for the purpose of this appeal, what I have already stated, namely, that Standing Order No. 2 of 1952 does not validly effect an amendment of the rules of the Court and leave the other two points to be dealt with if and when an amendment of the rules is validly made. We have considered this aspect of the question, but have felt that a postponement of the consideration of the other two points will only mean postponing the evil day. The question of the power of this Court to make rules which will be applicable to pending appeals has been raised and argued at the Bar. In view of the large number of such appeals which are still pending, it is necessary and desirable that our opinion on the question should be recorded at the earliest opportunity.

11. The power of this Court to make rules for the exercise of the original and appellate jurisdiction vested in the Court, by one or more Judges or by Division Courts constituted by two or more Judges of the High Court, is not in dispute. The power of this Court to amend such rules is also not in dispute. It is admitted that the power to make rules includes the power to amend the rules. What is in dispute is if this Court can give retrospective effect to the amendments made so as to take away what is described as a vested right of appeal to the Supreme Court. It is necessary to start a consideration of this question with a statement of certain general principles which are not in dispute. As observed in *'Moon v. Durden[1]',* the general rule governing the construction of statutes, and I take it statutory rules as well, is

> "that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of Parliament is, that 'nova constitutio futuris formam debet imponere, non praeteritis".

The general rule was so stated by Lord Coke, in the Second Institute, 292, in his Commentary on the Statute of Gloucester. It is now well settled that in the absence of express words or necessary, intendment, it cannot be supposed that the legislature meant to deprive a man of a vested right; and though there is no doubt of the justice of the rule of construction laid down, by Lord Coke, the rule would yield to the intention of the legislature. On the other hand, it is equally clear that there is a material difference when a statute is dealing with rights already vested, not intended to

be taken away and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter (as per Lord Wensleydale in *'A.G v. Sillem[2]',* As has been often said, there is no vested right in procedure. The above principles are well-established and I do not wish to encumber this judgment with a citation of authorities in support of such well-known principles.

12. Keeping the aforesaid general principles in mind, let me approach the problem before us. The point urged on behalf of the appellants is that an amendment of the rule of procedure made by this Court cannot take away a vested right of appeal. The argument in support of this point is founded on a process of reasoning which may be briefly indicated; first, it is stated that a right of appeal is

> "the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below"

created and granted by statute is a vested right, a substantive right, and not a mere matter of procedure; the right to enter the superior Court is deemed to arise to a litigant before any decision has been given by the inferior Court; namely, the determining date is the date of the institution of the suit, because

> "the legal pursuit of a remedy-suit, appeal and second appeal - are really steps in one legal proceeding connected by an intrinsic unity."
> *'Colonial Sugar Refining Company, Limited v. Irving'[3], 'Delhi Cloth And General Mills Co. Ltd. v. Income-Tax Commissioner, Delhi'[4],* secondly at the date of the institution of the suit out of which this appeal has arisen and till the date of the passing of the Standing Order, the parties had an existing right of appeal - first to the District Judge under Section 96 of the Code of Civil Procedure , then to the High Court under Section 100 of the Code of Civil Procedure , and lastly to the Supreme Court under Article 133 of the Constitution read with Sections 109 and 110 of the Code of Civil Procedure; the third step in the argument is that by an amendment of the rule - assuming
> the Standing A Order to have validly effected an amendment of the rule - it is not open to this Court to take away or affect adversely any of the existing rights of appeal; it is pointed out that by directing the appeal to be heard by a single Judge, the right of appeal to the Supreme Court is either taken away or adversely affected, because Clause (3) of Article 133 of the Constitution lays down that unless Parliament by law otherwise provides, no appeal shall lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

It is contended that the right of appeal from the judgment of one Judge under Clause 10 of the Letters Patent is dependent upon the Judge declaring that the case is a fit one for appeal and is not the same right as given by Article 133 of the Constitution read with Sections 109 and 110 of the Code of Civil Procedure. It is contended that where the statute gives a right of appeal, it is not open to the rule-making authority to take away or adversely affect the right by an amendment of the rule relating to practice or procedure.

13. I have summarized above the argument advanced before us in support of the contention that a single Judge is not competent to hear second appeals exceeding Rs. 1000/- in value, which have arisen out of suits instituted before the date on which the amendment was made.

14. Mr. Lalnarain Sinha, appearing in a connected appeal which was heard along with this appeal but was disposed of on compromise, supported the opposite view, and contended that the decision of the Privy Council in *'Colonial Sugar Refining Co. Ltd. v. Irving[5]',* which is the leading decision on the subject, is no longer binding on us and requires re-examination. He has contended that the reasoning of the decision which goes to support the proposition that right of appeal to a litigant at the date of the institution of the suit is not correct and should be re-examined. He has pointed out that Section 212 of the Government of India Act, 1935 which made the law declared by any judgment of the Privy Council binding on all Courts stands repealed, and Section 141 of the Constitution makes the law declared by the Supreme Court binding on all Courts. He has also referred to Section 8 of the Abolition of Privy Council Jurisdiction Act, 1949 and has contended that it does not make the decision in Colonial Sugar Refining Co. Ltd. binding on us. Lastly, he has submitted that if the decision in Colonial Sugar Refining Co. Ltd. is accepted as correct and binding, then there is no escape from the position that a right of appeal vested in a litigant at the commencement of the section cannot be interfered with by an amendment of a rule relating to practice or procedure.

15. Having summarized the arguments of learned counsel on both sides, I proceed now to give my own views and the conclusion at which I have arrived after a careful consideration of the arguments and the case-law on the subject. There are two decisions directly bearing on the question, in which two opposite views have been taken; *'Radhakishan v. Shridhar'[6],* and *'Gordhan Das Baldev Das v. Governor General In Council[7]',* There are three other decisions which do not directly bear on
the problem before us but are relevant and require careful consideration. These are *'Ram Charan v. Hamid Ali'[8], Sardar Ali v. Dalimuddin[9],* and 'IN RE, VASUDEVA SAMIAR', 52 Mad 361. All the aforesaid decisions are Full Bench or Special Bench decisions.

16. I do not think that it is possible to get rid of the decision of the Privy Council in Colonial Sugar Refining Co. Ltd. in the way suggested by Mr. Lalnarain Sinha. The decision was accepted as correct in a large number of cases by Courts in India, and may be said to have established a course of decisions declaring the law on the subject, which cannot be disturbed or unsettled except for very compelling reasons. There cannot be the least doubt that a decision of the Privy Council is entitled to very great respect, apart from whether it is now binding on the Courts in India. The Privy Council decision in question may be said to have laid down three principles; first, the general principle established by a long line of authorities from the time of Lord Coke that a statute cannot be supposed to take away a vested right, except by express enactment or necessary intendment; second, to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure; third, the right of appeal arises at the date of the suit. As to the correctness of the first two principles, there can, I think, be no doubt. As to the third principle, it may be somewhat of a paradox that a right of appeal arises even before a decision has been given by the inferior Court. But I think that the paradox is resolved, if the distinction between the 'existence of a right' and the 'exercise of the right' (when the occasion arises) is kept in mind. A right may exist long before it is exercised.

17. Therefore, the crux of the problem before us is assuming that there is a valid amendment of the Rules of the Court by which a single Judge is empowered to hear and dispose of all second appeals (including pending appeals) exceeding Rs. 1000/- in value with effect from a particular date, can it be said that such an amendment takes away or adversely affects any existing right of appeal? I venture to think that it does not, and my reasons are these. I do not think that it can be doubted that a rule laying down the powers of a single Judge is a rule of practice and procedure as to the internal arrangement within the Court for disposal of cases. No party can say that he has a right to be heard by a particular number of Judges. If, therefore, a change is made in the rules and an appeal is heard by a single Judge instead of by two Judges, no party can object unless some vested right is affected, it being clearly understood that there is no vested right that an appeal to the High Court must be heard by a particular number of Judges. Let us examine if any vested right of appeal is really affected by such a change in the rule as I have predicated above. Take the right of appeal under Section 96 of the Code of Civil Procedure . Clearly enough, it is not affected in any way by the change; nor is the right of appeal under Section 100 of the Code of Civil Procedure affected, because the right is that of an appeal to "the High Court" not to any particular Judge or Bench. Then comes the important question of the right of appeal to the Supreme Court - previously to the Privy Council or the Federal Court. Whatever difference of opinion there has been on this problem centres round this question. Now, we must first make sure what right of appeal the statute has
given, before we consider if the right is taken away or adversely affected. The right
given by the statute (Article 133 of the Constitution read with Sections 109 and 110 of the Code of Civil Procedure now; Sections 109-112 of the Code of Civil Procedure before) was the right to appeal to a superior Court, on certain conditions being fulfilled, provided the judgment decree or final order was not of one Judge of a High Court. The statute itself put certain limitation on the right of appeal, from order of a single Judge, except in the manner laid down in Clause 10 of the Letters Patent. If that be the position with regard to the right of appeal and if the party had no vested right to have his appeal heard by a particular number of Judges, in the High Court, how can it be said that a change in the rules relating to the power of a single Judge has taken away his right of appeal given by the statute? The right of appeal given by the statute remains unaffected unless the party aggrieved can say that he had a vested right to be heard by two Judges - which right he clearly had not.

18. The view which I have expressed above was the view expressed by Bose, C.J., (as he then was) in the order of reference leading to the Full Bench decision in *'Radhakishan v. Shridhar*[10]*',* I am not unmindful of the observations made by Bose, C.J., as a member of the Full Bench, in which he said :

> "I have read the opinion of my learned brother Hidayatullah, J., and I am driven by his remorseless logic to the conclusion that he is right and that the tentative opinion expressed by me in my order of reference is wrong so far as appeals which my learned brother has called appeals as of right are concerned."

Hidayatullah, J., made distinction between appeals which satisfied the condition of valuation prescribed in Section 109, Clauses (a) and (b), read with Section 110 of the Code of Civil Procedure , and appeals which came under the third clause of Section 109 of the Code of Civil

Procedure . In making this distinction he observed :

> "My conclusion is that while under Clauses (a) and (b) of Section 109 a substantive right is involved, the same cannot be said of appeals under Clause (c) of that Section."

He further pointed out that appeals under Section 109 (c) of the Code of Civil Procedure depended not on any right of the party concerned, but upon the discretion of the Court. According to him,

> "a difference must be made between those cases in which the appeal is such an absolute fact that it can be said to vest in a litigant the moment his case is before the Court and those cases in which the litigant has no immediate right and the appeal can only be taken to the Superior Court when the Court itself decides that the case is fit for decision of the King in Council."

The distinction which Hidayatullah, J., made was not accepted as a valid distinction by the Full Bench of the Punjab High Court in *'Gordhan Das Baldev Das v. Governor-General In Council*[11]*',* Bhandari, J., with whom
Soni, J., agreed, the third Judge expressing some doubt in regard to cases under Section 109 (c) of the Code of Civil Procedure, said :

> "Section 109 draws no distinction whatsoever between appeals which can be preferred under any of the three clauses of the said section for it provides that 'an appeal shall lie' to the Supreme Court; (a) from any decree or final order passed on appeal by a High Court or by any other Court or final appellate jurisdiction; (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Leave to appeal to the Supreme Court can be granted either when the case fulfils the requirements of Section 110 or when it is 'otherwise' a fit case for appeal to the Supreme Court. In either case the petitioner has to apply for a certificate either that the case fulfils the requirements of Section 110 and is therefore a fit case for appeal to the Supreme Court, or that for other reasons it is a fit case for appeal to the Supreme Court. Ordinarily, it is not difficult to satisfy the Court that the case fulfils the requirements of Section 110 as far as the value of the subject-matter is concerned. It is more difficult to satisfy the Court that the case involves the decision of a substantial question of law. It is still more difficult to satisfy the Court that even though the matter in controversy is not measurable by money the case is a fit one for appeal to the Supreme Court. But the fact that it is more difficult to obtain a certificate in one case than in another does not, in my opinion, alter the fact that a person who procures the certificate under Clause (c) has as much right to prefer an appeal to the Supreme Court as the person who procures a certificate under either of the other two clauses. The only construction that may reasonably be placed on the words 'an appeal shall lie to the Supreme Court' is that a person who satisfies any one or more of the conditions specified in Sections 109 and 110 of the Civil

Procedure Code, is entitled to claim that leave to appeal must be given to him as a matter of right. If, for example, he satisfied the Court that his case fulfils the requirements of Section 110 or that the case is a fit one for appeal to the Supreme Court, the Court has no discretion to refuse leave to appeal and must grant it as a matter of course." I do not wish to repeat the reasons given by Bhandari, J., but content myself with saying that I respectfully agree with him. I do not think that any such distinction can be drawn between Clauses (a), (b) on one side and Clause (c) of Section 109, on the other, as was drawn by Hidayatullah, J. Leave to appeal to the Supreme Court is granted either when the case fulfils the requirements of Section 110 of the Code of Civil Procedure or when it is otherwise a fit case for appeal to the Supreme Court. In either case, the petitioner has to apply for a certificate and has to satisfy the Court that the requisite conditions are fulfilled. The right is thus a limited right, but no distinction in principle emerges from the different limitations in Clauses (a), (b) and (c) of Section 109 of the Code of Civil Procedure .

19. The point which I wish to make is more fundamental than the distinction made by Hidayatullah, J. My point is that unless it is predicated that a party appealing to the High Court under Section 100 of the Code of Civil Procedure has a vested right to be heard by two Judges, a change in the rules relating to the powers of a single Judge does not take away or affect the right of appeal given to the party by the statute. The nature of the right given by the statute has to be kept in mind. The right is to ask for a certificate that the appeal fulfils the requirements of Section 109 or Section 110 of the Code of Civil Procedure , but the right is only given in such cases as are heard in the High Court by two or more Judges : there is no such right in a case which is heard by a single Judge, there being a different right of appeal with regard to single Judge decisions under Clause 10 of the Letters Patent. If it is conceded that no party has a vested right to be heard by two or more Judges in the High Court, it follows as a necessary corollary that a change of rules with regard to the powers of a single Judge does not affect the right of appeal given by the statute. That right still remains the same as before. All that happens is that the statutory prohibition under Section 111 of the Code of Civil Procedure , now Clause (3) of Article 133 of the Constitution, comes into operation. A party can say that his right of appeal has been taken away or adversely affected, if he establishes two premises - (1) that he had a vested right to be heard by two Judges, and (2) that the right of appeal consequent on hearing by two Judges has been taken away or curtailed by a change in the rules of procedure. It must be conceded that a rule of the Court relating to the powers of a single Judge is a rule of procedure only; therefore, a party whose appeal under the old rules would have been heard by two Judges cannot say that his vested right of appeal has been taken away because his case is now to be heard by a single Judge. He must, I think, submit to such procedure as is laid down by the Court for the hearing of his appeal. Speaking with great respect, it seems to me that this aspect of the matter has not received much consideration by their Lordships of the Punjab High Court in *'Gordhan Das Baldev Das v. Governor-General In Council*[12]*',* Bose, C.J., indicated this line of approach in his order of reference leading to the Full Bench decision in the Nagpur case, and though the learned Chief Justice (as he then was) said later that his tentative opinion expressed in the order of reference was wrong, I venture to say with very great respect that the view expressed by him in the order of reference is supported by reasoning, the cogency of which is not shaken by any logical fallacy or even by the principles established by a long line of authorities following the case of 'COLONIAL SUGAR REFINING CO. LTD.', (1905) AC 369.

20. It remains now to consider the other three Full Bench decisions in *'Ram Charan v. Hamid Ali*[13]*"Sardar Ali v. Dalimuddin"*[14]*,* and *In re 'Vasudeva Samiar'*[15]*,* These decisions dealt with a

somewhat different problem. Prior to the amendment of the Letters Patent of the Court concerned, a party had a right of appeal from the decision of a single Judge without a certificate from the Judge that the case was a fit one for appeal. The amendment in the Letters Patent read with Section 111, C.P.C., took away that right, and an appeal lay from the decision of a single Judge only when the Judge gave a certificate that the case was a fit one for appeal. In these circumstances, the question arose whether the amendment affected appeals which arose out of suits instituted before the date of the amendment. The decision was that the amendment did not affect such appeals. Their Lordships were dealing with a case in which the amendment, if given effect to in all pending appeals from the date on which it was made, would undoubtedly have taken away an existing right of appeal given by the unamended Letters Patent. The principles laid down in the 'COLONIAL SUGAR
REFINING COMPANY'S CASE', were accordingly applied, and it was held that the amendment could not take away an existing right of appeal unless it said so expressly. After the decisions given by the Calcutta and Madras High Courts, the Letters Patent were amended so as to make it clear that the amendment would affect all appeals after a particular date. In my opinion, those decisions do not directly bear upon the problem before us, the problem before us being of a different nature. It is, however, pertinent to quote certain observations of Rankin, C.J., in 'SARDAR ALI'S CASE'. 56 Cal 512 at page 517 :

> "Now, there is a certain paradox in regarding the right to appeal within the High Court from the decision of a single Judge as a right 'vested' in the litigant at the date of the suit, since it is in no way certain that the case will ever be decided by a single Judge. Again, as the right of Second Appeal is the right given by Section 100 of Civil Procedure Code to appeal 'to the High Court', it does not seem unreasonable that a litigant should take the internal arrangements of the High Court as he finds them when he gets there. If, under the Letters Patent, all Second Appeals had been required to come before two Judges and a new Letters Patent had provided that one Judge should be competent to exercise this jurisdiction, leaving the right of appeal to the High Court and from the High Court, as before it would have been difficult, in my opinion, to hold that any litigant had a right to a hearing before two Judges."

Rankin, C.J., said that if under the Letters Patent all second appeals had been required to come before two Judges and a new Letters Patent had provided that one Judge should be competent to exercise this jurisdiction, leaving the right of appeal to the High Court and from this the High Court as before, it would have been difficult to hold that any litigant had a right to a hearing before two Judges. The problem before us is exactly what Rankin, C.J., had in mind when he made the above observations. All that is necessary is to substitute "Rules of the Court" for the expression "Letters Patent." Under the rules of the Court as they existed at the date of the institution of the suit, certain second appeals were required to come before two Judges; a change in the rules provided that one Judge should be competent to hear such appeals, but the rule made no change in the right of appeal to the High Court and from the High Court as given by the statute. The view of Rankin, C.J., as expressed in the observation quoted above, was that it would be difficult to hold that any litigant had a right to a hearing before two Judges. If I may say so with great respect to an eminent Judge, I think that the problem cannot be better stated, and it would, indeed, be difficult to hold that any litigant had a right to a hearing before two Judges. If

he had no such right, neither had he any vested right of appeal to a higher tribunal under Sections 109 and 110 of the Code of Civil Procedure or under Article 133 of the Constitution.

21. It is worthy of note that after the amendment in the Letters Patent came into force, there arose a conflict of opinion as to whether it had retrospective effect. According to the High Court of Bombay in the case of *'Badrudin v. Sitaram Vinayak[16]',* it had such effect, so that no appeal lay against a judgment of a single Judge, in second appeal filed after the amendment in the absence of the requisite certificate. The High Courts of Calcutta *'Sardar Ali v. Dalimuddin'[17],* and Madras *'In re : Vasudeva Samiar'[18],* held on the other hand, that the amendment did not operate retrospectively so as to affect the right of appeal which had accrued in respect of suits instituted prior to the amendment. According to the High Court of Allahabad *'Baijnath v. Doolarey Hajjam'[18],* all judgments delivered after the amendment were governed by the amended clause. In order to set this conflict at rest, the clause was again amended and the words "on or after the first day of February 1929" were added.

22. As a result of a careful consideration of the case law on the subject, my conclusion is that it is open to this Court to make a rule changing the powers of a single Judge and to make the rule applicable to all pending appeals with effect from a particular date. Such a rule does not take away any vested right of appeal. If I were of the opinion that Standing Order No. 2 of 1952 had validly effected an amendment of the rules of the Court, I would have been prepared to hold that a single Judge was competent to hear this appeal. The conclusion at which I have arrived does not, in my opinion, militate against the principles laid down in the 'COLONIAL SUGAR REFINING COMPANY'S CASE', (1905) AC 369, and subsequent decisions which have followed that case. Those decisions should be considered in the context of the facts on the basis of which they were given, and it would be wrong on principle, to enlarge the decision; after all a case is only an authority for what it decides *'Quinn v. Leatham', 1901 AC 495(Supra)*. In *'Attorney-General v. Sillem', (1864) 11 ER 1200,* Lord Westbury said that the creation of a new right of appeal is plainly an act which requires legislative authority; similarly, the taking away of a vested right of appeal requires express enactment or necessary intendment to that effect. A rule of procedure, however, stands on a different footing and a change of procedural rule which does not make any alteration in the statutory right of appeal cannot be said to be hit by the principles laid down in the 'COLONIAL SUGAR REPINING COMPANY'S CASE.' I shall be reluctant to so enlarge the decision of that case as to make it almost impossible to effect a satisfactory change in the rule of this Court. It is right to add that in the course of arguments I felt that prima facie, the view accepted by the Punjab High Court in *'Gordhan Das Baldev Das v. Governor-General In Council', AIR 1952 Punjab 103(Supra)*, was correct. My learned brother, Sarjoo Prasad, J., felt differently. On a more careful consideration, I now think that the decision in the 'COLONIAL SUGAR REFINING COMPANY'S CASE', does not really militate against the conclusion at which I have arrived.

23. I now proceed to consider the appeal on merits. But before I do so, it is necessary to refer to one more point. There does not appear to be any rule in the Rules of this Court relating to civil matters under which a particular point only can be referred to a Full Bench, except Rule 3 in Chapter V which is applicable to a first appeal only. The other rules seem to contemplate that the appeal itself shall be referred for the final decision of the Full Bench. Clause 28 of the Letters Patent provides for the reference of a particular point on which two or more Judges of a Division

Court are divided in opinion; in such a case the point has to be stated and the case heard upon that point by one or more of the other Judges and the point is decided according to the opinion of the majority of Judges who hear the case including those who first heard it. The provisions of Clause 28 of the Letters Patent do not, however, cover an appeal of the nature which we have before us, where there is no difference of opinion but a
particular point of general importance and legal complexity has arisen necessitating a decision by a larger Bench. I am mentioning this matter so that if there is any lacuna in the Rules of the Court, it may be brought to the notice of the Full Court for such action as may be considered necessary.

24. I now turn to the merits of the appeal. At the beginning of this judgment, I have stated some of the facts on which the plaintiffs-respondents brought their suit for redemption. The defense of the appellants was that Rikhai Raut was joint with them and died in a state of jointness. It was denied that the defendants third party were his daughters. The principal defence, however, was that the sale-deed, on the basis of which the plaintiffs-respondents claimed the right of redemption, was collusive, fraudulent and without consideration. In substance, the defense was that Rikhai Raut was a member of a joint family and had no necessity, nor occasion, for executing the sale-deed, dated the 25th of February 1924. The transaction was challenged as a sham and collusive transaction. It was alleged that in Jeth 1350 Fasli the appellants redeemed the bonds in question and were in possession of the lands stated to be the subject of the two mortgages as also other lands of Rikhai Raut.

25. The learned Additional Subordinate Judge, who dealt with the suit in the first instance, came to the following findings under Issue No. 3 : first, he found that Rikhai Raut was living separate from his other agnates and died in a state of separation sometime in October 1933; secondly, he found that the defendants third party were daughters of Rikhai Raut. On the question of the genuineness of the sale-deed (Exhibit 2), on which the plaintiffs-respondents claimed the right of redemption, the learned Subordinate Judge found that the evidence of the payment of consideration, particularly with regard to the sum of Rs. 325 which was stated to have been set off against the previous dues, was unsatisfactory. The learned Subordinate Judge stated, however, that he was not prepared to hold that the transaction was a bogus one merely because the evidence of the payment of a part of the consideration was unsatisfactory. On the question of possession, the learned Subordinate Judge expressed himself as follows :

> "As regards the question of possession over the area outside the rehan bond, no finding is necessary, because those lands are outside the purview of the present action. Moreover, the parties were not particularly prepared to adduce evidence on this point, because this question was not directly in issue."

After having come to the aforesaid findings, the learned Subordinate Judge stated :

> "So on a consideration of all these facts and circumstances, I must hold that the plaintiffs have clearly got title under Exhibit 2 and they are entitled to redeem the bonds in question."

26. On appeal, the learned District Judge formulated three main points which arose for

consideration before him : (1) whether the sale-deed set up by the plaintiffs is valid and for consideration;

> (2) whether Rikhai Raut died in a state of separation from the defendants second party; and
> (3) whether the defendants third party are Rikhai Raut's daughters. The learned District Judge affirmed the findings of the learned Subordinate Judge on the three questions formulated by him though on somewhat different grounds.

27. Learned counsel for the appellants has contended before us that the learned District Judge misdirected himself as to the principal question for decision before him, namely, the right of the plaintiffs-respondents to redeem the two mortgage bonds. Learned counsel has further contended that the learned District Judge has not considered the relevant evidence on the record bearing on that principal question and he has arrived at a finding on the question of possession without any consideration of the evidence in the record. Learned counsel for the respondents, on the contrary, has contended that this appeal is concluded by findings of fact.

28. On a cursory perusal of the two judgments it seems as though the appeal is concluded by findings of fact. On closer examination, however, it appears to me that the contentions of learned counsel for the appellants are correct and the finding of the learned District Judge on the principal question, namely, the right of the plaintiffs-respondents to redeem the mortgage bonds, is vitiated by reason of the fact that the learned District Judge did not correctly appreciate what was the principal question at issue before him and also by a failure to consider the relevant points and relevant evidence bearing on that question.

29. It is obvious that the plaintiffs-respondents could succeed only if they proved the genuineness of the sale-deed, dated the 25th of February 1924. In paragraph 6 of the plaint, the plaintiffs-respondents themselves stated that the basis of the suit was their title to the land by virtue of the purchase made on the 25th of February 1924. The appellants alleged that the sale-deed was a sham and bogus transaction and conferred no title on the plaintiffs-respondents. Therefore, the principal question for determination was whether the sale-deed was a genuine transaction or not. The learned District Judge misdirected himself when, after formulating the three points, he said as follows :

> "If the second and the third points are found against the appellants, they will not be entitled to question the right of the plaintiffs to redeem the mortgages."

The second and third points referred to by the learned District Judge related to the question whether Rikhai Raut died in a state of separation and whether the defendants third party were Rikhai's daughters. The learned District Judge, in my opinion, was wrong in thinking that an adverse finding on those two questions would disentitle the appellants from questioning the right of the plaintiffs to redeem the mortgages. The plaintiffs-respondents asked for redemption and recovery of possession from the appellants or the defendants first party. It is obvious that they had to prove their right to redeem. Even assuming that the appellants being strangers to the transaction were not entitled to challenge the passing of consideration for the sale-deed, it was

clearly open to them to plead, and they did so plead, that the sale-deed on the basis of which the plaintiffs-respondents claimed the right of redemption was a bogus and a sham transaction. Even if one takes the worst possible view against the appellants, namely, that they were trespassers, yet the plaintiffs-respondents had to prove that they had a better title, namely, the right to redeem and to ask for recovery of possession. The learned District Judge clearly misdirected himself when he thought that if Rikhai Raut was separate from his agnates and the defendants third party were his daughters, the appellants would not be entitled to question the right of the plaintiffs-respondents to redeem the mortgages. This wrong view of the learned District Judge appears to have affected his finding on the principal question and, as I shall presently show, he has failed to take into consideration several relevant facts and evidence bearing on the principal question. Learned counsel for the appellants contested also the finding of the Courts below that Rikhai Raut was separate from his 'pattidars' and pointed to a statement in the sale-deed which was to the effect that the family was joint and further to a finding of the learned District Judge himself in another appeal (Title Appeal No. 78 of 1945) which was to the effect that Rikhai Raut was joint with his 'pattidars'. The Courts below have considered the statement in the sale deed and the finding in Title Appeal No. 78 of 1945. It is worthy of note that the plaintiffs-respondents were not parties to the suit out of which Title Appeal No. 78 of 1945 arose. The statement in the sale deed has been differently explained by the two Courts. Both Courts have, however, referred to other evidence in the record showing separate dealings and transactions by Rikhai Raut and his 'Pattidars' in respect of the lands in their possession. From that evidence the Courts below found that Rikhai Raut was separate from his 'pattidars'. I do not think that that finding can be disturbed in second appeal. There is evidence in the record which supported that finding in spite of the statement made in the sale deed and the finding of the learned District Judge In Title Appeal No. 78 of 1945. The finding that Rikhai Raut was separate from his 'pattidars' must be accepted as binding in second appeal. Not so, however, the finding regarding genuineness of the sale-deed. I have already referred to the wrong view which the learned District Judge adopted with regard to that question. The learned District Judge found, as also the learned Subordinate Judge, that the evidence of the plaintiffs-respondents relating to the passing of consideration was extremely unsatisfactory. The learned District Judge wrongly thought that the recital in the sale-deed that consideration had passed was by itself sufficient to prove the passing of consideration, even though the evidence regarding the passing of consideration was unsatisfactory. When direct evidence was given about the passing of consideration, the question of presumption hardly arose. It is to be noted that the question of the passing of consideration has an important bearing on the question whether the sale deed was a genuine transaction or not. The learned District Judge does not appear to have considered the question of passing of consideration from that point of view. Similarly, the question of possession has an important bearing on the principal question. The learned Subordinate Judge wrongly thought that the question was of no importance. He stated that the parties were not particular to adduce evidence on the point. The learned District Judge without referring to any particular evidence in support of his finding said :

> "The question is whether the plaintiffs came in possession of the land covered by their sale deed, excluding the land covered by the mortgage deeds in question. I have no doubt on the evidence that they did come in possession of that land."

30. There is no reference to any evidence on which the learned District Judge came to that finding, though earlier he had said that the oral evidence was conflicting and it was not possible to come to any finding on it. On the contrary, there were rent receipts (Ex. A series), revenue

chalan (Ex. D series) and notices of certificate cases (Ex. E series) which were produced by the appellants in support of their plea of possession. The learned District Judge explained those documents, and I concede that it was open to the learned District Judge to consider the documentary evidence and reject it, for reasons given by him; but before recording a finding of possession in favour of the plaintiffs-respondents it was incumbent on the learned District Judge to refer to such evidence as supported that finding. He has, however, referred to no such evidence, and the learned Subordinate Judge said that the parties were not prepared to give evidence on the question of possession of the lands sold by Rikhai Raut. A finding given without reference to any evidence cannot be accepted as binding in second appeal.

31. The original sale-deed, was not produced by the plaintiffs-respondents. That aspect of the matter was, however, considered by both Courts. There was a suggestion on behalf of the appellants that Ganesh Raut was the father of a son-in-law of Rikhai Raut and the sale deed was a bogus one. The learned District Judge has referred to that suggestion, but does not appear to have considered it carefully. Be that as it may, this case must, I think, go back on remand to the learned District Judge for a fresh determination of the principal question, namely, whether the sale-deed on the basis of which the plaintiffs-respondents claimed the right of redemption is genuine or not. The learned District Judge will consider afresh all the circumstances bearing on that question in the light of the observation made above. We are not interfering in any way with the other two findings of the Courts below, namely, that Rikhai Raut died in a state of separation and that the defendants third party were his daughters.

32. For the reasons given above, the appeal is allowed and the judgment and decree of the learned District Judge dated the 8th of October, 1947, are set aside. The appeal will now be re-heard by the learned District Judge as directed above. The costs of the hearing of the second appeal in this Court will abide the result of the hearing by the learned District Judge.

Reuben, J.

33. This Special Bench was constituted to consider the question of law arising out of Standing Order No. 2 of 1952 extending a single Judge's jurisdiction to hear second appeals. In the absence of any provision under the High Court Rules by which the point of law alone could be referred the second appeal itself has been referred to us. In consequence it is no longer necessary for the disposal of the appeal to decide the question of law for deciding which this Special Bench was constituted. Keeping in view the purpose for which the reference was made and the importance of the question referred, we decided that we ought to record our opinion on the point. Therefore, we heard the parties and are greateful to Mr. Ganesh Sharma, Rai T.N. Sahai and Mr. Lalnarain Sinha who have been of great assistance to us in considering this difficult question.

34. I agree with my learned brother Das, J., that the Standing Order in question has not the effect of amending the High Court Rule which defines the jurisdiction of a single-sitting Judge to hear second appeals. Section 108 of the Government of India Act, 1915, under which the High Court Rules are made distinguishes between the High Court as such and the Chief Justice. Under sub-section (1) the High Court may by rule provide for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the original and appellate jurisdiction vested in the Court. Under sub-section (2) the Chief Justice is empowered to decide which Judges will sit alone and which of them will constitute the Benches. From the administrative files

examined by us it appeared that, although there was a decision of the Full Court for enlarging the jurisdiction of a single-sitting Judge to hear second appeals up to the value of Rs. 5000, there was no decision as to the date from which the proposed change should come into effect.

35. It remains to consider, whether the Court has power to make an amendment to this effect which can apply to pending second appeals, that is to say, whether such an amendment can be made with retrospective effect. Prima facie, it would appear that this can be done. It is apparent from sub-section (1) of Section 108 of the Government of India Act, 1915, and Clause 28 of the Letters Patent of the High Court that it is a matter of procedure whether the original and appellate jurisdiction of the High Court is exercised by it through a single-sitting Judge or a Division Court and, since no party has a vested right in procedure, an amendment affecting the powers of a single-sitting Judge to exercise original or appellate jurisdiction will operate with retrospective effect. The reason urged against retrospective operation in the present case is that the amendment will affect a vested right, namely, the right of appeal to a superior Court. It has been held in a number of has urged that the decision in *'Colonial Sugar Refining Co. Ltd. v. Irving*[20]*',* is no longer binding on this Court and that the correctness of this proposition should be re-examined. I do not think that it is necessary for the purpose of this case. All that is necessary is to examine what exactly is the right of appeal which is said to be affected by the amendment of the rule. The suit is for redemption of a usufructuary mortgage and is valued at Rs. 1200. It was instituted on the 1st September, 1945. Under the law in force at the time when the suit was instituted the parties to the suit were entitled to appeal from the decree in the suit to the District Judge. From the decision in the appeal so filed the law gives the party aggrieved a right of second appeal to the High Court subject to the conditions specified in Section 100 of the Code of Civil Procedure . All that the party can ask for is that its second appeal, provided that it satisfies these conditions, shall be entertained and heard by the High Court. Up to this stage the provisions of the law regarding the venue of the appeal are definite. For the stage after the hearing by the High Court, the provisions are in the alternative and are dependent on whether the appeal is heard by a Single Judge or by a Division Court. In the former case an appeal lies to the High Court itself under Clause 10 of the Letters Patent, in the latter case to the Privy Council, and since the commencement of the Constitution of India to the Supreme Court, subject to the conditions prescribed in the relevant provisions of the law. This, then, is the right of appeal which has vested in the party, namely, a right to go to the High Court if the second appeal is heard by a single Judge and a right to go to the Privy Council, now the Supreme Court, if the hearing is by a Division Court.
As I have observed, whether the second appeal is heard by a single Judge or by a Division Court is a matter of procedure, and there is nothing in the amendment under consideration which will affect the further right of appeal from the decision in the second appeal. Viewed in this light the amendment under consideration is an amendment of a rule of procedure, and, therefore, can be made with retrospective effect.

36. On the merits of the appeal before us I agree with what has been said by my learned brother Das, J., and have nothing to add.

Sarjoo Prosad, J.

37. I have read with interest judgment prepared by my learned brother Das, J., and I agree with him in his decision both on the question of law, to consider which this Special Bench was

constituted, and also on the merits of the appeal.

38. As observed by Das, J., in course of arguments I was strongly inclined to the view that a vested right of appeal was something quite different from the claim put forward in this reference that a party had the right to have his appeal heard by a Bench of two Judges and not by a single Judge of this Court. The latter is a mere matter of procedure affecting the internal administration of this Court and the arrangement of Benches therein in which no litigant could claim any vested right. In taking this view I appealed to have struck the same line of thought which attracted Bose, C.J., as indicated in his order of reference in *'Radhakishan v. Shridhar*[21]*',* but I avoided demurring out of deference to the observations made from time to time by my learned colleagues in course of arguments. I am glad to find that the view then expressed by me has eventually found favour with Das, J., and I feel no hesitation in accepting the same for the reasons so elaborately discussed by my learned brother to which I have little to add.
Order accordingly.

Cases Referred.

[1](1848) 154 ER 389
[2](1864) 11 ER 1200)
[3]1905 AC 369
[4]54 Ind App 421 (PC)
[5](1905) AC 369
[6] ILR (1950) Nag 532
[7] AIR 1952 Pun 103
[8]56 Cal 507
[9]56 Cal 512
[10] ILR (1950) Nag 532
[11] AIR 1952 Pun 103
[12] AIR 1952 Pun 103
[13]56 Cal 507
[14]56 Cal 512
[15]52 Mad 361
[16]52 Bom 753
[17]56 Cal 51
[18]52 Mad 361
[19] AIR 1928 All 708
[20]1905 AC 369
[21] ILR (1950) Nag 532