Fateh Kunwar vs Durbijai Singh on 14 March, 1952

Equivalent citations: AIR1952ALL942, AIR 1952 ALLAHABAD 942

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Sankar Saran, J.

1. This is an application for leave to appeal to the Supreme Court. The applicant is the widow of Lal Durga Saran Singh. One Raja Earn Chandra Singh was the owner of an impartible Raj known as Rampur Raj. He died in the year 1883 leaving a widow, Rani Krishna Kuar, and a daughter, Munni Saheba. After his death his widow, Rani Krishna Kuar, succeeded to the Raj and continued to be in possession of it till her death in May, 1939. She died issueless and there was a dispute upon her death between the applicant, Rani Fateh Kuar, on the one hand and Raja Durbijai Singh, opposite party, on the other in respect of the succession to the Rampur Raj.

2. A suit was filed in October, 1939, on the allegation that, upon the death of Raja Ram Chandra Singh, Rani Krishna Kuar entered into possession of the estate as his heir, that there was a litigation between Rani Krishna Kuar and a brother of Raja Ram Chandra Singh and that after several contests a family settlement is said to have been arrived at by which it was agreed that Rani Krishna Kuar should adopt Lal Durga Saran Singh, that she should continue in possession of the estate till her death and that the rights of Durga Saran Singh be deferred till after the death of the Rani.

3. The applicant, Rani Pateh Kuar, was married to Lal Durga Saran Singh and became a widow soon after, Lal Durga Saran Singh having died issueless. The applicant claimed that she was entitled to the Rampur Raj because she was the widow of Lal Durga Saran Singh, the adopted son of Raja Ram Chandra Singh and Rani Krishna Kuar, and had a vested interest in the estate due to the family settlement. She also pleaded custom in support of her claim. Her suit was for a declaration that she was the owner of all the movable and immovable properties which appertained to Rampur estate and at the time of the suit were under the management of the Court of Wards. The suit was contested by Raja Durbijai Singh who claimed to be a reversioner of the late Raja Ram Chandra Singh and entitled to succeed. He denied the family settlement. He also set up a custom in support of his claim. He challenged the fact that Rani Krishna Kuar had a right to make any adoption.

4. The first Court held that the applicant's husband was the validly adopted son of Raja Ram Chandra Singh and Rani Krishna Kuar but did not believe that there was any family settlement upon

which reliance was placed by the applicant Rani Fateh Kuar, and that the deceased Rani Krishna Kuar had no right to nominate a successor. The trial Court passed a decree in the following terms :

> "The suit is dismissed except to declare that the plaintiff is entitled to get a maintenance from the defendant Rs. 3,000 a year ..... and will continue to live where she is living now. The defendant is the owner of the Rampur estate."

5. Against this decree Raja Durbijai Singh, opposite party, preferred a first appeal to this Court and the applicant filed a cross-objection. The first appeal and the cross-objections were heard by a Bench of this Court which affirmed the finding of the trial Court with regard to title but allowed the appeal in the following terms :

> "The result is that we allow the defendant's appeal and setting aside the order of the learned Civil Judge granting a maintenance allowance of Rs. 3,000 a year to the plaintiff dismiss her suit in its entirety. The cross-objections filed by the plaintiff are dismissed."

6. Against this decree of this Court the applicant has applied for leave to make an appeal to the Supreme Court. Her contention is that this Court varied the decree of the first Court and, therefore, under the provisions of Article 133 of the Constitution she is entitled as of right to go to the Supreme Court in appeal. In support of this contention learned counsel for the applicant has placed reliance upon two Full Bench cases of this Court, viz., Nathu Lal v. Raghubir Singh, A. I. R. 1932 ALL. 65 (S. B.) and Jaggo Bai v. Harihar Prasad Singh, A. I. R. 1941 ALL. 66 (F. B.).

7. On behalf of the opposite party it was contended that the preponderance of opinion in the High Courts in India was in favour of the view that where the High Court has affirmed the decree of the trial Court with regard to certain points and has reversed it with regard to other points and if the points raised are divisible then no appeal lies with regard to those points upon which there has been an affirmation of the decree of the Court below. Reliance was placed on behalf of the opposite party upon a number of cases of several High Courts, viz., Karunalaya Valangupalli Pandian v. Rev. Father Pignot, A. I. R. 1943 Mad. 67; Prandhan Das v. Promode Chandra Deb, A. I. R. 1946 Pat. 19; Abdul Majid Khan v. Dattoo Raoji, A. I. R. 1946 Nag. 307; Brahma Nand v. Sanatan Dharam Sabha, I. L. R. (1945) Lah. 156 (F. B.) and Wahid-ud-Din v. Makhan Lal, I. l. R. (1945) Lah. 242 (F.B.). Reliance was also placed upon a Bench case of our own Court reported in Wiqar Ali v. Narain Das, 1939 ALL. L. J. 62. In this case, however, the Full Bench case of Nathu Lal v. Baghubir Singh, A. I. R. 1932 ALL. 65 was not considered yet a view not in favour of the Full Bench cases of this Court was adopted.

8. In view of this difference of judicial opinion we consider that it is desirable that an authoritative pronouncement on this point be obtained. We accordingly direct that this case be laid before the Hon'ble the Chief Justice for the constitution of a Bench which may be larger than three Judges.

9. The applicant is permitted to make an application for adding a ground claiming maintenance. The matter will be considered by the Full Bench at the time of the hearing.

Agarwala, J.

10. This is an application for leave to appeal to the Supreme Court. The case has been referred to this Bench on account of divergence of judicial opinion on the point involved. The facts briefly are these:

11. One Raja Ram Chandra Singh was the owner of an impartible Raj, known as Eampur Raj. He died in 1883, leaving a widow, Rani Krishna Kuar, and a daughter, Munni Sahiba. Rani Krishna Kuar succeeded to the Raj and on her death issueless in May 1939, disputes arose between the applicant Rani Fateh Kuar, the widow of Durga Saran Singh, natural son of Govind Saran Singh, who was a nephew of Raja Ram Chandra Singh, on the one hand, and Raja Durbijai Singh, opposite party, on the other, in respect of succession to the estate.

12. In October 1939, the applicant Rani Fateh Kuar filed a suit for a declaration that she was entitled to succeed to the moveable and immovable properties appertaining to the Rampur Raj on two grounds: first, on account of her husband Durga Saran Singh having been adopted by the late Bani Krishna Kuar to her husband under a family settlement under which the right of Durga Saran Singh to the possession of the properties was postponed upto the lifetime of the late Rani, but the estate became vested in him upon his adoption; and secondly, on the ground of custom as the widow of Durga Saran Singh.

13. The suit was contested by Raja Durbijai Singh on the ground that he was the next reversioner of Raja Ram Chandra Singh and was entitled to succeed, that there was no family settlement, that Rani Krishna Kuar had no right to make any adoption and that there was no custom as claimed by the applicant.

14. The first Court held that Lal Durga Saran Singh was validly adopted to her husband by Rani Krishna Kuar but that the family settlement or the custom was not established. It, therefore, dismissed the suit but made a declaration that the plaintiff was entitled to get a maintenance allowance from the defendant to the extent of Rs. 3000 a year and to continue to live in the house where she was living at the time. It also declared that the defendant was the owner of the Rampur estate. Against that portion of the decree which contained a declaration to the effect that the plaintiff was entitled to maintenance allowance, Raja Durbijai Singh preferred an appeal to this Court and against the rest of the decree the applicant filed a cross-objection.

15. A bench of this Court disposed of the First Appeal and the cross-objection by one judgment affirming the finding of the trial Court with regard to the title to the estate, but disallowing the declaration with regard to the maintenance allowance of Rs. 3000 a year with the result that the defendant's appeal was allowed, the suit was dismissed in ita entirety and the cross-objection was dismissed.

16. The applicant made the present application for leave to appeal to the Supreme Court. The grounds for the proposed appeal as disclosed in the application make no mention of maintenance allowance. Before the referring bench it was contended on behalf of the opposite party that the appeal was confined to the question of title and as the decision of the Court below had been affirmed

by this Court so far as that question was concerned, no appeal could be filed unless a substantial question of law was shown to be involved in the appeal. On behalf of the applicant, it was contended that the appeal was in regard to the entire subject-matter of the appeal in this Court, so that the decision of the High Court with regard to maintenance allowance also was the subject-matter of the proposed appeal to the Supreme Court. The applicant further made an application for amendment of the application for leave to appeal praying that a ground relating to maintenance allowance be added to the grounds in the original application. This application is also before us for orders.

17. The case has been argued from the point of view that the proposed appeal was confined to the question of title alone and also upon the ground that the proposed appeal included the subject-matter relating to maintenance allowance.

18. An appeal to the Supreme Court lies under Article 133 of the Constitution. It is common ground that the amount or value of the subject-matter of the proposed appeal both in the appellate Court as well as in the Court of first instance is not less than Rs. 20,000. If the judgment, decree or final order appealed from affirms the decision of the Court immediately below, then it has to be shown that the proposed appeal involves a substantial question of law. It is conceded that no such question of law is involved. Therefore, the only question for determination is whether "the judgment, decree or final order appealed from affirms the decision of the Court immediately below."

19. On behalf of the applicant the argument advanced is in the alternative. It has been urged in the first place that in order to find out whether the "judgment, decree or final order appealed from" affirms the decision of the Court below, what one has to see is whether the judgment, decree or final order of the High Court as a whole has affirmed or varied the decree of the Court below as a whole. If there is variance even as to part of the decree of the Court below there is no affirmance and an appeal lies to the Supreme Court as of right even where the proposed appeal is in respect of the part affirmed by the High Court. In this argument the expression "judgment, decree or final order appealed from" in Article 133 is taken to mean the entire decree of the High Court irrespective of the subject-matter of the proposed appeal. If this argument is accepted it is immaterial whether the amendment application is allowed or not and whether the proposed appeal is confined to the question of title or not as in either event the applicant will be entitled to appeal as of right. In the alternative it is urged that what one has to see is the entire subject-matter of the proposed appeal. If in respect of that subject-matter or any part thereof, the High Court has varied the decision of the trial Court there is no affirmance, and in such an event an appeal wquld lie to the Supreme Court as of right. This argument is based upon the assumption that either the original application is considered as being directed against the entire subject-matter of the decree of the High Court including the question of maintenance allowance or the amendment application is allowed.

20. On behalf of the opposite party it is urged that whether you take the proposed appeal as including the question relating to the maintenance allowance or not there can be no appeal as of right so far as the question of title is concerned, because in that respect the High Court has affirmed the decision of the Court below. It is pointed out that when the decision of the Court below has been affirmed by this Court on a question of fact, the point cannot be reagitated in the Supreme Court and, therefore, there is no point in permitting an appeal in so far as that subject-matter is

concerned. It is contended that where there are separate subject-matters decided by the trial Court and the High Court, each of such subject-matters is an independent decision or decree and must be taken separately even though on paper there is one decree and there is one appeal to the Supreme Court. It is further contended that at any rate this must be so when the different subject-matters form part of different proceedings like an appeal and a cross-objection. In this connection reliance has been placed upon the fact that if the different subject-matters decided by the trial Court were the subject-matters of different appeals in the High Court, the separate appeals could not be treated as one and no leave to appeal to the Supreme Court could be allowed from the decree passed in the appeal in which there was affirmance of the decision of the Court below. It is urged that there could be no distinction between the case of two cross appeals and the case of an appeal and a cross-objection.

21. In my judgment the crux of the matter lies in the correct interpretation to be placed upon two expressions in Article 133, namely the expression "judgment, decree or final order appealed from", and the expression "decision of the Court immediately below", or perhaps upon the correct interpretation of the first expression rather than of the second. To my mind the expression "judgment, decree or final order appealed from" does not necessarily refer to the judgment, decree or final order of the High Court in its entirety but means that part of the judgment, decree or final order of the High Court which is the subject-matter of the proposed appeal. If the whole of the judgment, decree or final order is the subject-matter of the proposed appeal then obviously it is the whole of the judgment, decree or final order that has to be taken into consideration; but if only a part of the judgment, decree or final order of the High Court is challenged in the proposed appeal then it is that part alone which is covered by the expression "judgment, decree or final order appealed from". This conclusion flows not only from the fact that the words "appealed from" qualify and limit the expression, "judgment, decree or final order", but also from the context in which the expression is used.

It may be observed that the enquiry about valuation is in respect of the subject-matter of the proposed appeal. The valuation of the subject-matter no longer in dispute in the proposed appeal is not to be taken into account. Again, the enquiry about substantial question of law is also in respect of the subject-matter of the proposed appeal and not in respect of the subject-matter not included in the proposed appeal. There is no reason why the affirmance or variance of the deci-sion of the Court below should have to be seen in respect of the subject-matter with which the proposed appeal is not concerned. In this view of the matter the first contention of the applicant that irrespective of the subject-matter of the proposed appeal if the judgment, decree or final order of the High Court as a whole varies even a part of the decision of the Court below, an appeal will lie to the Supreme Court as of right even though the appeal is confined to a portion in respect of which the decision of the Court below was affirmed by the High Court, is not tenable. On the other hand, the entire subject-matter of the proposed appeal should be taken as one unit and as a one whole and cannot be divided up into so many decrees, although in part, it may affirm and in part it may vary the decree or final order of the trial Court. The reason is simple. The entire subject-matter of the proposed appeal is taken as one unit not only for the purposes of valuation but also for the purposes of determining whether a substantial question of law is involved. There is no reason, therefore, why the entire subject-matter should not be considered as one unit in order to find out whether there is affirmance

or variance.

22. If the expression "judgment, decree or final order appealed from" means that portion of the judgment, decree or final order of the High Court which is the subject-matter of the proposed appeal, it necessarily follows that the expression "decision of the Court immediately below" must have reference to that portion of the decision of the Court below which corresponds with the subject-matter of the proposed appeal. This must be so in the nature of things. When the question is whether in respect of the subject-matter of the judgment, decree or final order appealed from the decree of the High Court has affirmed or varied the decision of the Court below, there is no point in looking at that portion of the decision of the Court below with which we are not concerned and which is not the subject-matter of the proposed appeal. Variance or affirmance of one out of several matters decided by the Court below can be determined with reference to the decision of that particular matter and not with reference to other matters.

23. The parties were not agreed as to the precise meaning of the word "decision". Both agree that it is not the judgment in the sense of the reasons for the decree because of the Privy Council decision to that effect in Tassaduq Rasul Khan v. Kashi Ram, 25 ALL. 109 (P. C.). In that case the Privy Council held that the word "decision" meant the 'decision of the suit'. In other words it meant the adjudication of the rights of the parties in the suit. A decree is merely a formal expression of this adjudication. It is immaterial, therefore, whether you take the decision as corresponding to the adjudication of the rights of the parties or its formal expression. In both events it is only that part of the adjudication or the decree which is the subject-matter of the proposed appeal with which we are concerned and in respect of which the question of affirmance and variance can arise.

24. Both parties relied upon a Privy Council decision in Annapurnabai v. Ruprao, 51 Ind. App. 319 (P. C.), and urged that their respective points of view were supported by the decision of the Privy Council in that case. Most of the decisions of the Indian Courts turned upon the interpretation of the observations of their Lordships of the Privy Council. It is not very difficult to divine what their Lordships really meant. So far as I can see, the decision supports the alternative contention of the applicant and does not support the contention of the opposite party. The facts of the case were these :

> There was a suit for possession of half the property of one Shankar Rao Patel deceased upon the allegation that the plaintiff had been adopted to him by his senior widow. The defendants were the junior widow and a person who was alleged to have been adopted by the junior widow. They denied the plaintiff's adoption and the junior widow claimed a sum of Rs. 3,000, per annum out of the estate as maintenance. The trial Court held that the plaintiff's adoption was proved and that the alleged adoption of defendant 2, was not proved, but that the plaintiff was bound to provide maintenance for the junior widow at the rate of Rs. 800 per annum. On appeal the Judicial Commissioner affirmed the decree of the trial Court in all respects except that he modified the amount of maintenance and raised it from Rs. 800 to Rs. 1200 per annum. The defendants then applied to the Judicial Commissioner for leave to appeal to the Privy Council. The application was dismissed upon the ground that the

decree of the first Court had been affirmed except in respect of a small change in favour of one of the applicants and that no question of law was involved.

There was an application for special leave to appeal to the Privy Council. The subject-matter of the property itself was over Rs. 10,000 and the subject-matter of the maintenance allowance, also having regard to the widow's prospects of life exceeded Rs. 10,000. As I read the report it appears to me that the argument put forward on behalf of the petitioners was in the alternative. In effect, they said, whether you take the entire subject-matter of the appeal, namely the property plus maintenance allowance, or you take the maintenance allowance alone, in both events the decree of the appellate Court did not affirm the decree of the first Court but varied it, and consequently it was not material under Section 110, Civil P. C. whether any substantial question of law was involved. Counsel for the petitioners, however, added that "having regard to the concurrent findings (on the question of title to the property), the petitioners desire to appeal only with regard to the amount of the maintenance". The judgment of the Privy Council is a very short one and may be quoted in full :

"In the opinion of their Lordships the contention of the petitioners' counsel as to the eSect of Section 110, Civil P. C. is correct and the petitioners had a right of appeal. They should have special leave to appeal, but it should be limited to the question as to the maintenance allowance."

25. Two important points are to be noted in this judgment:

(1) That a variation even in favour of the petitioner or the proposed appellant was considered a variance, and in this respect certain decisions of the Courts in India to the contrary were overruled e. g., Kamal Nath v. Bithal Das, 44 ALL. 200 and Raja Sree Nath v. Secy. of State, 8 cal. W. N. 294, and (2) That their Lordships accepted the entire contention of the petitioners as to the effect of Section 110, Civil P. C. as correct. In other words, they accepted the contention that if regard be had to the entire appeal--title plus maintenance allowance even then there was variance.

26. If their Lordships wanted to repel the appellants' contention on the last point they would have clearly said so and would not have said that the contention of the petitioners was correct. The fact that their Lordships limited the appeal to the question as to the maintenance allowance is quite different. That they did because the petitioners themselves stated that in view of the concurrent findings of the Court below they would no longer challenge that finding. Moreover, the petition for special leave to appeal is an entirely descretionary matter and even without the statement of counsel their Lordships could have limited the appeal to the maintenance allowance alone. But the fact remains all the same that their Lordships accepted both the contentions of the petitioners as correct. If their Lordships were of opinion that the decree of the High Court should be considered as two decrees, one relating to the question of title and the other relating to maintenance allowance, and that since there was affirmance so far as the decree relating to the question of title was concerned

there was no right of appeal qua the question of title, they would have clearly said so and would not have accepted the petitioners' contention as correct. In my judgment' their Lordships' decision is no authority for the proposition contended for by the opposite party and is an authority for the alternative contention of the applicant. This interpretation of the decision of their Lordships of the Privy Council finds support from several decisions of the High Courts in India.

27. In Jaggo Bai v. Harihar Prasad Singh, I.L.R. (1941) ALL. 180; A.I.R. 1941 ALL. 66 (F.B.) the facts were these: The High Court affirmed the decision of the trial Court in regard to the defendant's liability to refund a sum of Rs. 26,000, as claimed by the plaintiff. It, however, reduced the rate of interest from 6 per cent. to 4 per cent. At 6 per cent. the liability in respect of interest amounted to Rs. 18,700, and at 4 per cent. to Rs. 12,380. In other words, the High Court reduced the defendant's liability for interest by Rs. 6,320. The defendant applied for leave to appeal both in respect of his liability to refund the sum of Rs. 26,000 and also in respect of the interest. The Full Bench disagreeing with certain observations in an earlier decision of this Court in Wiqar Ali Khan v. Narain Das, 1939 ALL. l. J. 62, and overruling another earlier decision of this Court in Sri Narain Khanna v. Secy. of State, 1939 ALL. l. J. 736, held that the defendant was entitled to appeal even though no substantial question of law was involved.

28. In Wiqar Ali Khan v. Narain Das, 1939 ALL. L. J. 62, Bennet J. had observed with reference to the Privy Council decision in Annapurna-bai's case, 51 Ind. App. 319 (P.c.), that their Lordships had imposed "this restriction (namely that the appeal should be confined to the question of maintenance allowance) because they considered it to be imposed. The case, therefore, is no authority for the present application in which the applicant desires to raise a question on which there have been concurrent findings by the two Courts."

29. In respect of this observation the Full Bench observed :

> "We do not agree however with the observation that in the case before the Privy Council the Board imposed restriction as to the appeal because they considered that it should be imposed. Whether the Privy Council imposed the restriction because it should be imposed or whether they imposed it because counsel for the applicant had intimated that he proposed to restrict the appeal to the question of maintenance is not at all clear from the terms of the judgment of the Board."

30. In Sri Narain Khanna v. Secy. of State, 1939 ALL. l. j. 736, it had been held that no appeal lay in respect of a matter on which there were concurrent findings by both the Courts even though in the proposed appeal was included a matter upon which there was variance. The Full Bench observed with regard to this decision :

> "We find it impossible to reconcile this decision with the decision of the Privy Council in Annapurnabai v. Ruprao, 51 Ind. App. 319 (P.C.). On the principle of the Privy Council decision, in our judgments, an appeal did lie to the Privy Council. The decision of this Court, therefore, in 1939 All. L. J. 736 can no longer be considered to be good law."

Then their Lordships considered another argument that the appellant's appeal should be confined to the question of interest. With regard to this contention the Full Bench held :

> "That is not a matter for us to decide. The only question we have to consider is whether the provisions of Section 110, Civil P. C., have been complied with. In our judgment we think that we must grant a certificate for leave to appeal. It is for the Privy Council to decide whether the appellant is entitled to challenge the decision of the High Court upon the other issues on which there are concurrent findings."

With respect I agree with the observations of their Lordships. These observations dispose of the contention raised on behalf of the opposite party that there should be no right of appeal in respect of matters of fact on which the two Courts have concurred. To the same effect are the following cases: Perichiappa Chettiar v. Nachiappan, A.I.R. 1932 Mad. 46, Gangadara Ayyar v. Subramania Sastrijal, I.l.R. (1947) Mad. 6 (F.B.), Eiayat Ali v. Mahomed Ali, A.I.R. 1947 Nag. 93 and Attar Kaur v. Gopal Das, A.I.R. 1948 Lah. 1.

31. In the following cases the proposed appeals to the Privy Council were confined only to the portion in respect of which the High Court had affirmed the decision of the trial Court and, therefore, it was held (and, with respect, rightly) that no permission could be granted unless a substantial question of law was involved : Narendra Lal Das v. Gopendra Lal Das, 31 cal. W. N. 572, Bibhootibhooshan Datta v. Sreepati Datta, 62 cal. 257, Venkitasami Chettiar v. Sakkutti Pillai, A.I.R. 1936 Mad. 881, Chavali Velayya v. The Board of Commissioners of Hindu Beligious Endowments, Madras, A.I.R. 1938 Mad. 631, Karunalaya Valanguppalli v. Rev. Father Pignot, A.I.R. 1943 Mad. 67, Wahid-ud-din v. Makhan Lal, A.I.R. 1944 Lah. 458 (F.B.), Abdul Majid Khan v. Dattoo Raoji, A.I.R. 1946 Nag. 307, Lahshmanan Chettiar v. Thangam, A. I. R. 1947. Mad. 227 and Abdul Rahman v. Baghbir Singh, A.I.R. 1951 Punj. 313.

The facts in Kapurji Magniram v. Pannaji Debichand, A.i.r. 1929 Bom. 359, have not been clearly stated in the report but it appears that the proposed appeal to the Privy Council was confined to the matter upon which there was affirmance by the High Court of the trial Court's decision. In all these cases the Privy Council decision in Annapurnabai's case, 51 Ind. App. 319 (P.c.) was rightly distinguished as referring to a case in which the subject-matter of the appeal to the Privy Council included the matter about which there was variance, and not to a case in which the matter on which there was variance was not the subject matter of the proposed appeal.

32. In Narendra Lal Das v. Gopendra Lal Das, 31 cal. W. N. 572, the decree of the trial Court gave the applicant a certain share in the property in suit but the appellate decree, while it affirmed the original decree in every other respect, modified it in respect of the share giving him the whole share he claimed so that on that point he had no further grievance. The question was whether the appellate decree was nevertheless one varying the original decree and the applicant was entitled to leave to appeal without proving that a substantial question of law was involved. Sir George Rankin observed as follows :

> "We may take it, I think, that where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant does not mean that the decision is one of affirmance, but I am not in a case of this kind prepared to say that because on a totally different point, namely, a point about the share, the applicant has succeeded and succeeded altogether so that he has no further grievances in that matter, he can without showing a substantial question of law have a right to litigate upon other points upon which both the Courts have been in agreement."

The distinction, which the learned Chief Justice drew between the two classes of cases, namely those in which the proposed appeal embraced the subject-matter upon which there was affirmance as also the subject-matter upon which there was variation, whether in favour of the proposed appellant or against him, and cases in which the proposed appeal was confined to the subject-matter upon which the High Court had affirmed the decision of the court below, is obvious but in some subsequent cases this distinction was missed and Sir George Rankin's observations were erroneously criticised.

33. In Viraraghava Rao v. Narasimharao, A.i.r. 1950 Mad. 124, there was a case in which the proposed appeal included both the matter of affirmance and the matter of variance and, therefore, it was rightly held that an appeal lay to the Privy Council as of right, but Raghava Rao J., ignoring the distinction between the two classes of cases said with regard to the perfectly correct observations of Sir George Rankin that they were "illogical, laboured and not particularly well-reasoned" with great respect, these observations were unnecessary for the decision of the case before him.

34. In two cases, however, it was held that even though the subject-matter of the proposed appeal to the Privy Council did not comprise a matter in which the High Court had varied the decree of the Court below, still there was a right of appeal to the Privy Council without a sustantial question of law being involved. To my mind these cases were not correctly decided. The first case is a Full Bench decision of the Patna High Court in Brajasunder Deb v. Rajendra Narayan, A. I. R. 1941 pat. 269 (S. B.). In this case the suit was for a declaration of possession or, in the alternative, for possession over lands in three villages. The suit was substantially dismissed by the trial Court but on appeal the High Court decreed the suit with regard to the land in one village and affirmed the decree of the lower Court with regard to the land in the other two villages. The proposed appeal to the Privy Council was by the plaintiff in respect of the lands in two villages with regard to which the High Court had affirmed the decree of the lower Court. After a review of the various authorities, Harries C. J. expressed the opinion :

> "..... in my judgment the true test is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute have been affirmed by the High Court. The difficulty arises owing to the use of the phrase "the decision of the Court immediately below the Court passing such decree." Had the words "decree of the Court below" been used, the matter would have been clear. In my view, however, the expression 'the decision of the Court immediately below the Court passing such decree' as used in Section 110 means the same as the expression "decree of the Court below." Once an appeal has

> been decided, the decree of the Court below is merged in that of the appellate Court and strictly there is no longer in existence a decree of the trial Court. There is only a decision, and in my view the word 'decision' means the decision of the trial Court taken as a whole. It must be remembered that an appeal is not preferred against any item or items in a decree. An appeal must be preferred against the whole decree, though for the purposes of valuation the subject-matter in dispute in appeal only is valued."

For this last proposition the learned Chief Justice relied on the observations of the Privy Council in Jowad Hussain v. Gendan Singh, 6 Pat. 24 (P. C.) in which Viscount Dunedin who delivered the opinion of the Board observed :

> "The appellant's counsel strenuously urged that the appeal was not against the decree, but only against the items in the decree. This is a complete misunderstanding. An appeal must be against a decree as pronounced. It may be rested on an argument directed to special items, but the appeal itself must be against the decree and the decree alone."

35. In Jowad Hussain's case, 6 Pat. 24 (P. C.) the question was whether limitation for applying for the preparation of a final decree commences to run from the expiry of the period fixed in the preliminary decree for the payment of the amount found due or from the date of the decision of the appellate Court in an appeal from the preliminary decree when such decision was given after the date fixed in the preliminary decree had expired. Their Lordships held that the time commenced to run from the date when the appeal was decided and finality conferred on the preliminary decree. It was in this connection that their Lordships made the above observation. It is well-settled that observations of Judges are not to be construed as the words of a statute. They are always to be construed with reference to the facts of the particular case in which they were made. Whether the appeal is against a part of the decree or against the whole of the decree there is obviously no finality to the preliminary decree unless the appeal is decided because finality cannot come to a decree if an appeal is pending against either the whole of it or even a part of it. The expression "judgment, decree or final order appealed from" has, however, to be construed in the context in which it occurs in Article 133 and not on the basis of the observations of the Privy Council made in altogether different circumstances. With the greatest respect I do not find myself in agreement with the learned Chief Justice.

36. This Full Bench decision was followed by a Division Bench of this Court in Mt. Jamna Kumvar v. Lal Bahadur, A. I. R. 1946 ALL. 262. In that case a party had laid claim to 37 items of property. Her claim was dismissed by the Special Judge. In appeal this Court accepted her claim with regard to eighteen items of the property and affirmed the decree of the Special Judge with regard to the remaining items. The party proposed to go in appeal to His Majesty in Council against the decision of this Court regarding the items on which the decree of the Special Judge was affirmed by this Court. The application was allowed, even though there was no substantial question of law involved. Reliance was placed by Sinha J. who delivered the judgment of the Bench, mainly upon two decisions one reported in Jaggo Bai v. Harihar Prasad Singh, 1940 ALL. L. J. 869 (F. B.) and the

other a Full Bench decision of the Patna High Court in Brajasunder Deb v. Rajendra Narayan, A. I. R. 1941 pat. 269. The view taken by the Bench is not supported by the view of the Full Bench in Jaggo Bai's case. With all respect it may be pointed out that the learned judge overlooked the fact that in Jaggo Bai's case this Court had varied the decision of the trial Court in respect of interest and the question of interest was included in the proposed appeal. Therefore, the Full Bench case was a case in which both matters of affirmance and variance were the subject-matter of the proposed appeal to the Privy Council. The Patna case, however, did support the decision of the Bench. The Bench further interpreted the Privy Council decision in Annapurnabai's case, 51 Ind. App. 319 (P. C.) as if it supported their view. I have already shown that far from supporting the view taken by the Bench, it is in fact opposed to their view. I would with all respect dissent from the view taken in Mt. Jamna Kumvar v. Lal Bahadur, A. I. R. 1946 ALL. 262.

37. The fact that in the High Court there is an appeal by one party and a cross objection by another is immaterial, since the decree prepared both for the appeal and the cross-objection by the High Court is one and it is immaterial that the variation is in the appeal or in the cross-objection. A cross-objection is not wholly independent of an appeal. It is a part of the same proceeding. If it turns out that the appeal was not validly presented or was not duly stamped, the cross-objection falls to the ground and cannot be considered, though the case of dismissal of an appeal by withdrawal or otherwise is different. This was the view taken in the Full Bench decision of this Court in Nathu Lal v. Raghubir Singh, 54 ALL. 146 (S. B.) and that of the late Chief Court of Oudh in Abdur Samad v. Mt. Aisha Bibi, A.I.r. 1948 oudh 76 (F. B.).

38. In the case of two cross appeals, however, two decrees are prepared by the High Court even though both of them arise out of the same suit, and, therefore, there must be two appeals to the Privy Council if the decrees in both the appeals are to be appealed from. As the decree appealed from in an appeal from one of such decrees is that decree alone with which that particular appeal is concerned, the variance or affirmance of the trial Court's decision in the other appeal cannot affect the question whether the proposed appeal lies as of right. This matter was fully considered by a Full Bench of this Court in Banaras Bank Ltd. v. Rajnath Kunzru, 1935 ALL. l. J. 352 (F. B.).

39. In Banaras Bank Ltd. v. Rajnath Kunzru, 1935 ALL. l. J. 352 (F. B.) Sulaiman, C. J., observed:

> "The case of two cross appeals is not exactly identical with an appeal and a cross-objection. In the case of an appeal and a cross-objection there is only one judgment delivered and only one decree is prepared by the Court which embodies the adjudication in both the appeal and the cross-objection. On the other hand, under Order 41, Rule 35 the decree of the appellate Court has to contain the number of the appeal, the names and description of the appellant and the respondent and a clear specification of the relief granted or other adjudication made. If there are two cross appeals pending in the High Court two decrees have to be prepared giving all these particulars." Then his Lordship concluded:
>
> "It therefore seems to me that from the mere fact that a cross appeal has been allowed and the adjudication so far as the matter in controversy in that appeal is

> concerned, it does not follow that the decision in the other appeal which is dismissed is not one of affirmance."

Niamatullah, J. observed:

> "In my opinion the decision of the suit, so far as it is the subject-matter of the proposed appeal to the Privy Council, is meant by the word 'decision' in Section 110, and not the decision of the whole suit."

Then his Lordship made certain observations upon which the learned counsel for the opposite party very strongly relies. His Lordship said:

> "It seems to me that, even if the word 'decision' be taken to mean 'decree', as defined in the Civil Procedure Code, the position is. not materially different. A 'decree' does not mean the document described as such. It means the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.
>
> If there are several distinct controversies in the suit and the decision of the Court is embodied 'in one document, described as a decree, the adjudication with regard to each matter in controversy is a decree in itself. In that sense one document, described as a decree, may contain several adjudications on several distinct matters and may amount to several 'decrees'."

In this passage his Lordship was endeavouring to show that if the word 'decision' in Section 110 was equivalent to a decree, even then it meant not the whole of the decree, but the decree in respect of the subject-matter of the proposed appeal. Surely, his Lordship never intended to lay down that different subject-matters of the proposed appeal should be considered as different decrees. The observations of his Lordship should not be taken to lay down that one decree is the same thing as more than one decrees for all purposes. [40-41] I would, therefore, hold that where there are several matters of controversy in a suit and the High Court varies the decision of the trial Court with regard to one or more of such matters and affirms it in respect of other matters, then,

(a) If the proposed appeal to the Supreme Court is in respect of the matter upon which there is a variation, whether the variation is in favour of the appellant or against him, he has a right of appeal; provided, of course, that the valution of the subject matter, of the proposed appeal is not less than Rs. 20,000/-.

(b) If the proposed appeal consists of matters about some of which there is affirmance and about the rest there is variation, again there is a right of appeal, provided, of course, that the valuation of the entire subject-matter of the proposed appeal is not less than Rs. 20,000/-.

(c) If the proposed appeal is in respect of only that matter upon which the High Court has affirmed the decree of the trial Court, there is no right of appeal unless there is a substantial question of law

involved.

(d) the fact that against the decision of the trial Court there were an appeal and a cross-objection in the High Court is immaterial as only one decree is prepared by the High Court both for the appeal and the cross-objection and the principles mentioned in (a), (b) and (c) will apply to the composite decree.

(e) But if there were two appeals in the High Court from one decree of the lower Court, then the decree of the High Court in each of the appeals will be separately considered and if the proposed appeal to the Supreme Court arising out of one of such decrees relates to a matter on which that decree has affirmed the decision of the Court below, there will be no right of appeal without a substantial question of law being involved. Applying these principles to the present case, it is clear that if the proposed appeal relates merely to the question of title to the property and does not relate to the question of maintenance allowance, there is no right of appeal, even though the valuation of the subject-matter is not less than Rs. 20,000/-, because there is no substantial question of law involved. But if the proposed appeal either with or without amendment relates to both the title to the property and the question of maintenance allowance, there is a right of appeal even though there is no substantial question of law involved.

42. In my opinion although no ground is taken in the application for leave to appeal with reference to the question of maintenance allowance, it cannot be said that the appeal is not directed against the question of maintenance allowance. The appeal is against the whole of the decree of this Court and not against a part of it, because there is no reason to suppose that the applicant would not agitate the question of maintenance allowance when the decision of the High Court is against her. In any case, I consider that the omission of the applicant to take a ground with respect to the question of maintenance allowance is an accidental omission or mistake and her application for amendment of the application should, in fairness and justice, be allowed.

43. I would, therefore, allow, the applicant's application for amendment of her petition and would also allow her petition for leave to appeal to the Supreme Court and would grant the necessary certificate.

V. Bhargava, J.

43a. I agree with my brother Agarwala, J. and have nothing to add. For the reasons given by him, I concur in the order proposed by him.

B. B. Prasad, J.

44. I agree.

Wall Ullah, J.

45. I entirely agree with Hon'ble Agarwala, J. and have nothing to add.

P.L. Bhargava, J.

46. I have had the advantage of reading the judgment prepared by my learned brother Agarwala J. and agree with the order proposed to be passed by him in this reference, though for slightly different reasons.

47. This Full Bench reference has arisen out of an application for leave to appeal to the Supreme Court against a decree of this Court and it raises an important question as to the interpretation of the following clause, which occurs in Article 33(1) of the Constitution of India.

> "Where the judgment, decree or final order appealed affirms the decision of the Court immediately below."

Raja Ram Chandra Singh was the owner of an impartible Estate, known as Rampur Raj, in the district of Etah. He died in the year 1883 and was succeeded by his widow, Rani Krishna Kuar, who died issueless in May 1939. After her death Rani Fateh Kuar instituted a suit to obtain a declaration that she was entitled to succeed to the Estate as the heir of her husband, Durga Saran Singh, under the custom and also because he (Durga Saran Singh) had been adopted by Rani Krishna Kuar to her husband and in consequence of the adoption the Estate became vested in him and by virtue of a family settlement his right to possession of the Estate had been postponed until after the death of Rani Krishna Kuar.

48. The suit was contested by Raja Durbijai Singh, who claimed to be the next reversioner of the Raja and as such entitled to succeed to the Estate. He denied the alleged custom and the family settlement and the right of Rani Krishna Kuar to make any adoption.

49. The trial Court found that Durga Saran Singh had been validly adopted to her husband by Eani Krishna Kuar, and that the alleged custom or the family settlement was not proved. On this finding, the suit was dismissed but it was declared that Eani Fateh Kuar was entitled to receive a maintenance allowance of Rs. 3,000 per annum from Raja Durbijai Singh, who was declared to be the owner of the Estate. The decree of the trial Court was in these terms :

> "The suit is dismissed except to declare that the plaintiff is entitled to get a maintenance from the defendant Rs. 3,000 a year ..... and will continue to live where she is living npw. The defendant is the owner of the Rampur Raj estate. ....."

50. Against the decree of the trial Court, Raja Durbijai Singh preferred a first appeal to this Court, challenging his liability to pay the maintenance allowance decreed by the trial Court, and Rani Fateh Kuar filed cross-objections against the rest of the decree. The appeal and the cross-objections were disposed of by the same judgment; and the following decree was passed by this Court:

> "The result is that we allow the defendant's appeal and setting aside the order of the learned Civil Judge granting a maintenance allowance of Rs. 3,000 a year to the plaintiff dismiss, her suit in its entirety. The cross objections filed by the plaintiff are

dismissed."

51. Now, Rani Fateh Kuar has applied for leave to appeal to the Supreme Court against the decree of this Court. On behalf of the applicant it is contended that the decree appealed from does not affirm the decision of the Court below and as such she is entitled to appeal as of right and the value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000 when this application came up for hearing before a Division Bench of this Court. In support of the applicant's contention reliance was placed upon two Full Bench decisions of this Court in Nathu Lal v. Baghubir Singh, 54 ALL. 146 (S.B.)and Jaggo Bai v. Hari Har Prasad Singh, I. L. R. (1941) ALL. 180 (F. B.), while on behalf of the opposite party it was contended that as the High Court had affirmed the decree of the trial Court in regard to certain points and had reversed it in regard to other points no appeal can be allowed in regard to the points upon which the decree of the Court below had been affirmed. In support of this contention reliance was placed upon certain cases decided by various High Courts, viz., Karunalaya Valangupalli Pandian v. Rev. Father Pignot, A. I. r. 1943 Mad. 67; Pardhan Das v. Pramode Chandra Deb, A. I. r. 1946 pat. 19; Abdul Majid Khan v. Shree Sanatan Dharam Sabha, I.l.R. (1945) Lah. 156 (F.B.) and Wahiduddin v. Makhan Lal, I. L. R. (1945) Lah. 242 (F.B.). In view of the divergence of opinion on the point involved this reference was made to the Full Bench.

52. Our attention has been invited to later decisions of the Madras High Court in Gangadara Ayyar v. Subramania Sastrigal, I. l. R. (1947) Mad. 6 (F.B.) and in Viraraghava Rao v. Narasimhrao, A. I. R. .1950 Mad. 124 and earlier Special Bench decision of the Patna High Court in Brajasunder Deb v. Rajendra Narayan, A. i. R. 1941 pat. 269 (S. B.) and a later decision of the Lahore High Court in Attar Kuar v. Gopal Das, A. I. R. 1948 Lah. 1.

53. The decision of the matter in controversy depends upon the correct interpretation to be placed upon the clause quoted above, namely, "where the judgment, decree or final order appealed from affirms the decision of the Court immediately below". On behalf of the applicant it has been contended that in order to find out whether "the judgment, decree or final order appealed from" affirms the decision of the Court below, we have to see whether the judgment, decree or final order of the High Court as a whole affirms the judgment, decree or final order of the Court below as a whole and that if there is variation even as to part of the decree of the Court below the decree is not one of affirmance and an appeal will lie to the Supreme Court as of right even in respect of the part affirmed by the High Court. In the alternative it has been argued on behalf of the applicant, that we have to see the entire subject-matter of the proposed appeal and if in respect of that subject-matter or any part thereof the High Court has varied the decision of the trial Court there is no affirmance, and in such a case an appeal would lie to the Supreme Court as of right. These propositions of law have been contested on behalf of the opposite party and it is argued that there can be no right of appeal as of right in this case as on the question of title the High Court has affirmed the decision of the trial Court, and that when there are separate subject- matters decided by the trial Court and the High Court each subject-matter is an independent decision or decree, and must be taken separately even though on paper there is one decree and there is one appeal to the Supreme Court, more especially when different subject-matters are raised in different proceedings like appeals or an appeal and cross-objection. It is further argued that the expressions "judgment, decree or final

order" and "the decision of the Court immediately below" do not contemplate judgment, decree or final order or decision taken as a whole but they refer only to that part against which the appeal is filed and the corresponding portion of the decision of the Court below.

54. Article 133 of the Constitution of India provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies (1) that the case fulfils the requirement as to the amount or valuation of the subject-matter in dispute; or (2) that the case is a fit one for appeal to the Supreme Court. If the judgment, decree or final order appealed from affirms the decision of the Court below, in cases other than a case which can be certified as a fit one for appeal to the Supreme Court, the High Court will have to further certify that the appeal involves some substantial question of law. Therefore, an appeal is permitted and has to be filed against the judgment, decree or final order, irrespective of the fact whether part of the judgment, decree or order appealed from is in favour of the appellant. "Judgment" is the statement given by the Judge of the grounds of a decree or order and "decree or order" contains a formal expression of any adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit: (vide, definitions of these terms in Section 2, Civil P. C.). The appeal against the judgment will, therefore, be directed against the grounds of the decree or order, and the appeal against the decree or order will be directed against the formal expression of the adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. The appeal against the judgment and decree or order may be directed against the grounds upon which the formal expression of the adjudication is based, and in the appeal the determination of the rights of the parties with regard to all or any of the matters in controversy may be challenged. The extent to which the formal expression of the adjudication is or can be challenged in the appeal will determine the scope of the appeal, but it will have no bearing on the right of appeal against the judgment or decree. Therefore, the right of appeal to the Supreme Court allowed by Article 133 of the Constitution is quite distinct and separate from the scope of the proposed appeal with reference to the matters in controversy arising therein.

55. It has been pointed out that the words "appealed from" in the expression "judgment, decree or final order appealed from" limit the expression. The said expression in Article 133 of the Constitution contemplates three separate documents, viz., the judgment which is the statement given by the judge of the grounds of a decree or order, the decree or final order, which contains a formal expression of any adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. The words "appealed from" therefore qualify the word "judgment" as also the words "decree or final order", and the expression "judgment appealed from" will mean the judgment against which the appeal is proposed to be filed. Similarly the expression "decree or final order appealed from" will mean the decree or final order against which the appeal is preferred. On account of the qualifying words "appealed from" the said expression cannot be taken as referring only to that part of the judgment, decree or final order which deals with the particular matters in controversy in the proposed appeal.

56. It has been further pointed out that the expression "judgment, decree or final order" ought to be construed in conjunction with and as relating to the "subject-matter of the dispute", as an enquiry has to be made about the valuation of the subject-matter of the dispute in the Court of first instance as well as that still in dispute on appeal. That was the old view (vide: Raja Shree Nath v. The Secy. of State, 8 cal. W. n. 294 and Venkitasami Chettiar v. Sakkutti Pillai, I. L. R. (1937) Mad. 121. But, that view no longer holds good in view of the decision of their Lordships of the Privy Council in Annapurnabai's case, 51 Ind. App. 319 (P.c.). In a subsequent decision of the Calcutta High Court in Narendra Lal Das v. Gopendra Lal Das, 31 cal. W. N. 572 the learned Judges observed :

> "That case is the origin of the doctrine that the language which now finds place in Section 110 of the Code is to be construed with reference to the subject-matter in dispute in appeal to the Privy Council. The basis of that case is that if the two Courts are at one upon the matter which is to be in debate before the Privy councilsthen it is a case of a decree which affirms the decision of the Court immediately below."

57. The right of appeal against a judgment decree or final order under Section 110, Civil P. C. was, and even now under Article 133 of the Constitution of India is, only subject to one of the following three conditions, as stated in Article 133 of the Constitution:

> (a) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than Rs. 20,000 or such other sum as may be specified in that behalf by Parliament by a law; or
>
> (b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or
>
> (c) that the case is a fit one for appeal to the Supreme Court.

58. Where the judgment, decree or final order appealed from affirms the decision of the Court immediately below, in any case other than a case referred to in Sub-clause (c) aforesaid, the High Court must further certify that the appeal involves some substantial question of law.

59. Therefore, the right of appeal conferred by the opening paragraph of Sub-clause (1) of Article 133 of the Constitution does not depend upon what the subject-matter of the dispute in the appeal is and it is only necessary to see that the amount or value of the subject-matter is not below the prescribed figure, that is, below Rs. 20,000. It will be necessary to see what the subject-matter of the appeal to the Supreme Court is in order to ascertain whether the case fulfils the requirements in regard to valuation, and not in order to see whether the appeal lies. If the value of the subject-matter is more than Rs. 20,000, the appeal will be allowe and if it is less it will not be allowed. If any party wishes to appeal to the Supreme Court against any judgment, decree or final order in a civil proceeding of a High Court and if the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal to the Supreme Court was and is not less than Rs. 20,000, the appeal will lie as a matter of right if the judgment, decree or final order appealed from varies the decision of the Court immediately below. In order to decide whether this essential condition has

been fulfilled the Court will have to see the decree appealed from and the decision of the Court immediately below, without any reference to the subject-matter of the dispute in the Court of first instance and still in dispute in the proposed appeal.

60. In Narendra Lal Chaudhury's case, (31 cal. W. N. 572) itself, while dealing with the Privy Council decision in Annapurnabai's case, (51 Ind. App. 319 P. C.), the learned Judges pointed out at p. 575 "that the particular application made in Sree Nath Boy's case, (8 Cal. W. N. 294) of the principle that you have to have regard to the subject-matter of dispute in appeal to the Privy Council must be taken as overruled." The view expressed in Narendra Lal Das Chaudhury's case was that we have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council but the learned Judges were doubtful whether in the end even that principle would be found to be in accordance with a construction to be put upon Section 110, Civil P. C. The learned Judges interpreted Annapurnabai's case as not going further than this that where there is dispute as to the amount of the decree or as to the amount of damages the reasoning of Sree Nath Soy's case was not a correct application of that principle. I, however, see no justification for interpreting the decision of their Lordships of the Privy Council in that manner.

61. As observed by Raghava Rao J. in Vira-raghava Rao v. Narasimhrao, A. i. R. 1950 Mad. 124 at p. 131:

> "The collocation of the words "the subject-matter in dispute on appeal to His Majesty in Council" of Clause (1) of Section 110, Civil P. C., and of the words in Clause (3) the decree or final order appealed from is not such as to necessitate the reading together of the two sets of words so as to curtail a right of appeal which, on the only mode of construction justified by the plain positions in the section occupied by the two sets of words or at any rate on an equally possible manner of construction of which they are susceptible, is available to the litigant. This mode of reading together of the two sets of words is that lay at the root of the doctrine of Sree Nath Boy's case, 8 Cal, W. N. 294, which admittedly stands overruled by Annapurnabai v. Ruprao, 51 Cal. 969 : A. I. R. 1925 P. C. 60 and which, as I shall show in the sequel, the Full Bench in Gangadara Ayyar v. Subramania Sastrigal, I. L. R. (1947) Mad. 6 : A. I. R. 1946 Mad. 539 (F.B.) also disapproves of by necessary implication if not in express terms."

62. It follows, therefore, that the doctrine which had its origin in Sree Nath Boy's case, 8 cal. W. N. 294 no longer holds good after the Privy Council decision in Annapurnabai's case, A. I. R. 1925 P. C. 60.

63. It has also been pointed out that the enquiry about substantial question of law is also in respect of the subject-matter of the proposed appeal. The certificate which the High Court is required to give where the judgment, decree or order is one of affirmance must show that the ap peal involves some substantial question of law. It is true that substantial question will be related to one of the matters in controversy which had been adjudicated upon, but is still in dispute; but that does not support the contention that the expres sion "judgment, decree or final order" must be interpreted with reference to the subject-matter of the dispute in the proposed appeal.

64. The question may arise as to why the affirmance or variance of the decision of the Court below should be seen in respect of the subject-matter with which the proposed appeal is not concerned. The reason is that unless we compare the whole decision of the Court below with the decree of the High Court, as a whole, it will not be possible to decide whether the decree affirms or varies the decision of the Court below. The words used in the Article are "decree" and "decision" and, as already pointed out, the decree in an appeal is one, which contains a formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. The adjudication is one although it determines several matters in controversy. I find it difficult to accept the contention put forward on behalf of the opposite party that where there are separate subject-matters decided by the trial Court and the High Court, each of such subject-matters is an independent decree or decision and must be taken separately even though on paper there is one decree and there is one appeal to the Supreme Court. This argument entirely ignores the definition of the term "decree," which has been referred to more than once in this judgment. It is true that in a suit there are several matters in controversy relating to and concerning the rights of the parties. These matters are adjudicated upon and there is one formal expression of that adjudication, which is incorporated in the decree of the Court. Such a contention was raised and repelled by the Full Bench in Abdur Samad v. Mt. Aisha Bibi, A. i. r. 1948 oudh 76 (F.B.).

65. Let us take a few illustrations: (1) in a suit where the plaintiff claimed to be entitled as an adopted son to property valued at more that Rs. 10,000 one of the defendants, the widow of the alleged adoptive father, denied the adoption and claimed to be entitled to Rs. 3,000 per annum by way of maintenance. The trial Court held that the plaintiff had substantiated the plea of adoption and gave the widow maintenance at the rate of Rs. 800 per annum and it "was declared a charge upon the estate. The defendant appealed to the High Court and the decree of the trial Court in so far as it concerned the adoption was confirmed but the rate of maintenance was varied instead of Rs. 800 per annum the widow was awarded maintenance at the rate of Rs. 1,200 per annum. The decree of the High Court conclusively determined the right of the adopted son to the property and the defendant's right to maintenance, the amount of which was fixed at Rs. 1,200 per annum. The leave to appeal was asked for and granted against the decree, although in the appeal the subject-matter of the dispute was limited to the amount of maintenance. Annapurnabai v. Ruprao, 51 Ind. App. 319 (P. C.).

(2) In another case, the suit by the plaintiff against the defendant was one for specific performance of a deed of assignment of certain mortgagee rights to the plaintiff for a sum of Rs. 52,000, on 16-12-1928. Upon that date the plaintiff paid half the purchase price, namely Rs. 26,000. The deed of assignment was not completed. The plaintiff in his plaint prayed for an order for specific performance and in the alternative for a refund of the amount paid with interest. At a late stage in the proceedings in the trial the plaintiff withdrew the prayer for an order for specific performance. In the result the trial Court decreed the suit for Rs. 26,000 plus interest at the rate of 6 per cent. per annum. The High Court affirmed the decision of the trial Court in regard to the defendant's right to refund of the sum of Rs. 26,000 together with interest; but reduced the rate of interest from 6 per cent. to 4 per cent. Here again, the appeal was directed against the decree, which upheld the claim for Rs. 26,000 and interest thereon at the rate of 4 per cent. although the subject-matter of dispute

in the appeal was the rate of interest allowable. Jaggo Bai v. Harihar Prasad Singh, 1940 ALL. L. J. 869 (F. B.).

(3) In a suit where eleven items of properties were in dispute, the trial Court granted a declaration in respect of six items of property and dismissed the claim in respect of other items of property, but on appeal the High Court modified the decree of the trial Court and the claim in respect of four other items of property was decreed. In appeal to the Privy Council the validity of the plaintiff's claim in respect of ten out of eleven items of property was being challenged. The decree appealed from was, therefore, the decree of the High Court affirming the decision of the trial Court in respect of six items and decreeing the claim in respect of four items and the Subject-matter of dispute in the appeal to the Privy Council was all the items oi property in respect whereof claim had been allowed. Gangadara Ayyar v. Subramania Sastrigal, I. L. R. (1947) Mad. 6 (F. B.).

66. In my opinion, therefore, it is not necessary to construe the expression "judgment, decree or final order appealed from" in conjunction with or as relating to the "subject-matter of dispute in the proposed appeal" or to hold that the expression means the subject-matter of the "judgment, decree or final order appealed from". The expression should be interpreted independently and with reference to its context and given its plain meaning.

67. The expression "the decision of the Court immediately below in any case" must similarly be interpreted to mean the whole decision of the suit by the Court. The significance of the words "in any case" cannot be lost sight of; consequently, it is the decision in the case, and not the decision of any matter in controversy, that has to be taken into consideration.

68. In Tassaduq Rasul Khan v. Kashi Ram, 25 ALL. 109 (P. C.), the word "decision", used in the corresponding Section 596, Civil P. C., 1882, was thus interpreted by their Lordships of the Privy Council :

> "They think that the natural, obvious and prima facie meaning of the word "decision" is decision of the suit by the Court, and that that meaning should be given to it in the section."

69. In any case it should not be difficult to find out what the decision of the trial Court is, For example, in the present case the trial Court decided that Durga Saran Singh was validly adopted to her husband by Rani Krishna Kuar, but the family settlement or the custom set up by the plaintiff was not established; and that the plaintiff (as the widow of the adopted son of the last holder of the estate) was entitled to get from the defendant, who had become the owner of the estate, a maintenance allowance of Rs. 3,000 a year and to continue to live in the house where she was living at that time. In view of this decision, the suit was dismissed but a declaration in regard to the maintenance allowance and the right of residence was made. When we compare the decree of the High Court with the above decision of the trial Court, it becomes clear that the decree of this Court does not affirm the decision of the trial Court but varies it by setting aside the declaration that the plaintiff was entitled to get a maintenance allowance of Rs. 3,000 a year from the defendant and to continue to live in the house of the estate, where she was living at the time of the decree.

70. We have, therefore, to take the judgment, decree or final order appealed from as a whole and decide with reference to it and the decision of the trial Court taken as a whole whether the decree appealed from is one of affirmance or not.

71. The view expressed above is in conformity with the view taken in various cases decided by their Lordships of the Privy Council and by this and other High Courts in India.

72. To begin with, there is the decision of their Lordships of the Privy Council in Annapurnabai v. Buprao, 51 Ind. App. 319 (P. C.). The facts of this case have been set out above by way of illustration. In the case, as we have already seen, the Court of the Judicial Commissioner had, on appeal, modified the decree of the trial Court by increasing the amount of maintenance from Rs. 800 to Rs. 1200 per annum, but affirmed it in all other respects. The Judicial Commissioner rejected the application for leave to appeal to the Privy Council on the ground that the decree of the first Court had been affirmed except in respect of a small change in favour of the applicants and that no question of law was involved. Then an application for special leave was presented to their Lordships of the Privy Council. While arguing the application for special leave, Sir George Lowndes, counsel for the petitioner, contended that, under Sections 109 and 110, Civil P. C., they had a right of appeal to the Privy Council. Since the appellate Court did not affirm the decision of the trial Court but varied it, it was not material under Section 110 whether any substantial question of law was involved. The contention of the petitioner's counsel as to the effect of Section 110, Civil P. C. was held by their Lordships of the Privy Council to be correct and it was held that the petitioners had a right of appeal. The leave to appeal was, no doubt, limited to the question of maintenance, but that was in view of the statement made on behalf of the petitioners that having regard to the concurrent findings of the two Courts the petitioners desire to appeal only with regard to the amount of maintenance.

73. In Annapurnabai's case, A. i. r. 1925 p. c. 60 the right of appeal to the Privy Council must be deemed to have been recognised, in the absence of any substantial question of law, treating the decree of the High Court as not one. of affirmance. The case is, therefore, an authority for the proposition that even if the High Court's decree affirms the decision of the trial Court on the main question in issue in the suit and varies it on a minor matter in dispute in favour of the appellant the latter will have the right of appeal as a matter of right. So long as it was held that the petitioner had a right of appeal, it was immaterial what matters in dispute could or could not be raised or pressed at the time of the heading of the appeal before the Privy Council.

74. The decision in Annapurnabai's case, A. I. R. 1925 P. C. 60 was followed by this Court in Jaggo Bai v. Harihar Prasad Singh, 1940 ALL. l. j. 869 (F. B.). The facts of that case have also been set out by way of illustration. In that case, the High Court's decree varied the decision of the Court below by reducing the rate of interest from 6 per cent. to 4 per cent. and affirmed it in respect of the main dispute. An application for leave to appeal to the Privy Council was filed. The application was opposed on the ground that there had in fact been no substantial modification in the decision of the trial Court so far as the main question in issue was concerned and such modification as had been effected by the High Court decree was in favour of the applicant. In disposing of the application it was pointed out by the Full Bench that the matter was concluded by the decision of the Privy Council

in favour of the applicant and leave to appeal was granted. It was pointed out by the Full Bench that the Privy Council in Annapurnabai's case "did decide that an applicant is entitled to challenge the decision of a High Court, even if the High Court has modified in his favour the decision of the trial Court where the amount involved is Rs. 10,000 or upwards." When asked by the respondent's counsel to limit the appeal to the question of interest, the Full Bench pointed out that that was not a matter for them to decide and the leave to appeal against the decree was granted. Similar view was expressed in an earlier Full Bench decision of this Court in Nathu Lal v. Raghubir Singh, 54 ALL. 146 (S. B.).

75. In Gangadara Ayyar v. Subramania Sastrigal, I. l. r. (1947) Mad. 6 (F. B.) the claim was in respect of 11 items of property. The trial Court gave a declaration to the plaintiff in respect of six out of eleven items of the property but dismissed the rest of the claim. On appeal to the High Court the claim of the plaintiff in respect of four out of the remaining five items of the property was allowed; and in the proposed appeal to the Privy Council by the defendant the validity of the plaintiff's claim with regard to ten out of elven items of the property was being challenged. The application for leave to appeal was opposed on the ground that, as there were concurrent findings so far as six of the properties are concerned, the petitioners can appeal only with regard to four items decreed by the High Court and that they in themselves do not fulfil the requirement with regard to value. The petitioner's reply was that the value of the four items was immaterial as the subject-matter of the proposed appeal was the ten items of property in respect of which the plaintiff had succeeded. After referring to the case of Annapurnabai, A. i. r. 1925 P. C. 60 the Full Bench pointed out :

> "There is here a pronouncement of the Judicial Committee that, where there is a variance of the decree passed by the trial Court, the party affected thereby is entitled as of right to a certificate subject, of course, to the requirements of the Code being fulfilled with regard to value."

76. A similar view has been expressed in the later decision of the same Court in Viraraghava Rao v. Narasimhrao, A. i. R. 1950 Mad. 124.

77. The view of the Patna High Court is in line with the view expressed by the Full Bench decision of this Court and in that connection reference may be made to Brajasunder Deb v. Rajendra Narain, A. I. R. 1941 Pat. 269 (S. B.). In that case, the plaintiffs brought a suit for a declaration that they were the owners of certain lands in three villages set out in four schedules to the plaint and for confirmation of possession. In the alternative, it was prayed that, if it was found that the plaintiffs were not in possession, they should be given possession of the lands in question. The defendant by his defence denied that the plaintiffs were entitled to any relief and claimed that the lands in question belonged to him by reason of adverse possession over a long period of time. The trial Court substantially dismissed the claim of the plaintiffs and thereupon the latter preferred an appeal to the High Court. On appeal the plaintiffs claim with regard to the land in one village Olaver was decreed but their claim with regard to the land of the two other villages was dismissed, though on grounds different from those upon which their claim with regard to these lands was dismissed by the trial Court. The application for leave to appeal was opposed inter alia on the ground that the High Court's decree was one of affirmance. In disposing of the application for leave to appeal to the Privy Council,

the Special Bench pointed out that after the decision of their Lordships of the Privy Council in Annapurnabai's case, A. I. R. 1925 P. C. 60 the old view that a variation of the above nature could give no right of appeal no longer held the field. Harries C. J., who delivered the judgment of the Special Bench, summed up the position thus :

> "There can be no question that the point involved in this case is a difficult one and there is a conflict of decisions of this Court, but in my judgment the true test is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute have been affirmed by the High Court. The difficulty arises owing to the use of the phrase the decision of the Court, immediately below the Court passing such decree'. Had the words 'decree of the Court below' been used, the matter would have been clear. In my view, however, the expression 'the decision of the Court immediately below the Court passing such decree' as used in Section 110 means the same as the expression 'decree of the Court below'. Once an appeal has been decided the decree of the Court below is merged in that of the appellate Court and strictly there is no longer in existence a decree of the trial Court. There is only a decision, and in my view, the word 'decision' means the decision of the trial Court taken as a whole. It must be remembered that an appeal is not preferred against any item or items in a decree. The appeal must be preferred against the whole decree, though for the purposes of valuation the subject matter in dispute in appeal only 'is valued'.

78. In Sm. Attar Kuar v. Gopal Das, A. i. R. 1948 Lah. I the Lahore High Court had expressed a similar view. Two earlier decisions of that Court, which have been relied upon by the opposite party, viz., Brahmanand v. Sanatan Dharm Sabha, I. L. R. (1945) 26 Lah. 156 (F. B.) and Wahid-Ud-din v. Makhan Lal, I. L. R. (1945) 26 Lah. 242 (F. B.) were distinguished. Those cases are distinguishable from the present case also.

79. Reference may also be made to a Full Bench decision of the Chief Court of Oudh in Abdur Samad v. Mt. Aisha Bibi, A. i. r. 1948 oudh 76 (F. B.). In that case, the plaintiff claimed possession of a I/6th share in the properties of her parents by partition on the basis of inheritance. The trial Court decreed the claim except in respect of certain properties. The defendants appealed and the plaintiff filed cross-objections. The appeal was dismissed but the cross-objections were allowed by the Chief Court. In the result the whole of the plaintiff's claim stood decreed. The valuation of the subject-matter of dispute in the suit was found to be over Rs. 10,000. The question which arose for consideration in the application for leave to appeal to the Privy Council was whether the decree of the Chief Court was one of affirmance. The Full Bench while interpreting the clause "where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law", observed:

> "On the plain reading of the provision it would be impossible to attach any qualifications to the affirmance except that it must be by the decree against which the appeal is preferred. Apparently regard is not to be had to the manner in which the

affirmance is made or the person at whose instance it is brought about. The extent of affirmance is also not a matter to be considered. The sole question which arises under the clause is whether the appellate decree affirms or varies the decision of the Court immediately below on merits. This question scarcely presents much difficulty where there is only one decree passed by the High Court. But where there is multiplicity of appeals, and consequently a number of appellate decrees are passed considerations other than those which prevail in the case of a single appellate decree may perhaps arise. We need not, however, concern ourselves with the latter class of cases. Where an appeal is sought to be preferred against a decree which varies the decision of the Court immediately below whether the variance is brought about at the instance of the appellant or at the instance of the respondent it cannot be said that the appellate decree affirms the decision of the first court. This section does not conceive of the decree as partly affirming and partly varying the original decision. The Legislature appears to have envisaged an appellate decree either as upholding that decision or as varying or modifying it and if an appeal is permissible, it is against the decree as a whole and not against the finding or adjudications on the controversies involved in the suit."

80. There is one more aspect of the matter which needs consideration. It may be argued that according to the interpretation which I have placed upon the expression "where the judgment, decree or final order appealed from affirms the decision of the Court immediately below" an appellant will be entitled to . a certificate even when he desires, to challenge in appeal only the concurrent findings of the two Courts. In considering this argument we will have to disabuse our minds of the idea that the appeal is allowed against particular findings recorded by either or both the Courts and to treat the appeal as distinct from the scope of the appeal. As already pointed out above, under Article 133 of the Constitution of India an appeal is provided and has to be filed against the Judgment, decree or final order and not against particular findings incorporated in the judgment. If the High Court grants the certificate prescribed by Article 133, it will have the effect of permitting an appeal to the Supreme Court and it will not entitle the appellant to challenge the concurrent findings of fact if he is otherwise not entitled to do so. A certificate will not in any manner interfere with the discretion of their Lordships, of the Supreme court to decide what matters are concluded by findings of fact and what matters can legitimately be raised in the appeal. It was pointed out that if in the proposed appeal only the matters which are concluded by findings of fact are to be raised the High Court should be reluctant to unnecessarily increase the work of the Supreme Court. I am of the view that this Court should grant a certificate when the requirements of Article 133 have been complied with unmindful of any such extraneous considerations.

81. The result of the above discussion is that taking the judgment and decree appealed from as a whole and comparing it with the decision of the Court immediately below taken as a whole, there can be no doubt whatsoever that the decree appealed from does not affirm the decision of the Court immediately below. The fact that in this Court an appeal was filed by the defendant and the cross-objections were filed by the plaintiff is of no consequence as the decree passed by this Court is one and that disposes of both the appeal as well as the cross-objections. The valuation of the subject matter of the appeal being over Rs. 20,000, the applicant is, in my opinion, entitled to leave to

appeal to the Supreme Court as of right. Whether at the time of the hearing of the appeal the applicant will be entitled to argue the question of title, upon which there are concurrent findings of the two Courts, it is not necessary for us to consider, as that has no bearing on the applicant's right of appeal in the present case. I am not prepared to hold that in Annapurnabai's case (A. I. R. 1925 P. C. 60) their Lordships imposed the limitation as regards the points to be agitated in the appeal as they consider it necessary to do so. Their Lordships seem to have mentioned the limitation in their order in view of the statement made before them by the counsel for the petitioner. As the respondents were not represented, no request could have been made on their behalf to their Lordships to impose the limitation which they did. As their Lordships could have refused to hear the appellant on a point which was concluded by concurrent findings of the two Courts at the time of the hearing of the appeal, so it was hardly necessary for them to impose the limitation while granting special leave.

82. The Full Bench decisions of this Court in Nathu Lal v. Raghubir Singh, 54 ALL. 146 (S. B.) and Jaggo Bai v. Harihar Prasad Singh, I. L. R. (1941) ALL. 180 (F. B.) lay down the correct law and these decisions fully support the applicant's right to appeal to the Supreme Court as of right, irrespective of the subject-matters which she may or may not be entitled to raise at the hearing of the appeal in the Supreme Court.

By the Court

83.The application for amendment and the petition for leave to appeal to the Supreme Court are allowed. It is certified that the case fulfils the requirements of Article 133 of the Constitution and is declared a fit one for appeal to the Supreme Court.