Umaji Keshao Meshram And Ors. vs Radhikabai, Widow Of Anandrao ... on 14 March, 1986

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Bench: D.P. Madon, O. Chinnappa Reddy

JUDGMENT

O. Chinnappa Reddy, J.

1. Unfamiliar as I am with the history, tradition and the lore of the city and the High Court of Bombay, I content myself by agreeing with the conclusion of my learned brother that no appeal under Clause 15 of the Letters Patent lies to the High Court against the order of a single judge of the High Court exercising jurisdiction under Article 227 of the Constitution, no less and no more. I do not have any doubt that the reference to Section 107 of the Government of India Act, 1915 in Clause 15 of the Letters Patent must necessarily be read as a reference to Article 227 of the Constitution. So read an appeal under Clause 15 is clearly not maintainable against an order made in exercise of the power under Article 227. This is the view taken by all the High Courts in India except the High Court of Bombay, where alone opinion has not been unanimous.

D.P. Madon, J.

2. The question which falls for determination in this Appeal is "Whether an appeal lies under Clause 15 of the Letters Patent of the Bombay High Court to a Division Bench of two judges of that High Court from the judgment of a Single Judge of that High Court in a petition filed under Article 226 or 227 of the Constitution of India?"

3. The facts which have given rise to this Appeal by Special Leave granted by this Court need to be briefly stated. The First Respondent, Radhikabai, is a widow. She is the owner of three fields situate at Mouza Khed-Makta, Tahsil Brahmapuri, District Chandrapur. Kesheo, the father of the Appellants, was the tenant of the said fields. The First Respondent filed an application under Section 36(2) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (Bombay Act No. XCIX of 1958), read with Section 39 of that Act for possession of the said fields on the

ground that she wanted them for personally cultivating them. The said application was allowed and she took possession of the said fields. On the ground that instead of personally cultivating the said fields the First Respondent had leased them to the Second Respondent, the Appellants filed an application under Section 52 of the Tenancy Act claiming that they had become entitled to have the possession of the said fields restored to them. It was the case of the First Respondent that the Second Respondent was working in the said fields as her servant on a monthly salary. The Appellants' said application was allowed by the Additional Tahsildar, Brahmapuri. The First Respondent's appeal against the said order was allowed by the Sub-Divisional Officer, Brahmapuri. The Appellants thereupon went in revision to the Maharashtra Revenue Tribunal at Nagpur and the Tribunal allowed the said revision application. Thereupon the First Respondent filed a petition under Article 227 of the Constitution of India before the Nagpur Bench of the High Court of Bombay being Special Civil Application No. 1392 of 1974. By reason of the provision of Rule 18 of Chapter XVII of the Bombay High Court Appellate Side Rules, 1960, the said petition was heard by a learned Single Judge of the said High Court who allowed the petition, set aside the order of the Tribunal and restored the order of the Sub-Divisional Officer. Against this judgment and order the Appellants filed an appeal under Clause 15 of the Letters Patent to a Division Bench of the Bombay High Court, Nagpur Bench. The Division Bench dismissed the said appeal as not being competent in view of the decision of a Full Bench of the Bombay High Court, Nagpur Bench, in Shankar Naroba Salunke and Ors. v. Gyanchand Lobhachand Kothari and Ors. Letters Patent Appeals Nos 3, 10, 11 and 17 of 1979 and 34 of 1980 decided on September 3, 1980. It is against the said order of the Division Bench that the present Appeal by Special Leave has been filed by the Appellants.

4. As the Appellants' Letters Patent Appeal was dismissed as being not maintainable by reason of the judgment given by the Full Bench of the said High Court, what really falls to be considered in the present Appeal is the correctness of that judgment.

5. The High Court of Judicature at Bombay was established by Letters Patent dated June 26, 1862, issued by the British Crown in pursuance of authority conferred upon it by the Indian High Courts Act, 1861 (24 & 25 Vict., c.104). Clause 14 of the said Letters Patent provided as follows;

14. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction. -

And we do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment, in all cases of original civil jurisdiction, of one or more Judges of the said High Court or of any Division Court, pursuant to Section 13 of the said recited Act: Provided always that no such appeal shall lie to the High Court as aforesaid from any such decision made by a majority of the full number of Judges of the said High Court, but that the right of appeal in such case shall be to Us, Our heirs or successors, in Our or Their Privy Council in manner hereinafter provided.

6. The Letters Patent Issued in 1862 were revoked and replaced by Letters Patent dated December 28, 1865. Clause 15 of the new Letters Patent in its original form was in the following terms :

> 15. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction. -

And we do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay, from the judgment (not being a sentence or order passed or made in any criminal trial) of one sludge of the said High Court, or of one Judge of any Division Court, pursuant Co Section 13 of the said recited Act; and that an appeal shall also lie to the said High Court from the judgment not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court, at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors, in Our or Their Privy Council, as hereinafter provided.

7. By Letters Patent dated March 11, 1919, published in the Bombay Government Gazette dated June 19, 1919, Part I, pages 1446-7, the words and brackets in Clause 15, namely, "(not being a sentence or order passed or made in any criminal trial)", were substituted by the words and brackets "(not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915, or in the exercise of criminal jurisdiction)". By Letters Patent dated December 9, 1927, published in the Bombay Government Gazette dated February 2, 1928, Part 1, pages 196-7, Clause 15 was substituted. This substituted clause was amended by Letters Patent dated January 22, 1929, published in the Bombay Government Gazette dated January 24, 1929, Part I, at pages 131-2. The substituted Clause 15 as amended in 1929 reads as follows :

> 15. Appeal to the High Court from Judges of the Court.

And We do further ordain that an appeal shall lie to the said High Court of Judicature at: Bombay from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made on or after the first day of February One thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

In Clause 15 as substituted in 1927 the words "on or after the first day of February One thousand nine hundred and twenty-nine" did not find a place but were inserted by the said Letters Patent of 1929.

8. It may be pointed out that the provision in Clause 15 providing for an appeal from a judgment in a second appeal decided by a Judge of the High Court if such Judge declares that the case is a fit one for appeal has now become inoperative in view of Section 100A of the CPC, 1908, which was inserted in that Code by the CPC (Amendment) Act, 1976, under which no further appeal is to lie against the judgment of a single Judge of the High Court in a second appeal. The provision in Clause 15 providing for an appeal from the judgment of one Judge of any Division Court has also become redundant and inoperative after the amendment of Clause 36 of the Letters Patent by the said Letters Patent dated December 9, 1927. Prior to such amendment where a Division Bench was composed of two or more Judges and the Judges were equally divided in opinion as to the decision to be given on any point, the opinion of the senior Judge was to prevail and under Clause 15 an appeal lay from Ms judgment. After the amendment of Clause 36, if the Judges of the Division Bench are equally divided, they are to state the point upon which they differ and the case has then to be heard upon that point by one or more of the other Judges and the point is to be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

9. When analysed and broken up into its competent parts Clause 15 in its finally amended and operative form reads as follows :

> An appeal shall lie to the High Court of Judicature at Bombay -
>
> (1) from a judgment (2) of one Judge of the High Court (3) pursuant to Section 108 of the Government of India Act of 1915 (4) not being -
>
> (a) a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court,
>
> (b) an order made in the exercise of revisional jurisdiction,
>
> (c) a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act of 1915, or
>
> (d) a sentence or order passed or made in the exercise of criminal jurisdiction.

10. The Letters Patent of the Calcutta, Bombay and Madras High Courts are mutatis mutandis in the same terms with minor variations, mostly as a result of amendments subsequently made. The word "judgment" is not defined in the Letters Patent and has been the subject-matter of conflicting decisions by these three High Courts. The question fell for consideration of this Court in Shah Babulal Khimji v. Jayaben D. Kania and Anr. . in that case, a Single Judge sitting on the Original Side of the Bombay High Court dismissed an application made by the appellant for appointment of an interim receiver and the grant of an interim Injunction. An appeal against that order was dismissed by a Division Bench of the High Court on the ground that it was not maintainable under

Clause 15 of the Letters Patent. After considering various authorities a three-Judge Bench of this Court reversed the judgment and order of the Division Bench and held that an appeal under Clause 15 of the Letters Patent lay against the said order because Section 104 of the CPC, 1908, applied to the Original Side of the Bombay High Court and such an order would be appealable under that section read with Rule 1 of Order XLIII of the Code and also because such an order even on merits contained the quality of finality and would, therefore, be a "judgment" within the meaning of Clause 15 of the Letters Patent. The question whether the judgment of a Single Judge in a petition filed under Article 226 or 227 of the Constitution of India was not before the Court in Shah Babulal Khimji's case and was not decided by it.

11. There was no dispute before us that the decision of the learned Single Judge allowing the First Respondent's petition under Article 227 of the Constitution was a "judgment" within the meaning of Clause 15 of the Letters Patent, What was disputed was whether an appeal lay against that judgment under Clause 15 of the Letters Patent.

12. In Jagannath Ganbaji Chikhale v. Gulabrao Raghobajl Bobde a Division Bench of the Bombay High Court, Nagpur Bench, held that no appeal lies against the judgment of a Single Judge in a petition under Article 227 of the Constitution because after the coming into force of the Constitution the words "Section 107 of the Government of India Act" (that is of the Government of India Act of 1915) in Clause 15 should be read as "Article 227 of the Constitution" Inasmuch as Article 227 confers a power of superintendence as wide as was available to the High Court under Section 107 of the Government of India Act of 1915. Later, a group of Letters Patent appeals from the judgments of different Single Judges in writ petitions filed either under Article 226 or 227 of the Constitution came before a Full Bench of three Judges which, as mentioned earlier, held that no appeal lay under Clause 15 of the Letters Patent against the judgment of a Single Judge of that High Court in a petition filed under Article 226 or Article 227 of the Constitution. The reasons given by the Full Bench for reaching this conclusion (quoting as far as possible its own words) were as follows :

> (1) The Constitution of India brought about a fundamental change in the character of the High Courts which were in existence on the date the Constitution came into force. According to the Full Bench, the Constitution "purports to lay down an original Institutional matrix of its own". It observed that "it is not out of the historical ramparts that something is being put up, but a fundamental scheme, though mostly drawn on the historical feed back, is conceived and constructed .... Source of founding the High Court is thus changed and is now referable to the terms of the paramount law of the Constitution."
>
> (2) the Constitution made a break with the past and had made absolutely a new original and vital beginning and it, therefore, followed as a matter of law that as far as origin, source of power and the conferment of constitutional authority were concerned, the Letters Patent or earlier legislation had mere historical relevance and could not control matters expressly provided in the Constitution.

(3) The High Courts were created as a result of the Letters Patent issued under, the Indian High Courts Act, 1861 (24 & 25 Vict. c. 104), and, therefore, the establishment, creation and jurisdiction of the High Courts had their origin in the ordinary law made by the "Imperial Parliament".

(4) The phraseology of the Letters Patent, the Government of India Act of 1915 and the Government of India Act, 1935, make it obvious that the words "original" and "appellate" were used with reference to legal jurisdictions of the High Courts created by ordinary legislations as distinct from organic or Constitutional jurisdiction not subject to such laws. The Constitutional jurisdiction conferred by Article 226 or 227 cannot be equated with nor can form part of any of the jurisdictions within the contemplation of the Letters Patent.

(5) The historical origin of Clause 15 lies in the Imperial device to provide an intra court appeal in causes heard in the exercise of its original civil jurisdiction by the High Court acting by its Single Judge's Court, all other appeals being differently provided for.

(6) The fact that the Letters Patent can be amended by ordinary legislation shows that the jurisdiction of the High Court under Articles 226 and 227 could not fall within the purview of the Letters Patent.

(7) Articles 226 and 227 of the Constitution contain Inbuilt rule-making power and, therefore, after the coming into force of the Constitution, the authority to make rules is not required to be traced to Section 108 of the Government of India Act, 1915, but resides in Articles 226 and 227 of the Constitution supplemented with regard to identical matters by Article 225.

(8) Both Articles 226 and 227 of the Constitution, in substance, provide for the same relief, namely, scrutiny of records and control of subordinate courts and tribunals and, therefore, the exercise of jurisdiction under these Articles would fall within the expression "revisional jurisdiction" or "power of superintendence" and hence even under Clause 15 of the Letters Patent an appeal would be barred.

(9) When by virtue of the rules made by the High Court a Single Judge exercises the power conferred upon the High Court under Article 226 or Article 227, it follows that the power is exercised by him for the entire High Court and, therefore, the filing of an appeal against his judgment would amount to filing a second writ petition in the same matter which is not permissible.

(10) The expression "shall be heard and finally disposed of" in Rule 18 of Chapter XV11 of the Bombay High Court Appellate Side Rules, 1960, negatives the filing of any appeal in a proceeding under Article 226 or 227 of the Constitution.

13. The question thereafter came to be considered by a Special Bench of five Judges of the Bombay High Court in State of Maharashtra v. Kusum Charudutt Bharma Upadhye . The Special Bench traced in great detail the origin, growth and development of the different powers and jurisdiction of the Bombay High Court and referred to various authorities on the point canvassed before it. It held that under Article 225 of the Constitution of India, the High Courts of various Provinces which were in existence immediately before the commencement of the Constitution continued on and from that date as the High Courts of corresponding States possessing all the jurisdictions and powers which they had prior to that date. It further held that Articles 226 and 227 of the Constitution did not confer upon the existing High Courts wholly new powers not reflected in any of the powers or jurisdictions possessed by any of them at the commencement of the Constitution. According to the Special Bench, the power under Article 226 was modelled upon the prerogative writ jurisdiction possessed by the three Chartered High Courts, namely, the High Courts of Calcutta, Bombay and Madras, in the exercise of their original jurisdiction, though that power had been made much wider by Article 226, and that Article 227 derives its origin from Section 15 of the Indian High Courts Act, 1861, Section 107 of the Government of India Act of 1915 and Section 224 of the Government of India Act, 1935, and that this power also existed in the former Supreme Court of Judicature at Bombay with respect to the Court of Requests and the Court of Quarter Sessions. The Special Bench also held that by reason of the provisions of Section 38(1) of the Interpretation Act (52 & 53 Vict., c. 63) and Section 8 of the General Clauses Act, 1897, and on well-established principles of interpretation of statutes the words "the power of superintendence under the provisions of Section 107 of the Government of India Act" occurring in Clause 15 of the Letters Patent were to be read as "the power of superintendence under the provisions of Section 224 of the Government of India Act, 1935" when the 1935 Act came into force and by the same process of interpretation when the Constitution of India came into force the words "the power of superintendence under the provisions of Article 227 of the Constitution" are to be read for the words "the power of superintendence under the provisions of Section 224 of the Government of India Act, 1935". According to the Special Bench an appeal against the judgment of a Single Judge in a proceeding under Article 227 of the Constitution was, therefore, expressly barred by Clause 15 of the Letters Patent. The Special Bench also held that Articles 226 and 227 of the Constitution operated in different fields and that in the exercise of its power under Article 226 the High Court exercises original jurisdiction as contrasted with its appellate or revisional Jurisdictions and that where the original proceeding under Article 226 concerned civil rights, the proceeding under Article 226 would be an original civil proceeding and, therefore, an appeal would lie under Clause 15 of the Letters Patent against the judgment of a Single Judge in such a proceeding. The Special Bench further held that the words "heard and finally disposed of" in Rule 18 of the Chapter XVII of the Bombay High Court Appellate Side Rules, 1960, did not imply any exclusion of a Letters Patent appeal against the judgment of a Single Judge in a proceeding under Article 226 of the Constitution. According to the Special Bench, where the facts justified a party in filing an application under either Article 226 or 227 of the Constitution and the party chooses to file his application under both these Articles, the court ought to treat the application as being one made under Article 226. The Special Bench overruled the decision in Shankar Naroba Salunke and Ors. v. Gyanchand Lobhachand Kothari and Ors. except for the conclusion reached in that case that no appeal lies under Clause 15 of the Letters Patent against the judgment of a Single Judge of the High Court in a proceeding under Article 227 of the Constitution.

14. Though the Petition for Special Leave to Appeal in this matter was filed in the end of April 1983 nearly two and a half years after the Judgment of the Special Bench was delivered and nearly two years after it was reported, strangely enough what was challenged in the Petition for Special Leave was only the correctness of the judgment of the Full Bench and not that of the Special Bench. None the less, in view of the importance of the question raised by this Appeal, the correctness of the Full Bench decision requires to be examined by this Court.

15. The judgment of the Full Bench is based upon one major premise and two minor premises - the major premise being that on the commencement of the Constitution the High Courts then in existence became organically different High Courts as they acquired a different origin, nature and character; the minor premises being (i) that the provision for an intra-court appeal in the Letters Patent dealt with different jurisdictions under the ordinary law only and not with any jurisdiction conferred upon the High Court by the Constitution, and (11) that Rule 18 of Chapter XVII of the Bombay High Court Appellate Side Rules, 1960, negatived any right of appeal. Each of these premises is, however, vitiated by a fallacy.

16. As the High Court of Bombay was in existence Immediately prior to the commencement of the Constitution, we will first turn to the relevant provisions of the Constitution as originally enacted, pointing out where necessary the subsequent changes made therein.

17. Clause (14) of Article 366 of the Constitution defines the term "High Court" as follows :

> (14) 'High Court' means any Court which is deemed for the, purposes of this Constitution to be a High Court for any State and Includes -
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> (a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and
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> (b) any other Court in the territory of India Which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution.

18. Chapter V of Part VI of the Constitution deals With High Courts and is headed "The High Courts in the States". Article 214 as originally enacted provides as follows :

> 214. High Courts for States. -
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> (1) There shall be a High Court for each State.
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> (2) For the purposes of this Constitution the High Court exercising jurisdiction in relation to arty Province Immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State.
>
> (3) The provisions of this Chapter shall apply to every High Court referred to in this article.

Clauses (2) and (3) of this Article were omitted with effect from November 1, 1956, by the Constitution (Seventh Amendment) Act, 1956, in order to implement the scheme of reorganization of States.

19. Clauses (1) and (2) of Article 1 of the Constitution a originally enacted provided as follows :

> (1) India, that is Bharat, shall be a Union of States.
>
> (2) The States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule.

Clause (2) was substituted by the Constitution (Seventh Amendment) Act, 1956, to read "The States and the territories thereof shall be as specified in the First Schedule." Under the First Schedule to the Constitution, the territory comprised in the Province of Bombay became the territory of the State of Bombay, and by reason of Article 214(2) read with Clause (14) of Article 366 of the Constitution the High Court for the Province of Bombay became the High Court for the State of Bombay. Article 215 provides as follows :

> 215. High Courts to be courts of record. -

Every High Court shall be a court of record and shall have all the powers of such a court Including the power to punish for contempt of itself.

Article 225 reads as follows :

> 225. Jurisdiction of existing High Courts. -

Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, 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 immediately before the commencement of this Constitution:

> Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act. ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such Jurisdiction.
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> The proviso to Article 225 was omitted by the Constitution (Forty-second Amendment) Act, 1976, with effect from February 1, 1977, and was reinserted with effect from June 20, 1979, by the Constitution (Forty-fourth Amendment) Act, 1978.

Clause (1) of Article 226 as originally enacted provided as follows :

226. Power of High Courts to issue certain writs.

(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas' corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part HI and for any other purpose.

This clause was substituted by the Constitution (Forty-second Amendment) Act, 1976. Clause (1) as so substituted was amended by the Constitution (Forty-third Amendment) Act, 1977, and the Constitution (Forty-fourth Amendment) Act, 1978, with the result that Clause (1) of Article 226 has now been restored to its original form.

Article 227 as originally enacted provided as follows :

227. Power of superintendence over all courts by the High Court. -

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may -

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Courts may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under Clause (2) or Clause (3) shall not be Inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating

to the Armed Forces.

Clause (1) of Article 227 was substituted with effect from February 1, 1977, by the Constitution (Forty-second Amendment) Act, 1976, to read, "Every High Court shall have superintendence over all courts subject to its appellate jurisdiction". The clause was further substituted so as to restore it to its original form by the Constitution (Forty-fourth Amendment) Act, 1978, with effect from June 20, 1979.

20. It is also relevant to set out the provisions of Article 228. That Article is as follows:

228. Transfer of certain cases to High Court. -

If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may -

(a) either dispose of the case itself, or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

The above Article was amended by the Constitution (Forty-second Amendment) Act, 1976. It was again amended by the Constitution (Forty-third Amendment) Act, 1977, to restore it to its original form.

21. Article 230 as originally enacted provided as follows:

230. Extension of or exclusion from the jurisdiction of High Courts. -

Parliament may by law -

(a) extend the jurisdiction of a High Court to, or

(b) exclude the jurisdiction of a High Court from, any State specified in the First Schedule other than, or any area not within, the State in which the High Court has its principal seat.

This Article was substituted by the Constitution (Seventh Amendment) Act, 1956, when the distinction between Parts A, B and C States was done away with, and the Article now confers power upon Parliament to extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union Territory.

Article 372(1) provides as follows :

> 372. Continuance in force of existing laws and their adaptation. -
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> (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

The expression "existing law" is defined by Clause (10) of Article 366 to mean "any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, by-law, rule or regulation".

22. Under Article 367(1), unless the context otherwise requires, the General Clauses Act, 1897, subject to any adaptations and modifications that may be made therein by any Presidential order made under Article 372 to bring it in conformity with the provisions of the Constitution, is to apply for the interpretation of the Constitution.

23. The result of the above Constitutional provisions may be summed up thus :

> (1) Under Article 225, the High Courts exercising jurisdiction in relation to the Provinces immediately before the commencement of the Constitution (hereinafter referred to as "the existing High Courts") became the High Courts for the corresponding States and exercised the same jurisdiction and administered the same law as theretofore; and the respective powers of the Judges of such High Courts in relation to the administration of justice in such Courts, including the power to make rules for the Court and regulate the sittings of the Court and of members thereof sitting singly or in Division Courts, remained the same as immediately before the commencement of the Constitution.
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> (2) The proviso to Article 225 removed the bar to the exercise of original jurisdiction by the existing High Courts in matters concerning the revenue contained in Section 226(1) of the Government of India Act, 1935.
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> (3) Articles 226, 227 and 228 provided for the exercise of certain specific powers by every High Court, whether an existing High Court or a High Court which may come to be established after the commencement of the Constitution as some High Courts in fact were, for example, the High Courts of Andhra Pradesh, Gujarat and Delhi. These specific powers are the power to issue directions, orders and writs under Article 226, the power of superintendence over subordinate courts and tribunals under Article 227, and the power under Article 228 to withdraw to itself from a subordinate court a case involving a substantial question of law as to the interpretation of the

Constitution.

24. By Section 8 of the States Reorganisation Act, 1956 (Act 37 of 1956), a new State of Bombay was formed with effect from "the appointed day", namely, November 1, 1956, comprising inter alia certain territories which then formed part of the State of Madhya Pradesh and were by that Section transferred from that State to the new State of Bombay. These territories comprised what is known as the "Vidarbha Region" consisting of the districts of Buldana, Akola, Amravati, Yeotmal, Wardha, Nagpur, Bhandara and Chanda (later named Chandrapur). It is from this region that the appeals before the Full Bench as also the present Appeal arise.

Section 49(1) of that Act provides as follows :

> 49. High Courts for the new States -
>
> (1) The High Courts exercising immediately before the appointed day jurisdiction in relation to the existing States of Bombay, Madhya Pradesh and Punjab shall, as from the appointed day, be deemed to be the High Courts for the new States of Bombay, Madhya Pradesh and Punjab, respectively.

25. Under Section 51(1), the principal seat of the High Court for a new State was to be at such place as the President may, by notified order, appoint. Under Section 51(2), the President could, after consultation with the Governor of a new State and the Chief Justice of the High Court for that State, by notified order, provide for the establishment of a permanent Bench or Benches of that High Court at one or more places within the State other than the principal seat of the High Court and for any matters connected therewith. Sub-section (3) of Section 51 provided that notwithstanding anything contained in Sub-section (1) or Sub-section (2), the Judges and Division Courts of the High Court for a new State may also sit at such other place or places in that State as the Chief Justice may, with the approval of the Governor, appoint.

26. By a Presidential Order, namely, S.R.O. No. 2514 dated October 27, 1956, published in the Gazette of India Extraordinary, 1956, Part II, Section 3, at page 2195, the principal seat of the Bombay High Court was notified to be at Bombay. A temporary Bench of the Bombay High Court was established at Nagpur.

27. Sections 52, 54 and 57 of that Act provide as follows :

> 52. Jurisdiction of High Courts for new States -

The High Court for a new State shall have, in respect of any part of the territories included in that new State, all such original, appellate and other jurisdiction as under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Commissioner's Court for an existing State.

54. Practice and procedure -

Subject to the provisions of this Part, the law in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, with necessary modifications, apply in relation to the High Court for a new State, and accordingly, the High Court for the new State shall have all such powers to make rules and orders with respect to practice and procedure as are, Immediately before the appointed day, exercisable by the High Court for the corresponding State:

> Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, until varied or revoked by rules or orders made by the High Court for a new State, apply with the necessary modifications in relation to practice and procedure in the High Court for the new State as if made by that Court.

> 57. Powers of Judges -

The law in force immediately before the appointed day relating to the powers of the Chief Justice, Single Judges and Division Courts of the High Court for the corresponding State and with respect to matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court for a new State.

28. The State of Bombay underwent another reorganisation with effect from May 1, 1960, by the enactment of the Bombay Reorganisation Act, 1960, (Act 11 of 1960). By Section 3 of that Act, as from the appointed day, namely, May 1, 1960, certain territories comprised in the State of Bombay were formed into a new State to be known as "the State of Gujarat" and "the residuary State of Bombay" was to be known as "the State of Maharashtra". By Section 28 of the Bombay Reorganisation Act, a separate High Court was formed for the State of Gujarat from the appointed day. Section 28(1) of that Act further provided that "the High Court of Bombay shall become the High Court for the State of Maharashtra (hereinafter referred to as 'the High Court of Bombay')." Section 41 of the Bombay Reorganisation Act provided as follows:

> 41. Permanent Bench of Bombay High Court at Nagpur. -

Without prejudice to the provisions of Section 51 of the States Reorganisation Act, 1956, such Judges of the High Court at Bombay, being not less than three in number, as the Chief Justice may from time to time nominate, shall sit at Nagpur in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the districts of Buldana, Akola, Amravati, Yeotmal, Wardha, Nagpur, Bhandara, Chanda and Rajura:

> Provided that the Chief Justice may, in his discretion, order that any case arising in any such districts shall be heard at Bombay.

> It was the Permanent Bench of the Bombay High Court at Nagpur which decided the said Full Bench case of Shankar Naroba Salunke and Ors. v. Gyanchand Lobhachand Kothari and Ors. as also passed the order appealed against in the case before us. The

Special Bench case of the State of Maharashtra v. Kusum Charudutt Bharma Upadhye was decided by the Bombay High Court sitting at its principal seat at Bombay.

29. Before proceeding further we may as well complete the post Constitution history of the Bombay High Court. At the request of the Varishta Panchayat and the people of Free Dadra and Nagar Haveli, the areas of Dadra and Nagar Haveli were integrated with the Union of India as a Union Territory by the Constitution (Tenth Amendment) Act, 1961, with effect from August 11, 1961. The Dadra and Nagar Haveli Act, 1961 (Act No. XXXV of 1961), was enacted to make provision for the representation in Parliament and for the administration of that Union Territory and for matters connected therewith. Section 11 of that Act provided that "As from such date as the Central Government may, by notification in the Official Gazette, specify, the jurisdiction of the High Court at Bombay shall extend to Dadra and Nagar Haveli." The date specified was July 1, 1965, by notification published in the Gazette of India Extra-ordinary dated June 17, 1965, Part II, Section 3(ii), at page 579. in exercise of the power conferred by Article 230 Parliament enacted the. High Court at Bombay (Extension of Jurisdiction to Goa, Daman and Diu) Act, 1981 (Act No.26 of 1981). Under that Act as from the appointed day, the jurisdiction of the High Court at Bombay was extended to the Union Territory of Goa, Daman and Diu and the Judicial Commissioner's Court which was till then functioning there was abolished. By Government of India Notification in the Ministry of Law, Justice and Company Affairs No. 64/1/81 Jus. dated October 8, 1982, the Central Government appointed October 30, 1982, as the date on which the said Act would come into force, and with effect from that date a Permanent Bench of the Bombay High Court was established at Panaji. Under Section 51(3) of the States Reorganisation Act, with effect from August 27, 1981, a temporary Bench of the Bombay High Court was established at Aurangabad for the Marathwada Region which consists of the territories of the former State of Hyderabad transferred to the new State of Bombay by Section 8 of that Act and now forming part of the State of Maharashtra. By a Presidential Order, namely, G.S.R. 475 E dated June 26, 1984, entitled "The High Court of Bombay (Establishment of a Permanent Bench at Aurangabad) Order, 1984, issued under Section 51(2) of that Act a Permanent Bench of the Bombay High Court was established at Aurangabad on and from August 27, 1984, for the Marathwada Region, that is, the districts of Aurangabad, Beed, Jalna, Latur, Nanded, Osmanabad and Parbhani.

30. The effect of the above Constitutional and statutory provisions so far as they concern the High Court of Bombay is that the High Court of Bombay which was the High Court for the Province of Bombay immediately before the commencement of the Constitution continued in existence on the coining into force of the Constitution as the High Court for the pre-Reorganization State of Bombay and the jurisdiction of, and the law administered in, the Bombay High Court and the respective powers of the Judges thereof in relation to the administration of Justice in the Court, including the power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, continued to be the same as they were immediately before the commencement of the Constitution. Further, the Bombay High Court was also vested with the specific powers conferred by Articles 226, 227 and 228 of the Constitution. All existing laws, Ordinances, Orders, bye-laws, rules and regulations made by any competent Legislature, authority or person continued to be administered by the Bombay High Court until altered or repealed or

amended by a competent Legislature or other competent authority. Thus, by the Constitution itself the High Court for the former Province of Bombay was made the High Court for the pre-Reorganisation State of Bombay with the same jurisdictions and powers, Including rule-making power and the power to regulate the sittings of the Court either by Judges sitting alone or in Division Benches, which it previously possessed. The Letters Patent of the Bombay High Court and the rules made by that High Court thus continued to be in operation by virtue of the Constitution itself. The statutory provisions referred to above show that the Bombay High Court as the High Court for the pre-Reorganization State of Bombay continued as the High Court for the post-Reorganization State of Bombay and thereafter for the State of Maharashtra with the same jurisdiction and powers which it possessed, exercisable either by Judges sitting singly or in Division Courts, whether at its principal seat or at one of its Benches at a place other than its principal seat.

31. It is, therefore, necessary to see the jurisdiction and powers which the High Court for the Province of Bombay possessed immediately prior to the commencement of the Constitution, namely, immediately before January 26, 1950, and to ascertain whether the powers specified in Articles 225, 226 and 227 of the Constitution formed part of its existing jurisdiction or were conferred for the first time upon that High Court when it became the High Court for the pre-Reorganization State of Bombay on the Constitution coming into force. This Involves tracing in brief the origin and development of judicial Institutions and administration of justice in the former Province of Bombay. Apart from the various Charters and Letters Patent granted by the British Crown and the statutes passed by the British Parliament, much useful information in this regard can be gathered from other sources, particularly "The Imperial Gazetteer of India" published under the authority of the Secretary of State for India in Council; "Gazetteer of the Bombay Presidency" in twenty-eight volumes published in 1882-84 under Government orders; "The Gazetteer of Bombay City and Island" in three volumes compiled under Government orders and published in 1909; and books such as "The Administration of Justice in British India" by William H. Morley published in 1858. Herbert Cowell's Tagore Law Lectures entitled "History and Constitution of the Courts and Legislative Authorities in India" published in 1872, "Bombay in the Making - Being Mostly a History of the Origin and Growth of Judicial Institutions in the Western Presidency, 1661-1726" by Phiroze B.M. Malabari published in 1910, "First Century of British Justice in India" by Sir Charles Fawcett (a former Judge of the Bombay High Court) published in 1934 under the patronage of the Secretary of State for India in Council, M.C. Setalvad's Hamlyn Lecture on "The Common Law in India" published in 1960, "Famous Judges, Lawyers and Cases of Bombay - A Judicial History of Bombay during the British Period" by P.B. Vacha published in 1962, "City of Gold - The Biography of Bombay" by Gillian Tindall published in 1982, and "The East India Company's Sadar Courts 1801-1834" by Sir Orby Mootham (former Chief Justice of the Allahabad High Court) published in 1982. A judicial decision in which much valuable information can be found is the judgment of Westropp, J., who spoke for the Court in the case of Naorojl Beramjl v. Henry Rogers [1866-67] 4 Bom. H.C.R. 1.

32. Bombay consisted originally of seven small islands in addition to some islets in the harbour. The seven islands which became the City and Island of Bombay were Colaba, Old Woman's Island, Bombay which was the main island, Mazagaon, Parel (also at times called by some writers by the names of its other three sections - Matunga, Dharavi and Sion), Mahim and Worli. These seven

islands practically retained their original shape until the eighteenth century. Some scholars believe Bombay to be the 'Haptanesia' mentioned by the second-century astronomer, geographer and cosmographer Ptolemy (Claudius Ptolomaeus) in his 'Geographike Huphegesis' ('Guide to Geography'). It is unnecessary to trace the history of Bombay from its earliest days. Suffice it to say that after passing through various hands it came to form part of the territories of Sultan Bahadur Shah of Gujarat. By the Treaty of Bassein dated December 23, 1534, negotiated by Shah Khwajeh on behalf of Bahadur Shah and Nano da Cunha the Viceroy of Goa, on behalf of the King of Portugal, and signed on board the galleon "San Mateos", Bahadur Shah ceded to the King of Portugal "the City of Bassein, its territories, islands and seas" (which included the above-mentioned seven islands) in return for Portuguese assistance against the Mogul Emperor. This treaty was confirmed the next year on October 25, 1535, by a treaty of peace and commerce between Bahadur Shah and Nuno da Cunha on behalf of the King of Portugal. The natural advantages of Bombay soon aroused the cupidity of the English who recognized its value as a naval base. They, therefore, with the Dutch as their allies, landed at Bombay and burnt the manor-house in 1626 and, according to some contemporary reports, actually seized it from the Portuguese but thereafter abandoned it for some unknown reason. There were regular efforts made by the Company of London merchants (hereinafter referred to as "the London Company"), which had obtained by Royal Charter the right to trade with the East Indies, urging the Crown and thereafter the Lord Protector Oliver Cronwell to purchase Bombay from the Portuguese. These efforts bore fruit when King Charles II married Infanta Donna Catherine of Braganza, sister of Alfonao VI, King of Portugal. By the Treaty of Marriage dated June 23, 1661, and ratified about two months later, in addition to the City and Fort of Tangier, by Article 11 of that Treaty Alfonso VI, as part of the marriage dowry, granted and confirmed "unto the King of Great Britain, his heirs and successors for ever, the Port and Island of Bombay in the East Indies with all the rights, profits, territories and appurtenances whatsoever there-into belonging, and together with all income and revenue, as also the direct and absolute Dominion and Sovereignty of the said Port and Island of Bombay and premises, with all their royalties, freely, fully, entirely and absolutely." What is significant about this Marriage Treaty is that while in the case of Tangier the third article of the Treaty provided that "they (the inhabitants of the City and Fort of Tangier) shall be ruled and governed by the same laws and customs as being hitherto used and imposed in the aforesaid town and castle", the Marriage Treaty did not contain any such provision so far as Bombay was concerned. The reason for this distinction will be pointed out later. Yet another significant thing about this Marriage Treaty was that as the King of Portugal had full and complete sovereignty which he transferred to the King of Great Britain, it made Bombay' the only part of India directly under the British Crown while the rest of British India was until 1858 held by the British under the 'firman' of the Mogul Emperor Shah Alam granted on August 12, 1765, and grants made and territories ceded by other Indian rulers and the territories acquired by the East India Company by conquest. Though the King of Portugal did not realize the value and Potentialities of Bombay, the Portuguese Viceroy of Goa, Don Antonio de Mello de Castro, who exercised viceroyalty over all the Portuguese possessions in India including Bombay did and he temporized and put off handing over possession of Bombay to the representatives of the British Crown so that the English Fleet under the Earl of Marlborough (later Duke) which arrived at Bombay in September 1662 was kept off from taking possession and sailed away on January 14, 1663, and it was not until February 18, 1665, that Bombay was handed over to the British.

33. Upon obtaining possession of the Island of Bombay, Charles II, in return for a substantial loan by a Charter dated March 27, 1668, after reciting the Letters Patent of 1661 granted by him to the London Company and the said Marriage Treaty, proceeded to "give, grant, transfer, and confirm" to the London Company the Fort and Island of Bombay "with all the rights, profits, territories, and appurtenances thereof whatsoever," etc., in as large a manner a* the Crown of England enjoyed or ought to enjoy them under the grant of the King of Portugal, by the said Marriage Treaty "and not further or otherwise," and created the London Company "the true and absolute Lords and Proprietors of the Port and Island and premises aforesaid, and of every part and parcel thereof, "(saving the allegiance due to the Crown of England, and its royal power and sovereignty over its subjects in and over the inhabitants of the Port and Island), "to have, hold," etc., the said Port and Island, etc., "unto them (the London Company), to the only use of them (the London Company), their successors and assigns for evermore, to be holden of Us, Our Heirs and Successors as of the Manor of East Greenwich in the County of Kent, in free and common Socage, and not in Capite, nor by Knight's Service," at the rent of ten pounds yearly payable to the Crown.

34. We may pause here to cast a look backwards to see how the London Company came into existence. The London Company came into being on December 31, 1601, when by a Royal Charter granted on that date, Queen Elizabeth I created a body corporate consisting of "the Governor and Company of the Merchants of London trading into the East Indies" Amongst other things the Charter empowered the London Company to make and enforce laws "for the good government of the said Company, and of all factors, masters, mariners, and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of the said trade and traffic .... Soe alwais the said lawes ... be reasonable and not contrary or repugnant to the lawes, statutes or Customes of this Our Realm." It is pertinent to note that this power to legislate contained no express reference to factories or territories. This was pointed out by Westropp J., in Naoroji Beramji v. Henry Rogers [1866-67] 4 Bom. H.C.R. 1. This Charter was renewed and confirmed in nearly Identical language by Letters Patent granted by James I on May 31, 1609, and again by a Charter granted on February 4, 1622, by the same monarch. The Charter of 1622 also empowered the Company to chastise and correct all English persons residing in the East Indies and committing any misdemeanour either with martial law or otherwise. On his restoration to the throne Charles II confirmed both the above Charters by Letters Patent granted on April 3, 1661. This Charter conferred upon the Governor and his Council of each place where the Company had or should have a factory or place of trade within the East Indies the power to "judge all persons belonging to the said Governor and Company, or that shall live under them, in all causes, whether civil or criminal, according to the laws of this Kingdom and to execute judgment accordingly". Thus, the London Company got under this Charter the power to judge according to the laws of England not only its own servants but all persons who should live under it - a power exercises by it not only in the places where it had factories or places of trade but also in those places where it may have in future any factories or places of trade. This was the first Charter that actually created Courts of Justice in British India by making the Governor and the Council of each such factory or place of trade the judge in all civil or criminal matters according to the laws of England. The reason for the Marriage Treaty of Charles II not containing in the case of Bombay a provision similar to that in the case of Tangier for the inhabitants to be ruled and governed by Portuguese laws and customs now becomes obvious. Since the Charter of 1661 empowered the Company to establish Courts of Justice and

further provided that the laws of England should prevail in all the factories and settlements subordinate to it, a provision in the Marriage Treaty that Portuguese laws and customs should prevail in Bombay would have been Inconsistent with the Charter of 1661, as Charles II always contemplated handing over Bombay to the London Company.

35. A word about the free and common socage tenure under which the London Company held the Port and Island of Bombay would not be out of place. Socage was a form of land tenure. Originally, it was of two kinds - free socage and villein socage, depending upon whether the services were free or base. Thus, where a man held land by fealty and a fixed rent, the tenure was free socage. Free socage was of two kinds - socage in capite and common socage. Free and common socage by which the London Company was to hold the Island of Bombay under the Charter of 1668 was the modern ordinary freehold tenure. The Charter also enabled the Company "as a general court, to establish under their common seal, any laws whatsoever for the good government of Bombay, and the inhabitants thereof ... provided that the said laws ... be consonant to reason, and not repugnant to the laws of this Our Realm of England ...." The London Company placed Bombay under the control of the Governor and his Council at Surat with a Deputy Governor at Bombay.

36. In 1669 the London Company sent out detailed instructions for the establishment of a Court of Justice in Bombay but it was, however, not until three years later that the first court was established by Gerald Aungier who was the President of the Surat Council and the second Governor of Bombay and who may well be called the Father of the modern City of Bombay for which he visualized a splendid future, calling it "the city which by God's assistance is intended to be built", and it was to this end that he directed his administration and efforts. For the purpose of establishing a Court of Judicature in Bombay he issued a proclamation "for abolishing the Portuguese laws, and for establishing the English" from and after August 1, 1673. The opening ceremony of the Court took place on August 8, 1672, commencing with a ceremonial procession from the Fort to the guild-hall. Aungier then entered the Court, took the chair. After the Letters Patent granted by Charles II to the London Company for the Island of Bombay were read and the oaths of office administered to the Judge and others, Aungier made a speech. Today, when there is so much concern for preserving the independence of the judiciary, it is worth reproducing that speech. Aungier said :

> The Inhabitants of this Island consist of several/nations and Religions to wit - English, Portuguese and other Christians, Moores, and Jentues, but you, when you sit in this seat of Justice and Judgment, must look upon them with one single eye as I doe, without distinction of Nation or Religion, for they are all his Majesties and the Hon'ble Company's subjects as the English are, and have all an equall title and right to Justice and you must doe them all justice, even the meanest person of the Island, and in particulare the Poore, the Orphan, the Widdow and the stranger, in all matters of controversy, of Common right, and Meum and Tuum; And this not only one against the other, but even against myself and those who are in office under me, nay against the Hon'ble Company themselves when Law, Reason and Equity shall require you soe to doe, for this is your Duty and therein will you be Justified, and in soe doing God will be with you to strengthen you, his Majestie and the Company will commend you and reward you, and I, in my place, shall be ready to assist, Countenance, honour

> and protect you to the utmost of the power and Authority entrusted to me; and soe I pray God give his blessing to you.

37. The late Mr. M.C. Setalvad in his Hamlyn Lecture "The Common Law in India" has thus eulogized this speech (pp. 10-11) :

> The noble worda of Governor Aungier ... enunciate principles which in the course of years that followed set the pattern for the administration of justice not only in the island but in other areas in the country which gradually fell under the sway of the British .... Thus were laid the foundations in the seventeenth century albeit in the small area of the town and Island of Bombay of the application of English laws to Indians residing in the Presidency Towns and of the system of administering justice fostered by the common law in England.

38. Governor Aungier also established an inferior Court of Justice consisting of a civil officer of the London Company assisted by Indian officers with jurisdiction to try all . disputes under 200 xeraphins. Appeals from the decision of the inferior court lay to the superior Court. The superior Court was composed of the Deputy Governor in Council with the title of the "Judge of the Courts of Judicature." It not only heard appeals from the decisions of the Inferior Court but also took cognizance of civil causes of the value of and exceeding 200 xeraphins and all criminal actions. All trials before the superior Court were jury trials.

39. By a Charter dated October 5, 1677, Charles II confirmed the Letters Patent of 1661 and the Charter of 1668, and by another Charter dated August 9, 1683, he confirmed the earlier Charters granted by Elizabeth I, James I and himself and inter alia provided for establishing a Court of Judicature to be held at such places, forts, plantations or factories upon the coast as the London Company should from time to time direct. This Charter also authorized the establishment of admiralty jurisdiction in India with the object of enabling the London Company to seize and condemn the ships of those whom it considered as interlopers and a special Admiralty Judge for Bombay was appointed by the King. James II by his Charter dated April 12, 1686, confirmed the Charter granted by his elder brother Charles II and when William III and Mary II ascended the throne they confirmed the earlier Charters by a Charter dated October 7, 1693, Under it, the laws which the Company had power to make were not to be contrary or repugnant to the laws, statutes or customs of England.

40. Meanwhile the London Company's rivals had formed a new society and had demanded a Charter. To enable this to be done, Parliament enacted Statute 9 and 10 Wm. III, c.44, providing for "raising a sum not exceeding two millions, upon a Fund for payment of Annuities, after the rate of eight pounds per centum and for settling the Trade to the East Indies." Section 62 of that Statute authorized the King, if the said sum or half of it were subscribed by September 29, 1698, by Letters Patent under the Great Seal of England, to Incorporate the subscribers, by such name as he may think fit, "to be one Company, with power to manage and carry on their trade to the East Indies." The whole fund being subscribed, William III by Charter dated September 5, 1698, incorporated the subscribers "to be one body politic and corporate, by the name of the English Company trading to

the East Indies" (hereinafter referred to as "the English Company"). This Charter contained provisions for establishing Courts to try mercantile and maritime causes similar to those provided for in the Charters of 1683 and 1686 granted to the London Company. An Act of Parliament of 1698 ultimately granted the monopoly of Indian trade to those who contributed to it a loan of 20,00,000. The London Company gave a loan of 3,15,000 and retained its supremacy, keeping its forts and privileges in India, but the English Company had gained a foothold in the Indian trade. Rivalry between the two Companies continued and an effort was made in 1702 to resolve it by an Indenture Tripartite dated July 22, 1702, made between Queen Anne, the London Company and its rival the English Company, which had as its object the union of the two Companies at the expiration of seven years. Under this Indenture the London Company was to convey Bombay and the Island of Saint Halena to the English Company. The London Company also covenanted to surrender to the Queen its Charters within two months after the expiration of seven years and from thenceforth the English Company was to be called "The United Company of Merchants of England trading to the East Indies". By an Indenture Quinquepartite dated July 22, 1702, made between various parties, the London Company conveyed to the English Company all its forts, settlements, and dead stock of every description including the Port and Island of Bombay as also its factories at Surat and other places. An Act was passed by Parliament in the sixth year of the reign of Queen Anne to bring about a speedy and complete union of the two Companies and in pursuance of the said Act all matters in dispute between the two Companies were referred to the final arbitrament of the Earl of Godolphin, the Lord High Treasurer. By a Deed Poll dated September 29, 1708, Lord Godolphin made his award by virtue of which the union of the two Companies was completed. By a Deed Poll enrolled in Chancery, dated March 22, 1709, the London Company, in pursuance of Lord Godolphin's award, and for the entire extinguishment of its corporate capacity, granted, surrendered, yielded, and gave up to the Queen, her heirs and successors, its corporate capacity or body politic and all its charters, capacities, powers and rights whatever, for acting as or continuing to be a body politic or corporate, by virtue of any Acts of Parliament, Letters Patent, or Charters whatever. The United Company which thus emerged will be hereinafter referred to as "the East India Company". It may be mentioned that Section 111 of Statute 3 and 4 Wm. IV c.85, provided that in all suits, proceedings, and transactions whatsoever, the United Company be called "The East-India Company."

41. The working of Company's Courts proved so ineffective that the Court of Directors of the East India Company made a representation to the King in which they emphasized the need for "a competent power and authority" at Madras, Bombay and Calcutta "for the more speedy and factual administering of justice in civil cases and for the trying and punishing of capital and other criminal offences and misdemeanours," and begged permission to establish a Mayor's Court at all these centers. On September 24, 1726, King George 1 issued a new Charter for a Mayor's Court at Bombay, Madras and Calcutta. The Mayor's Court was to consist of a Mayor and nine Aldermen. The Mayor's Court was declared a Court of Record and was empowered to hear civil cases of all kinds subject to an appeal to the Governor and Council and a further appeal to the Privy Council if the amount involved exceeded Rs. 3,000. The Mayor's Court had also authority to grant probate and letters of administration. By the same Charter the Governor and Council were constituted a Court of Record and were authorized to hold quarter sessions. The President and five senior members of the Council were created Justices of the Peace and constituted a Court of Oyer and Terminer and Gaol Delivery. The Governor and Council had jurisdiction to try all offences except high treason. The Mayor's

Courts were to be the Courts of the King of England and were not to be the Company's Courts though at that time the King of England had no claim to sovereignty over any part of the country except the Island of Bombay. By the Charter dated November 17, 1727, George II granted to the East India Company the fines imposed by these Courts. The Mayor's Court was established at Bombay on February 10, 1728.

42. The working of the Mayor's Court created dissatisfaction, particularly in the matter of the 'cow-oath' which the Mayor's Court insisted upon all Hindu witnesses taking and which consisted of the witness being made to take hold of a cow's tail in court and swear to speak the truth. Ultimately, the Court of Directors in England prohibited this practice. The administration of criminal justice by the Court of the Governor and Council proved equally unsatisfactory for that Court failed lamentably to live up to the noble principles enunciated by Governor Aungier while establishing the first Court of Judicature at Bombay. For Instance, when the slave boy in collusion with the housekeeper of one Jenkinson robbed his escritoire of fifteen guineas, they were both sentenced to be hanged but when George Scott, a member of the Council, Justice of the Peace, Marine Paymaster and 'Keeper of the Custom-house of Mahim, was convicted of the gross oppression of three Indians for the purpose of extorting ten rupees, he was merely fined five pounds and deprived of his Commission. The defects in the working of these Courts had become so patent by the middle of the eighteenth century that the Court of Directors was obliged to request for a new Charter which was granted by King George II on January 8, 1753, and by this Charter, the Mayor's Courts were re-established as Courts of Record with similar jurisdiction but curtailed in several respects; for Instance, the Charter limited the civil jurisdiction of the Mayor's Courts to suits between non-Indians and forbade the Court from entertaining suits between Indian Inhabitants of Bombay except with the express consent of parties, while the jurisdiction of the Governor and Council in criminal matters was limited to an offence committed within Bombay. A Court of Requests (the predecessor of the Bombay Presidency Small Cause Court) was also created for the summary disposal of small cases not exceeding five pagodas or rupees fifteen in value.

43. For the first time the British Parliament asserted its authority and control over the East India Company's activities both in India and in England by enacting Statute 13 Geo. III, c.63, of 1773, commonly known as the Regulating Act. Under this Statute the Governor of Bengal became the Governor-General in Council with a certain amount of control over the Presidencies of Bombay and Madras and the appointment of the Governor-General had to be approved by the Crown. This Statute also empowered the Crown to establish a Supreme Court of Judicature, in lieu of the Mayor's Court, at Fort William (Calcutta), to be a Court of Record and to consist of a Chief Justice and three puisne Judges. Accordingly, by a Charter of George III dated March 26, 1774, a Supreme Court of Judicature was established at Fort William. Soon a controversy arose between the said Supreme Court and the Governor-General, Warren Hastings, supported by his Council, with respect to the powers of the said Supreme Court in revenue matters. This controversy was settled in favour of the Governor-General by Parliament by providing in Section 8 of the East India Company Act, 1780 (21 Geo. III, c.70) that "the said Supreme Court shall not have or exercise any jurisdiction in any matter concerning revenue." The East India company Act, 1797 (37 Geo. III, c.142), limited the number of puisne Judges of the Supreme Court at Fort "William to two and further authorized the Crown to establish at Madras and Bombay, in lieu of the Mayor's Courts, Recorder's Courts consisting of the

Mayor, three Aldermen and a Recorder. By a Charter of George III dated February 20, 1798, Recorder's Courts were established both at Madras and Bombay with jurisdiction similar to that of the Court of King's Bench in England "as far as circumstances would admit". An equitable jurisdiction similar to that of the Court of Chancery in England was given to the Recorder's Courts as also ecclesiastical jurisdiction which included the power to grant probates and letters of administration, and admiralty jurisdiction. The Recorder's Courts were also made Courts of Oyer and Terminer to administer criminal justice as in England "or as nearly thereto as the condition and circumstances of the pleas and persons would admit." The Recorder's Courts were to be Courts of Record and an appeal lay from their decision to the Privy Council. The Recorder's Courts also had no jurisdiction in respect of revenue matters.

44. The Recorder's Court which had been set up at Madras was abolished by the Government of India Act, 1800 (39 & 40 Geo.III, c.79), which provided for the establishment in its place of a Supreme Court to be a Court of Record and to consist of a Chief Justice and two puisne Judges possessing the like jurisdiction and the same powers, and subject to the same restrictions, as the Supreme Court at Fort William. The Charter of the Supreme Court at Madras was granted on December 26, 1801. The Indian Bishops and Courts Act, 1823 (A Geo.IV, c.71) authorized the Crown to abolish the Recorder's Court at Bombay and in its place to establish for Bombay and its dependencies a Supreme Court to be a Court of Record consisting of the same number of Judges, possessing a similar jurisdiction and the same powers and subject to the same restrictions as the Supreme Court at Fort William. in pursuance of the said Statute, King George IV by Letters Patent issued on December 8, 1823, established at Bombay a Court of Record to be called "the Supreme Court of Judicature at Bombay." It is interesting to note that in those days when there was no income-tax, under the said Act of 1823, Bombay Rupees 52,500 was fixed as the annual salary of the Chief Justice of the Supreme Court of Judicature at Bombay and Bombay Rupees 43,500 as the annual salary of each of the puisne Judges which salaries were increased by the Indian Salaries and Pensions Act, 1825 (6 Geo.IV, c.85) with retrospective effect from the date of the Inauguration of the said Supreme Court up to the date of passing of the said Act (namely, July 15, 1825) to Bombay Rupees 58,000 and Bombay Rupees 48,000 respectively and from the date of the passing of the said Act to Bombay Rupees 60,000 and Bombay Rupees 50,000 respectively.

45. The Supreme Court of Judicature at Bombay was formally inaugurated on May 8, 1824. Clause 1 of the Letters Patent created and constituted the said Supreme Court to be a Court of Record to consist of a Chief Justice and two puisne Judges. Clause 5 of the said Letters Patent provided as follows :

> 5. The Court invested with a jurisdiction similar to the Jurisdiction of the King's Bench in England.-
>
> AND it is our further will and pleasure, That the said Chief Justice and the said Puisne Justices shall, severally and respectively, be, and they are, all and every of them, hereby appointed to be Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Bombay, and the Town and Island of Bombay, and the limits thereof, and the Factories subordinate thereto and all the territories which now are or hereafter may be subject to, or dependent upon, the

Government of Bombay, aforesaid, and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise, within that part of Great Britain, called England, as far as circumstances will admit.

(Emphasis supplied) Clause 23 conferred upon the said Supreme Court all powers possessed by the Mayor's Court and the Recorder's Court. By Clause 25 the jurisdiction of the said Supreme Court was inter alia expressly barred in all revenue matters. Clause 26 conferred power upon the said Supreme Court to punish by fine, Imprisonment or other corporeal punishment witnesses who committed contempt of Court by refusing to appear, or wilfully neglecting to appear and be sworn, or to be examined and subscribe his or her deposition. By various clauses original civil jurisdiction, equitable jurisdiction of the Court of Chancery in Great Britain, criminal jurisdiction as a Court of Oyer and Terminer, jurisdiction over persons and estates of infants and lunatics, and ecclesiastical, testamentary, intestate, and admiralty jurisdictions were conferred upon the said Supreme Court. Clause 32 conferred upon the Supreme Court the power to frame process and make rules. Clause 55 made the Court of Requests and the Court of Quarter Sessions established at Bombay subject to the control of the Supreme Court of Judicature at Bombay, and was in the following terms :

55. Court of Requests and Quarter Sessions, subject to this Court. -

AND to the end that the Court of Requests and the Court of Quarter Sessions, erected and established at Bombay aforesaid, and the Justices and other Magistrates appointed for the Town and Island of Bombay, and the Factories subordinate thereto, may better the ends of their respective institutions, and act conformably to law and justice, it is our further will and pleasure and we do hereby further grant, ordain, and establish that all and every the said Courts and Magistrates shall be subject to the order and control of the said Supreme Court of Judicature at Bombay, in such sort, manner, and form, as the Inferior Courts and Magistrates of and in that part of Great Britain called England, are by law subject to the order and control of our Court of King's Bench; to which end, the said Supreme Court of Judicature at Bombay is hereby empowered and authorized to award and Issue a writ or writs of Mandamus, Certiorari, Procedendo, or Error, to be prepared in manner abovementioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment.

(Emphasis supplied.) Clause 56 provided for an appeal to the Privy Council from any judgment or determination of the said Supreme Court.

46. Three things are pertinent to note about the Letters Patent of the Supreme Court of Judicature at Bombay. The first is that by Clause 5 it was invested with the same jurisdiction as was possessed by the Court of King's Bench in England which included the power of issuing prerogative writs. The second is that under Clause 55 the Court of Requests and the Court of Quarter Sessions at Bombay and the Justices and other Magistrates appointed for the Town and Island of Bombay and the factories subordinate thereto were made "Subject to the order and control of the said Supreme Court" in the same way as the inferior Courts and the magistrates in England were subject to the order and control of the Court of King's Bench and for this purpose the said Supreme Court was empowered and authorized to issue writs of mandamus, certiorari, procedendo and error. The third

is that there was no intra-court appeal provided against the judgment and decree of any Judge or Judges of the said Supreme Court but under Clause 56 an appeal lay directly to the Privy Council.

47. Before we turn to the establishment of the High Courts in India, it will not be out of place to consider the position with respect to the judicial Institutions in the rest of the Bombay Presidency. Until 1765 the jurisdiction of the East India Company's Law Courts was confined to the factories of the Company and its branches. in 1765 Robert Clive secured, or rather exacted, the Dewany of Bengal, Bihar and Orissa from the titular Mogul Emperor Shah Alam in Delhi. in this delegated capacity, the East India Company derived its title to administer the revenue and civil affairs of these provinces, and for this purpose it established in Bengal, Bihar and Orissa, civil and revenue Adalats. The delegated capacity was, however, a mere fiction. The real source of the East India Company's authority to administer these provinces was the sword and not the 'firman' of the Mogul Emperor. The Regulating Act of 1773 vested in the Governor-General in Council the whole civil and military government of the Presidency of Bengal as also the government of the territorial acquisitions and revenues in Bengal, Bihar and Orissa which were Dewany lands. By the East India Company Act, 1780, the Governor-General in Council was empowered to frame regulations for the "provincial Courts and Councils" which could be disallowed within two years by the Court of Directors and the Secretary of State. By the Government of India Act, 1800 (39 Geo.III, c.79), the Madras Government and by Statute 47 Geo.III, c. 68, the Bombay Government were Invested within the territories subject to their respective governments with the same legislative powers and exerciseable in the same manner as had previously been given to and exercised for Bengal by the Governor-General in Council.

48. Meanwhile in 1797 the Governor-General in Council of Bengal authorized the Bombay Government to set up Adalats, both Dewany and Nizami, within its territories on principles similar to those on which the courts in the Bengal Provinces had been established. Progress in this respect was, however, gradual and it was in 1799 that such courts were established at Thana for the islands of Salsette and Caranja and their dependencies, Elephanta and Hog, by Bombay Regulations III and V of 1799 and in 1800 at Surat for that city and the town of Randeir by Bombay Regulations I and III of 1800. These courts were subordinate to the Governor in Council who heard civil appeals in a separate department of Sadar Adalat in pursuance of Bombay Regulations III of 1799 and I of 1800, and also disposed of criminal matters as "the tribunal of the Governor in Council" in pursuance of Bombay Regulations V of 1799 and III of 1800. The name "the tribunal of the Governor in Council" was changed to "Superior Tribunal or Chief Criminal Court" by Bombay Regulation IX of 1812. By Bombay Regulation II of 1805 a Provincial Court of Appeal was established at Broach. It was also a Court of Circuit and in that capacity replaced the Court of Session which had been established at Surat in 1800. Though the setting up of this Court eased the burden on the Governor in Council on the civil side, as the Governor in Council had also to deal with revenue matters, in January 1820 the Governor, Mountstuart Elphinstone, decided that it had become "utterly impossible for the Governor in Council to continue to execute the duties of the Sadar Adalat and Superior Tribunal without neglecting other important duties". Consequently by Bombay Regulations V and VII of 1820, which came into force on January 1, 1821, the Provincial Court of Appeal and of Circuit was abolished and the then existing Sadar Adalat and the Superior Tribunal were replaced by new Courts, namely, the Sadar Adalat (the former name being retained) and the Sadar Foujdari Adalat.

The seat of the Sadar Adalat was also transferred from Bombay to Surat. Under Bombay Regulation V of 1820 an appeal lay from the decision of the Sadar Adalat to the Privy Council.

49. On becoming Governor, Mountstuart Elphinstone set up in August 1820 a committee "to examine the existing law and practice and to prepare a comprehensive code, expressed in non-technical language, which would as far as possible preserve native Institutions". Following upon the recommendations of the committee, on January 1, 1827, twenty-six Regulations known as the Elphinstone Code were passed which (with the exception of Regulation XVIII) came into force on September 1, 1827. Under this Code, the judicial system was reorganized and the Sadar Court was replaced by a "Sadar Adalat" which in the exercise of its civil jurisdiction was named "the Sadar Dewani Adalat" and in the exercise of its criminal jurisdiction as "the Sadar Foujdari Adalat". In 1827 the jurisdiction of the Sadar Adalat was extended to Khandesh and Deccan which had been formed into the zillas of Poona and Ahmednagar and in 1830 to that part of the Southern Mahratha country which had been formed into the zilla of Dharwar. in 1828 the Sadar Adalat was transferred to Bombay from Surat for the convenience both of the litigating public and the judges going on circuit.

50. Prior to 1827, subordinate courts had also been established and they too were reorganized by the Elphinstone Code. Bombay Regulation II of 1827 established Zilla or District Courts. An appeal lay from a decree or order passed by a Zilla Court to the Sadar Dewany Adalat which was invested with civil jurisdiction over the whole of the Bombay Presidency except the Town and Island of Bombay. The decisions of the Sadar Dewany Adalat were made subject to an appeal to the Privy Council by Bombay Regulation IV of 1828.

51. Bombay Regulation XIII of 1827 reorganized the structure of subordinate criminal courts, and Zilla Criminal Courts were established in certain parts of the Presidency, The Sadar Foujdari Adalat was vested with supreme criminal jurisdiction over the whole of the Bombay Presidency except the Town and Island of Bombay. It was, however, not an appellate court. It exercised a general supervision over the administration of justice in criminal cases, and to this end it had the power to call for the proceedings of the lower courts and pass such orders on them as it considered proper. It alone had the power to confirm sentences of death, transportation for life or life imprisonment passed by the Judges of the Court when on circuit. All sentences of imprisonment for more than two years passed by the lower criminal courts had to be referred to it. The Court construed its powers of revision widely. Thus, in Wittoojee Rugshette's Case [1831] 1 Bellasls 52, where the prescribed procedure had not been followed, the Court annulled the proceedings and ordered a fresh trial.

52. The Sadar Dewany Adalat and the Sadar Foujdari Adalat were Courts of Record.

53. We will now briefly look at the important legislative measures relating to the government of India which preceded the setting up of High Courts in the country.

54. The Government of India Act of 1833 (3 & 4 Wm. IV, c.85) introduced important changes in the system of legislation in India, vesting the sole legislative power in India in the Governor-General in Council. The existing powers of the Councils of Madras and Bombay to make laws were superseded

and they were merely authorized to submit to the Governor-General in Council drafts or projects of any law which they might think expedient. After considering such drafts and projects the Governor-General in Council was to communicate his decision thereon to the local government which had proposed them. This Statute expressly saved the right of the British Parliament to make laws for India. All laws made previously to this statute were called "Regulations", but laws which were made in pursuance of the Statute of 1833 were known as "Acts". The Government of India Act of 1853 (16 & 17 Vict., c.95) renewed the Charter granted to the East India Company by the Government of India Act of 1833. Under this Statute the territories in the possession and under the government of the East India Company were continued under such government in trust for the Crown until the British Parliament should otherwise provide. This Statute also set up a Legislative Council which was to include some Judges.

55. From about 1852 the Parliamentary Committee for East Indian affairs was considering a proposal to consolidate the Supreme and Sudder Courts into one Court in each of the three Presidencies of Bengal, Madras and Bombay in the Interest of the public administration of justice. Meanwhile the events of 1857 led to the passing of the Government of India Act of 1858 (21 & 22 Vict., c.106). Under that Act the government of the territories in the possession or under the government of the East India Company and all rights in relation to government vested in or exercised by the East India Company ceased to be vested or exercised by it and became vested in the British Crown, and India was thenceforth to be governed by and in the name of the Queen of England. By Section 64 of the 1858 Act all existing Acts and provisions concerning India were to continue in force subject to the provisions of the said Act and similarly by Section 59 all existing Orders, Regulations and Directions given or made by the Court of Directors or the Commissioners for the Affairs of India were to continue is force. This Act, however, did not make any provision for setting up of new Courts. An Act for this purpose was passed by the British Parliament in 1861, that being the Indian High Courts Act, 1861 (24 & 25 Vict., c.104), referred to in many judgments as the Charter Act. Under it, the Crown was authorized to issue Letters Patent or Charters for the purpose of erecting and establishing High Courts of Judicature at Fort William in Bengal and at Madras and Bombay for these three Presidencies, to consist of a Chief Justice and a certain number of other Judges. Upon the Letters Patent being issued and the High Court for a Presidency being established under Section 8 of that Act the Supreme Court of Judicature and the Sadar Dewany Adalat and the Sadar Foujdari Adalat of that Presidency were to stand abolished.

56. Sections 9, 10 and 11 of the Indian High Courts Act, 1861, are material for our purpose and require to be reproduced in extenso. They provided as follows :

9. Jurisdiction and Powers of High Courts. -

Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such Bowers and Authority for and in relation to the Administration of Justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such Directions and Limitations as to the Exercise of original Civil and Criminal Jurisdiction beyond the Limits of the Presidency Towns as may be

prescribed thereby; and, save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative Powers in relation to the Matters as aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all Jurisdiction and Power and Authority whatsoever in any Manner vested in any of the Courts in the same Presidency abolished under this Act at the Time of the Abolition of such last mentioned Courts.

10. High Courts to exercise same jurisdiction as Supreme Courts. -

Until the Crown shall otherwise provide under the Powers of this Act, all Jurisdiction now exercised by the Supreme Courts of Calcutta, Madras and Bombay respectively over Inhabitants of such Parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts respectively.

(Emphasis supplied)

11. Existing Provisions applicable to Supreme Courts to apply to High Courts. -

Upon, the Establishment of the said High Courts in the said Presidencies respectively all Provisions then in force in India of Acts of Parliament, or of any Orders of her Majesty in Council, or Charters, or of any Acts of the Legislature of India, which at the Time or respective Times of the Establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay respectively, or to the Judges of those Courts, shall be taken to be applicable to the said High Courts and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the Legislative Powers in relation to the Matters aforesaid of the Governor-General of India in Council.

Section 13 of the said Act conferred rule-making power upon the High Courts and Section 14 conferred power upon the Chief Justice from time to time to determine what Judges in each case should sit alone and what Judges of the Court, whether with or without the. Chief Justice, should constitute the several Division Courts. These two sections were in these terms :

> 13. Power to High Courts to provide for Exercise of Jurisdiction by single Judges or Division Courts. -

Subject to any Laws or Regulations which may be made by the Governor General in Council the High Court established in any Presidency under this Act may by its own Rules provide for the Exercise, by one or more Judges, or by Division Courts constituted by two or more Judges, of the said High Court of the original and appellate Jurisdiction vested in such Court, in such Manner as may appear to such Court to be convenient for the due Administration of Justice.

14. Chief Justice to determine what Judges shall sit alone or in the Division Courts. -

The Chief Justice of each High Court shall from Time to Time determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

Section 15 of the said Act conferred upon the High Court the power of superintendence over all Courts subject to its appellate jurisdiction. This power of superintendence was very similar to the like power conferred later by Section 107 of the Government of India Act of 1915. As under Clause 15 of the Letters Patent of the Bombay High Court as amended by Letters Patent dated March 11, 1919, an intra court appeal does not lie against a sentence or order passed or made by a Single Judge in the exercise of his power of superintendence under the provisions of Section 107 of the Government of India Act of 1915, it would be relevant to reproduce Section 15 of the Indian High Courts Act, 1861. The said Section 15 provided as follows :

15. High Court to superintend and to frame Rules of Practice for subordinate Courts.-

Each of the High Courts established under this Act shall have Superintendence over all Courts which may be subject to its appellate Jurisdiction and shall have Power to call for Returns, and to direct the Transfer of any Suit or Appeal from any such Court La any otter Court of equal or superior Jurisdiction and shall have Power to make and issue General Rules for regulating the Practice. and Proceedings of such Courts, and also to prescribe Forms for every Proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all Books, Entries, and Accounts to be kept by the officers, and also to settle Tables of Fees to be allowed to the Sheriff, Attorneys, and all Clerks and Officers of Courts, and from Time to Time to alter any such Rule or Form or Table; and the Rules so made, and the Forms so framed and the Tables so settled shall be used and observed in the said Courts, provided that such General Rules and Forms and Tables be not inconsistent with the Provisions of any Law in force, and shall before they are issued have received the Sanction, in the Presidency of Fort William, of the Governor General in Council, and in Madras or Bombay of the Governor in Council of the respective Presidencies.

(Emphasis supplied.)

57. In pursuance of the power conferred by the Indian High Courts Act, 1861, Letters Patent were issued on May 14, 1862, establishing the High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort Bengal (now the Calcutta High Court) and on June 26, 1862, establishing the Bombay High Court and the Madras High Court for the Presidencies of Bombay and Madras respectively. The Letters Patent of the Madras and Bombay High Courts were mutatis mutandis in identical terms with the Letters Patent of the Calcutta High Court. in the Despatch dated May 14, 1862, from the Secretary of State to the Governor-General in Council which accompanied the Letters Patent of the Calcutta High Court, these Letters patent were referred to 'as the Letters Patent or Charter". Hence the Indian High Courts Act, 1861, is commonly referred to as the Charter Act and the three High Courts of Calcutta, Bombay and Madras as the Chartered High Courts.

58. After referring to the provisions of the Indian High Courts Act, 1861, the Letters Patent for the Bombay High Court by Clause 1 established the High Court for the Presidency of Bombay, to be called "the High Court of Judicature at Bombay" and expressly constituted the High Court to be "a Court of Record". Clauses 11 to 17 formed a group of clauses which bore the heading "Civil Jurisdiction of the High Court". Under Clause 11 the High Court was to have and exercise Ordinary Original Jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law or regulation made by the Governor in Council, and until such local limits were so declared and prescribed, within the limits of the than local jurisdiction of the Supreme Court of Judicature at Bombay. Clause 12 prescribed when the ordinary original civil jurisdiction in suits was exercisable by the High Court. Clause 13 conferred upon the High Court the power to remove and try and determine as a Court of extraordinary original jurisdiction any suit in any court subject to the superintendence of the High Court, whether such court was within or without the Presidency of Bombay. Clauses 14 and 15 dealt with appeals; Clause 14 dealing with appeals from the judgments given in the exercise of original civil jurisdiction of the High Court and Clause 15 dealing with appeals from the subordinate civil courts in the Presidency. Other clauses of the 1862 Letters Patent conferred upon the Bombay High Court jurisdiction over Infants and lunatics, Insolvency Jurisdiction, civil and criminal, admiralty and vice-admiralty, testamentary and Intestate jurisdiction, matrimonial jurisdiction, and ordinary and extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any court then subject to the superintendence of the Sadar Foujdari Adalat, whether within or without the Presidency of Bombay. Clause 24 barred any appeal from any sentence or order passed in any criminal trial before the Courts of original criminal jurisdiction constituted by one or more Judges of the High Court;. Clause 25, however, conferred in such cases a power of review upon the High Court in certain circumstances, Clause 26 ordained the High Court to be a court of appeal from the criminal courts of the Presidency of Bombay and from all other courts which were subject to appeal to the Court of Sadar Foujdari Adalat. Clause 36 provided that any function which under the said Letters Patent was to be performed by the High Court in the exercise of its original or appellate jurisdiction might be performed by any Judge or by any Division Court of the High Court appointed or constituted for such purpose by Section 13 of the Indian High Courts Act, 1861. Under Clause 44 of the said Letters Patent so much of the Letters Patent of the Supreme Court of Judicature at Bombay as were inconsistent "with the said recited Act" (that is, the Indian High Courts Act, 1861) and with the said Letters Patent of 1862 were to "cease, determine, and be utterly void to all intents and purposes whatsoever."

59. The Bombay High Court was formally inaugurated and commenced its work on August 14, 1862, the Judges making a declaration that they would from that day sit as Judges of the High Court.

60. Under Section 17 of the Indian High Courts Act, 1861, the Crown could, if it so thought fit, at any time within three years after the establishment of any High Court under that Act, by Letters Patent revoke all or such parts or provisions of the Letters Patent by which such Court was established and could grant and make such other powers and provisions as the Crown thought fit. The said section also conferred power by similar Letters Patent to grant any additional or supplementary powers and provisions without revoking the earlier Letters Patent. By the Indian High Courts Act, 1865 (28 & 29 Vict., c. 15), the time for issuing fresh Letters Patent was extended to January 1, 1866. in pursuance

of the above power, the Letters Patent issued in 1862 for establishing the three chartered High Courts were revoked and replaced by Letters Patent dated December 28, 1865, which, with amendments, still continue to be the Letters Patent of those High Courts.

61. Clause 2 of the 1865 Letters Patent of the Bombay high Court provided that notwithstanding the revocation of the 1862 Letters Patent the High Court of Judicature at Bombay "shall be and continue as from the time of the original erection and establishment thereof, the High Court of Judicature at Bombay for the Presidency of Bombay" and that "the said Court shall be and continue a Court of Record". Clauses 11 to 18 of the Letters Patent are grouped under the heading "Civil Jurisdiction of the High Court". Under Clause 11 the High Court is to have and exercise ordinary original civil jurisdiction within such local limits as might, from time to time, be declared and prescribed by any law made by the Governor in Council, and until such local limits were so declared and prescribed, within the limits of the local jurisdiction of the High Court at the date of the publication of the 1965 Letters Patent. Clause 12 specifies the suits with respect to which the High Court is to exercise its ordinary original civil jurisdiction. Clause 13 confers upon the High Court the power to remove and to try and determine, as "a Court of extraordinary original jurisdiction", any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Bombay, subject to the High Court's superintendence, either when the High Court thinks proper to do so on the agreement of the parties to that effect or for purposes of justice. Clause 15 deals with intra-Court appeal from the judgment of a Single Judge, and Clause 16 makes the High Court a Court of Appeal from the Civil Courts of the Presidency of Bombay and from all other Courts subject to its superintendence. Jurisdiction with respect to Infants and lunatics, insolvency jurisdiction, ordinary and extra-ordinary criminal jurisdiction, civil and criminal admiralty and vice-admiralty jurisdiction, testamentary and intestate jurisdiction, and matrimonial jurisdiction were conferred upon the High Court by various clauses. The provisions with respect to criminal appellate jurisdiction in the Letters Patent of 1865 is in almost the same terms as in the earlier Letters Patent. Clause 36 as amended by further Letters Patent dated March 11, 1919, and December 9, 1927, inter alia provides as follows :

> 36. Single Judges and Division Courts.

And we do hereby declare that any function, which is hereby directed to be performed by the said High Court of Judicature at Bombay in the exercise of its original or appellate jurisdiction may be performed by any Judge or 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....

(Emphasis supplied.) The words "in pursuance of section One hundred and eight of the Government of India Act, 1915" were substituted for the words "under the provisions of the 13th section of the aforesaid Act of the Twenty-fourth and Twenty-fifth Years of Our reign" by the Letters Patent dated March 11, 1919. The said clause further went on to state what is to happen if the Judges constituting a Division Court are equally divided in opinion. This part of the clause was amended by the Letters Patent dated December 9, 1927. Clause 37 confers upon the High Court the power to make rules and orders, from time to time, for the purpose of regulating all proceedings in civil cases, which may be brought before the High Court, including proceedings in its admiralty, vice-admirality, intestate and

matrimonial jurisdictions respectively, with this proviso that the High Court is to be guided in making such rules and orders as far as may be possible by the provisions of the CPC (Act No. VIII of 1859) and the provisions of any law which was made amending or altering the same by competent legislative authority. Clause 41 deals with appeals in criminal cases. Clause 44 made the Letters Patent subject to the legislative power of the Governor-General in Council and provided that they could in all respects be amended and altered thereby. Claue 45 inter alia provides that :

> so much of the aforesaid Letters Patent granted by His Majesty King George the Fourth (that is, the Letters Patent of the Supreme Court) as was not revoked or determined by the said Letters Patent of the Twenty-sixth of June One Thousand Eight hundred and Sixty-two, and is inconsistent, with these Letters Patent, shall cease, determine, and be utterly void to all intents and purposes whatsoever.

62. Section 16 of the Indian High Courts Act, 1861, conferred power upon the Crown to erect and establish a High Court of Judicature in any portion of British India not included within the limits of the local jurisdiction of other High Courts. in pursuance of this power by Letters Patent dated March 17, 1866, a High Court was erected and established for the North-Western Provinces of the Presidency of Bengal which by Section 101(5) of the Government of India Act of 1915 came to be styled as the High Court of Judicature at Allahabad and the High Court at Fort William in Bengal was styled as the High Court at Calcutta. Section 2 of the Indian High Courts Act, 1911, amended Section 16 of the Indian High Courts Act, 1861, to enable the Crown to establish by Letters Patent a High Court in any portion of British India whether or not included within the limits of the local jurisdiction of another High Court and to alter by Letters Patent the local jurisdiction of that High Court.

63. The next statute with which we are concerned is the Government of India Act, 1915 (5 & 6 Geo. V, c. 61). This Act was amended in 1916 by the Government of India (Amendment) Act, 1916 (6 & 7 Geo. V. c. 37), and principally by the Government of India Act, 1919 (9 & 10 Geo. V, c. 101). The Government of India Act, 1915, as so amended, is, under Section 135 of that Act, to be cited as "the Government of India Act". The Government of India Act introduced a scheme of dyarchy in the Provinces but the constitutional set-up still remained unitary. The Act of 1915 repealed several statutes including the High Courts Acts 1861, 1865 and 1911. Under Section 130, such repeal was inter alia not to affect "the validity of any law, charter, letters patent. . . under any enactment hereby repealed and in force at the commencement of" the Act of 1915. The provisions of the Government of India Act with which we are really concerned are those contained in Part IX thereof which consisted of Sections 101 to 114 and was headed "THE INDIAN HIGH COURTS". Sections 101 to 105 bore the sub-heading "Constitution" (that is, the Constitution of the High Courts); Sections 106 to 111, the sub-heading "Jurisdiction" (that is, the jurisdiction of the High Courts); Section 113, the sub-heading "Additional High Courts"; and Section 114, the sub-heading "Advocate-General". Sections 101(1), 106, 107 and 108 provided as follows :

> 101. Constitution of high courts -

(1) The high courts referred to in this Act are the high courts of judicature for the time being established in British India by letters patent.

106. Jurisdiction of high courts -

(1) The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdiction, powers and authority as are vested in those courts respectively at the commencement of this Act.

(1-A) The letters patent establishing or vesting jurisdiction, powers or authority in a high court may be amended from time to time by His Majesty by further letters patent.

(2) The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

107. Powers of high courts with respect to subordinate courts.-

Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say, -

(a) call for returns,

(b) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction;

(c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and

(e) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts :

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval, in the case of the high court at Calcutta, of the Governor-General in Council, and in other cases of the local Government.

108. Exercise of jurisdiction by single judges or division courts.-

(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.

64. Section 113 of the Government of India Act conferred power upon the Crown, by Letters Patent, to establish additional High CourtS Under it the Crown could by Letters Patent establish a High Court of Judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court; and where a High Court was so established in any area included within the limits of the local jurisdiction of another High Court, the Crown could by Letters Patent alter those limitS In pursuance of the power conferred by the said Section 113, Letters Patent were issued on February 9, 1916, establishing the High Court of Judicature at Patna; on March 21, 1919, establishing the High Court of Judicature at Lahore; and on January 2, 1936, establishing the High Court of Judicature at Nagpur.

65. The Government of India Act 1915 was replaced by the Government of India Act, 1935 (25 & 26 Geo. V. c. 42, reprinted in pursuance of the Government of India (Reprinting) Act, 1936 (26 Geo. V & 1 Edw. VIII, c. 2) (hereinafter referred to as "the 1935 Act"). The 1935 Act envisaged a federal constitution. It made a division of powers between the center and the Provinces, certain subjects being exclusively assigned to the Central Legislature and Ors to the Provincial Legislature. In another field the two Legislatures had concurrent legislative powerS The 1935 Act came into force with regard to the Provinces on April 1, 1937. The federal structure of the center, however, never came into existence, and the Central Government continued to be carried on in accordance with the provisions of the old Government of India Act except that its executive and legislative powers were restricted to the matters assigned to it by the 1935 Act. Part IX of the 1935 Act was headed "THE JUDICATURE". Chapter I. of Part IX dealt with the establishment and Constitution of the Federal Court. Chapter II, which consisted of Sections 219 to 231, was headed "THE HIGH COURTS IN BRITISH INDIA". Section 219, without the proviso to Sub-section (1) thereof which is not material for our purpose, provided as follows :

> 219. Meaning of 'High Court'. -
>
> (1) The following courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras Bombay, Allahabad, Lahore and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Berar, in the North-West Frontier Province and in Sind, any other court in British India constituted or reconstituted under the chapter as a High Court, and any other comparable court in British India which His Majesty in Council may declare to be a High Court for the

purposes of this Act:

X X X X (2) The provisions of this chapter shall apply to every High Court in British India.

Section 220(1), as amended by the India and Burma (Miscellaneous Amendments) Act, 1940 (3 & 4, Geo, VI, c. 5), provided as follows :

220. Constitution of High Courts -

(1) Every High Court shall be a court of record and shall consist of a chief justice and such other judges as His Majesty may from time to time deem it necessary to appoint :

X X X X There was a proviso to this Sub-section with which we are not concerned. Sections 223 to 225 require to be reproduced in extenso. They were as follows :

223. Jurisdiction of existing High Courts -

Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, 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 immediately before the commencement of Part III of this Act.

224. Administrative functions of High Courts.

(1) Every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,-

(a) call for returns;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(c) prescribe forms in which books, entries and accounts shall he kept by the officers of any such courts; and

(d) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts;

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any Law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.

225. Transfer of certain cases to High Coure for trial.

(1) If on an application made in accordance with the provisions of this Section a High Court is satisfied that a case pending in an inferior court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Federal or Provincial Act, it shall exercise that power.

(2) An application for the purposes of this section shall not be made, except in relation to a Federal Act, by the Advocate-General, for the Federation and, in relation to a Provincial Act, by the Advocate-General for the Federation or the Advocate for the Province.

Section 226 barred the High Court's original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof unless otherwise provided by an Act of the appropriate Legislature. Under the 1935 Act the jurisdiction and powers of the High Courts with respect to any of the matters in the Federal Legislative List were to be a Federal subject (Sch.VII, List I, Entry 53), with respect to any of the matters in the Provincial Legislative List were to be a Provincial subject (Sch.VII, List II, Entry 2), and with respect to any of the matters in the Concurrent Legislative List were to be a concurrent subject (Sch.VII, List III, Entry 15).

66. The political events with which everyone is familiar led to the passing of the Indian Independence Act, 1947 (10 & 11, Geo. VI c. 30). Under the Act as from August 15, 1947 (referred to in the said Act as "the appointed day"), two independent Dominions were set up in India, to be known respectively as India and Pakistan. In each Dominion there was to be a Governor-General to be appointed by the King and the paramountcy of the British Crown over the Indian States was to lapse. As from August 15, 1947, the British Government was to have no responsibility with respect to the Government of India or Pakistan. The Legislature of each of the new Dominions was to have full legislative sovereignty and no Act passed by the British Parliament on or after August 15, 1947, was to extend to either of the new Dominions as part of the law of that Dominion unless it was extended thereto by law of the Legislature of the Dominion. The powers of the Legislature of the Dominion were exerciseable by the Constituent Assembly and the Constituent Assembly was not to be subject to any limitation whatsoever in exercising its constituent powerSection Until a new Constitution was made, each of the new Dominions and all Provinces and other parts thereof were to be governed as nearly as may be in accordance with the 1935 Act with such modifications and adaptations, as may be specified by the Governor-General, and similarly all existing laws with necessary modifications and adaptations were to continue as law of each of the new Dominions and the several parts thereof until other provision was made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf. Sub-section (3) of Section 19 defined the term "Constituent Assembly". Clause (a) thereof defined it in relation to India and Clause (b) in relation to Pakistan. The said Clause (a) was as follows :

19. Interpretation, etc. -

x x x x (3) References in this Act to the Constituent Assembly of a Dominion shall be construed as references -

(a) in relation to India, to the Constituent Assembly, the first sitting whereof was held on the ninth day of December, nineteen hundred and forty-six, modified -

(i) by the exclusion of the members representing Bengal, the Punjab, Sind and British Baluchistan; and

(ii) should it appear that the North-West Frontier Province will form part of Pakistan, by the exclusion of the members representing that Province; and

(iii) by the inclusion of members representing West Bengal and East Punjab; and

(iv) should it appear that on the appointed day, a part of the Province of Assam is to form part of the new Province of East Bengal, by the exclusion of the members theretofore representing the Province of Assam, and the inclusion of members chosen to represent the remainder of that Province;

x x x x

67. The Consuituent Assembly for India so set up under the Indian Independence Act adopted and enacted on November 26, 1949, in the name of the people of India, the Constitution of India. Under Article 394 of the Constitution, that Article and Articles 5 to 9, 60, 324, 366, 367, 379, 380, 388 and 391 to 393 came into force at once and the remaining provisions were to come into force on January 26, 1950. This date is referred to in the Constitution as the commencement of the Constitution. The Constitution repealed both the Government of India Act, 1935, and the Indian Independence Act, 1947. The relevant provisions of the Constitution have already been noticed.

68. There is an underlying assumption running through the entire judgment of the Full Bench that the Constitution of India is a unique document - the first of its kind. This assumption has led it to conclude that the Constitution "purports to lay down an original institutional matrix of its own", that "it is not out of the historical ramparts that something is being put up, but a fundamental scheme", and that "In the matters of powers of the High Court, therefore, there is clear evidence that the Constitution posits a break from that past and has made absolutely a new original and vital beginning." We are constrained to observe that the above assumption made and the conclusion reached by the Full Bench are both erroneouS How unwarranted these are is shown by the words of Dr. Ambedkar when introducing to the Constituent Assembly the Draft Constitution as settled by the Drafting Committee and moving that it be taken into consideration. Dr. Ambedkar said (Constituent Assembly Debates - Official Report, Volume VII, pp. 37-38) :

> It is said that there is nothing new in the Draft Constitution, that about half of it has been copied from the Government of India Act of 1935 and that the rest of it has been borrowed from the Constitutions of other countrie. Very little of it can claim originality.

> One. likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled over when the first written Constitution was drafted. It has been followed by many countries reducing their Constitutions to writing. What the scope of a Constitution should be has long been settled. Similarly what are the fundamentals of a Constitution are recognized all over the world. Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there can be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country....
>
> As to the accusation that the Draft Constitution has reproduced a good part of the provisions of the Government of India Act, 1935, I make no apologies There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution. What I am sorry about is that the provisions taken from the G Government of India Act, 1935, relate mostly to the details of administration. I agree that administrative details should have no place in the Constitution.
>
> In these circumstances it is wiser not to trust the Legislature to prescribe forms of administration. This is the justification for incorporating them in the Constitution.
>
> (Emphasis supplied.)

69. The opening words of our Constitution "WE THE PEOPLE OF INDIA" follow the partern set by the Constitutions of the United States of America, Eire and Japan. The Preamble to our Constitution contains echoes of the Preamble to the Constitution of the United States of America and of Eire. The concepts of Fundamental Rights and Directive Principles of State Policy are also not something new in our Constitution. The first ten Amendments to the Constitution of the United States of America, which reproduce in substance the American Bill of Rights, contain rights akin to the Fundamental Rights in our Constitution though not designated as such. The Constitution of Eire has a Chapter headed "FUNDAMENTAL RIGHTS" and another chapter headed "DIRECTIVE PRINCIPLES OF SOCIAL POLICY". The Constitution of Japan contains a chapter headed "Rights and Duties of the People". These Constitutions came into existence before ours did. Almost three-fourths of our Constitution is based upon the Government of India Act, 1935, subject to modifications which were made in the light of experience and adapted to a republican form of government. Apart from the forms of administration taken from the Government of India Act, 1935, the federal form of our Constitution is also erected on the foundation of that Act and shaped mostly in the light of the Constitution of the Dominion of Canada. The principle of responsible Government is taken from the British constitutional system. The provisions relating to emergency are also patterned on the Government of India Act, 1935.

70. Historical evidence shows that our Constitution did not make a break with the past but was the result of a process of evolution. Politically India achieved her own independence, but legally and constitutionally the independence of India was an act of the British Parliament. The legal and

constitutional basis of our independence was the Indian Independence Act, 1947, and it was in the exercise of power conferred by that Act that the Constituent Assembly adopted and enacted the Constitution of India. The setting up of the Constituent Assembly itself was an act of the British Parliament. In 1940 the Coalition Government in Great Britain recognized the principle that Indians should themselves frame a new Constitution for an autonomous India. Repeated efforts were made to bring about unanimity among different political parties with respect to the basis for such a Constitution. Ultimately, elections for a Constituent Assembly were held, and the Constituent Assembly first sat on December 9, 1946. The Constituent Assembly was composed of representatives of the Provinces and of the Indian States, on the basis of one represervative for a million of the population. Representatives of the Provinces were elected by the members of the lower Chamber of the Provincial Legislatures where the Legislatures were bicameral and by the Chamber of the Provincial Legislatures where the Legislatures were unicameral. In the case of the Indian States, their representatives were elected by electoral colleges constituted by the Indian RulerS This Constituent Assembly was not a sovereign body for its authority was limited both in respect of basic principles and procedure. It was the Indian Independence Act, 1947, which established the sovereign character of the Constituent Assembly and freed it from all limitationS This is the harsh reality of history which one cannot escape. On the midnight of August 14, 1947, the Constituent: Assembly reassembled as the sovereign Constituent Assembly for the Dominion of India. As a result of the Partition, the representatives of Bengal, Punjab, Sind North-West Frontier Province, Baluchistan, and the Sylhet District of Assam (which District had joined the Dominion of Pakistan by a referendum) ceased to be the members of the Constituent Assembly of India, and there were fresh elections in the new Provinces of West Bengal and East Punjab. The result was that when the Constituent Assembly reassembled on October 31, 1947, its membership was 299 only, including 70 representatives of the Indian StateS Of this total number of members of the Constituent Assembly, 284 were actually present on November 26, 1949, to append their signatures to the Constitution as finally passed (See Basu's "Introduction to the Constitution of India", eighth edn., pp. 13 to 18; Basu's "Commentary on the Constitution of India" sixth edn., vol. A, pp. 1 to 6; Sukla's "Constitution of India", seventh edn., pp. A-16 to A-18).

71. In State of Gujarat v. Vora Fiddali Badruddin Mithibarwala a contention was raised before a Constitution Bench of seven Judges of this Court that the sovereignty of the Dominion of India and of the Indian States was surrendered to the people of India and in the exercise of their sovereign power the people gave themselves the new Constitution as from January 26, 1950. Rejecting this contention, Shah, J., observed (at pp. 580 and 582.-3) :

> It has also to be remembered that promulgation of the Constitution did not result in transfer of sovereignty from the Dominion of India to the Union. It was merely change in the form of Government. By the Constitution, the authority of the British Crown over the Dominion was extinguished and the sovereignty which was till then rooted in the Crown was since the Constitution came into force derived from the people of India. It is true that whatever vestige of authority which the British Crown had over the Dominion of India, since . the Indian Independence Act was thereby extinguished, but there was no cession, conquest, occupation or transfer of territory. The new governmental set up was the final step in the process of evolution towards

self-government. The fact that it did not owe its authority to an outside agency but was taken by the representatives of the people made no difference in its true character. The continuance of the governmental machinery and of the laws of the Dominion, give, a lie to any theory of transmission of sovereignty or' of the extinction of the sovereignty of the Dominion, and from its ashes, the springing up of another sovereign....

These assumptions are not supported by history or by constitutional theory. There is no warrant for holding that at the stroke of Midnight of the 25th January, 1950, all our pre-existing political institutions ceased to exist, and in the next moment arose a new set of institutions conpletely unrelated to the past. The Constituent Assembly which gave form to the Constitution functioned for several years under the old regime, and set up the constitutional machinery on the foundations of the earlier political set up. It did not seek to destroy the past institutions: it raised an edifice on what existed before. The Constituent Assembly moulded no new sovereignty: it merely gave shape to the aspirations of the people by destroying foreign control and evolving a completely democratic form of government as a republic. The process was not one of destruction, but of evolution.

(Emphasis supplied.) Though some of the Judges in that case differed on certain points, on this point none expressed a dissent or a contrary opinion.

72. The historical evidence and earlier legislations referred to above, the political, legal and constitutional position accepted and acknowledged by the Constituent Assembly itself when considering the Draft Constitution and in enacting it, and the observations of Shah, J., in Vora Flddali's Case falsify the assumption made and the conclusion reached by the Full Bench that the Constitution wide a total break with the past and set up new institutionS On the contrary, what is established by the above data is that not only was there no break with the past but the Constitution was the culmination of the aspirations of the people of India to be independent and to be governed by their own elected representatives and that the existing institutions, including the High Courts, as also the laws in force which were in existence at the commencement of the Constitution, were preserved and continued by the Constitution. What the Constitution did was to put its imprimatur upon them and upon their continuance.

73. According to the Full Bench, under the Constitution the existing High Courts acquired a wholly different origin, nature and character from what they possessed immediately prior to the commencement of the Constitution because the Constitution of India is a constitutional law while the Indian High Courts Act, 1861, the Government of India Act of 1915-1919 and the Government of India Act, 1935, were ordinary laws To emphasize this distinction made by it the Full Bench has referred to earlier legislations as "Imperial legislations" and the Letters Patent of the Chartered High Courts as having been issued by the "Imperial Sovereign". We may preface our discussion with respect to this distinction made by the Full Bench by pointing out that as Queen Victoria (in whose reign the Government of India Act, 1858, was passed) was proclaimed "Empress of India" only in 1876, to refer to the Indian High Courts Act, 1861, as "Imperial Legislation" or to the Letters Patent

issued in 1862 and 1865 as issued by the "Imperial Sovereign" is not correct.

74. Jowitt's Dictionary of English Law" (second edition, p.430) defines the term "Constitution" as "any regular form or system of government" and the term "constitutional law" as "all rules which directly or indirectly effect the distribution or exercise of the sovereign power; the law relating to the legislature, the executive and the judiciary." According to Dicey, constitutional law includes "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State". (Dicey's "An Introduction to the Study of the Law of the Constitution", tenth edn., p.23). What a constitutional law usually embraces within its scope has been thus set out by Hood Phillips in his "Constitutional and Administrative Law" (sixth edn., p.11) :

> More specifically, constitutional law embraces that part of a country's laws which relates to the following topics, among others : the method of choosing the Head of State, whether king or president; his powers and prerogatives; the Constitution of the legislature; its powers and the privileges of its members; if there are two Chambers, the relations between them; the status of Ministers and the position of the civil servants who act under them; the armed forces and the power to control them; the relations between the central government and local authorities; treaty-making power; citizenship; the raising and spending of public money; the general system of courts, and the tenure and immunities of judges; civil liberties and their limitations; the parliamentary franchise and electoral boundaries; and the procedure (if any) for amending the Constitution.
>
> (Emphasis supplied.) In Sri Sankari Prasad Singh Deo v. Onion of India and State of Bihar [1952] S.C.R. 89, Patanjali Sastri, J., speaking for the Court, said (at page 106) :
>
> Although law must ordinarily include constitutional law, there is a clear demarcation between ordinary law, which is made in exercise of legislative power, and constitutional law, which is made in exercise of constituent power. Dicey defines constitutional law as including 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State.' It is thus mainly concerned with the creation of the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation.
>
> (Emphasis supplied.)

75. In the sense defined above the Indian High Courts Act, 1861, and the Government of India Acts of 1915-1919 and 1935 were all constitutional laws. The Indian High Courts Act, 1861, provided for the creation of the superior judiciary, one of the three organs of the State. The Government of India Acts of 1915-1919 and 1935 dealt with all the three organs of the State, namely, the executive, the legislature and the judiciary, and the distribution of governmental power among them and the definition of their mutual relation. The fact that the Indian High Courts Act, 1861, and the Government of India Acts were passed by the British Parliament does not make any difference. The

British Parliament is a sovereign and supreme legislative and constituent body and can make, and has made, laws affecting "the three great organs of the State, the executive, the legislature and the judiciary, the distribution of governmental power among them and the definition of their mutual relation." The sovereign character of Parliament in England has been pointed out by a Constitution Bench of this Court in Union of India etc. v. Tulsiram Patel etc. . Instances of constitutional laws enacted by the British Parliament are the Act of Settlement, 1701, which varied and finally fixed the descent of the Crown, the Act of Union with Scotland of 1706, and the Act of Union with Ireland of 1800. Acts passed by the British Parliament for the governments of various parts of the Crown's territories have been judicially recognized as Constitution Acts. For instance, in British Coal Corporation and Ors. v. The King [1935] A.C. 500, 518, J.C., the Judicial Committee referred to the British North America Act, 1867 (30 & 31 Vict., c.3), which was passed to provide for the establishment in Canada of one Dominion, as a constituent statute and in Janes v. Commonwealth of Australia [1936] 578, 614, J.C, It referred to the Commonwealth of Australia Constitution Act of 1900 (63 & 64 Vict., c.12), as a Constitution. So far as the Government of India Act, 1935, is concerned, the Federal Court in In re the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (Central Provinces and Berar Act No. XI? of 1938) [1939] F.C.R. 18, 36 and Ln re the Hindu Women'a Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938 [1941] F.C.R. 12, 26 and this Court in Navinchandra Mafatlal v. The Commissioner of Income Tax, Bombay City have referred to it as a Constitution Act. The British Parliament has also recognized the Government of India Act, 1935, as a Constitution Act. In moving the second reading of the Bill which when enacted became the Indian Independence Act, 1947, the Prime Minister, Mr. Attlee observed :

> This Bill is, unlike other Bills, dealing with India. It does not lay down as in the Act of 1935, a new Constitution for India providing for every detail. It is far more in the nature of an enabling Bill - a Bill to enable the representatives of India and Pakistan to draft their own Constitution and to provide for the exceedingly difficult period of transition.

> (Emphasis supplied.) The Indian Legislature has also recognized the Government of India Act, 1935, as a Constitution Act. The Statement of Objects and Reasons to the Legislative Assembly Bill No. 32 of 1942, which when enacted, became the CPC (Amendment) Act, 1942, whereby Order XXVII-A was inserted in the CPC, 1908, for the purpose of giving notice to the Advocate-General of India or the Advocate-General of a Province as the case may be, where in a suit a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Councll made thereunder was involved, referred to the Government of India Act, 1935, as the Constitution Act (Gazette of India dated September 10, 1942 Part V, p. 140). What is more important is that the Constitution itself accepts this position. Article 132 provides for an appeal to the Supreme Court from any judgment, decree or final order of a High Court on a certificate given by the High Court that "the case involves a substantial question of law as to "the interpretation of this Constitution." Under Article 145(2), the minimum number of Judges of the Supreme Court required to decide "any case involving a substantial question of law as to the

> interpretation of this Constitution" is to be five. Articles 132 and 145 are in Chapter IV of Part V of the Constitution which Chapter deals with the "Union Judiciary." Article 228 confers upon the High Court the power to transfer a case pending in a court subordinate to it for disposal by itself if "it involves a substantial question of law as Co the interpretation of this Constitution." Article 228 is la Chapter V of Part VI of the Constitution which Chapter deals with "The High Courts in the States". The phrase "any substantial question of law as to the interpretation of this Constitution" is defined by Article 147. Article 147 which occurs in Chapter IV of Part V provides as follows :
>
> 147. Interpretation. -

In this Chapter and in Chapter V of Part VI, references to any substantial question of law as to the interpretation of this Constitution shall be construed as including references to any substantial question of law as to the interpretation of the Government of India Act, 1935 (including any enactment amending or supplementing that Act), or any Order in Council or order made thereunder, or of the Indian independence Act, 1947 or of any order made thereunder.

76. What has been stated above would show that it is erroneous to characterize the Government of India Acts as ordinary laws and not as constitutional laws It is true that these Constitution Acts were given to a subject country by a foreign constituent and legislative body but then we must remember that it. was this very foreign constituent and legislative body which brought into being the Constituent Assembly, freed it of all limitations and made it possible for it to give to India its Constitution.

77. In order to emphasize its conclusion that the High Courts under the Constitution were organically different institutions from the same High Courts in existence Immediately prior to the commencement of the Constitution, the Full Bench relied upon Article 215 of the Constitution. Under Article 215, every High Court is to be a Court of Record and is to have all the powers of such a court including the power to punish for contempt of itself. According to the Full Bench this Article "subserves the need to indicate that the High Court under the Constitution has an institutional permanence". We are afraid that the Full Bench has misunderstood what a Court of Record iS Jowitt's "Dictionary of English Law" (second edition, page 493) under the heading "Court", states :

> A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has authority to fine and imprison for contempt of its authority. Such were the superior courts of common law before their abolition, and such are the High Court of Justice and Court of Appeal, and the county courts; many of the ancient inferior courts were also courts of record.
>
> Unless otherwise provided, the power to punish for contempt is thus inherent in and possessed by every Court of Record. It is fallacious to think that the High Courts became courts of record for the first time on the commencement of the Constitution. All the superior courts which preceded the High Courts were courts of record. Under

the Charter dated September 24, 1726, granted by George I, the Mayor's Courts which were established at Calcutta, Madras and Bombay were expressly made Courts of Record, and this position was reiterated when a fresh Charter dated January 8, 1753, was granted by George 11. Similarly, the Recorder's Courts established at Bombay and Madras by Charter dated February 20, 1798, granted by George III, were made Courts of Record. Statute 4, Geo, IV, c.71 of 1823 authorized the Crown to abolish the Recorder's Court at Bombay and establish in its place a Supreme Court to be a Court of Record and when the Supreme Court of Judicature at Bombay was established, Clause 1 of its Letters Patent expressly made that Court a Court of Record. The Sadar Dewany Adalat and the Sadar Foujdari Adalat were both Courts of Record. Clause 1 of the Letters Patent of 1862 constituted the High Court of Judicature at Bombay to be a Court of Record, and it was this High Court which by Clause 1 of the Letters Patent of 1865 was continued as the High Court of Judicature at Bombay for the Presidency of Bombay as a Court of Record. Section 106(1) of the Government of India Act of 1915, provided that the several High Courts would be Courts of Record, and Section 220 of the Government of India Act, 1935, made an identical provision. The scheme of Chapter V of Part VI of the Constitution which deals with High Courts closely follows the scheme of Part IX of the Government of India Act of 1915, and Chapter II of Part IX of the Government of India Act, 1935, both of which dealt with High Courts These Chapters provided for the Constitution of the High Courts as Courts of Record, for the salaries and tenure of judges of the High Courts, the power to make rules and regulate the sittings of the High Courts, and the continuance of the jurisdiction of the High Courts existing as at the date of coming into force of each of the two Government of India Acts, just as Chapter V of Part VI of the Constitution doeS These two Acts also provided for continuance in force of laws in existence at the date when these Acts respectively came into force. Article 215 thus did not bring any revolutionary change in the nature and character of the High Courts existing at the date of the commencement of the Constitution but merely followed a well established pattern and practice in drafting constitutional legislation.

78. Yet another reason given by the Full Bench for holding that the High Courts under the Constitution were organically different from the same High Courts immediately prior to the commencement of the Constitution was that unlike in the past, under the Constitution the existence of the High Courts is no more dependent upon ordinary legislation. This reasoning is erroneous for it overlooks the relevant provisions of the Constitution and the earlier Constitution Acts By Clause 44 of the Letters Patent of the three Chartered High Courts, the Letters Patent were made subject to the legislative powers of the Governor-General in Council. By further Letters Patent dated March 11, 1919, for the words "powers of the Governor-General in Council" the words "powers of the Governor-General in Legislative Council and also of the Governor-General in Council" were substituted. Further, under Section 9 of the Indian High Courts Act, 1861, read with the 3aid Clause 44, the Governor-General in Council had the power to remove any place or territory from the jurisdiction of a High Court (see Queen v. Burah) [1877-78] 5 I.A. 178. Under Sub-section (la) of Section 106 of the Government of India Act of 1915-1919, the Letters Patent establishing or vesting jurisdiction, powers or authority in a High Court could be amended from time to time by the Crown

by issuing further Letters Patent. Under Section 223 of the Government of India Act, 1935, the jurisdiction of the existing High Courts which was continued by that section was made subject to the provisions of Part IX of that Act and of any Order in Council made under that Act or any other Act and to the provisions of any Act of the appropriate Legislature. Under that Act, the Federal Legislature had the power to legislate with respect to the jurisdiction and powers of all courts except the Federal Court with respect to any matter in the Federal Legislative List, the Provincial Legislature with respect to matters in the Provincial Legislative List and the Federal Legislature as also the Provincial Legislature with respect to matters in the Concurrent Legislative List. The position under the Constitution is the same. By Article 225 the continuance of the jurisdiction of the existing High Courts is made subject to the provisions of the Constitution and of any law of the appropriate Legislature. Under Schedule VII to the Constitution, the power to legislate with respect to the jurisdiction and powers of all courts except the Supreme Court is with Parliament with respect to any matter in the Union List (List I, Entry 95), with the State Legislatures with respect to any matter in the State List (List II, Entry 65) and with both Parliament and the State Legislatures with respect to any matter in the Concurrent List (List III, Entry 46). Further, Parliament alone can legislate with respect to the Constitution and organization of the High Courts (List I, Entry 78) and the extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union Territory (List I, Entry 79). Under Article 214 of the Constitution there is to be a High Court for each State. Under Article 1(2) as originally enacted the territories which were to constitute the States at the commencement of the Constitution were to be as set out in the First Schedule to the Constitution. Under that Schedule the nine Provinces under the Government of India Act, 1935, with the territorial modifications resulting from the Partition, became the nine Part A StateS Clause (2) of Article 215 of the Constitution, prior to its deletion by the Constitution (Seventh Amendment) Act, 1956, provided that for the purposes of the Constitution the High Court exercising jurisdiction in relation to any Province before the commencement of the Constitution shall be deemed to be the High Court for the corresponding state. Article 2 confers powers upon Parliament by law to admit into the Union, or establish, new StateS Article 3 confers upon Parliament the power by law to form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, as also to increase or diminish the area of any State or alter the boundaries or name of any State. All this the Parliament can do by ordinary law. Once a new State is formed, Article 214 requires that it should have a High Court and the power to establish such High Court vests with Parliament under Entry 78 of List I in the Seventh Schedule to the Constitution, and, in fact, Parliament has done so in a number of cases when the States were reorganized or a new State formed or admitted into the Union.

79. The next question which falls to be considered is whether the powers conferred upon the High Courts by Articles 226, 227 and 228 of the Constitution are wholly new powers not possessed by the existing High Courts immediately prior to the commencement of the Constitution as held by the Full Bench. This conclusion of the Full Bench is as erroneous as the other conclusions reached by it and is once again based upon an inadvertence to notice the relevant provisions of the earlier Constitution Acts A provision similar to Article 228 was to be found in Section 225 of the Government of India Act, 1935. Article 227 has a longer ancestry. Clause 55 of the Charter of the Supreme Court of Judicature at Bombay made the Court of Requests and the Court of Quarter

Sessions subject to the order and control of the said Supreme Court in the same manner as inferior courts and Magistrates in England were subject to the Court of King's Bench. Section 15 of the Indian High Courts Act, 1861, conferred upon each of the Chartered High Courts the power of superintendence over all courts subject to its appellate jurisdiction. A similar power of superintendence was conferred upon the High Courts by Section 107 of the Government of India Act of 1915-1919, and a more limited power of superintendence was conferred upon them by Section 224 of the Government of India Act, 1935. The powers under Articles 227 and 228, though in a somewhat different form, were thus possessed by the existing High Courts immediately prior to the commencement of the Constitution. The power conferred by Article 226, however, stands on a different footing. This was not a power possessed by every existing High Court but only by the three Chartered High Courts The Recorder's Courts established at Madras and Bombay were invested with jurisdiction similar to the Court of King's Bench in England "as far as circumstances would admit". The Court of King's Bench possessed the jurisdiction to issue prerogative writs of various kinds A brief account of the origin, nature and development of the various prerogative writs in England has been set out in the judgment of this Court in Prabodh Vena and Ors. v. State of Uttar Pradesh and Ors. . Clause 55 of the Letters Patent of the Supreme Court of Judicature at Bombay conferred upon that Court the power to issue writs of Maudawus, Certiorari, Procedendo or Error to the Court of Requests and the Court of Quarter Sessions Procedendo was a prerogative which issued out of the common law jurisdiction of the Court of Chancery when Judges of any subordinate court delayed the parties by not giving judgment. In such a case the writ was known as a writ of procedendo ad Judicium (see Jowitt's "Dictionary of English Law", second edn., p. 1438). A writ de non procedendo rege inconsulte was issued at the intervention of the King to withdraw from the cognizance of the common law courts proceedings in which he claimed to have interest (see De Smith's "Judicial Review of Administrative Action", fourth edn., p.585). More important than this power to issue certain writs to Courts of Requests and Quarter Sessions was the conferment upon the said Supreme Court by Clause 5 of its Letters Patent of the jurisdiction which the Judges of the Court of King's Bench possessed. This jurisdiction included the power to issue prerogative writS A similar jurisdiction was conferred upon the two other Chartered High Courts Under Section 9 of the Indian High Courts Act, 1861, the High Courts were to have and exercise all jurisdiction and every power and authority vested in any of the Courts abolished by the said Act, which included the Supreme Courts of Judicature and the Sadar Dewany Adalat and the Sadar Foujdari Adalat. Under Section 10 of the said Act, all jurisdiction then exercised by the Supreme Courts of Judicature of Calcutta, Madras and Bombay respectively was to be exercised by each of the three Chartered High Courts subject to the legislative powers of the Governor-General of India in Council. By Clause 44 of the Letters Patent of 1862 so much of the Letters Patent of the said Supreme Court as were inconsistent with the said Letters Patent stood revoked, and when the Letters Patent of 1862 were replaced by new Letters Patent in 1865, Clause 45 of the Letters Patent of 1865 expressly provided that so much of the Letters Patent of the said Supreme Courts as were not revoked by the earlier Letters Patent of 1862 and were inconsistent with the Letters Patent of 1865 should stand revoked. Neither the Letters Patent of 1862 nor the Letters Patent of 1865 contained any provision inconsistent with the Chartered High Courts possessing the jurisdiction of the Court of King's Bench which had been conferred upon the Supreme Courts of Judicature by their respective Letters Patent, and each of the three Chartered High Courts on its Original Side continued to possess the power inter alia of issuing prerogative writS In Ryots of Gara-bandho and other villages v. Zemindar of

Parlakimedi and Anr. [1942-43] 70 I.A. 129, the Judicial Committee of the Privy Council held that this power of the High Court of Madras was confined to issuing such writs only within the local limits of its original civil jurisdiction, this power being derived by that High Court as successor of the Supreme Court of Judicature at Madras which had been exercising jurisdiction over the Presidency Town of Madras, and that there was no power in that High Court to issue such a writ beyond the local limits of its original civil jurisdiction. In Election Commission, India v. Saka Venkata Subba Rao, [1953] S.C.R. 1144, 1150 this Court reiterated what had been held in the above case by the Judicial Committee and pointed out that the position with respect to the two other Chartered High Courts, namely, the High Courts of Calcutta and Bombay, was the same. As explained by this Court in Dwarkanath, Hindu Undivided Family v. Income-Tax Officer, Special Circle, Kanpur, and Anr. Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts to reach injustice wherever found and to mould the reliefs to meet the peculiar and complicated requirements of this country. The power to issue prerogative writs though in a much restricted form was thus already possessed by the three Chartered High Courts immediately prior to the commencement of the Constitution.

80. A question may well be asked why it was thought necessary to incorporate in the Constitution the jurisdiction and powers conferred by Articles 226, 227 and 228. The answer is obviouS Provisions similar to Articles 227 and 228 already existed in a Constitution Act, namely, in Sections 224 and 225 of the Government of India Act, 1935. The said Sections 224 and 225 were not made subject to the provisions of Part IX of the said Act and of any Order in Council made under the said Act or any other Act or to the provisions of any Act of the appropriate Legislature as the jurisdiction of the existing High Courts was by Section 223 of the said Act. These sections could, therefore, have been amended only by a legislation made by the British Parliament by amending the Government of India Act, 1935. The Government of India Act, 1935, was repealed by Article 395 of the Constitution. It was, therefore, necessary to re-enact these provisions and the only way in which it could be done was to insert them in the Constitution because were these powers to be treated on the same footing as the other powers and jurisdiction of the existing High Courts, they would have become subject to laws made by the appropriate Legislature. So far as Article 226 is concerned, the power to issue prerogative writs was possessed by the three Chartered High Courts only. As the Constitution makers intended to confer the enlarged power under Article 226 upon all High Courts, and not merely the three Chartered High Courts, this power had to be embodied in an Article of the Constitution. It should also be borne in mind that the jurisdiction under Articles 226, 227 and 228 was intended to be conferred upon all High Courts - not only the existing High Courts but also any other High Court as and when it came to be established in the future. Further, the insertion of Articles 226, 227 and 228 in the Constitution without making them subject to any law to be made by the appropriate Legislature put these Articles beyond the legislative reach of Parliament and the State Legislatures with the result that the jurisdiction conferred by these Articles can only be curtailed or excluded with respect to any matter by a constitutional amendment and not by ordinary legislation.

81. We are not concerned in this Appeal with Article 228 but only with Articles 226 and 227 or more specifically with the maintainability of an intra-court appeal against the judgment of a Single Judge

in a petition under Article 226 or 227. The Full Bench took the view that Clause 15 of the Letters Patent provides for an intra-court appeal only in causes heard in the exercise of original civil jurisdiction by a Single Judge of the High Court and does not, therefore, comprehend within its scope a judgment passed by a Single Judge in the exercise of jurisdiction under Article 226 or 227. In support of this conclusion the Full Bench relied upon paragraph 22 of the Despatch dated March 14, 1862, from the Secretary of State to the Governor-General of India in Council which accompanied the first Letters Patent of the Calcutta High Court. The said paragraph 22 was as follows :

22. Clauses 14 and 15. -

Clauses 14 and 15 give effect to the recommendations of the law Commissioners that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction in civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the Judges of the Court, the appeal shall lie to Her Majesty in Council.

Presumably, a similar Despatch also accompanied the first Letters Patent of the Madras and Bombay High Courts but in any event as the Letters Patent of these two High Courts were mutatis mutandis in identical terms with the Letters Patent of the Calcutta High Court, whether such Despatch accompanied them or not would not make any difference. The reliance placed by the Full Bench upon the said Despatch of the Secretary of State was, however, wholly misconceived. This Despatch accompanied the Letters Patent of 1862 and not the Letters Patent of 1865 and the provision for an intra-court appeal in the Letters Patent of 1865 was materially different from that contained in the Letters Patent of 1862. The Letters Patent of 1862 conferred upon the Chartered High Courts the jurisdictions which in England, until November 1, 1875, when the Supreme Court of Judicature Acts of 1873 and 1875 came into force, were exercised by different courts such as the Court of King's Bench, the Court of Common Pleas, the Court of Chancery, the Court of Exchequer as a common law court, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy. These several jurisdictions were conferred upon the High Courts by different clauses of the Letters Patent. Clause 14, however, specifically provided for an intra-court appeal only from judgments "in all cases of original civil jurisdiction". The marginal note to Clause 14 was "Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction". Jurisdictions other than ordinary and extra- ordinary civil jurisdictions were conferred by clauses which followed Clause 14. For this reason, it was doubted at one time whether an intra-court appeal would lie from the judgment of one Judge in the exercise of original testamentary jurisdiction but in the case of Saroda Soonduree Dossee v. Tincowree Nundee [1884] Hyde's Reports 70, a Division Bench of three Judges of the Calcutta High Court by a majority held that such an appeal would lie. The Letters Patent of 1865 followed the pattern of the Letters Patent of 1862. Clause 15 forms part of a group of clauses consisting of Clauses 11 to 18 headed "Civil Jurisdiction of the High Court". Clause 12 deals with original jurisdiction as to suits and Clause 13 with extra-ordinary original civil jurisdiction while Clause 14 deals with joinder of several causes of action. Though the marginal note to Clause 15 was the same as that to the old Clause 14, a most material change was made in Clause 15 by providing that intra-court appeals

would lie "from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High,Court, or of one Judge of any Division Court." The word "judgment" in. Clause 15 is not qualified in any way as to the jurisdiction in which it is given except that it should not be a sentence or order passed or made in any criminal trial, thus excluding judgments given in the exercise of criminal jurisdiction. Criminal jurisdiction is provided for in Clauses 22 to 29. Various other jurisdictions conferred upon the High Courts, except ordinary and extra-ordinary civil jurisdiction, also feature in clauses subsequent to Clause 15. Marginal notes or headings to groups of sections cannot control the meaning of a section if the section is unambiguous and its meaning plain. Not only is the wording of Clause 15 unambiguous but there is strong intrinsic evidence in that Clause itself to show that it applies to all jurisdictions mentioned in different clauses of the Letters Patent, whether preceding Clause 15 or subsequent thereto, except those expressly excluded by Clause 15 itself. Had it not been so, there would have been no need to exclude expressly a judgment from a sentence or order passed or made in any criminal trial from the purview of Clause 15. Further, under Clause 15 an appeal also lies against the judgment of one Judge of any Division Court where the Judges are equally divided in opinion. Under the unamended Clause 36, in such a case the opinion of the senior Judge was to prevail and under Clause 15 an appeal lay against his judgment. A Division Bench may hear an original matter or an appeal from a subordinate court. The omission from Clause 15 of the words "in all cases of original civil jurisdiction" which occurred in Clause 14 made the judgment of the senior Judge of the Division Bench appealable whether it was given in an original matter or in an appeal from a subordinate court even though the appellate jurisdiction of the High Court in respect of decisions given in civil cases by subordinate courts is conferred by Clause 16 which in numerical order follows Clause 15. Such was the view taken by a Full Bench of seven Judges of the Calcutta High Court in Ranee Shurno Moyee v. Luchmeeput Doogur and Ors. [1867] 7 Sutherland's Weekly Reporter 52 as far back as January 23, 1867. Since then all the Chartered High Courts have taken the same view and have held that unless excluded from the purview of Clause 15, an intra-court appeal lies under that clause against the judgment delivered in the exercise of any of the jurisdictions conferred by the Letters Patent, whether by a clause preceding or succeeding Clause 15. When Clause 15 was substituted by Letters Patent dated December 9, 1927, the marginal note was changed to "Appeal to the High Court from the Judges of the Court". This change brought the marginal note in conformity with what Clause 15 provides.

82. There has also been unanimity among the Chartered High Courts that the word "judgment" in Clause 15 embraces not only judgments given in the exercise of jurisdictions specifically mentioned in the Letters Patent but also in the exercise of jurisdictions not so mentioned. For instance, the jurisdiction to commit for contempt is not expressly mentioned in the Letters Patent but the Calcutta High Court in Mohendra Lall Hitter v. Anundo Comaar Hitter I.L.R. (1897) 25 Cal. 236 arid the Bombay High Court in Collector of Bombay v. Isaac Penhas F.B. have held that an order made by a Single Judge committing a person for contempt is appealable under Clause 15. Similarly, in Mahomedalli Allabux v. Ismailji Abdulali , the Bombay High Court held that an appeal lay from an order passed by a Single Judge directing a writ of habeas corpus to issue and in Raghunath Keshav Khadilkar v. Poona Municipality and Anr. , it held that an appeal lay under Clause 15 of the Letters Patent against the issue of a writ of certiorari by a Single Judge.

83. Revisional jurisdiction is not expressly mentioned in Clause 15 but as the Chartered High Courts were entertaining intra-court appeals from judgments given in the exercise of revisional jurisdiction, when the Letters Patent were amended in 1919 an intra-court appeal from an order made in the exercise of revisional jurisdiction was expressly excluded. Similarly, to prevent intra-court appeals from an order passed by a Single Judge in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act of 1915-1919, an appeal from such an order was expressly barred by the amending Letters Patent of March 11, 1919. It should be remembered that the Government of India Act of 1915-1919 was a Constitution Act and, therefore, the jurisdiction which was conferred upon the High Courts by Section 107 of that Act was a jurisdiction conferred upon them by a Constitution Act.

84. The above view consistently held by the High Courts has found favour with this Court. In National Sewing Thread Co. Ltd. v. James Chadwick & BroS Ltd. [1953] S.C.R. 1028, this Court, after considering the relevant provisions of the Government of India Act of 1915-1919, which are in their contents similar to the corresponding provisions of the Constitution of India, held that under that Act the Bombay High Court possessed all the jurisdictions that it had at the commencement of that Act and could also exercise all such jurisdictions that would be conferred upon it from time to time by the legislative power conferred by that Act and, therefore, unless the right of appeal was otherwise excluded, an intra-court appeal lay under Clause 15 of the Letters Patent of the Bombay High Court. The same, of course, would apply to the Letters Patent of the Calcutta and Madras High Courts The Letters Patent establishing the Lahore High Court constitute the Charter of the Punjab High Court. Clause 10 of those Letters Patent is in pari materia with Clause 15 of the Letters Patent of the Chartered High Courts Referring to Clause 10 of the Letters Patent of the Punjab High Court, this Court in South Asia Industries Private Ltd. v. SB. Sarup Singh and Ors. , said (at pages 761-62) :

> A plain reading of the said clause indicates that except in the 3 cases excluded an appeal lay against the judgment of a single Judge of the High Court to the High Court in exercise of any other jurisdiction....Looking at the first part of the amended clause excluding the exceptions, it is obvious that its wording is generalIt is not permissible, by construction, to restrict the scope of the generality of the provisions of Clause 10 of the Letters Patent.

85. The Full Bench sought to distinguish the judgment of this Court in National Sewing Thread Company's case on the ground that the jurisdiction which the Single Judge was exercising in that case was one under the ordinary law and not under a Constitutional law, namely, the Constitution of India, and that if the powers of the High Court under Articles 226 and 227 of the Constitution were also to be made subject to the rules of the High Court and the Letters Patent, these powers could be altered or affected by ordinary legislation. Article 225 of the Constitution is by its term made "Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution". Thus, under Article 225 the jurisdiction of the existing High Courts and the law administered by them and the powers of the High Courts to make rules and to regulate the sittings of the Court and of members thereof sitting singly or in Division Courts have been preserved and continued subject to the provisions of the Constitution and of any law made by the appropriate Legislature. According to

the Full Bench the words "Subject to" create a limitation upon the jurisdiction and powers of the existing High Courts This is not a correct interpretation. Article 225 follows a pattern established by earlier legislation. Under Section 9 of the Indian High Courts Act, 1861, the jurisdiction and powers of the High Courts were made subject to the legislative powers of the Governor-General of India in Council. Clause 44 of the Letters Patent of 1865 earlier made the provisions of the Letters Patent subject to the same legislative powers and after the amendment of the said clause by the amending Letters Patent of March 11, 1919, subject to the legislative powers of the Governor-General in Legislative Council and also of the Governor-General in Council. Under Section 106(la) of the Government of India Act, 1915-1919, the Letters Patent of a High Court could be amended from time to time by the Crown by further Letters Patent. Section 223 of the Government of India Act, 1935, continued the jurisdiction of the existing High Courts subject to the provisions of Part IX of that Act, the provisions of any Order in Council made under that Act or any other Act and the provisions of any Act of the appropriate Legislature enacted by virtue of the powers conferred on that Legislature by that Act. In the same way, Article 225 is made subject to the provisions of the Constitution and the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by the Constitution. The opening words of Article 225 "Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of the powers conferred on that Legislature by this Constitution" only mean that Article 225 is subject to what is provided in the Constitution and in law made by an appropriate Legislature. The words "Subject to" cannot be construed, as the Full Bench has done, as referring only to a provision limiting or restricting the jurisdiction of the existing High Courts They also include a provision which enlarges the jurisdiction and powers of the existing High Courts Article 225, therefore, comprehends within its scope not only the jurisdiction which the existing High Courts possessed immediately prior to the commencement of the Constitution but also the jurisdiction and powers which the other Articles of the Constitution, such as Articles 226, 227 and 228, confer upon the High Courts A Special Bench of the Calcutta High Court in Chairman, Budge Budge Municipality v. Mongru Mia and Ors. , took the view that the words "Subject to" in the opening part of Article 225 also covered enlargement of jurisdiction and these words would, therefore, import into Article 225 the enlargement of its jurisdiction, for example, by Article 226. Das Gupta, J., however, gave a dissenting judgment in that case following the line of reasoning adopted by a Division Bench of that High Court in India Electric Works Ltd. v. Registrar of Trade Marks A.l.R. 1947 Cal. 49 in which a contrary view was taken. The case of India Electric Works Ltd. v. Registrar of Trade Marks was expressly overruled by this Court in National Sewing Thread Company's case. Other High Courts, as for example, the Allahabad High Court in Sheo Prasad v. State of U.P., A.l.R. 1965 All. 106 have also taken the same view as the majority judgment in Budge Budge Municipality Case.

86. The fact that Article 225 makes the jurisdiction and powers of the existing High Courts subject to a law of the appropriate Legislature does not mean that the jurisdiction under Article 226 or 227 cannot come within the scope of Article 225. A law made by an appropriate Legislature can amend another law enacted by it but it cannot amend or affect the provisions of the Constitutions and as Articles 226, 227 and 228 are not made subject to any law made by Parliament or the State Legislatures, the powers conferred by these three Articles cannot be limited, abridged or taken away by any Legislature. They can only be affected by amending the Constitution. All that the qualifying phrase in Article 225 means is that if a particular jurisdiction of an existing High Court is one

conferred by ordinary legislation, it can be affected, either by way of abridgement or enlargement, by a law made by the appropriate Legislature and if it is one conferred by the Constitution, it can only be so affected by a constitutional amendment. What has escaped the notice of the Full Bench is that a provision for a right of appeal is not one which in any manner limits, abridges, takes away or adversely affects the power of the High Court under Article 226 or 227. Such a provision merely regulates the exercise of the powers under these Articles We may point out here that Article 145(1) confers upon this Court the power to make rules including rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III, that is, Fundamental RightS By the opening clause of Article 145(1) this power is made "Subject to the provisions of any law made by Parliament". Therefore, the practice and procedure in respect of petitions under Article 32 for the enforcement of Fundamental Rights are regulated by rules framed by this Court and by any law made by Parliament in that behalf. We fail to see why the practice and procedure in respect of petitions under Articles 226 and 227 should stand on a different footing.

87. The position which emerges from the above discussion is that under Clause 15 of the Letters Patent of the Chartered High Courts, from the judgment (within the meaning of that term as used in that clause) of a Single Judge of the High Court an appeal lies to a Division Bench of that High Court and there is no qualification or limitation as to the nature of the jurisdiction exercised by the Single Judge while passing his judgment, provided an appeal is not barred by any statute (for example, Section 100A of the CPC, 1908) and provided the conditions laid down by Clause 15 itself are fulfilled. The conditions prescribed by Clause 15 in this behalf are : (1) that it must be a judgment pursuant to Section 108 of the Government of India Act of 1915, and (2) it must not be a judgment falling within one of the excluded categories set out in Clause 15.

88. What falls next to be considered is the question whether the judgment of a Single Judge of the High Court in a petition under Article 226 or 227 is a judgment pursuant to Section 108 of the Government of India Act of 1915-1919. The expression "pursuant to Section 108 of the Government of India Act" was substituted for the expression "pursuant to Section 13 of the said recited Act", that is, the Indian High Courts Act, 1861, when Clause 15 was amended by Letters Patent dated March 11, 1919. Section 13 provided that subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under that Act may by rules made by it 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 such High Court. Section 108(1) of the Government of India Act of 1915 made similar provision, while Section 108(2) reproduced the power conferred by Section 14 of the Indian High Courts Act, 1861, upon the Chief Justice of the High Court to determine what Judges, whether with or without the Chief Justice, should sit alone or in the Division Courts When the Government of India Act of 1915-1919 was repealed and replaced by the Government of India Act, 1935, and the 1935 Act was repealed and replaced by the Constitution, the expression "pursuant to Section 107 of the Government of India Act" in Clause 15 remained unamended. The fact that this expression remained unaltered makes no difference. Section 223 of the Government of India Act, 1935, while continuing the jurisdiction and powers of the Judges of the existing High Courts and the respective powers of the Judges thereof in relation to the administration of justice in the court expressly provided that such powers shall include "any power to make rules of Court and to regulate the sittings of the Court and of members

thereof sitting alone or any division court". Thus, the rule-making power of the High Court and of the Chief Justice of the High Court to assign work either to Single Judges or to Division Courts and to determine what Judges, whether with or without the Chief Justice, would constitute the several Division Courts remained unimpaired and unaffected. Section 38(1) of the Interpretation Act, 1889 (52 & 53 Vict., c.63), now repealed by the Interpretation Act, 1978 (1978 Eliz.2, c.30), provided as follows :

> 38. Effect of repeal in future Acts -
>
> (1) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

89. Section 8 of the General Clauses Act, 1897, (Act X of 1897) provides as follows :

> 8. Construction of references to repealed enactments -
>
> (1) Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision re-enacted.
>
> (2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then references in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as reference to the provision so re-enacted.

Sub-section (2) was inserted in Section 8 by Act 18 of 1919. The opening words of Sub-section (2) "Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted" were substituted for the words "Where any Act of Parliament repeals and re-enacts" by the Adaptation of Laws Order, 1950. Although Section 38(1) of the Interpretation Act speaks of references in any other Act to the provisions of a repealed and re-enacted Act, Section 8 of the General Clauses Act speaks of references to a repealed and re-enacted Act not only in any Act or Regulation but also in any "instrument". An "instrument" is a writing, and generally means a writing of a formal nature. (See Jowitt's "Dictionary of English Law", second edn., vol. 1, p.988). Letters Patent mean writings of the sovereign, sealed with the Great Seal, whereby a person or company is enabled to do acts or enjoy privileges which he or it could not do or enjoy without such authority (ibid, vol. 2, p.1085). Letters Patent thus mean an instrument issued by the Crown or government (see Black's "Law Dictionary", fifth edn., p.815). Letters Patent establishing the High Courts issued by the Crown would thus fall within the meaning . of the term "instrument" as used in Section 8(2) of the General Clauses Act. Thus, by the combined operation of Section 38 of the Interpretation Act

and Section 8 of the General Clauses Act, the expression "pursuant to Section 108 of the Government of India Act", is on the coming into force of the Government of India Act, 1935, to be read as "pursuant to Section 223 of the Government of India Act, 1935." Article 225 of the Constitution is in pari materia with Section 223 of the Government of India Act, 1935. Article 367(1) of the Constitution provides that the General Clauses Act, 1897, shall apply for the interpretation of the Constitution as It applies for the interpretation of an Act of the Legislature of the Dominion of India. Thus, fay the combined operation of Section 38(1) of the Interpretation Act and Section 8 of the General Clauses Act, the expression "pursuant to Section 223 of the Government of India Act, 1935," which was deemed to have been substituted for the expression "pursuant to Section 108 of the Government of India Act" in Clause 15 of the Letters Patent is, on the commencement of the Constitution, to be read as "pursuant to Article 225 of the Constitution.

90. In National Sewing Thread Company's case this Court said (at pages 1036-7) :

> As a matter, of history the power was not conferred for the first time by Section 108 of the Government of India Act, 1915. It had already been conferred by Section 13 of the Indian High Courts Act of 1861. We are further of the opinion that the High Court was right in the view that reference in Clause 15 to Section 108 should be read as a reference to the corresponding provisions of the 1935 Act and the Constitution. The canon of construction of statutes enunciated in Section 38 of the Interpretation Act and reiterated with some modifications in Section 8 of the General Clauses Act is one of general application where statutes or Acts have to be construed and there is no reasonable ground for holding that that rule of construction should not be applied in construing the charters of the different High Courts These charters were granted under statutory powers and are subject to the legislative power of the Indian Legislature. Assuming, however, but not conceding, that strictly speaking the provisions of the Interpretation Act and the General Clauses Act do not for any reason apply, we see no justification for holding that the principles of construction enunciated in those provisions have no application for construing these charters

91. The Full Bench sought to distinguish the decision in National Sewing Thread Company's case by relying upon a judgment of the Assam High Court in Radha Mohan Pattaak v. Upendra Patowary and Ors. A.I.R. 1962 Assam 71. That case had no relevance to the point which the Full Bench had to decide for it turned upon its own special facts By Section 3 of the Assam Revenue Tribunal (Transfer of Powers) Act, 1948, the Assam High Court was empowered to exercise such jurisdiction to entertain appeals and revise decisions in revenue cases as was vested in the Provincial Government immediately before April 1, 1937, under any law for the time being in force. Section 5 of the said Act provided that no appeal or revision should lie against any order passed by the Assam High Court in the exercise of its powers in appeal or revision under the said Act. A Letters Patent appeal was sought to be filed against the decision of a Single Judge of the said High Court given under Section 3 of the said Act. The Assam High Court held that such an appeal was not competent. Section 5 of the said Act itself showed that no further appeal lay against a decision of the High Court in an appeal filed under Section 3 of the said Act even though given by a Single Judge. The Assam High Court pointed out that the power exercised by the High Court under the said Act was a special jurisdiction

and was an exercise by the High Court of powers possessed by the Provincial Government and the Tribunal which were transferred to the High Court by the said Act and was not the exercise by the High Court of its powers as a High Court under the Act by which it was established. Thus, this was a case of a statutory exclusion of a right of second appeal in a matter decided by the High Court as an appellate and revisional authority constituted by a special Act passed by the Provincial Legislature in the exercise of its legislative power.

92. The Full Bench has confused the source of power with the exercise of that power. Conferment of power is one thing while the exercise of such power is a wholly different thing. Articles 226 and 227 confer certain powers upon the High Courts while Article 225 of the Constitution deals with the power to make rules for the exercise of powers possessed by the existing High Courts, The rule-making power extends to all jurisdictions and powers possessed by the existing High Courts, whether at the date of their Letters Patent or of the Government of India Act of 1915-1919 or of the Government of India Act, 1935, or conferred upon it by the Constitution itself or subsequent to the commencement of the Constitution by any amendment of the Constitution or any law made by the appropriate Legislature. According to the Full Bench, the rule-making power under Article 225 would not extend to the exercise of jurisdiction under Article 226 or 227 because these Articles contain inbuilt rule-making power. This Is equally incorrect. Such a rule-making power is neither expressly provided for nor implied in either of these these two Articles The power to make rules for the exercise of jurisdiction under Articles 226 and 227 by the existing High Courts is contained in Article 225 only.

93. Yet another reason given by the Full Bench for coming to the conclusion that the rule-making power of the High Court would not apply to the exercise of power conferred by Articles 226 and 227 is that as these powers were to be exercised by the High Court, when a Single Judge exercised either of these powers, he did it on behalf of the whole High Court and filing an appeal against the judgment of the Single Judge given in a petition filed under Article 226 or 227 would be tantamount to filing a second petition in the same matter. It is difficult to understand this line of reasoning. Various statutes provide for appeals to the High Court. When the expression "High Court" is used, it only means the High Court acting through one Judge or a Division Court consisting of two or more Judges as may be provided by the rules of Court unless any enactment specifically provides for a particular number of Judges to hear any particular matter. What the Full Bench overlooked was that an appeal is not a fresh proceeding but merely a continuation of the original proceeding as is well-established by decisions of this Court - see, for instance, Garikapatti Veeraya v. N. Subbiah Choudhury [1957] S.C.R. 488, and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand and Ors. .

94. From what has been said above it must follow that when a Single Judge of a Chartered High Court decides a petition under Articles 226 or 227, his judgment is one given pursuant to Article 225 of the Constitution and is appealable under Clause 15 of the Letters Patent unless it falls within one of the excluded categories.

95. According to the Full Bench even were Clause 15 to apply, an appeal would be barred by the express words of Clause 15 because the nature of the jurisdiction under Article 226 and 227 is the

same inasmuch as it consists of granting the same relief, namely, scrutiny of records and control of subordinate courts and tribunals and, therefore, the exercise of jurisdiction under these Articles would be covered by the expression "revisional jurisdiction" and "power of superintendence". We are afraid, the Full Bench has misunderstood this scope and effect of the powers conferred by these Articles These two Articles stand on an entirely different footing. As made abundantly clear in the earlier part of this judgment, their source and origin are different and the models upon which they are patterned are also different. Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any Government. Under Article 227 every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of habeas, corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law (see State of Gujarat v. Vakhatsinghji Vajesinghji Veghela A.I.R. 1968 SC. 1487, 1488, and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Bamnand and Ors.). The orders, directions and writs under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence Inasmuch as at times the end result is the same, the nature of the power to issue these writs is different from the supervisory or superintending power under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fieldS The fact that the same result can at times be achieved by two different processes does not mean that these processes are the same.

96. Under Article 226 an order, direction or writ is to issue to a person, authority or the State. In a proceeding under that Article the person, authority or State against whom the direction, order or writ is sought is a necessary party. Under Article 227, however, what comes up before the High Court is the order or judgment of a subordinate court or tribunal for the purpose of ascertaining whether in giving such judgment or order that subordinate court or tribunal has acted within its authority and according to law. Prior to the commencement of the Constitution, the Chartered High Courts as also the Judicial Committee had held that the power to issue prerogative writs possessed by the Chartered High Courts was an exercise of original jurisdiction (see Mahomedalli Allabux v. Ismailji Abdulali, Raghunath Keshav Khadilkar v. Poona Municipality and Anr., Ryots of Garabandho and other villages v. Zamindar of Parlakimedi and Anr.and Moulvi Hamid Hasan Nomani v. Banwarilal Roy and Ors. L.R. [1946-47] 74 I.A. 120, 130-31; s.c.= A.I.R. 1947 P.C. 90, 98). In the last mentioned case which dealt with the nature of a writ of In their Lordships' opinion any original civil jurisdiction possessed by the High Court and not in express terms conferred by the Letters Patent or later enactments falls within the description of ordinary original civil jurisdiction.

By Article 226 the power of issuing prerogative writs possessed by the Chartered High Courts prior to the commencement of the Constitution has been made wider and more extensive and conferred upon every High Court. The nature of the exercise of the power under Article 226, however, remains

the same as in the case of the power of issuing prerogative writs possessed by the Chartered High Courts A series of decisions of this Court has firmly established that a proceeding under Article 226 is an original proceeding and when it concerns civil rights, it is an original civil proceeding (see, for instance, State of Uttar Pradesh v. Dr. Vijay Anand Maharaj , Commissioner of Income-tax, Bombay and Anr. v. Ishwarlal Bhagwandas and Ors. [1966] 1 S.C.R. 190, 197-8, Ramesh and Anr. v. Seth Gendalal Motilal Patni and Ors. , Arbind Kumar Singh v. Nand Kishore Prasad and Ors. and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand and Ors. .

97. Consequently, where a petition filed under Article 226 of the Constitution is according to the rules of a particular High Court heard by a Single Judge, an intra-court appeal will lie from that judgment if such a right of appeal is provided in the charter of that High Court, whether such Charter be Letters Patent or a statute. Clause 15 of the Letters Patent of the Bombay High Court gives in such a case a right of intra-court appeal and, therefore, the decision of a Single Judge of that High Court given in a petition under Article 226 would be appealable to a Division Bench of that High Court.

98. It is equally well-settled in law that a proceeding under Article 227 is not an original proceeding. In this connection, we need refer to only two decisions of this Court. In Ahmedabad Mfg. & Calico Ptg. Co.'s Case this Court said (at pages 193-4) :

> Article 227 of the Constitution no doubt does not confer on the High Court power similar to that of an ordinary court of appeal. The material part of this Article substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 except that the power of superintendence has been extended by this Article to Tribunals as well. Section 107 according to preponderance of judicial opinion clothed the High Courts with a power of judicial superintendence apart from and independently of the provisions of the other laws conferring on them revisional jurisdiction. The power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors : see Narayan Singh v. Amar Nath, [1954] S.C.R. 565. . . Under Article 226 of the Constitution it may in this connection be pointed out the High Court does not hear an appeal or a revision : that court is moved to interfere after bringing before itself the record of a case decided by or pending before a court, a tribunal or an authority, within its jurisdiction.
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> The origin and nature of the power of superintendence conferred upon the High Courts by Article 227 was thus stated by this Court in Waryam Singh and Anr. v. Amarnath and Anr. [1954] S.C.R. 565. It reads as follows (at pages 570-1) :
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> The material part of article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915, except that the power of superintendence has been extended by the article also to tribunals. . . The only question raised is as to the nature of the power of superintendence conferred by the article. Reference is made to

> Clause (2) of the article in support of the contention that this article only confers on the High Court administrative superintendence over the subordinate courts and tribunals. We are unable to accept this contention because Clause (2) is expressed to be without prejudice to the generality of the provisions in Clause (1). Further, the preponderance of judicial opinion in India was that Section 107 which was similar in terms to Section 15 of the High Courts Act, 1861, gave a power of judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. In this connection it has to be remembered that Section 107 of the Government of India Act, 1915, was reproduced in the Government of India Act, 1935, as Section 224. Section 224 of the 1935 Act, however, introduced Sub-section (2), which was new, providing that nothing in the section should be construed as giving the High Court any jurisdiction to question any judgment of any inferior court which was not otherwise subject to appeal or revision. The idea presumably was to nullify the effect of the decisions of the different High Courts referred to above. Section 224 of the 1935 Act has been reproduced with certain modifications in Article 227 of the Constitution. It is significant to note that Sub-section (2) to Section 224 of the 1935 Act has been omitted from Article 227. This significant omission has been regarded by all High Courts in India before whom this question has arisen as having restored to the High Court the power of judicial superintendence it had under Section 15 of the High Courts Act, 1861, and Section 107 of the Government of India Act, 1915.

99. Under Clause 15 of the Letters Patent of the Bombay High Court no intra-court appeal lay against an "order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act". By the same process of interpretation by reason of which the phrase "pursuant to Section 108 of the Government of India Act" in Clause 15 is to be read as "pursuant to Article 225 of the Constitution of India", the phrase "order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act" is to be read as "order passed or made in the exercise of the power of superintendence under the provisions of Article 227 of the Constitution". The result is that an intra-court appeal does not lie against the judgment of a Single Judge of the Bombay High Court given in a petition under Article 227 by reason of such appeal being expressly barred by Clause 15 of the Letters Patent of that High Court. This is the view also taken by different High Courts (see, for instance, Jagannath Ganbaji Chikhale v. Gulabrao Kaghobaji Bobde, Sukhendu Barua v. Hare Krishna De and Ors. , Shrinivasa Reddiar and Ors. v. Krishnaswami Reddiar and Ors., , In re V. Tirupuliswamy Naidu, , J. and K. Co-operative Bank v. Shams-ud-din- Bacha, A.I.R. 1970 J & K 190, and Ishwar Singh v. Ram Piari and Anr.,).

100. According to the Full Bench, a right of appeal against the judgment of a Single Judge in a petition under Articles 226 or 227 is expressly barred by Rule 18 of Chapter XVII of the Bombay High Court Appellate Side Rules, 1960 (hereinafter referred to as "the Appellate Side Rules"). In order to reach this conclusion the Full Bench relied upon the phrase "finally disposed of" occurring in the said Rule 18. It Is not possible to accept the construction placed by the Full Bench upon the said Rule 18. The Bombay High Court possesses both an Original Side and an Appellate Side. The

Judges of the High Court have, therefore framed two sets of rules of Court, one for the Original Side and the other for the Appellate Side. We need not trouble ourselves with the earlier sets of rules but will confine ourselves only to referring to the rules now in force. Under Rule 636(1) of the Rules of the High Court of Judicature at Bombay (Original Side), 1980, an application for the issue of a direction, order or writ under Article 226 other than an application for a writ of habeas corpus is to be filed on the Original Side if the matter in dispute is or- has arisen substantially within Greater Bombay and is to be heard and disposed of by such one of the Judges sitting on the Original Side or any specially constituted Bench as the Chief Justice may appoint. The provision in the earlier Original Side Rules was the same. Under Chapter XXVIII of the Appellate Side Rules, all applications for writs or orders in the nature of writs of habeas corpus under Article 226 of the Constitution are to be made and heard and disposed of by the Division Bench taking criminal business of the Appellate Side of the High Court. Under Rule 1 of Chapter XVII, of the Appellate Side Rules, every application for the issue of a direction, order or writ under Article 226, if the matter in dispute is or has arisen substantially outside Greater Bombay, is to be heard and disposed of by a Division Bench appointed by the Chief Justice. Rule 4 of Chapter XVII is as follows :

> 4. Division Bench to dispose of the application; rule nisi may be granted by a Single Judge.

Applications under Rule 1 shall be heard and disposed of by a Division Bench; but a Single Judge may grant rule nisi, provided that he shall not pass any final order on the application.

Under Rule 17 of Chapter XVII, an application invoking the jurisdiction of the High Court under Article 227 of the Constitution or under Article 228 of the Constitution is to be filed on the Appellate Side and to be heard and disposed of by a Division Bench to be appointed by the Chief Justice. The relevant provisions of Rule 18 are as follows :

> 18. Single Judge's powers to finally dispose of applications under Article 226 or 227. -

Notwithstanding anything contained in Rules 1, 4 and 17 of this Chapter, applications under Article 226 or Article 227 of the Constitution (or applications styled as applications under Article 227 of the Constitution read with Article 226 of the Constitution) arising out of -

(1) the orders passed by the Maharashtra Revenue Tribunal under any enactment.

x x x x may be heard and finally disposed of by a Single Judge to be appointed in this behalf by the Chief Justice.

x x x x The omitted portion of Rule 18 sets out the orders passed by authorities under various statutes and decrees and orders passed by subordinate courts in any suit or proceeding, excluding those arising out of the Parsi Chief Matrimonial Court, which are to be heard and disposed of by a Single Judge.

101. The non obstante clause in Rule 18, namely, "Notwithstanding anything contained in Rules 1,4, and 17 of this Chapter", makes it abundantly clear why that rule uses the words "finally disposed of". As seen above, under Rules 1 and 17, applications under Article 226 and 227 are required to be heard and disposed of by a Division Bench. Rule 4, however, gives power to a Single Judge to issue rule nisi in an application under Article 226 but precludes him from passing any final order on such application. It is because a Single Judge has no power under Rules 1, 4 and 17 to hear and dispose of a petition under Article 226 or 227 that the non-obstante clause has been introduced in Rule 18. The use of the words "be heard and finally disposed of by a Single Judge" in Rule 18 merely clarifies the position that in such cases the power of the Single Judge is not confined merely to issuing a rule nisi. These words were not intended to bar a right of appeal. To say that the words "finally disposed of" mean finally disposed of so far as the High Court is concerned is illogical because Rules 1, 4 and 17 use the words "be heard and disposed of by a Division Bench" and were the reasoning of the Full Bench correct, it would mean that so far as the High Court is concerned, when a Single Judge hears a matter and disposes it of, it is finally disposed of and when a Division Bench disposes it of, it is not finally disposed of. The right of appeal against the judgment of a Single Judge is given by the Letters Patent which have been continued in force by Article 225 of the Constitution. If under the rules of the High Court, a matter is heard and disposed of by a Single Judge, an appeal lies against his judgment unless it is barred either under the Letters Patent or some other enactment. The word "finally" used in Rule 18 of Chapter XVII of the Appellate Side Rules does not and cannot possibly have the effect of barring a right of appeal conferred by the Letters Patent. As we have seen above, an intra-court appeal against the judgment of a Single Judge in a petition under Article 226 is not barred while Clause 15 itself bars an intra-court appeal against the judgment of a Single Judge in a petition under Article 227.

102. Petitions are at times filed both under Articles 226 and 227 of the Constitution. The case of Hari Vishnu Kamath v. Syed Ahmad Ishaque and Ors. , before this Court was of such a type. Rule 18 provides that where such petitions are filed against orders of the tribunals or authorities specified in Rule 18 of Chapter XVII of the Appellate Side Rules or against decrees or orders of courts specified in that Rule, they shall be heard and finally disposed of by a Single Judge. The question is whether an appeal would lie from the decision of the Single Judge in such a case. In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in Aidal Singh and Ors. v. Karan Singh and Ors. and by the Punjab High Court in Raj Kishan Jain v. Tulsi Dass and Barham Dutt and Ors. v. Peoples' Co-operative Transport Society Ltd., New Delhi and Ors. and we are in agreement with it.

103. For the reasons aforesaid it must be held that the Full Bench case of Shankar Naroba Salunke and Ors. v. Gyanchand Lobhachand Kothari and Ors. was wrongly decided except for the conclusion reached by the Full Bench that no appeal lies under Clause 15 of the Letters Patent of the Bombay

High Court against the judgment of a Single Judge of that High Court in a petition under Article 227 of the Constitution but not the reasons given by the Full Bench for reaching this particular conclusion. Accordingly, the said Full Bench decision is hereby overruled to the extent mentioned above and the view taken by the Special Bench in State of Maharashtra v. Kusum Charudutt Bharme Upadhya is approved.

104. Before concluding the judgment on this part of the case it may be mentioned that in Shah Babulal Khimji v. Jayaben D. Kania and Anr. S. Murtaza Fazal All, J., who spoke for himself and Varadarajan, J., observed at the end of his judgment as follows (at page 260) :

> Before closing this judgment we may indicate that we have refrained from expressing any opinion on the nature of any order passed by a Trial Judge in any proceeding under Article 226 of the Constitution which are not governed by the Letters Patent but by rules framed under the CPC under which in some High Courts writ petitions are heard by a Division Bench. In other High Courts writ petitions are heard by a Single Judge and a right of appeal is given from the order of the Single Judge to the Division Bench after preliminary hearing.
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> The third member of the Bench, A.N. Sen, J., who delivered a separate judgment did not make any observation to the above effect or concur with the above observation.

105. The question whether an intra-court appeal lay against the judgment of a Single Judge in a petition under Article 226 or 227 of the Constitution was not before the Court in Shah Babulal Khimji's case and did not fall to be decided in it. In fact, as stated in the above passage, the Court refrained from expressing any opinion with respect to the nature of an order passed in a proceeding under Article 226 of the Constitution. The statement in the above passage that such proceedings are governed by rules framed under the CPC and not by Letters Patent was merely a casual and passing observation and not intended to be a statement of the law on the point. In fact, proceedings under Article 226 cannot be governed by rules made by the High Courts under the CPC, 1908. Under Sections 122 and 125 of the Code, the High Courts are conferred the power to make rules regulating their own procedure and the procedure of the civil courts subject to their superintendence and they can by such rules annul, alter or add to all or any of the rules in the First Schedule to the Code. These rules are, therefore, intended to regulate the exercise of procedure in respect of matters to which the Code applies. The Code deals with suits and appeals, reference, review and revision arising out of orders and decrees passed in suits. Under Section 141, the procedure provided in the Code in regard to suits is to be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction. The Explanation to that section Inserted by the CPC (Amendment) Act, 1976, provides as follows :

> Explanation. - In this section, the expression 'proceedings' includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.

> The power of a High Court to make rules of Court and to regulate the sittings of the Court and members thereof sitting singly or in Division Courts is to be found in its charter, whether it be a statute or Letters Patent. The position with respect to existing High Courts has already been set out in detail above. So far as High Courts which came into existence after the commencement of the Constitution are concerned, whenever new High Courts were set up the relevant statute made provisions in that behalf, for instance, the Andhra State Act, 1953, the States Reorganisation Act, 1956, the Bombay Reorganisation Act, 1960, the Delhi High Court Act, 1966, and the State of Himachal Pradesh Act, 1970. It is the charter of the High Court which generally confers a right of intra-court appeal and it is the rules made under the rule-making power of the High Court which generally provide which matters are to be heard by a Single Judge and which by a Division Bench though at times statutes may also do so, as for example, the Kerala High Court Act, 1958, and the Karnataka High Court Act, 1961. Where by the charter of a High Court matters are not required to be heard by any particular number of Judges and such charter provides for an intra-court appeal from the decision of a Single Judge, whether such an appeal would lie or not would depend upon whether by the rules made by the High Court in the exercise of its rule-making power the matter is heard by a Single Judge or a Division Bench subject to the condition that such right of appeal is not otherwise excluded.

106. The petition filed by the Appellants before the Nagpur Bench of the Bombay High Court was admittedly under Article 227 of the Constitution and under the rules of the High Court it was heard by a Single Judge. Under Clause 15 of the Letters Patent of that High Court an intra-court appeal against the decision of the learned Single Judge was expressly barred. The appeal filed by the Appellants from the decision of the Single Judge to the Division Bench was, therefore, rightly dismissed as being not maintainable.

107. Learned Counsel for the Appellants also sought to challenge the decision of the learned Single Judge on the merits. The real object of granting Special Leave to Appeal in this case was to consider the question of law arising in the case. Apart from the question of maintainability of the appeal, there was no merit in the appeal filed by the Appellants before the Division Bench and even otherwise that appeal deserved to be dismissed.

108. In the result, this Appeal fails and is dismissed. The parties will bear and pay their own costs of this Appeal.