Supreme Court of India
Ladli Prasad Jaiswal vs Karnal Distillery Co., Ltd., & Ors on 17 December, 1962
Equivalent citations: 1963 AIR 1279, 1964 SCR (1) 270
Author: S C.
Bench: Sinha, Bhuvneshwar P.(Cj), Gajendragadkar, P.B., Wanchoo, K.N., Gupta, K.C. Das, Shah, J.C.

PETITIONER:
LADLI PRASAD JAISWAL

Vs.

RESPONDENT:
KARNAL DISTILLERY CO., LTD., & ORS.

DATE OF JUDGMENT:
17/12/1962

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
SINHA, BHUVNESHWAR P.(CJ)
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
GUPTA, K.C. DAS

CITATION:
1963 AIR 1279 1964 SCR (1) 270
CITATOR INFO :
F 1963 SC1322 (3)
R 1965 SC1442 (18)
R 1967 SC 878 (9)
R 1971 SC 658 (6)
RF 1974 SC1178 (8)
R 1974 SC2048 (2)
RF 1976 SC 163 (19)

ACT:
Company-Managing Director appointed on certain terms-Resolution removing Managing Director and appointing another-General Meeting -Subsequent resolution passed cancelling previous resolution-Suit by the Director-Fraud and undue influence on the part of the appellant alleged-Whether first appellate, court went far beyond pleadings-Letters Patent Appeal-Certificate under Art. 133 (1) (a) of the Constitution Whether competent-"Court immediately below"-Courts subordinate-Constitution of India, Art. 133 (1) (a) and (b)Companies Act, 1956(I of 1956) s. 155 - Code of Civil Procedure, 1908 (Act V of 1908), ss. 100 ,110,0.6, r. 4-Indian Contract Act, 1872 (9 of 1872) s. 16.

HEADNOTE:

The appellant filed a suit in the Court of the Subordinate judge for a declaration that certain resolutions of the directors and the shareholders in a private limited company passed on March 3 and 28, 1946, and at the meetings of the Directors held thereafter were illegal and void and for a declaration that the resolutions of October 16, 1945, were operative and in force. The respondents resisted the suit contesting that respondents 2 to 5 were coerced by the appellant who took advantage of his dominating position, into passing the resolutions on October 16, 1945, and those resolutions were not binding on the company.

The Subordinate judge, held that the written statements did not contain sufficient particulars of the plea of coercion and undue influence' and that the respondents having failed to give evidence in support of the plea of coercion and undue influence, the burden of proving which lay upon them the appellant's suit must be decreed. In appeal the District Court held that the appellant was in a position to dominate the will of respondents 2 to 5 and he took advantage of that position and on that account the resolutions relied upon by the appellant dated October 16, 1945, were vitiated by coercion and undue influence, and the appellant could not get a decree relying upon those resolutions. The appellant appealed to the High Court. A single Judge of the High Court found that the District judge

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had 'travelled far beyond the pleadings' and therefore his findings on issue of coercion and fraud could not be upheld, In an appeal under cl. 10 of the Letters Patent a Division Bench of the High Court found that the appellant was in a position to dominate and had obtained unconscionable advantage and it was for him to prove that the resolutions of October 16,1945, were not vitiated by coercion and fraud which burden he had failed to discharge. They further held that later resolutions of the company were not binding on the appellant because no notice was issued to him of the meeting of the company; but no decree could be granted to him since 'equity declines to lend its aid to a person whose conduct has been inequitable'. A certificate of fitness was however granted to appeal to this Court under Art. 133 (1) (a) of the Constitution.

Before this Court, it was urged that the appeal did not involve any substantial quesion of law and the High Court was not competent to grant the certificate under Art. 133 (1) (a) and (b). It was submitted that the expression 'Court Immediately below' in Art. 133 meant a court subordinate to the High Court and a single judge not being subordinate to a Division Bench of the High Court the 'Court Immediately below' was the District Court.

Held, that there is nothing in the phraseology used or the

context which justified the view that the expression 'Court immediately below' in Art. 133 (1) of the Constitution is used in two different senses according as the High Court is trying an appeal in a proceeding instituted in the High Court in exercise of the Original Jurisdiction, and a proceeding instituted in exercise of its appellate jurisdiction. The test for determining whether an aggrieved party has no right to appeal, other condition being fulfilled is not whether the judgment is of a court subordinate, but whether the judgment is of a court immediately below. The two expressions being different the same considerations do not apply in their interpretation. The certificate granted by the High Court under Art. 133 (1) (a) and (b) was competent because a single judge of the High Court hearing either a proceeding as a court of original jurisdiction or in exercise of appellate jurisdiction is a court immediately below the Division Bench which hears an appeal against his judgment under the relevant clause of the Letters Patent.

Toolsey Prasad Bhuckt v.Benayek Misser,(1896)L.R.23 I.A. 102, referred to.

Wahid-ud-din v. Makhan Lal (1944) I. L. R. 26 Lah. 242, and Debendra Nath Das v. Bibudhendra Mansingh, (1915) I. L. R. 43 Cal. 90, disapproved.

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Minna Heatherly v. B. C. Sen, A. 1. R. 1927 Lah. 537 and Gopal Lal v. Balkissan, (1931) 1. L. R. 13 Lah. 338, approved.

Kishanlal Nandlal v. Vithal Nagayya, I. L. R. 1955 Nag. 821, disapproved.

Held, that a finding that a particular transaction is vitiated on the ground of undue influence is primarily a finding on a question of fact.

Satgur Prasad v. Har Narain Das, (1932) L. R. 59 I. A. 147 followed.

The High Court has no jurisdiction to entertain a second appeal "on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be."

Mussammat Durga Choudhrain v. Jawahir Singh Chowdhri, (1890) L. R. 17 I. A. 122, followed.

But a decision of the first appellate court reached after placing the onus wrongly resulting in a substantial error or defect in the decision of the case on the merits or based on no evidence is not conclusive and a second appeal lies to the High Court against the decision.

A plea of undue influence must be precise and all necessary particulars in support of that plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the court should, before proceeding with the trial of the suit insist upon the particulars.

Bharat Dharma Syndicate v. Harish L. R. 64 I. A. 143 and Biqhandas Narain v. Jagannath [1951] S. C . R. 548, followed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION :No. 535 of 1960. Appeal from the judgment and decree dated October 18, 1957 of the Punjab High Court in Letters Patent Appeal No. 100 of 1954.

B. R. Tuli, S. K. Kapur and K. K. Jain, for the appellent.

M. C. Setalvad, Attorney-General for India,A. N. Khanna and Harbans Singh, for the respondents.

1962. December 17. The judgment of the Court was delivered by SHAH, J.-One Kishori Lal Jaiswal started a "distillery business' in the name of Kishori Lal & Sons and set up a factory at Kamal in the Punjab for manufacturing liquor. Kishori Lal died in 1528 leaving him surviving three sons, Durga Prasad, Ladli Prasad and Shanti Prasad. Durga Prasad who was the eldest surviving member became karta of the Joint Hindu family, and continued the family business. On the death of Durga Prasad in 1934 leaving him surviving two sons Sajjan Lal and Madan Lal and his wife Suraj Mukhi, Ladli Prasad became the 'karta' of the family and continued the business. By mutual arrangement on November 5, 1940 the joint Hindu Family of three branches was disrupted and the business of Kishori Lal & Sons was thereafter conducted as a partnership concern each branch having a third share therein. On March 23, 1941 a private limited company called the Karnal Distillery Company Ltd. was incorporated under the Indian Companies Act, 1913, and the business of Kishori Lal & Sons was taken over by that Company. Under the final allotment of shares made by the Company on August 1, 1941- 1005 shares were allotted to the branch of Durga Prasad, 1503 shares to Ladli Prasad and 1003 to Shanti Prasad. By the Articles of Association the maximum number of Directors was five and the maximum number was two. Ladli Prasad, SHanti Prasad and Suraj Mukhi were appointed as the first Directors of the Campany. Every year one-third of the Directors except the Managing Directors were to retire by rotation. Ladli Prasad was appointed Managing Director for ten years with the right to continue for another ten years unless a notice of fifteen days within eight years was given by a two-third majority at a special general meeting held for the purpose of terminating his appointment as Managing Director, and that two third of the total number of members could expel a member of the Company. Ladli Prasad as Manag- ing Director of the Company drew an allowance of Rs. 1,800/- per month, a commission of 7 1/2 per cent on net profits of the Company, a motor-car allowance of Rs. 350/- per month with a right to be provided a new motor-car every three years for personal use and Rs. 30/- per day as travelling allowance. The other Directors of the Company were paid remuneration at the rate of Rs. 250/- per month, and each Director who attend the meeting of the Board of Directors was allowed in addition Rs. 25/-per day.

Manifestly there was great disparity between the remuneration received by Ladli Prasad and the other Directors, and this gave rise to quarrels between the members of the family. At an extraordinary general meeting of the Company held on February 20, 1945 at which Shanti Prasad, Sajjan Lal, Madan Lal and Suraj Mukhi were present, it was resolved that Ladli Prasad be removed from his office of Managing Director and that Shanti Prasad be appointed Managing Director instead. But Ladli Prasad declined to hand over charge of the Managing Director's office to Shanti

Prasad. A suit was thereupon filed by Shanti Prasad in the Court of the Subordinate Judge, Karnal, on behalf of the Company against Ladli Prasad on April 10, 1945 for a declaration that he was lawfully appointed Managing Director of the Company and for enforcing the resolution dated February 20, 1945. Ladli Prasad in his turn filed a suit for a declaration that Shanti Prasad had ceased to be a Director of the Company. In the suit filed by Shanti Prasad on behalf of the Company,, the trial Court appointed Suraj Mukhi and Madan Lal as joint receivers to manage the affairs of the Company for the duration of the suit. Against that order Ladli Prasad appealed to the High Court of judicature at Lahore and obtained an order staying the operation of the order appointing receivers.On October 16, 1945 at an extraordinary general meeting of the Company held at the residence of Ladli Prasad at which all the members of the family were present certain special resolutions were passed. The effect of the resolutions was that:-

(1) That each branch of the family should own 1170 shares and for this purpose Ladli Prasad should transfer 167 shares to Shanti Prasad and 166 to the branch of Durga Prasad. (2) Resolution dated February 20, 1945 pur- porting to remove Ladli Prasad from the Managing Directorship was cancelled. (3) Resignation of Ladli Prasad of his post as Managing Director was accepted, and he was appointed permanent Director and Chairman, and Madan Lal son of Durga Prasad was appointed Director in place of Suraj Mukhi who submitted her resignation. Shanti Prasad continued to be a Director of the Company.

(4) The maximum number of Directors was fixed at three and the quorum of the Directors' meeting was also fixed at three. (5) Every decision submitted to a meeting of the Directors or members was to be deemed to be passed only if the decision thereon. be unanimous, and the proceedings recorded being signed by the Chairman of the Company and all the Directors or the members, as the case maybe, present at the meeting.

(6) Shanti Prasad was appointed Manager for five years under the control of the Board of Directors.

(7) Article 47 which gave power to a two- third majority to expel a member of the Company was deleted.

(8) Each Director was to be paid Rs. 900/per month as remuneration and Rs. 25/- for each meeting of the Board of Directors attended. No extra remuneration to be paid to Shanti Prasad as Manager or to Ladli Prasad as Chairman.

(9) Ladli Prasad gave up the remuneration which had been provided for him under the Articles of Association as originally framed and he was discharged in respect of all previous accounts which were ratified and confirmed.

(10) All contracts executed, business done, benefits derived by Ladli Prasad under the facilities granted to him by resolution dated April 30, 1941 of the Board of Directors

were confirmed and ratified and all transactions recorded in the accounts of the Company for the period April 1, 1941 till the date of the resolution were ratified and it was resolved that the accounts of each of the four years ending March 31, 1942, 1943, 1944 and 1945 be confirmed.

(11) Dividend at the rate of 65 per cent of the face value of the share free of income-tax was declared.

(12) While ratifying and confirming the con- tracts executed, business done, benefits derived in the name, or from the Company by any Director or the Managing Director of the Company in the past, it was resolved that in future no Director of the Company will contract in the name of the Company for his personal benefit.

(13) A large number of Articles of Association of the Company were amended in order to make them consistent with the special resolutions.

Effect was given to these resolutions. Shanti Prasad assumed the office of Manager of the Company and took charge of the Company's properties, assets and business. Re- adjustment in share-holding of the members was also effected, Ladli Prasad having transferred the shares according to the terms of the resolution. But disputes started afresh. In a meeting of the Board of Directors held on March 3, 1946, at which Shanti Prasad and Madan Lai were present, it was resolved to call an extraordinary general meeting of the share-holders of the Company on March 28, 1946 to consider a requisition received from Suraj Mukhi and Madan Lal for cancelling some of the special resolutions passed at the meeting held on October 16, 1945. No notice of this meeting was given to Ladli Prasad. At the meeting held on March 28, 1946-in the absence of Ladli Prasad- several resolutions were passed to the effect that, all amendments made in the Articles of Association by the resolutions dated October 16, 1945 do stand cancelled and the original Articles of Association of the year 1941 (including Art. 47 which authorised the Company by a 2/3rd majority to expel any member) do stand restored. It was also resolved that Ladli Prasad be removed from the dire- ctorate and Chairmanship of the Company, and in his place Suraj Mukhi be appointed Director of the Company at a remuneration of Rs. 900/- per month; that Shanti Prasad be appointed Managing Director for ten years, such appointment not being liable to termination earlier by the members; and that Shanti Prasad do receive in addition to his remuneration as Director Rs. 1000/- per month as Managing Director, a travelling allowance of Rs. 30/- per day and a motor-car allowance of Rs. 200/- per month.

Coming to know about these amendments, Ladli Prasad called upon Shanti Prasad and the other members of the Company to rescind the resolutions, and failing to induce them to comply with the requisition, he filed a petition on May 1, 1946 in the High Court of judicature at Lahore for an order for winding up the Company. An order for winding up the Company was passed by a single judge, but was set aside in appeal by the High Court of Lahore by its order dated January 19, 1956.

On November 26, 1946, Ladli Prasad filed a suit in the Court of the Senior Subordinate judge, Karnal for a declaration that the meeting and proceedings of the Board of Directors dated March 3, 1946, and the extraordinary general meeting dated March 28, 1946, and all meetings of the

Directors held after March 28, 1946 were illegal, ultra vires, ineffective and operated as a fraud on the Company and the interests of minority members of the Company and that the unanimous resolutions of the extraordinary general meeting dated October 16, 1945, continued to remain in force and were still operative, and a permanent injunction restraining the Company, Shanti Prasad, Suraj Mukhi, Sajjan Lal and Madan Lal (who were impleaded respectively as defendants I to 5) from acting upon or carrying into effect the resolutions passed in the meetings dated March 3, 1946 and March 28, 1946 and all meetings held after March 28, 1946. The defendants by separate written statements resisted the suit contending inter alia that the defen-

dants 2 to 5 were coerced by Ladli Prasad taking advantage of his position, into passing the resolutions in the extraordinary general meeting dated October 16, 1945, and that the resolutions were not binding upon the Company and the other defendants.

The Subordinate judge raised a large number of issues the first of which related to the challenge to the validity of the resolution dated October 16, 1945, raised by the defendants on the ground that it was procured by coercion and undue influence. Even though the burden of proving the first issue which was substantially the central issue in the suit was laid upon the defendants, they did not attend the Court for examination as witnesses. By his judgment dated May 25, 1953, the Subordinate judge observed that the written statement did not contain any 'substantial particulars of the plea of coercion or undue influence', and that the defendants having failed to submit themselves to give evidence in support of their plea of coercion or undue influence despite several opportunities given in that connection, a strong presumption arose against the defendants; that viewed in the context of the resolution dated February 20, 1945, passed by the defendants, and the subsequent litigation which ensured between the parties, and the fact that the resolutions dated October 16, 1945 were acquiesced in by the defendants and were never attempted to be avoided by resort to a competent court, and even the allegation that they were improperly procured was made for the first time in the written statement in the suit before him, the plea of undue influence and coercion was not substantiated; and that the resolutions dated October 16, 1945, were not invalid. He further held that the resolutions passed at the Directors' meeting dated March 3, 1946, and at the extra-ordinary general meeting on March 28, 1946, were unauthorised and invalid; that by holding the meeting on March 28, 1946, in breach of the Articles of Association and the resolutions dated October 16, 1945, it was intended to play a fraud on Ladli Prasad by committing a clear breach of the contract; and that the matter agitated by the plaint did not relate to the internal management of the Company. The learned judge accordingly granted the relief claimed by the plaintiff for declaration and injunction.

In appeal by the defendants, the District judge, Karnal held that Ladli Prasad was in a position to dominate, the will of defendants to 5 "who were in a helpless position, being hard hit by the lack of" adequate financial resources. that they were under pressure exercised by the plaintiff induced to give their consent to the resolutions in the meeting held on October 16, 1945, and on that account the resolutions were ineffective. He observed that Ladli Prasad took undue advantage of his dominating position qua the affairs of the Company and compelled the defendants 2 to 5 to pass the resolutions and thereby obtained an unfair advantage in that he was absolved from all liability incurred by him in the course of his management prior to the meeting held on October 16, 1945, and

that he obtained -a power of veto over the affairs and smooth running of the business of the Company'. The District judge agreed with the trial Court that no proper notice was served upon Ladli Prasad of the meetings held on March 3, 1946, and March 28, 1946, and therefore the resolutions at those meetings were not binding upon Ladli Prasad and that in any event the resolutions of those dates were 'a fraud on the minority rights' and were illegal and ultra vires, but as the plaintiff Ladli Prasad had filed his suit relying on the resolution dated October 16, 1945, which was invalid, no relief could be awarded to him.

In appeal against the decree of the District judge dismissing the suit filed by Ladli Prasad, Bishan Narain, J., of the High Court of Punjab observed that the findings of the District judge "travelled for beyond the pleadings", and only two facts which were pleaded were proved by the evidence viz. that the High Court of Lahore had stayed the order of the Subordinate judge appointing Receivers of the affairs of the Company and that Ladli Prasad was the eldest male member. The learned judge on a review of the evidence found that Ladli Prasad was not in a position to dominate the will of defendants 2 to 5 when the resolutions dated October 16, 1945, were passed and they were the result of a compromise unanimously accepted, and were binding on the parties. He confirmed the view of the trial Court and the District judge that the resolutions dated March 3, 1946, and March 28, 1946, were invalid because no notice was given to Ladli Prasad of the proceedings, and in the light of his findings granted a decree for declaration and injunction as prayed but subject to the proviso that the decree shall not affect the rights and liabilities of third parties who were not members of the Company, unless thereby the rights of the plaintiff Ladli Prasad, and the Company were adversely affected. Against this judgment an appeal was preferred by the defendants with leave under cl. 10 of the Letters Patent. In appeal the Division Bench of the High Court reversed the decree passed by Bishan Narain, J., and dismissed the suit filed by Ladli Prasad. In the view of the High Court Ladli Prasad as the elder brother of Shanti Prasad and uncle of Sajjan Lal and Madan Lal was in a position to dominate their will and availing himself of that position he obtained an unfair advantage over them and that the failure of Shanti Prasad to submit himself to examination before the Court in support of his case though improper could not be considered as fatal to a decision in favour of the defendants. They observed :

> "I feel convinced that Ladli Prasad was throughout in a position of commanding influence over his brother and younger nephews, and in consequence thereof, he benefited himself very substantially. This superiority and position of vantage that he occupied continued up to and even after the 16th October, 1945. Under the circumstances, it was for him to rebut the presumption that the benefits which he had thus obtained did not stem from his undue influence, but had been given by the defendants freely and without any pressure, or coercion."

They also observed that Ladli Prasad was in the position to dominate the will of defendants 2 to 5 and had obtained unconscionable advantage over them, and it was for Ladli Prasad to establish that the resolution dated October 16, 1915 was not vitiated on account of undue influence and this Ladli Prasad has failed to establish. They summarised their conclusions on the issue of undue influence as follows :-

"To sum up, the conclusion of the District ..Judge on the first issue to the effect that the resolutions mentioned in para 6 of the plaint and passed at the Extraordinary General Meeting. dated the 16th October., 1945 were ineffective as having been passed under undue influence, was a finding of fact; and this conclusion had been arrived at after a review of the evidence placed on the record and after having surveyed the facts and circumstances of the case. This finding was not based either on misconception of evidence or by adopting a procedure contrary to law. Such evidence as there is on the record, the history of the business from its very inception till the final disputes between the parties, their relationship inter se, and the manner in which the plaintiff derived benefit for himself, and the circum-

stances of the case go to show :

(a) that the plaintiff was in a position to dominate the will of the defendants and used that position to obtain unfair advantage for himself over the other ;

(b) that he held an authority over them which was real and apparent by dint of his being formerly a karta and later on an elder brother in loco parents. He stood in a fiduciary relation to the other standing in a position of active confidence ;

(c) that the plaintiff in consequence of the resolutions passed on the 16th of October 1945 obtained for himself unfair advantage to their serious detriment by virtue of his position to dominance and the transactions entered into on 16th October 1945 appear to be unconscionable ; and

(d) that the burden of proof that the transactions were not induced by undue influence was upon the plaintiff, he being in a position to dominate the will of others which he failed to discharge."

On the other issues they held that the proceedings of the resolutions in the meetings dated March 3, 1946 and March 28, 1946 were not binding upon Ladli Prasad, but the claim made by Ladli Prasad for a permanent injunction could not be entertained because "equity declines to lend its aid to a person whose conduct has been inequitable in relation to the subject matter of the suit and that if the prayer of Ladli Prasad was granted, it would result in a deadlock and the Company's working and affairs would come to a stand still necessitating the winding up of the Company." They suggested that it was open to Ladli Prasad to seek relief available to him under s. 155 of the Indian Companies Act, 1956 and it was open to Ladli Prasad to invoke the powers of the Court or of the Central Government under the Indian Companies Act, if so advised, but the High Court would not, having regard to the apprehension of an immediate deadlock, be justified in issuing a permanent injunction claimed by him in the suit.

With certificate of fitness granted by the High Court under Art. 133 (1) (a) of the Constitution this appeal is preferred. Two questions arise at the threshold in this appeal :-

(1) Whether it was competent to the High Court to grant a certificate under Art. 133 (1) (a) or (b) of the Constitution; and (2) Whether in reversing the decree of the District judge, Bishan Narain, J., trans- gressed the restrictions imposed upon the powers of the High Court by s. 100 of the Code of Civil Procedure.

Article 133 (1), in so far as it is material, provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies-

(a) that the amount or value of the subject- matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law ; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value ; or

(c) that the case is a' fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certified that the appeal involves some substantial question of law.

The High Court has not certified the case under sub-clause

(c) of Art. 133(1). There is also no dispute that the judgment of the High Court involves directly some claim or question respecting property of the value exceeding twenty thousand rupees. The Attorney-General, however, contended that the judgment of the High Court against which this appeal is preferred affirms the decision of the court immediately below and the appeal does not involve any substantial question of law and therefore the High Court was not competent to grant the certificate under Art.133(1)(a) &

(b). It is urged that an appeal against the judgment of a single judge to a Division Bench under cl. 10 of the Letters Patent is a 'domestic appeal' within the High Court and in deciding whether the decree of a Division Bench in an appeal under the Letters Patent from a decision of a single judge exercising appellate jurisdiction affirms the decision of the Court immediately below, regard must be had to the decree of the Court subordinate to the High Court, against the decision of which appeal was preferred to the High Court. In other words, it is contended that in this case the decision of the Court immediately below the Division Bench was the deci-

sion of the District judge and not of Bishan Narain, J., this it is contended is so, because the expression 'court immediately below' used in the Constitution means 'court subordinate. and a single judge of the High Court not being a court subordinate to the Division Bench qua the Division Bench the District Court was the court immediately below. But the two expressions have not the same meaning. A court subordinate to the High Court is a court subject to the superintendence of

the High Court. whereas a court immediately below is the court from whose decision the appeal has been filed. If the two expressions are equated, the right of appeal against the decree of the High Court sitting in appeal over the decision of a single judge exercising original jurisdiction would be severely restricted for in such an appeal whether the judgment is of affirmance or reversal -the High Court can certify a case under Art. 133 (1) cls. (a) & (b) only if the appeal involves a substantial question of law. The Attorney- General, however, concedes and in our judgment properly that there has been a long standing practice which has the approval of the Privy Council (see Tulsi Prasad v. Benayak : L. R. 23 I. A. 102) that if the decree or order of the Division Bench reverses the judgment of a single ,Judge trying a suit or proceeding in exercise of original jurisdiction of the High Court and the condition as to valuation is satisfied, an appeal lies as a matter of course, i.e. without satisfying the condition that it involves a substantial question of law. This view can be justified only if a single Judge of a High Court trying a suit or proceeding in exercise of the original jurisdiction is a court immediately below the Division Bench of the High Court which decides an appeal from his decision. The right to appeal against the judgment of a single judge whether exercising original jurisdiction or exercising appellate jurisdiction to a Division Bench is governed by the same clause of the Letters Patent. If for certifying a case for appeal to this Court in a pro-

ceeding tried in exercise of the original jurisdiction the judgment of a single judge is to be regarded as the decision of the court immediately below a Division Bench to which an appeal is filed under the Letters Patent, it is difficult to discover any logical ground for holding that the judgment of a single judge in exercise of appellate jurisdiction is not such a decision. Clause 10 of the Letters Patent of the Lahore High Court (which continues to apply to the Punjab High Court) provides, in so far as it is material:-

> "'And we do further ordain that an appeal shall lie to the said High Court of judicature x x x x x x from thejudgment (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 x x x x x) of one judge of the said High Court x x x x x 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 x x x x x 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; x x x X.

Manifestly the clause confers an unqualified right of appeal to the High Court from the judgment of a single judge exercising original civil jurisdiction. Similarly there is a right of appeal from a judgment of a single judge hearing a civil appeal where the judgment is not in an appeal from an appellate decree. But against the judgment of a single judge exercising powers in appeal from an appellate decree, an appeal under the Letters Patent only lies if the judge declares that the case is a fit one for appeal, and not otherwise. There is no warrant for making a distinction between an appeal filed against the judgment of a single judge exercising original jurisdiction and a judgment in exercise of appellate jurisdiction. There is nothing in the context to support the plea that the

expression court immediately below' includes a judge of the High Court trying a proceeding in exercise of original jurisdiction, i. e. sitting as a court of first instance, but not a judge exercising appellate jurisdiction. The Constitution in cl. (1) (a) of Art. 133 has expressly referred to a 'court of first instance' in prescribing the condition relating to the value of the subject- matter and if it was intended that for the purpose of deciding whether the judgment of the High Court sought to be appealed against affirmed the decision of the Court immediately below, the decision of a single judge was to be ignored, if it was a judgment in exercise of appellate powers, but not when he was exercising original jurisdiction, an appropriate provision that behalf would have been enacted. In the absence of any such enactment, the expression "court immediately below' in Act. 133 (1) must mean the court from the decision of which an appeal has been filed to the High Court, whether such court is a single judge of the High Court or a Court subject to the superintendence of the High Court.

In Wahid-ud-din v. Makhan Lal (1) a full Bench of the Lahore High Court (Blacker, J., dissenting), held that for the purposes of s. 110 of the Code of Civil Procedure 1908 (which is in material terms identical with Art. 133 of the Constitution) a judge of a High Court sitting to hear not an original proceeding, but as a court of appeal cannot be considered a 'court immediately below' the Bench hearing the Letters Patent appeal from his judgment, (1) [1944] I.L.R. 26 Lah. 24.

Din Mohammad, J., delivering the principal judgment of the Court observed at p. 247 :

> "Wherever any provision is made for an appeal to the High Court, it is the High Court as such that is contemplated and not the Court of any individual judge or a combination of different judges. It is only for the sake of convenience facility of disposal that some cases are required to be heard by one judge and some by more judges than one. The Court accordingly continues to be the same even if by any domestic arrangement an appeal from one Judge lies to a Bench of two judges and must be taken to be the High Court in either case. x x x x x X. It is obvious that the authorities dealing with Judge of the High Court in the exercise of his original jurisdiction can render no assistance in the disposal of this matter and it was for this reason that this distinction was emphasized when the question was formulated. A judge sitting on the original side is merely discharging the functions of a trial Court and to all intents and purposes, therefore, be is a Court of first instance and when an appeal is lodged against his order, as a Court he is immediately below the Court which hears the appeal. Such an appeal is provided for even in the Code of Civil Procedure itself as an appeal from an original decree. This, however, is not the case when the same Judge sits on the appellate side and- for the purposes of that appeal is the High Court in himself. Neither the Code of Civil Procedure nor the Punjab Courts Act contemplates an appeal to another Court from an order made in the High Court whether by one judge or more than one and consequently the same analogy cannot apply."
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> The learned judge further observed: "I cannot reconcile myself to the position that a judge sitting alone can be characterised as a tribunal inferior to the Letters Patent Bench, merely because the Bench has power to modify or reverse his judgment. It is

> not with an idea of implying any Subordination of the Court of the Single judge to the Letters Patent Bench that such an appeal is provided for by Letters Patent, it is merely with a view to provide a further safeguard in the interests of the litigant that the domestic rules framed by the High Court permit a case to be heard by a judge sitting alone."

Abdur Rahman, J., agreeing with Din Mohammad, J., observed "x x when a suit or proceeding is decided on the original side, it cannot but be held to have been disposed of by the Court of first instance and should be of the value of ten thousand rupees or upwards before an appeal can be taken to the Privy Council under the first paragraph of section 110. It is this Court of first instance which would usually be covered by the expression "the Court immediately below" used in the latter part of that section. x x x x Different considerations might prevail in construing the expressions "the Court of first instance" and "the Court immediately below" when "the Court immediately below" does not happen to be the Court of the first instance but as long as they are the same the decision of the Court of first instance whether it is by a Subordinate judge, a District judge. or a judge of the High Court on its original side, where such a side exists, must be held to have been given by a Court immediately below the Court which affirms or upsets that decision on appeal. Viewed thus a judge of a High Court sitting on the original side will be the Court imme-

diately below the Court hearing an appeal from his decision. But the same cannot be said of a Single judge sitting on the appellate side who is never "a Court of first instance" and cannot therefore be correctly described to have been presiding over the Court immediately below the Court hearing an appeal from his judgment under the Letters Patent."

We are unable to agree, for reasons already set out, with the view expressed by the learned judges of the Lahore High Court. There is nothing in the phraseology used or the context which justifies the view -that the expression "the Court immediately below' is used in s. 110 of Code of Civil Procedure or in Art. 133 (1) of the Constitution in two dfferent senses, according as the court is trying a proceeding in exercise of its original jurisdiction and in exercise of its appellate jurisdiction.

There is a decision of the Calcutta High Court in Debendra Nath Das v. Bibudhendra Mansingh (1), decided by Jenkins, C. J., and N. R. Chatterjee, J., which has expressed a similar view. The learned Chief justice in delivering the judgment of the Court observed at p. 93:

> "It only remains to be seen whether as regards nature the requirements of section I I 0 are fulfilled. The Court of first instance as well as the lower Appellate Court decided adversely to the present applicant. On appeal to the High Court, a Single judge reversed the decree of the lower (1) (1915) I.L.R, 43 Cal. 90.
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> Appellate Court. From this judgment of a Single judge there was an appeal to the High Court under clause 15 of the Charter with the result that the judgment of the Single judge was reversed by a Bench of two Judges. It will thus be seen that the first judgment of the High Court reversed the decree of the Court immediately below, but that this reversal was afterwards in effect cancelled with the result that the only

effective judgment of the High Court affirmed. the decision of the Court immediately below (section 110, Civil Procedure Code)."

The view appears prima facie to support the contention that in considering whether within the meaning of Art. 133 (1) of the Constitution judgment of the Court immediately below the High Court is affirmed, the judgment of the judge of the High Court trying the proceeding as a court of appellate jurisdiction must be ignored. Any expression of opinion by the eminent Chief Justice would always be considered with the great deference and respect. It must, however, be stated that the observations of the learned Chief justice were in the nature of obiter dicta, because in the view of the Court, the test of pecuniary valuation was satisfied and in the appeal a substantial question of law was involved, and on that account the Court was bound to certify the case. It was therefore strictly not necessary to consider whether the judgment affirmed the decision of the court immediately below. It must also be observed that the learned Chief justice equated the expression "Court immediately below" with the expression "Court subordinate" used in s. 115 of the Code of Civil Procedure. That is clear from the obs- ervations made by him "that a judge sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court (clause 36, Letters Patent). And thus no decision of a Single judge can be revised under section 115 of the Code." But as we have already pointed out the test for determining the right to appeal is not whether the judgment is of a Court subordinate,but whether the judgment is of a Court immediately below. The two expressions being different, the same considerations do not apply in their interpretation. A similar view was also expressed in a very recent judgment by the Andhra Pradesh High Court decided on August 18, 1961: Vadiapatla Marayya v. Vallabhaneni Buchiramayya (which has not yet been officially reported).

There are however two earlier judgments of the Lahore High Court which have expressed a contrary view. Minna Heatherly v. B. C. Sen (1) and Gopal Lal v. Balkissan (2). In these two cases it was held that a Single judge of the High Court hearing an appeal is within the meaning of s. 110 of the Code of Civil Procedure 1908 a court immediately below the Division Bench of the High Court hearing an appeal under the Letters Patent. The High Court of Nagpur in Kishanlal Nandlal v. Vithal Nagayya, (3), has preferred the earlier view of the Lahore High Court.

In our judgment the appeal with certificate granted by the High Court under Art. 133 (1) (a) and (b) is competent, because a Single Judge of the High Court hearing either a proceeding as a Court of original jurisdiction or in exercise of appellate jurisdiction is a Court immediately below the Division Bench which hears an appeal against his judgment under the relevant clause of the Letters Patent. Bishan Narain J., was, it is true, hearing an appeal from an appellate decree and his powers were restricted, for a second appeal lies to the High Court only on the following grounds, namely:-

(a) the decision being contrary to law or to some usage having the force of law; (1) A.I.R. (1927) Lah. 537. (2) (1931) I.L.R. 13 Lah. 318.

(3) I.L.R. (1955) Nag. 821.

(b) the decision having failed to determine some material issue of law or usage, having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

Whether a particular transaction was vitiated on the ground of undue influence is primarily a decision on a question of fact. In Satgur Prasad v. Har Narain Das (1), the Privy Council held that in a suit to set aside a deed on the ground that it was procured by undue influence and fraud, the finding that it was so procured is a finding of fact and is not liable to be re-opened if fairly tried. Under the Civil Procedure Code, a second appeal does not lie to the High Court, except on the grounds- specified in the relevant provision of the Code, prescribing the right to prefer a second appeal,and the High Court has no jurisdiction to entertain a second appeal "on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be" (Mussummant Durga Choudhrain v. Jawahir Singh Choudhri (2)) . But the challenge before Bishan Narain, J., to the decision of the District.Judge was founded not on the plea that appreciation of evidence was erroneous, but that there were no adequate particulars of the plea of undue influence, that the particulars of facts on which undue influence was held established by the District judge were never set up, that there was no evidence in support of the finding of the District judge and that burden of proof on a misconception of the real nature of the dispute was wrongly placed on the plaintiff. A decision of the first appellate Court reached after placing the onus wrongly or based on no evidence, or where there has been substantial error or defect in the procedure, producing (1) (1932) L.R. 59 I.A. 147.

(2) (1890) L.R. 17 I.A. 122.

error or defect -in the decision of the case on the merits, is not conclusive and a second appeal lies to the High Court against that decision.

o. 6 r. 4 of the Code of Civil Procedure provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms in the Appendix, particulars (with dates and items if necessary) shall be stated in the pleading. The reason of the rule is obvious. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct

from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading : if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particular, which give adequate notice -to the other side of the case intended to be set up.

In Bharat Dharma Syndicate v. Harish Chandra (1), the Privy Council emphasized the necessity of particulars in the following terms :

> Their Lordships desire to call attention to the great difficulty which is occasioned both to persons charged with fraud or other improper conduct, and to the tribunal which are called upon to 'decide such issues, if the litigant who prefers the charges is not compelled to place on record precise and specific details of those charges. In the present' case, the petitioner ought not to have been allowed to proceed with his petition and seek to prove fraud, unless and until he had, upon such terms as the Court thought fit to impose, amended his petition -by including therein full particulars of the allegations which he intended to prove, Such cases as the present will be much simplified if this practice is strictly observed and insisted upon by the Court, even if, as in the present case, no objection is taken on behalf of the parties who are interested in disproving the accusations."
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> Similarly this Court in Bishnudeo Narain v. Seogeni Rai and Jagernath (2), in dealing with the practice to be followed in a case where a plea of undue influence and coercion is raised, observed at p. 656 :
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> "'It is also to be observed that no proper particulars have' been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them. in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the (1) (1917) 64 I.A. 146.
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> (2) [1951] S.C.R. 548.
>
> language in which they are couched may be, and the same applies to undue influence and i coercion."
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> The plea of undue influence and coercion by the Company and defendants 2 to' 5 was raised in terms-which were identical. The plea analysed in its component parts may be stated as follows:-
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> (1) Because of the resolution dated October 16, 1945 the plaintiff "'succeeded in getting dictatorial powers over the Company, practically usurping all the powers of

> the General body of the shareholders and thereby purporting to deprive them to exercise even those rights which they" were ""legally entitled to exercise under the law"; (2) "These resolutions which gave the plain- tiff a complete veto over the affairs of the Company (which is not permissible under any valid constitution) were obtained by the plaintiff at the point of a dagger" (3) "That the plaintiff was refusing to hand over charge of the moneys, books and the entire assets of the Company and using the funds of the Company for ruinous litigation against the defendants who on the other hand were having to prosecute their cases out of their meagre funds which too were dwindling fast" :
>
> (4) "'Taking full advantage of his position and knowing fully well the resources of the defendants, the plaintiff succeeded in coercing the defendants in submitting to his dictations and virtually compelled them to pass these unconstitutional resolu- tions."

It may be observed that though issue No. 1 raised a plea both of coercion and undue influence as vitiating the resolutions, no attempt was made to rest the right to relief on a case of coercion in the Courts below and in this Court. The first part of the case of the, defendants amounts to a plea that by the resolutions dated October 16, 1945that plaintiff acquired a position of domination over the affairs of the Company and over the defendants. What the second part means it is difficult to appreciate. The language used is somewhat extravagant : it is not the case of the defendants that they were compelled to agree to the resolutions by threats of physical violence. By the third part it is affirmed that the plaintiff unlawfully refused to part with the moneys, books and the assets of the Company and commenced litigation with the aid of the funds of the Company whereas the defendants had to rely upon their own resources which were limited. Presumably this has reference to the refusal of the plaintiff to comply with the resolution of February 20, 1945 and to litigation which ensued between the parties after the resolution was passed. It is difficult to regard this as a plea precisely expressing that the plaintiff was in a position to dominate the will of the defendants. The last part of the plea is that taking advantage of his Position and knowing that the position of the defendants was precarious he succeeded in compelling the defendants to submit to his dictation and compelled them to pass the resolutions.

The pleading which was regarded as one of undue influence also suffers from a lack of particulars. How the plaintiff took advantage of his position as a person in possession of the assets of the Company and by what device he compelled the defendants to submit to his will has not been stated. Section 16 of the Indian Contract Act, which incorporates the law relating to undue influence in its application to contracts is but a particularisation of a larger principle. All transactions procured in the manner set out therein, are regarded as procured by the exercise of undue influence. Section 16 of the Contract Act provides:

> "(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2)In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other;or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. (3) where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section III of the Indian Evidence Act, 1872." The' doctrine of undue influence under the common law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party exercising his position of dominance obtains an unfair advantage over another. The Indian enact- ment is founded substantially on the rules of English common law. The first sub-section of s. 16 lays down the principle in general terms. By subsection (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled.' Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence.

A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other.It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction : he has to prove that the other party to a transaction was in a position to dominate his will and that the other party had obtained an unfair advantage by using that position. Clause (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other or where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by evidence or by the presumption arising under sub-section (2) and he enters into a transaction with that other person, which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub-section (3) has manifestly a limited application : the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was

in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift. Assuming that in this case a plea of undue influence was attempted to be raised by paragraph 4 of the Company's written statement and paragraph 6 of the written statement of the other defendants, defendants 2 to 5 have not submitted themselves for examination before the Court. The burden of proving undue influence primarily lay upon the defendants who were setting up the plea. The manner in which the case on behalf of the defendants was conducted reflects little credit upon those in charge of the case. The primary issue on which the defendants sought to defend the suit raised the plea of undue influence and coercion in relation to the resolution dated October 16, 1945, and we should have expected the defendants to open the case and lead evidence in support of their plea. But on December 11, 1950 after the second defendant Shanti Prasad produced a number of documents which he was summoned to produce, the plaintiff for some reason not apparent on the record opened the case. Counsel for the plaintiff stated that the plaintiff was at that stage to be examined only on the issue of which the onus lay upon the plaintiff and that the plaintiff would be examined in rebuttal after the defendants closed their case and that he will examine the remaining witnesses mentioned in his list in rebuttal. Manifestly at that stage the evidence of the plaintiff led expressly on issues other than the first issue of undue influence could not be 'directed to rebutting any presumption of undue influence, for there was before the Court no evidence proving the facts on the proof of which alone the presumption under sub-s. (3) of s. 16 may arise and the burden of proof shift. After the plaintiff I concluded his evidence on the issues on which the plaintiff offered to lead evidence, on behalf of the dependents two witnesses Mohan Singh and Raghu Nandan were examined. Mohan Singh said nothing which might have a bearing on the plea of undue influence. Raghu Nandan made certain equivocal statements about examination of accounts 'at the meeting of October 16, 1945 and further stated that the compromise pursuant to which the resolutions were passed was arrived at about midnight of October 15, at the residence of the plaintiff Ladli Prasad, and that to his knowledge the defendants had no other source of income except the director's remuneration. Beyond this he appears to have said nothing which directly supported the defendant's case of undue influence. Thereafter followed a baffling series of applications made with a view to protract the proceeding in the suit, presumably to procure a situation in which the principal defendant Shanti Prasad may avoid going into the witness box. By diverse applications the proceeding was protracted till May 1953, but neither Shanti Prasad nor the other members of the family appeared before the Court for examination as witnesses in support of the defendants' case of undue influence. An application submitted on April 27, 1953 after the case was set down for judgment for the examination of Shanti Prasad was rightly rejected by the Subordinate Judge. A bare perusal of the statements and the course which the proceedings have taken leads to the only conclusion that the defendants did not desire to give evidence in support of their plea of undue influence and to subject themselves to cross-examination. There may arise cases in which even though the burden lies on the defendants to prove their case of undue influence they may establish it from admissions made by the plaintiff or his witnesses or from other evidence, and without giving their own testimony, but this, in our judgment, is not such a case.

Before directing our attention to the findings of the District Judge from which undue influence was inferred, it is necessary to reiterate certain undisputed facts. Ladli Prasad was the eldest male member in the family but the family had severed its joint status in 1940 and the business of the

family was taken over by a private limited company, in which the three branches held shares. Under the Articles of Association as originally framed in 1941, Ladli Prasad was drawing from the Company an allowance of Rs. 1800/- per mensem, a commission of 7 1/2% on the net profits of the Company and the car allowance of Rs. 350/- per mensem and an allowance of Rs. 30/- per day during tours together with a new car every third year for use, whereas the other directors were getting only Rs. 25O./- per mensem, and Rs. 25/- for every meeting of directors attended. Defendants 2 to 5 revolted against this disparity in the scale of , remuneration and by resolution dated February 20, 1945 removed Ladli Prasad from the -Managing Director-ship of' the Company. This step of the defendants led to litigation. Shanti Prasad claimed to enforce his rights under the resolution, and Ladli Prasad sought to retain possession asserting that the resolution was invalid. There were thereafter negotiations for settlement of the disputes, at which several near relations and employees of the Company were present, and certain terms of compromise were agreed upon pursuant to which in the meeting dated October 16, 1915 held at the residence of Ladli Prasad resolutions were passed,, which had the effect of equalising the share holding of the three branches, and the remuneration drawn by them. Ladli Prasad was also given complete discharge from liability for his previous dealings, resolutions of February 20, 1945 were cancelled, and amendments were made in the Articles of Association requiring that all decisions of the Board of Directors shall be unanimous. Thereafter by the special resolution passed in the extraordinary General Meeting dated March 28, 1946, the resolutions dated October 16, 1945 were cancelled, the plaintiff-Ladli Prasad-was removed from his post of Chairman, and also of Director, and Shanti Prasad was appointed Managing Director. The resolutions dated October 16, 1945 were acted upon, equalisation of share holding was effected by transfer of shares, and Shanti Prasad assumed the office of Manager of the Company, and presumably dividend declared at the meeting and remuneration settled were accepted. The defendants did not institute any proceeding to have the resolutions declared null and void on the ground that they had been secured by undue influence, and the plea that they were invalid was set up for the first time in the suit instituted by the plaintiff.

In support of his conclusion that undue influence was exercised by the plaintiff upon defendants 2, 4 and 5, the District judge recorded the findings that the plaintiff was the eldest male member of the family, and there was no one to look after the interests of defendants 2 to 5; that the plaintiff had taken into his possession all the jewellery belonging to defendants 2 to 5 and this jewellery was restored to them after the compromise of October 16, 1945; that after the joint family was dissolved and the business of Kishori Lal & Sons was taken over by the Company, plaintiff received as much as Rs.3000/- per month as salary, daily allowance, motor-car allowance and under other miscellaneous heads, whereas the other Directors received only an allowance of Rs. 250/- per month and a fee of Rs 25/per day for attending the meetings of the Board of Directors; that the plaintiff had started another Company in the name of Jagatjit Distilling and Allied Industries, Hamira from-which he made large profits and had "become a business magnate" that at the time of the compromise the financial position of the defendants was "helpless and miserable" and they were not doing any other business and had no other source of income. After the operation of the order appointing Receiver passed by the Subordinate judge, Karnal was stayed by the High Court of Lahore, defendants 2 to 5 were not in a position to defend their rights because of lack of financial resources and the plaintiff took advantage of their helplessness and dictated terms' which were not fair; and that the plaintiff was interested in creating a deadlock and thereby to make large profits

from his separate concerns-the jagatjit Distilling and Allied Industries. The District Judge inferred from these findings that the plaintiff Ladli Prasad was in a position to dominate the will of defendant-, 2 to 5, that he could exert undue influence upon them because "they were in a very wretched position being hard pressed by the lack money"; that the near relations of the family were present at the meeting to protect the interests of the family and they could not be expected to safeguard the interest of defendants 2 to 5; and that there was no evidence that defendants 2 to 5 received advice from any one else, or that they gave their consent to the compromise with free exercise of their volition. He held that the plaintiff got himself absolved from all liability to account for his dealing with the assets of the company since he commenced management as a Managing Director, and that he 'obtained by the resolution a power of veto' and managed to get himself appointed a permanent Director. The learned judge, therefore, concluded relying upon the '-presumption of undue influence on account of the above- mentioned facts" that the defendants 2 to 5 were induced by the exercise of undue influence and coercion to give their consent to the minutes of the meeting held on October 16, 1945 and the plaintiff had failed to adduce any satisfactory evidence to rebut the presumption.

In our view the conclusions of the District .Judge could not be regarded as binding upon the High Court in second appeal, for he raised the inference of undue influence from facts which were never pleaded and proved, and he relied upon the presumption under s. 16 (3) without the conditions prescribed thereby being fulfilled. The only facts on which the defendants relied in support of their plea in their written statement were that the plaintiff was in possession of the books, and assets of the Company ; that he used the funds of the Company for litigation, and that taking full advantage of his position the plaintiff succeeded in coercing the defendants to submit to his dictation. The first averment was admitted and the other two were denied by the plaintiff. There is no plea and no evidence on the record to prove that there was no one to look after the interest of defendants 2 to 5 that all the jwellery of the defendants was Prior t October 16, 1945 in the possession of the plaintiff; that the plaintiff had made large profits from jagatjit Distilling and Allied Industries; that the plaintiff was interested in creating a deadlock with a view to secure benefit for his concern Jagatjit Distiller; that the financial position of the defendants was "helpless and miserable"; that the defendants were not in a position to defend their rights because of lack of financial resources, and the plaintiff on that account dictated terms of compromise which were not fair. Again the presumption under s. 16 (3) could not come to the aid of the "defendants. The two conditions on the proof of which alone the presumption arises are that the plaintiff was in a position to dominate the will of the defendants, and the transaction was unconscionable. It was not pleaded by the defendants that as the eldest male member of the family, the plaintiff was in position to dominate the will of the defendants; nor was there evidence to show that he held any real or apparent authority over the defendants on that account. Admittedly on February 20, 1945 the defendants had by a resolution of the Company removed the plaintiff from the post of Managing Director. It is true that the plaintiff refused 'to accept the validity of that resolution, and declined to hand over management of the affairs of the Company to Shanti Prasad; but that does not establish that he was in a position to dominate the will of the defendants. Again the transaction cannot be called unconscionable. The Plaintiff Ladli Prasad was under the original appointment drawing an allowance exceeding Rs. 300/- per, month and held the largest single block of shares and Occupied the office of Managing Director. By the resolution his remuneration was reduced to Rs. 900/-, he

was deprived of his office of Managing Director and his share holding was also reduced and made equal to that of the other branches of the family. It is true that he became Chairman of the Board of Directors, but on that account lie acquired no superior rights. All resolutions of the Board of Directors had under the amended Articles to be unanimous and no member could be removed by the others. These resolutions operated as much to the benefit of the defendants 2 to 5 as of the plaintiff. It is true that by the resolutions passed at the meeting all previous dealings of the plaintiff were validated and he was absolved from-liability in respect of those transactions. The plaintiff has affirmed on oath that this was so because accounts were 'gone into' before the meeting, and the defendants have not entered the witness box to depose to the contrary, though the burden of proving that unfair advantage was obtained by the plaintiff lay upon the defendants. Undoubtedly a resolution which absolved the plaintiff from liability for all his past dealings, without settling accounts, may appear prima facie unfair, but the District judge did not hold that accounts were not scrutinised before the resolutions of October 16, 1945 were passed., In any event there is no evidence on the record that accounts were not scrutinised and accepted by the defendants 2 to 5 before the compromise which culminated in the impugned resolutions. The only evidence on behalf of the defendants was of Raghu Nandan-Works Manager of the Karnal Distillery. He stated "the compromise was finalised at about 12 and I A. M. at night. I stayed outside for some time, but at the time of finalising of the compromise, I was present at the place where the compromise had taken place. The accounts were gone into at that time. So far as I know accounts were never sent for during the talk of compromise. x x x x S. P. Jaiswal insisted on seeing the accounts, but abruptly he signed the compromise." In crossexamination he stated "I do not know if parties had been carrying on the negotiations about the compromise some 5 or 6 days before same was arrived at,but I know that they were there on the 15th s x x x I do not know when the compromise (talks) started. The compromise was finalised between the night of the 15th and 16th, and on the morning of the 16th, I was told to take office records to Karnal." The plaintiff Ladli Prasad has deposed that the accounts were scrutinised before the resolutions. It has to be remembered that in pursuance of the resolutions dated October 16, 1945 Shanti Prasad assumed the office of Manager of the Company, and it is common ground that the books of account were in his possession since that,date. The books were originally under the control of the plaintiff : since the resolutions they were with the defendants and the defendants have not led any evidence to show that in respect of his dealings for the period he was in management the plaintiff Ladli Prasad was liable to the Company.

It cannot- in the circumstances be held that the High Court was bound by the findings recorded by the District judge. For reasons already mentioned the conclusion on the issue of undue influence. was based on allegations which were never pleaded and proved. Bishan Narain,J., was therefore right in holding that the findings of the District Judge travelled beyond the pleadings of the defendants, and "that besides the facts that the plaintiff is the eldest surviving brother and the High Court stayed the operation of the order appointing the Receivers, there is no evidence in support of the findings of the District Judge."

On a review of the evidence, which Bishan Narain, J., was entitled in the circumstances to embark upon, he came to the conclusion that the defendants had failed to establish the plea of undue influence. The Division Bench of the High Court in appeal under cl. 10 of the Letters Patent held on an elaborate review of the evidence that the conclusion of the District judge on the issue of undue

influencc was correct. We must examine the findings recorded by the Division Bench, because the decision that the conclusions of the District judge were not binding upon Bishan Narain, J., does not effectively dispose of the appeal. This Court must decide whether on the pleading of the defendants and the evidence on the record, the conclusion of the High Court may independently of the findings of the District Judge, be sustained. The High Court observed that as the karta and elder brother, the plaintiff Ladli Prasad was in a position to dominate the will of the defendants and that he obtained an unfair advantage over them. In coming to that conclusion the learned judges relied upon "the Hindu Shastric injunctions and highly cherished Hindu sentiments that an elder brother in relation to his younger brothers or an uncle in relation to his fatherless nephews is placed on a high pedestal next after parents" and inferred that the plaintiff must be deemed to be in loco Parent to the defendants and that he not only held an authority which is both real and apparent but lie stood. in a fiduciary relationship and taking advantage of his position he could and did dominate the will of the defendants, The learned judges recognised that the case of the defendants suffered from the infirmity that they did not offer to be witnesses in the case, but they observed that "their omission in that behalf though improper could not be considered fatal because having regard to the circumstances, undue influence could be inferred, the plaintiff Ladli Prasad having been in a position of superiority and a position of vantage which he continued to occupy till October 16, 1945."

In our judgment, there is no evidence to support the finding that Ladli Prasad was qua the other members in loco parentis. The three branches of the family had separated in 1940, and were living apart. It is true that Ladli Prasad was drawing remuneration which was many times the remuneration drawn by the other branches but the validity of the resolutions under which he commenced drawing that remu- neration has never been challenged. By February 1945 the disputes between Ladli Prasad on the one hand, and the other members had come to a head, and by the resolution dated February 20, 1945 Ladli Prasad was removed from his office of -Managing Director. This was an "open revolt" against whatever authority Ladli Prasad may have once possessed. Shanti Prasad filed a suit against Ladli Prasad to secure custody of the assets of the Company as Managing Director, and obtained an order for appointment of a Receiver of the assets. It would be a complete perversion of the true situation to hold in this case in the light of the circumstances that merely because Ladli Prasad was the eldest male member, lie was in 'loco parentis' qua defendants 2 to 5. It may be notice, that this ground that Ladli Prasad stood in the relation similar to that of a parent qua defendants 2, 4 and 5 was never pleaded by the defendants. The defendants were represented by their lawyers in the two suits which were filed since February 20, 1945 and it is difficult to accept that though litigating in Court in assertion of the rights claimed by them, they were so much under the influence of Ladli Prasad (who at the material time was only about 27 years of age) that they could not secure independent advice. For reasons already mentioned the resolutions were, unless it was established that the plaintiff. Ladli Prasad was given a discharge without scrutiny of accounts, not unconscionable. Negotiations for a compromise were carried on for more than five days and several relations of the parties who were obviously interested in defendants 2 to 5 were present. If the plaintiff had attempted to exercise his authority over the defendants some reliable evidence should have been forthcoming in that behalf. The circumstance that none of the defendants gave evidence in support of their plea, even after protracting the proceedings for more than two years raises a strong presumption against them that they realised the infirmity of their case and were not willing to submit themselves to cross-examination.

Raghu Nandan who was practically the only witness examined by the defendant to depose to what transpired at the negotiations and the meeting which culminated in the impugned resolutions has not said anything which may even indirectly support their case. The case that the plaintiff refused to part with the jewellery of the defendants, and on that account was able to compel the defendants, to agree to the resolutions was never pleaded and no evidence was given by the defendants in that behalf. Ladli Prasad deposed that he had some jewellery belonging to the defendants 2 to 5, and that the defendants were in possession of his own jewellery, and after the meeting of October 16, 1645 the jewellery was exchanged. There is again no evidence that the defendents were at the material time in financial difficulties. Admittedly partition of joint family assets had taken place, and the different branches had obtained their shares in severalty except in the business. Defendants have also led no evidence as to what their financial resources in 1945 were, and the assump- tion made by the High Court in that behalf are not warranted. It is true that because of resolution No. 12 requiring every decision of the Board of Directors to be unanimous, and deletion of Art. 47, if the Directors quarrelled, creation of an impasse may be visualised, but by the resolutions the plaintiff acquired no overriding privilege. His rights were the same as of the other branches of the family. On the question as to what transpired at and before the meeting dated October 16, 1945 there is the evidence of Devi Prasad which may be briefly referred to: He has deposed that he was present at the meeting and that the compromise was arrived at by the free consent of the parties and no undue influence was exercised 'by any party on the other. The compromise talks had begun a week earlier, and the account books of the Karnal Distillery Company were produced at the time of the compromise, and the books were examined by defendants 2 to 5 and some objections raised during the talks of compromise were settled after seeing the books of account. The witness also produced a copy of the minutes of the meeting which had taken place at 10-30 A.M. on October 16, 1945 stating that the same were typed by him. There was substantially no cross-examination of this witness on the evidence given by him that the account books were examined during the negotiations for compromise. The finding of the High Court that the books of account were never examined and the plaintiff pursuaded the defendants to give him a complete discharge in respect of the liabilities incurred by him for his transactions was never pleaded in the written statement, though it was an important particular which if true would have been pleaded. Even assuming that on the general plea of undue influence it was open to the defendants to lead evidence on this matter, the defendants have not -chosen to lead any reliable evidence to show that that books of account were not examined and entries were not verified, and the equivocal evidence made by the witness Raghu Nandan has no evidentiary value at all. It is true that the plaintiff had started another Company in the name of Jagatjit Distilling and Allied Industries but even if that circumstance has any bearing on the issue of undue influence there is again little evidence that he had made large profits and had acquired influence and power thereby. The appointment of receivers by the Court of Subordinate Judge,Karnal was stayed by the High Court, but that single circumstance will not justify an inference that the defendants were effectively prevented from prosecuting their claim. There is no evidence to show that the plaintiff was interested in creating a deadlock so as to prevent the smooth and successful business of the Company. The only two facts viz. that the plaintiff was the eldest member and that he was before the resolution dated February 20, 1945 receiving very much larger sums of money from the Company as his remuneration in comparison with the remuneration received by the defendants, viewed in the light of the other circumstances will not justify an inference that the plaintiff was in a position to dominate the will of the defendants. For reasons already stated the

High Court was in error in relying upon the presumption under sub-section (3) of s. 16, because in our view the evidence does not justify the conclusion that the plaintiff was in a position to dominate the will of the defendants and that the resolutions gave an unconscionable advantage to the plaintiff. We must add that the decisions of the District Court and Division, Bench of the High Court, suffered from Serious infirmities in that they wrongly placed the onus of proof upon the plaintiff, and reached a conclusion that the plaintiff failed to prove that the resolutions were not obtained by the exercise of undue influence. It was urged that in any event, at this late stage-sixteen years after the date on which the resolutions were passed by the defendants at the meeting dated March 28, 1945-this Court would not be justified in declaring the actions of the defendants in pursuance of the resolutions, invalid, for they would affect third parties who must have dealt with the Company on the footing that the manangement of the Company had authority to transact business. But the plaintiff has unauthorisedly been deprived of his rights by the arbitrary conduct of the defendants. All the Courts below have held that the resolutions dated March 28, 1946 are invalid. The High Court declined to grant relief to the plaintiff, for in their view the plaintiff had disentitled himself to equitable relief because of his previous conduct in exercising undue influence, and thereby securing an unfair advantage to which he was not lawfully entitled. It is unnecessary to enter upon a discussion of the question whether in the circumstances it was a sufficient ground for depriving the plaintiff of relief, for we are of opinion that subject to the reservations made by Bishan Narain, J., which fully protect third parties, relief should be awarded. Before the learned judge, counsel for the plaintiff gave an undertaking that he will not question the dealings of the defendants qua third parties, and requested expressly that the prayer for declaration that all acts of the Company and the defendants which affected him personally qua the members of the Company may alone be declared invalid. That, in our judgment, should be sufficient to meet any objection which may be raised by the defendants on the score of delay.

It was also submitted that the plaintiff has lost his right to the shares since the suit was instituted because the Company had enforced its lien and had sold the shares of the plaintiff in enforcement of the lien. The validity of that action of the Company has been challenged in a separate proceeding, and we need express no opinion on that question. All the Courts have come to the conclusion that the reso- lutions dated March 3, 1.946 and March 28, 1946 were invalid and not binding on the plaintiff. Therefore, any action taken by the defendants pursuant to those resolutions may _prima facie be regarded as ineffective.

On that view of the case, this appeal must be allowed and the decree passed by Bishan Narain, J., must be restored with costs in this Court and before the Division Bench. Appeal allowed.