Supreme Court of India
Shah Babulal Khimji vs Jayaben D. Kania And Anr on 10 August, 1981
Equivalent citations: 1981 AIR 1786, 1982 SCR (1) 187
Author: S M Fazalali
Bench: Fazalali, Syed Murtaza

PETITIONER:
SHAH BABULAL KHIMJI

Vs.

RESPONDENT:
JAYABEN D. KANIA AND ANR.

DATE OF JUDGMENT10/08/1981

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
VARADARAJAN, A. (J)
SEN, AMARENDRA NATH (J)

CITATION:
1981 AIR 1786 1982 SCR (1) 187
1981 SCC (4) 8 1981 SCALE (3)1169
CITATOR INFO :
RF 1986 SC1272 (10,108,109)
RF 1988 SC 915 (17)
RF 1990 SC 104 (8)

ACT:
Code of Civil Procedure, 1908-Section 104 Order 43 Rule 1-Scope of-Letters Patent-Clause 15-Right of Appeal under clause 15-If affected by section 104, Order 43 Rule 1.

HEADNOTE:
In a suit for specific performance of an agreement to sell filed on the original side of the Bombay High Court the plaintiff (appellant) prayed for certain interim reliefs. A single Judge of the High Court dismissed the application. A Division Bench of the High Court, on appeal by the plaintiff, held that the appeal was not maintainable on the ground that the impugned order of the single Judge was not a 'judgment' within the meaning of clause 15 of the Letters Patent of the High Court.

In appeal to this Court it was contended on behalf of the appellant that since the trial Judge is governed by the procedure prescribed by the Code of Civil Procedure, by virtue of the provisions of section 104 read with Order 43

Rule (1) the impugned order is appealable to a larger Bench; (2) assuming that the Letters Patent was a special law, section 104 read with Order 43 is in no way inconsistent with clause 15 of the Letters Patent; (3) even if section 104 read with Order 43 Rule 1 does not apply an order refusing to appoint a receiver or to grant injunction has the attributes of finality and, therefore, amounts to a judgment' within the meaning of Letters Patent.

Allowing the appeal

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HELD:

(per Fazal Ali and A. Varadarajan, JJ.)

(Amarendra Nath Sen, J. concurring.)

Since the Order of the trial Judge was one refusing appointment of a receiver and grant of ad-interim injunction, it is a 'judgment' within the meaning of the Letters Patent both because order 43 rule 1 applies to internal appeals in the High Court, and such an order even on merits contains the quality of finality and would be a judgment within the meaning of clause 15 of Letters Patent. Hence an appeal is maintainable to the Division Bench. The Division Bench was in error in dismissing the appeal without deciding it on merits. [259 F-G]

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There is no inconsistency between section 104 read with Order 43 Rule 1, C.P.C. and appeals under Letters Patent. There is nothing to show that Letters Patent in any way excludes or overrides the application of section 104 read with Order 43 Rule 1 or that these provisions do not apply to internal appeals within the High Court. [237 E-F]

Code of Civil Procedure 1877, by sections 588 and 589, did not make any distinction between appeals to the High Court from the District Court and internal appeals to the High Court under Letters Patent. Notwithstanding the clear enunciation of law by the Privy Council that section 588 did not affect nor was it inconsistent with the provisions of Letters Patent and that, therefore, orders of a trial Judge which fall beyond section 588 could be appealable to a larger bench under the Letters Patent if its orders amounted to a 'judgment' within the meaning of clause 15 of the Letters Patent, there was a serious controversy among the High Courts on this question. Section 104 of the C.P.C., 1908 made it clear that appeals against orders mentioned in Order 43 Rule 1 were not in any way inconsistent with the Letters Patent but merely provide additional remedy by allowing appeals against miscellaneous orders passed by the trial Judge to a larger bench. [205 E-G]

In dealing with a suit the trial Judge has to follow the procedure prescribed by the Code. It is indisputable that any final judgment passed by the trial Judge amounts to a decree and under the provisions of the Letters Patent an appeal lies to a larger bench. Letters Patent itself does not define the term 'judgment' and has advisedly not used

the word 'decree' in respect of a judgment given by the trial Judge. [206 B-D]

Section 5 of the Code empowers the State Government to apply the provisions of the Code where any enactment is silent as to its applicability. Section 5 makes clear that, excepting the Revenue Courts, all other Civil Courts would normally be governed by the provisions of the Code in the matter of procedure.[206H,207A]

Section 4 of the Code which provides that in the absence of any specific provision to the contrary the provisions of the Code do not limit or affect any special or local law, is not applicable in the instant case because even if the Letters Patent is deemed to be a special law within the meaning of this section the provisions of section 104 do not seek to limit or affect the provisions of the Letters Patent. [207 B-C]

By force of section 104 all appeals, as indicated in the various clauses of Order 43 Rule 1, would lie to the appellate court. In short a combined reading of the various provisions of the Code leads to the conclusion that section 104 read with Order 43 Rule 1 clearly applies to proceedings before a trial Judge of the High Court. [207 H; 209 B]

In the instant case, therefore, section 104 read with Order 43 Rule 1 does not in any way abridge or interfere with or curb the powers conferred on the trial Judge by clause 15 of Letters Patent. They only give an additional remedy by way of appeal from the orders of the trial Judge to a larger bench. That being so there is no force in the respondent's argument that these provisions do not apply to internal appeals in the High Court. [209 D-E]

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Hurrish Chunder Chowdry v. Kali Sundari Debia, 10 I.A. 4, Mt. Sabitri Thakurain v. Savi & Anr. A.I.R. 1921 P.C. 80, Union of India v. Mohindra Supply Co., [1962] 3 S.C.R. 497 and Shankarlal Aggarwal & Ors. v. Shankarlal Poddar & Ors . [1964] 1 S.C.R. 71, referred to.

A number of enactments, as for example, section 202 of the Companies Act, 1956 and section 39 of the Arbitration Act widen, rather than limit, the original jurisdiction of the High Court by conferring additional or supplementary remedy by way of appeal to a Division Bench from the judgment of a single Judge. On a parity of reasoning, therefore, section 104 read with Order 43 Rule 1 expressly authorises and creates a forum for appeal against orders falling under the various clauses of Order 43 Rule 1 to a larger bench of the High Court without disturbing, interfering with or over-riding the Letters Patent jurisdiction.

[211 B-C]

Dayabhai Jiwandas & Ors. v. A.M.M. Murugappa Chettiar, I.L.R. 13 Rangoon 457, Sonbai v. Ahmedbhai Habibhai [1872] 9 Bom. HC Reports. 398, Rajagopal & Ors. (in Re. LPA 8 of 1886) ILR 9 Mad. 447, Ruldu Singh v. Sanwal Singh [1922] ILR

3 Lahore 188, Lea Badin v. Upendra Mohan Roy Chaudhary & Ors. [1934-35] 39 CWN 155, Mathura Sundari Dassi v. Haran Chandra Shaha & Ors. A.I.R. 1916 Cal. 361 Abdul Samad & Ors. v. The State of J & K. A.I.R. 1969 J&K 52, and Kumar Gangadhar Bagla v. Kanti Chunder Mukerjee & Anr., 40 CWN 1264, approved.

Ram Sarup v. Kaniz Ummehani, ILR 1937 All. 386 over-ruled.

Assuming that Order 43 Rule 1 does not apply to Letters Patent appeals the principles governing these provisions would apply by process of analogy. The provisions of Order 43 Rule 1 possess the traits, trappings and qualities and characteristics of a final order. Although the word 'judgment' has not been defined in the Letters Patent but whatever test may be applied the order passed by the trial Judge appealed against must have the traits and trappings of finality. The appealable orders indicated in the various clauses of Order 43 Rule 1 are matters of moment deciding valuable rights of the parties and are in the nature of final orders so as to fall within the definition of 'judgment'. [237G; 225 E-F]

Radhey Shyam v. Shyam Behari Singh [1971] 1 S.C.R. 783 referred to.

Pandy Walad Dagadu Mahar & Anr. v. Jamnadas Chotumal Marwadi, A.I.R. 1923 Bom. 218; Vaman Ravi Kulkarni v. Nagesh Vishnu Joshi & Ors, A.I.R. 1940 Bom. 216; Vishnu Pratap & Ors. v. Smt. Revati Devi & Ors. A.I.R. 1953 All. 647; Madhukar Trimbaklal v. Shri Sati Godawari Upasani Maharaj of Sakori & Ors. A.I.R. 1940 Nagpur 39; Ratanlal Jankidas Agarwal v. Gajadhar & Ors.; A.I.R. 1949 Nagpur 188; Beads Factory & Anr. v. Shri Dhar & Ors. A.I.R. 1960 All. 692; J. K. Chemicals Ltd. v. Kreba & Co.; A.I.R. 1967 Bom. 56, overruled.

Having regard to the nature of the orders contemplated in the various clauses of Order 43 Rule 1 which purport to decide valuable rights of the parties in the ancillary proceedings even though the suit is kept alive these orders possess the attributes or characteristics of finality so as to be judgments within the meaning of clause 15 of the Letters Patent. They are therefore, appealable to a larger
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bench. The concept of the Letters Patent governing only the internal appeals in the High Courts and the Code of Civil Procedure having no application to such appeals is based on a serious misconception of the legal position. [237H-238A-B]

The question to be decided in this case which is a vexed and controversial one is as to what is the real concept and purport of the word 'judgment' used in the Letters Patent. The meaning of the word 'judgment' has been the subject matter of conflicting decisions of the various High Courts raging for almost a century and over which despite the length of time no unanimity had been reached and it is high time that this controversy should be settled once

and for all as far as possible. [238 E-F]

Out of the numerous authorities cited three leading judgments have spelt out certain tests for determining as to when an order passed by a trial Judge can be said to be a 'judgment' within the meaning of clause 15 of the Letters Patent and we are inclined to agree generally with the tests laid down in these cases though some of the tests laid down are far too wide and may not be correct. [238 G-H]

While the view taken in the Justices of the Peace for Calcutta v. The Oriental Gas Company (VIII Bengal L.R. 433) is much too strict, the one taken in T. V. Tuljaram Row v. M.K.R.V. Alagappa Chettiar (ILR 35 Madras 1) is much too wide. The correct test seems to lie somewhere in between the tests laid down in these cases. Similarly the full Bench decision in Manohar Damodar Bhoot v. Baliram Ganpat Bhoot (AIR 1952 Nagpur 357) pithily described the essential requisites and the exact meaning of the word 'judgment' as used in the Letters Patent. The pointed observations made in this case try to synthesize the conflicting views taken by the Calcutta and Madras High Courts. They represent the true scope and import of the word 'judgment' as used in the Letters Patent.

> [The Court reviewed the entire case law on the subject laying down various tests to determine what a judgment is.]

The test for determining as to when an order passed by a trial Judge can be said to be a 'judgment' within the meaning of the Letters Patent are:

(1) Where an order, which is the foundation of the jurisdiction of the Court or one which goes to the root of the action, is passed against a particular party, it amounts to a judgment. [248 B-C]

Asrumati Debi v. Kumar Rupendra Deb Raikot [1953] SCR 1159

(2) An order dismissing an application for review would be appealable under the Letters Patent being a judgment, though it is not made appealable under Order 43 rule 1. [249 B]

State of Uttar Pradesh v. Dr. Vijay Anand Maharaj [1963] 1 SCR 1.

(3) The Companies Act, 1956 which confers original jurisdiction on the trial Judge expressly makes an order passed by the trial Judge under section 202 appealable and, therefore, any order passed under that section would be appealable under the Companies Act and is, therefore, a judgment. [249 C-D]

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Shankarlal Aggarwal v. Shankerlal Poddar [1964] 1 SCR 717

(4) Whenever a trial Judge decides a controversy which effects valuable rights of one of the parties it is a judgment within the meaning of the Letters Patent. [249 H]

Radhey Shyam v. Shyam Behari Singh [1971] 1 SCR 783.

(5) Where an order passed by the trial Judge allowing amendment of the plaint, takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a judgment within the meaning of clause 15 of the Letters Patent. [250 A-B]

Shanti Kumar R. Canji v. The Home Insurance Co. of New York [1975] 1 SCR 550.

(6) Clause 15 of the Letters Patent does not define the term 'judgment'. The Letters Patent is a special law which carves out its own sphere and it would not be possible to project the definition of the word 'judgment' as defined in the Code of Civil Procedure. Letters Patent were drafted long before the Code of Civil Procedure of 1882 was enacted. The word 'judgment' used in the Letters Patent does not mean a 'judgment' as defined in the Code. At the same time it does not include every possible order-final, preliminary or interlocutory passed by a Judge of the High Court. [251 D-E]

Mt. Shahzadi Begum v. Alak Nath & Ors. A.I.R. 1935 All 628.

Under the Code of Civil Procedure a judgment consists of reasons and grounds for a decree passed by a Court. As a judgment constitutes the reasons for the decree, it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined in the Code seems to be rather narrow and the limitations engrafted by section 2(2) cannot be physically imported into the definition of the word 'judgment' as used in clause 15 of the Letters Patent because the Letters Patent has advisedly not used the terms 'order' or 'decree' anywhere. The intention of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. The word 'judgment' has a concept of finality in a broader and not a narrower sense. [2 52 G-H; 253 A-C]

A judgment can be of three kinds:

(1) A final judgment: A judgment, which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided is a final judgment. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge is a judgment within the
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meaning of the Letters Patent and amounts to a decree so that an appeal would lie from such a judgment to a Division Bench. [254 D-E]

(2) A preliminary judgment: A preliminary judgment may

be of two forms: (i) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Since the suit is finally decided one way or the other, the order passed by the trial judge would be a 'judgment' finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to a larger bench; (ii) where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to the maintainability of the suit as for example, bar of jurisdiction, res judicata, a manifest defect in the suit, absence of notice under section 80 and the like. An order of the trial Judge rejecting these objections adversely affects a valuable right of the defendant who, if his objections were held to be valid, is entitled to get the suit dismissed on preliminary grounds. Such an order, though it keeps the suit alive, decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger bench. [254 F-H; 255 A-B]

(3) Intermediary or Interlocutory judgment: Most of the interlocutory orders which contain the quality of finality are clearly specified in clause (a) to (w) of Order 43 Rule 1. They are judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders not covered by Order 43 Rule 1 but possessing the characteristics and trappings of finality because they adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. Thus when an order vitally affects a valuable right of the defendant it will be a judgment within the meaning of Letters Patent so as to be appealable to a larger bench. [255 C-E; 256 A]

Every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. [256 H-257 A]

The following considerations should prevail with the Court in deciding whether or not an order is a judgment:

(1) The trial Judge being a senior court with vast experience of various branches of law occupying a very high status, should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment.[258D-E]

(2) An interlocutory order, in order to be a judgment,

must contain the traits and trappings of finality either when the order decides the question in controversy in ancillary proceeding or in the suit itself or in a part of the proceedings. [258 G]

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It is not the form of adjudication which has to be seen but its actual effects on the suit or proceedings. [243 H]

If irrespective of the form of the suit or proceeding, the order impugned puts an end to the suit or proceeding it doubtless amounts to a judgment. [244A]

If the effect of the order, if not complied with, is to terminate the proceedings, the said order would amount to a judgment. [244 B]

An order in an independent proceeding which is ancillary to the suit, (not being a step towards judgment) but is designed to render the judgment effectively can also be termed as judgment within the meaning of the Letters Patent. [244C]

An order may be a judgment even if it does not affect the merits of the suit or proceedings or does not determine any rights in question raised in the suit or proceedings. [244 D-E]

An adjudication based on a refusal to exercise discretion, the effect of which is to dispose of the suit, so far as that particular adjudication is concerned, would amount to a judgment within the meaning of the Letters Patent. [244 E-F]

Some illustrations of interlocutory orders which may be treated as judgments may be stated thus:

(1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant. [258 B-C]

(2) An order rejecting the plaint. [258 C]

(3) An order refusing leave to defend the suit in an action under Order 37, Code of Civil Procedure. [258 C]

(4) An order rescinding leave to the trial Judge granted by him under clause 12 of the Letters Patent. [258 D]

(5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under section 80, bar against competency of the suit against the defendant even though the suit is kept alive. [258 D-E]

(6) An order rejecting an application for a judgment on admission under Order 12 Rule 6. [258 E-F]

(7) An order refusing to add necessary parties in a suit under section 92 of the Code of Civil Procedure. [258 F]

(8) An order varying or amending a decree. [258 F-G]

(9) An order refusing leave to sue in forma pauperis.

[258 F-G]

(10) An order granting review. [258 F-G]

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(11) An order allowing withdrawal of the suit with liberty to file a fresh one. [258 G-H]

(12) An order holding that the defendants are not agriculturists within the meaning of the special law. [258 G-H]

(13) An order staying or refusing to stay a suit under section 10 of the Code of Civil Procedure. [258 H]

(14) An order granting or refusing to stay execution of the decree. [259A]

(15) An order deciding payment of court fee against the plaintiff. [259 B]

(per Amarendra Nath Sen J concurring)

On a plain reading and proper construction of the various provisions of the Code of Civil Procedure, section 104 of the Code applies to the original side of the High Court of Bombay and the impugned order of the single Judge is appealable to a Division Bench under this section read with Order 43 thereof.

[279 H; 280 A]

The right of appeal under clause 15 of the Letters Patent is in no way curtailed or affected by section 104. By virtue of the provisions of section 104(1) a litigant enjoys the right of preferring an appeal in respect of various orders mentioned therein, even though such orders may or may not be appealable under clause 15 of the Letters Patent as a judgment and the right of appeal under clause 15 remains clearly unimpaired. [275 E-G]

The argument of the respondent, based mainly on the provisions of sections 3 and 4 of the Code of Civil Procedure that even if various other provisions of the Code apply to the Bombay High Court, including its original side, the provisions of section 104 read with Order 43 could not apply to the original side of a Chartered High Court because the jurisdiction conferred by clause 15 of the Letters Patent is a special jurisdiction is without force. [267 B-C]

That by virtue of section 1 (which provides for territorial extent of the operation of the Code) the Civil Procedure Code applies to the State of Maharashtra cannot be disputed. [268 E-F]

Section 3 which deals with subordination of Courts to the High Court has no bearing on the point in issue and does not create any bar to the competence and maintainability of an appeal from an order passed by a single Judge on the original side if the order is otherwise appealable. While dealing with any matter on the original side of the High Court a single Judge is in no way subordinate to the High Court. Nor again, could there be a question of his being a subordinate to the Division Bench which hears an appeal from his judgment. If any order passed by him on the original side is a 'judgment' within the meaning of clause 15 of the

Letters Patent an appeal lies to a Division Bench. [272 E-G]

Similarly there is no force in the argument that since section 104 and Order 43 of the Code affect the special jurisdiction conferred on the High Court under
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clause 15 of Letters Patent these provisions are not applicable to the present case. [273 C-D]

Section 4 of the Code cannot be said to be in conflict with the provisions of clause 15; nor can it be said that it limits or otherwise affects the power and jurisdiction of the High Court under clause 15. [274 A-B]

Section 4 provides that nothing in the Code shall be deemed to limit or otherwise affect any special or local law in force or any special jurisdiction conferred by or under any law for the time being in force. Clause 15 confers on the litigant a right to prefer an appeal from the court of original jurisdiction to the High Court in its appellate jurisdiction. It confers a right of appeal from a judgment of any Judge on the original side to the High Court. Though this clause is a special provision it cannot be said that it is intended to lay down that no appeal would lie from an order of a single Judge on the original side even if specific provision is made in any statute making the order appealable. By virtue of this provision any order considered to be a judgment would be appealable. If a statute confers on the litigant right of appeal, it cannot be said that such provision would affect the special provisions of clause 15. This special power is in no way affected and is fully retained. In addition, the High Court may be competent to entertain other appeals by virtue of specific statutory provisions. [273 C-H: 274 A]

On the contrary, the Code contains specific provisions indicating cases in which its provisions are or are not applicable, as for example section 5, which makes specific provision regarding the nature and manner of applicability of the Code to revenue courts. Sections 116 to 120 clearly indicate that section 104 and order 43 apply to the original side of the High Court. Section 104 and Order 43 which is attracted by section 104, clearly provide that an appeal shall lie from the orders mentioned in rule 1 of Order 43. The impugned order is one such order and is clearly appealable. When the legislature conferred such a right on the litigant a Court would be slow to deprive him of the statutory right merely on the ground that the order had been passed by a single Judge on the original side of the High Court. [274 B-E]

Section 104 recognises that, apart from the orders made appealable under the Code, there may be other orders appealable by any law for the time being in force. It further provides that no appeal will lie from any orders other than orders expressly provided in the Code or by any other law in force. The right of appeal against a judgment of a single Judge on the original side under clause 15 is a

right conferred by "any other law in force". [275 C-E]

Union of India v. Mohindra Supply Co. [1962] 3 SCR 497 and Mt. Savitri Thakurain v. Savi and Anr . [1921] P.C. 80 referred to.

Mathura Sundari Dassi v. Haran Chandra Shaha , A.I.R. 1916 Cal. 361 and Lea Badin v. Upendra Mohan Roy Choudhary, A.I.R. 1935 Cal. 35 approved.

Vaman Raoji Kulkarni v. Nagesh Vishnu Joshi, A.I.R. 1940 Bom. 216 overruled.

Hurrish Chander Chowdhry v. Kali Sundari Debia, 10 I.A. 4, held in applicable.

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Unless a right is conferred on him by law, a litigant does not have an inherent right of appeal. An order appealable under the C.P.C. or any other statute becomes appealable because the concerned statute confers a right of appeal on the litigant. But yet such an order may or may not be appealable as 'judgment' under clause 15 of the Letters Patent. An order appealable under clause 15 as a 'judgment' becomes appealable because the Letters Patent confers the right of appeal against such order as 'judgment'. Similarly an order appealable under the Letters Patent may or may not be appealable under the Code. [281 C-E]

The Letters Patent, by clause 15, confers a right of appeal against a 'judgment' and therefore an order which satisfies the requirements of 'judgment' within the meaning of clause 15 becomes appealable. What kind of order will constitute a 'judgment' within the meaning of this clause and become appealable as such must necessarily depend on the facts and circumstances of each case and on the nature and character of the order passed. [281 F-G]

A comprehensive definition of 'judgment' contemplated by clause 15 cannot properly be given. Letters Patent itself does not define 'judgment'. The expression has necessarily to be construed and interpreted in each case. But yet it is safe to say that if an order has the effect of finally determining any controversy forming the subject matter of the suit itself or any part thereto or the same affects the question of the Court's jurisdiction or the question of limitation, it normally constitutes 'judgment' within the meaning of clause 15 of Letters Patent.

[282 E-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 662 of Appeal by special leave from the judgment and order dated the 15th January, 1981 of the Bombay High Court in Letters Patent Appeal No. 611 of 1980.

Soli J. Sorabji G.L. Sanghi, P.H. Parekh, P.K. Shroff and Gautam Philips for the Appellant.

R.P. Khambata, B.R. Agarwala, K.P. Khambata, Ashok C. Mehta and Miss Halida Khatun for Respondent No. 1.

K.K. Venugopal, R. Vaidya, M.B. Rele, Rajiv K. Garg and N.D. Garg for Respondent No. 2.

The following judgments were delivered:

FAZAL ALI, J. This appeal by special leave is directed against an Order dated January 15, 1981 of the Division Bench of the Bombay High Court by which the appeal filed by the appellant against the Order of the Trial Judge was dismissed on the ground that the appeal was not maintainable as the Order impugned was not a judgment within the meaning of clause 15 of the Letters Patent of the High Court.

After hearing counsel for the parties at great length we passed the following Order on April 22, 1981:-

> "We have heard counsel for the parties at great length. In our opinion, the appeal before the High Court was maintainable and the High Court should have entertained and decided it on merits. We, therefore, allow this appeal, set aside the judgment dated January 15, 1981 of the Division Bench of the Bombay High Court and remand the case to the same and decide it on merits. The High Court will dispose of the appeal as quickly as possible. The interim order passed by this Court on February 16, 1981 will continue until the High Court disposes of the appeal. Liberty to parties to approach the High Court for fixing an early date of hearing. In the circumstances, there will be no order as to costs.

Reasoned judgment will follow."

We now set out to give the reasons for the formal Order allowing the appeal which was passed by us on the aforesaid date.

As we are not at all concerned with the facts of the case it is not necessary to detail the same in this judgment. Suffice it to say that the plaintiff-appellant had filed a suit on the original side of the Bombay High Court for specific performance of a contract and prayed for an interim relief by appointing a receiver of the suit property and injuncting the defendant from disposing of the suit property during the pendency of the suit. The single Judge after hearing the notice of motion dismissed the application for appointment of receiver as also for interim injunction. Thereafter, the plaintiff-appellant filed an appeal before the Bombay High Court which dismissed the appeal as being non-maintainable on the ground that the Order impugned (order of the Single Judge) was not a judgment as contemplated by clause 15 of the letters patent of the High Court. Hence, this appeal by special leave.

The substantial questions of law raised in this appeal by the Counsel for the parties are as to the scope, ambit and meaning of the word 'judgment' appearing in clause 15 of the Letters Patent of the

Bombay High Court and corresponding clauses in the Letters Patent of other High Courts. We might mention here that the significance of the word 'judgment' assumes a special importance in those High Courts which have ordinary civil jurisdiction depending on valuation of the suit or the action. These High Courts are Calcutta, Bombay, Madras as also Delhi and Jammu & Kashmir. The other High Courts do not have any ordinary civil jurisdiction but their original jurisdiction is confined only to a few causes like probate and administration, admiralty and cases under Companies Act.

It seems to us that the interpretation of the word 'judgment' appearing in the Letters Patent of the High Court has been the subject-matter of judicial interpretation by decisions rendered by various High Courts in India. Unfortunately, however, the decisions are by no means consistent or unanimous. On the other hand, there appears to be a serious divergence of judicial opinions and a constant conflict between the High Courts regarding the true scope, ambit and meaning of the word 'judgment' appearing in the Letters Patent so much so that a colossal controversy has been raging in this country for more than a century. Several tests have been laid down by leading judgments of the Calcutta, Madras and Rangoon High Courts. Other High Courts have either followed one or the other of the leading judgments regarding the validity of the tests laid down by the three High Courts. The Calcutta High Court appears to have followed the leading case of its court in The Justices of the Peace for Calcutta v. The Oriental Gas Company where Sir Richard Couch, C.J. had laid down a particular test on a rather strict and literal interpretation of the Letters Patent. Later decisions of the Calcutta High Court have followed this decision of Sir Richard Couch, C.J. with some modifications and clarifications. The Madras High Court has taken a very liberal view in its decision in T.V. Tuljaram Row v. M.K.R.V. Alagappa Chettiar. The Bombay High Court seems to have consistently taken the view that no interlocutory order can ever be said to be a judgment within the meaning of the Letters Patent so as to be appealable from the order of a Single Judge exercising original civil jurisdiction (hereinafter referred to as 'Trial Judge') to a larger Bench. The Rangoon High Court speaking through Sir Page, C.J. in In Re Dayabhai Jiwandas & Ors v. A.M.M. Murugappa Chettiur has placed a very narrow interpretation on the term 'judgment' and has almost equated it with a decree passed by a civil court.

This Court also has incidentally gone into the interpretation of the word 'judgment' and has made certain observations but seems to have decided the cases before it on the peculiar facts of each case without settling the conflict or the controversy resulting from the divergent views of the High Courts. This Court, however, has expressed a solemn desire and a pious wish that the controversy and the conflict between the various decisions of the High Courts has to be settled once for all some time or the other. In this connection, in Asrumati Debi v. Kumar Rupendra Deb Raikot & Ors. this Court observed as follows:-

> "In view of this wide divergence of judicial opinion, it may be necessary for this Court at some time or other to examine carefully the principles upon which the different views mentioned above purport to be based and attempt to determine with as much definiteness as possible the true meaning and scope of the word 'judgment' as it occurs in clause 15 of the Letters Patent of the Calcutta High Court and in the corresponding clauses of the Letters Patent of the other High Courts. We are, however, relieved from embarking on such enquiry in the present case as we are

> satisfied that in none of the views referred to above could an order of the character which we have before us, be regarded as a 'judgment' within the meaning of clause 15 of the Letters Patent".

(Emphasis supplied) Similarly, in the case of State of Uttar Pradesh v. Dr. Vijay Anand Maharaj, this Court noticed the divergence of judicial opinions on the subject and observed as follows :-

> "The scope of the expression "judgment" came under the judicial scrutiny of the various High Courts, there is a cleavage of opinion on that question.
>
> ... ...
>
> The foregoing brief analysis of judgment shows that the definition given by the Madras High Court is wider than that given by the Calcutta and Nagpur High Courts. It is not necessary in this case to attempt to reconcile the said decision or to give a definition of our own, for on the facts of the present case the order of Mehrotra, J., would be a judgment within the meaning of the narrower definition of that expression".

After, however, analysing the various judgments this Court did not think it necessary to give any definition of its own and refrained from giving a final decision on the question as to the scope and meaning of the word 'judgment' appearing in the Letters Patent. Mudholkar, J. in his concurring judgment expressly refrained from expressing any opinion on the subject.

Again in a later decision in Shankarlal Aggarwal & Ors. v. Shankarlal Poddar & Ors. the conflict in the various decisions of various High Courts was again noticed and this Court observed as follows:

> "There has been very wide divergence of opinion between the several High Court in India as to the content of the expression 'judgment' occurring in Cl. 15 of the Letters Patent.....We consider that occasion has not arisen before us either since in view of the construction which we have adopted of s. 202 of the Indian Companies Act the scope of the expression 'judgment' in the Letters Patent does not call for examination or final decision".

(Emphasis ours) There are other decisions of this Court also which have touched the fringes of the question but did not choose to give a final verdict on the vexed question and preferred to decide the cases on their own facts. We shall briefly refer to these decisions at a later stage of this judgment.

With due deference to the desire of this Court to settle the controversy in question once for all, the very able, detailed and lengthy arguments advanced by counsel for the parties on various shades, features and aspects of the interpretation of the word 'judg-

ment' appearing in the Letters Patent, the serious legal controversy raging in this country for over a century between the various High Courts resulting in an irreconciliable element of judicial

uncertainty in the interpretation of the law and further having regard to the huge backlog and accumulation of arrears in the High Courts, we are clearly of the opinion that the time has now come when the entire controversy on the subject should be set at rest and an authoritative pronouncement on the matter may be given by us so as to maintain complete consistency in deciding the matter by the High Courts whenever it arises.

Mr. Sorabjee, learned counsel for the appellants has submitted four important points of law dwelling on the various facts of the question at issue:

> (1) It was contended that the provisions of s. 104 read with order 43 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'Code of 1908') does not impose any bar on the trial held by the Trial Judge and thus by virtue of these provisions the order impugned (the order of the trial court refusing to appoint Receiver and to grant injunction) falls squarely under clauses
>
> (r) and (s) of order 43 Rule 1 of the Code of 1908 and is therefore appealable to a larger Bench.
>
> In amplification of this contention it was submitted that the Trial Judge is governed by the procedure prescribed by the Code of 1908 in all matters and hence there is no reason why order 43 Rule 1 should not apply to any order passed by the Trial Judge under any of the clauses of order 43 Rule 1 read with s.
>
> 104. (2) Even if we assume that the Letters Patent was a special law which overrides the provisions of the Code of Civil Procedure, the power under s. 104 read with order 43 Rule 1 is in no way inconsistent with cl. 15 of the Letters Patent. Section 104 merely provides an additional remedy and confers a new jurisdiction on the High Court without at all interfering with or overriding the existing provisions of the Letters Patent.
>
> (3) Even if order 43 Rule 1 did not apply in terms, the orders which have been mentioned as being appealable to a larger Bench could form valuable guidelines for the Court in arriving at the conclusion that such orders amount to judgments of the Single Judge as contemplated by the Letters Patent.
>
> (4) Even if s. 104 read with order 43 Rule 1 does not apply, an order refusing to appoint a receiver or to grant injunction has the trappings and attributes of finality as it affects valuable rights of the plaintiff in an ancillary proceeding though the suit is kept alive and would, therefore, amount to a judgment within the meaning of the Letters Patent.

The learned counsel for the respondents while countering the arguments of Mr. Sorabjee submitted the following propositions:

(1) S. 104 read with order 43 Rule 1 could not apply to the original trial by the Trial Judge which is governed by the Letters Patent alone. (2) It was further argued that the forum for an appeal contemplated by s. 104 is the same as that for appeals under sections 96 to 100 of the Code of 1908, that is to say, appeals from the courts in the mofussil (district courts) to the High Court and it has no application to internal appeals within the High Court. In other words, the forum under which an appeal lies from one Judge of the High Court to a larger Bench is not a forum contemplated by s. 104 at all but is created by the Letters Patent.

(3) If s. 104 of the Code of 1908 is held to be applicable to proceedings before the Trial Judge of the High Court certain strange anomalies will arise, viz., where an appeal lies from a district court under order 43 Rule 1 before a Single Judge, a further appeal will have to lie before a larger Bench against the order of the Trial Judge although s. 104 prevents a second appeal against miscellaneous orders under order 43 Rule 1 and permits only one appeal. This will, therefore, lead to an inconsistent and anomalous position.

(4) The word 'judgment' should be strictly construed as was done by Sir Richard Couch, C.J. in Oriental Gas Company's case (supra) so as to include only those orders of the Trial Judge which are of a final nature and effectively decide the controversy of the issues in dispute.

We would first deal with the point relating to the applicability of s. 104 read with order 43 Rule 1 of the Code of 1908 because it seems to us that the arguments of Mr. Sorabjee on this score are well-founded and must prevail. Moreover, some of the decisions of this Court, those of the Privy Council and other High Courts support the propositions adumbrated by Mr. Sorabjee.

In order, however, to appreciate the applicability of s. 104 read with Order 43 Rule 1, it may be necessary to examine some important provisions of the Code of Civil Procedure as also the previous history which led to the enactment of s. 104 by the Code of 1908. It appears that prior to the Code of 1908 in the earlier Code of Civil Procedure there were two kinds of appeals to the High Court- (1) appeals against judgments and decrees of the Trial Judge, and (2) appeals against orders, either interlocutory or quasi-final, passed by the court during the pendency of the suit or proceedings. In the Civil Procedure Code of 1877 the section corresponding to order 43 Rule 1 of the Code of 1908 was s. 588 which provided for appealable orders under clauses (a) to (t). Section 588 of the Code of 1877 provided that an appeal from any order specified in s. 588 shall lie to the High Court or when an appeal from any other order is allowed by the Chapter it would lie to the Court to which an appeal would lie from the decree in the suit in respect of which such order was made or when such order is passed by a court other than the High Court, then to the High Court. A perusal of ss. 588 and 589 of the Code of 1877 would clearly show that the statute made no distinction between appeals to the High Courts from the district courts in the mofussils or internal appeals to the High Courts under the Letters Patent. Section 591 clearly provided that except the orders mentioned in s. 588 no further appeal could lie from any order passed by any court in exercise of its original or appellate jurisdiction. Section 591 may be extracted thus:-

> "591. No other appeal from orders; but error therein may be set forth in memorandum of appeal against decree.
>
> "Except as provided in this chapter, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction but if any decree be appealed against, any error, defect or irregularity in any such order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal".

In other words, the position was that while the statute provided only for appeals against orders, all other appeals could only be against a decree passed by the court concerned. The statute there fore, did not contemplate any other appeal except those mentioned in ss. 588 and 591.

The Code of 1877 was later on replaced by the Code of 1882 but the provisions remained the same. In view of the rather vague and uncertain nature of the provisions of ss. 588 to 591 a serious controversy arose between the various High Courts regarding the interpretation of s. 588. The Bombay and Madras High Courts held that under cl. 15 of the Letters Patent of the said High Courts, an appeal could lie only from orders passed under s. 588 and not even under the Letters Patent. In Sonba'i v. Ahmedbha'i Habibha'i a Full Bench of the Bombay High Court held that under cl. 15 of the Letters Patent an appeal to the High Court from an interlocutory order made by one of the Judges lies only in those cases in which an appeal was allowed under the Code of Civil Procedure, that is to say, under ss. 588 and 591 of the Code of 1877. The Madras High Court in Rajgopal & Ors (in Re: L.P.A. No. 8 of 1886 took the same view. Then came the decision of the Privy Council in the case of Hurrish Chunder Chowdry v. Kali Sundari Debia which while considering s. 588 made the following observations:-

> "It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals is from one of the Judges of the Court to the full Court."

(Emphasis ours) This judgment gave rise to a serious conflict of opinions in the High A Courts in India. The High Courts of Calcutta, Bombay and Madras held that in view of the decision of the Privy Council in the aforesaid case, even though an order may not have been appealable under s. 588 it could be appealable provided it was a judgment within the meaning of cl. 15 of the Letters Patent of the respective High Courts. Toolsee Money Dassee v. Sudevi Dassee,, Secretary of State v. Jehangir; Chappan v. Modin Kutti, However, the Allahabad High Court in Banno Bibi v. Mehdi Husain held that if an order was not appealable under ss. 588 and 591 of the Code of 1877 it could not be appealed against even under the Letters Patent of the High Court. This view was affirmed by a later decision of the same High Court in Muhammad Naim-ul- Lah Khan v. Ihsan-ul-Lah Khan.

With due respect we would like to point out that the pointed and terse observations of the Privy Council did not leave any room for any doubt or speculation in the matter. While construing s. 588, the Judicial Committee in Hurrish Chunder Chowdry's case (supra) had made it clear that appeals would lie under s. 588 to the High Court and the section did not contain any restriction to the effect

that appeal against the orders of the Trial Judge mentioned in s. 588 would not lie to a larger Bench of the High Court. In other words, the Privy Council intended to lay down clearly that s. 588 did not affect nor was it inconsistent with the provisions of the Letters Patent and hence those orders of the Trial Judge which fell beyond s. 588 could be appealable to a larger Bench under the Letters Patent if those orders amounted to judgment within the meaning of cl. 15 of the Letters Patent. Therefore, the views taken by the Calcutta, Bombay and Madras High Courts, referred to above, were undoubtedly correct. At any rate, since a fresh controversy had arisen, the legislature stepped in to settle the controversy by enacting the new s. 104 in the Code of 1908. Section 104 made it clear that appeals against orders mentioned in order 43 Rule 1 were not in any way inconsistent with the Letters Patent and merely provided an additional remedy by allowing appeals against miscellaneous Orders passed by the Trial Judge to a larger Bench. In other words, the legislature gave full statutory effect to the views of the Calcutta, Bombay and Madras High Courts. Even after the introduction of s. 104, the conflict between the various High Courts still continued as to whether or not s. 104 would apply to internal appeals in the High Court. That is the question which we shall now discuss.

To begin with, it is not disputed that a Trial Judge has to follow the entire procedure laid down by the Code of 1908 starting from the presentation of the plaint right up to the delivery of the judgment. The only difference in the assumption of jurisdiction by the High Court is that a suit of a particular valuation has to be instituted in the High Court rather than in the District court. Secondly, it is indisputable that any final judgment that the Trial Judge passes deciding the suit one way or the other amounts to a decree and under the provisions of the Letters Patent an appeal lies to a larger Bench which normally is a Division Bench as provided for under the Rules made by various High Courts. Thirdly, the Letters Patent itself does not define the term 'judgment' and has advisedly not used the word 'decree' in respect of any judgment that may be given by the Trial Judge. Section 5 of the Code of 1908 may be extracted thus:

> "5. Application of the Code to Revenue Courts: (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent the State Government may, by notification in the Official Gazette, declare that any portions of those pro visions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the State Government may prescribe.
>
> (2) "Revenue Court" in Sub-section (1) means a court having jurisdiction under any local law to entertain suits of other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature "

The importance of this section is that wherever the provisions of the Code of Civil Procedure are sought to be excluded by any special enactment which may be silent on the point, the State Government can by notification apply the provisions of the Code to Revenue courts. A bare perusal of this section would clearly reveal that excepting Revenue courts all other Civil courts would

normally be governed by the provisions of the Code of Civil Procedure in the matter of procedure. Section 4(1) of the Code of 1908 which is a saving provision clearly provides that in the absence of any specific provision to the contrary the provisions of the Code does not limit or affect any special or local law. Thus, the test contained in s. 4 is not applicable in the instant case because even if the Letters Patent of the High Court be deemed to be a special law as contemplated by s. 4, the provisions of s. 104 do not seek to limit or affect the provisions of the Letters Patent.

This now takes us to s. 104 of the Code of 1908, the relevant portion of which may be extracted thus:-

> "104.(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-
>
> (a) to (f) annulled;
>
> (ff) an order under section 35-A
>
> (g) an order under section 95;
>
> (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;
>
> (1) any order made under rules from which an appeal is expressly allowed by rules:
> (2) No appeal shall lie from any order passed in appeal under this section."

Thus by the force of s. 104 all appeals as indicated in the various clauses of order 43 Rule 1 viz. (a) to (w) would lie to the appellate court. Section 105 clearly provides that no appeal shall lie from any order of a Court made in the exercise of its original or appellate jurisdiction except according to the procedure laid down by the Code. The relevant part of s. 105 (1) may be extracted thus:

> "105. (1) Save as otherwise expressly provided no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

Finally, order, 49 Rule 3 expressly exempts matters contained in clauses (1) to (6) of Rule 3 from the operation of the extraordinary original civil jurisdiction of the chartered High Courts, that is to say, the jurisdiction conferred on the High Court by the Letters Patent. The relevant portion of this provision may be extracted thus:

> "O. 49.

> (3) The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:-
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> (1) rule 10 and rule 11, clauses (b) & (c), of order VII;
>
> (2) rule 3 of order X;
>
> (3) rule 2 of order XVI;
>
> (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15, and 16 (so far as relates to the manner of taking evidence) of Order XVIII;
>
> (5) rules 1 to 8 of order XX; and (6) rule 7 of order XXXIII (so far as relates to the making of a memorandum);
>
> and rule 35 of order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction"

It may be pertinent to note that although a number of rules have been exempted from the operation of the Code, order 43 Rule 1 and the clauses thereunder have not been mentioned in any of these clauses.

Thus, a combined reading of the various provisions of the Code of Civil Procedure referred to above lead to the irresistible conclusion that s. 104 read with order 43 Rule 1 clearly applies to the proceedings before the Trial Judge of the High Court. Unfortunately, this fact does not appear to have been noticed by any of the decisions rendered by various High Courts.

We might further point out that s. 117 of the Code of 1908 expressly applies the provisions of the Code to High Courts also. Section 117 may be extracted thus:

> "117. Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts".

We find ourselves in complete agreement with the arguments of Mr. Sorabjee that in the instant case s. 104 read with Order 43 Rule 1 does not in any way abridge, interfere with or curb the powers conferred on the Trial Judge by cl. 15 of the Letters Patent. What s. 104 read with order 43 Rule 1 does is merely to give an additional remedy by way of an appeal from the orders of the Trial Judge to a larger Bench. Indeed, if this is the position then the contention of the respondent that s. 104 will not apply to internal appeals in the High Courts cannot be countenanced. In fact, the question of application of the Code of Civil Procedure to internal appeals in the High Court does not arise at all because the Code of Civil Procedure merely provides for a forum and if order 43 Rule 1 applies to a Trial Judge then the forum created by the Code would certainly include a forum within the High Court to which appeals against the judgment of a Trial Judge would lie. It is obvious that when the Code contemplates appeals against orders passed under various clauses of order 43 Rule 1 by a Trial

Judge, such an appeal can lie to a larger Bench of the High Court and not to any court subordinate to the High Court. Hence, the argument that order 43 Rule 1 cannot apply to internal appeals in the High Court does not appeal to us although the argument has found favour with some of the High Courts.

We might also reiterate that prior to the Code of 1908, in the Code of 1877 an identical provision like order 43 Rule 1 also existed in the shape of s. 588 which was absolutely in the same terms as order 43 Rule 1 and its various clauses. Of course, section 104 was conspicuously absent from the Codes of 1877 or 1882. As indicated earlier, the question of the application of s. 588 (now Order 43 Rule 1) was considered as early as 1882 in Hurrish Chunder Chowdary's case (supra) where the Privy Council in very categorical terms observed thus:-

> "It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court."

We have already shown that a perusal of these observations leaves no room for doubt that the Privy Council clearly held that s. 588 undoubtedly applied to appeal from one of the Judges of the High Court to the Full Court, which really now means the Division Bench constituted under the Rules. In spite of the clear exposition of the law on the subject by the Privy Council it is rather unfortunate that some High Courts have either misinterpreted these observations or explained them away or used them for holding that s.588 does not apply to High Courts. We shall deal with those judgments and point out that the view taken by the High Courts concerned is not at all borne out by the ratio decidendi of the Privy Council. So far as the applicability of s. 588 to proceedings in the High Courts is concerned, in a later decision the Privy Council reiterated its view in unmistakable terms. In Mt. Sabitri Thakurain v. Savi & Anr., their Lordships observed as follows:

> "Section 15 of the Letters Patent is such a law and what it expressly provides, namely an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction, is thereby saved. Thus regulations duly made by orders and Rules under the Code of Civil Procedure, 1908 are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal".

Though not directly, some observations made by this Court also support the consistent view taken by the Privy Council that order 43 Rule 1 applies to the original proceedings before the Trial Judge. In Union of India v. Mohindra Supply Co., this Court made the following observations:-

> "The intention of the legislature in enacting sub- s. (1) of s. 104 is clear: the right to appeal conferred by any other law for the time being in force is expressly preserved. This intention is emphasised by s. 4 which provides that in the absence of any specific provision to the contrary nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force. The right to appeal against judgments (which did not

> amount to decrees) under the Letters Patent, was therefore not affected by s. 104 (1) of the Code of Civil Procedure, 1908".

Thus, this Court has clearly held that the right to appeal against judgments under the Letters Patent was not affected by s. 104 (1) of the Code of 1908 and the decision therefore fully supports the argument of Mr. Sorabjee that there is no inconsistency between the Letters Patent jurisdiction and s. 104 read with order 43 Rule 1 of the Code of 1908. Similarly, in Shankarlal Aggarwal's case (supra) this Court while construing the provisions of s. 202 of the Indian Companies Act observed as follows:-

> "There was no doubt either that most of the orders or decisions in winding up would not be comprehended within the class of appealable orders specified in s. 104 or O. 43 r.1. If therefore the contention of the respondent were accepted it would mean that in the case of orders passed by the District Courts appeals would lie only against what would be decrees under the Code as well as appealable orders under s. 104 and o. 43 r.1. and very few of the orders passed in the Courts of the winding up would fall within these categories. On the other hand, the expression "judgment" used in cl. 15 is wider. The learned Judge therefore rejected a construction which would have meant that the same orders passed by District Courts and by a Single Judge of a High Court would be subject to different rules as to appealability".

There is yet another aspect of the matter which shows that s. 104 merely provides an additional or supplemental remedy by way of appeal and, therefore, widens rather than limits the original jurisdiction of the High Court. For instance, in this very case with which this Court was dealing, an order passed under s. 202 of the Companies Act was appealable to a larger Bench and yet it was argued that the order being of an interlocutory nature would not be a judgment and therefore no appeal would lie to the Division Bench. This contention was negatived by the Supreme Court and it was held that against the order passed by a Trial Judge under the Companies Act, an appeal would lie to the Division Bench. On a parity of reasoning, therefore, s. 104 read with order 43 Rule 1 expressly authorises and creates a forum for appeal against orders falling under various clauses of order 43 Rule 1, to a larger Bench of the High Court without at all disturbing, interfering with or overriding the Letters Patent jurisdiction. There are a number of other Acts also which confer additional powers of appeal to a larger Bench within the High Court against the order of a Trial Judge. Take, for instance, a case under the Arbitration Act. Suppose in a suit the matter is referred to arbitration and after the award is filed by the Arbitrator certain objections are taken, under s. 39 of the Arbitration Act an appeal would lie to a Larger Bench from the order of a Single Judge disposing of the objections taken by the parties against the award. Section 39 runs thus:

"39. Appealable orders.-(1) An Appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decree of the Court passing the orders; An Order-

> (i) superseding an arbitration;

(ii) on an award stated in the form of a special case;

(iii)Modifying or correcting an award;

(iv) filing or refusing to file an arbitration agreement;

(v) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(vi)setting aside or refusing to set aside an award: Provided that the provisions of this section shall not apply to any order passed by a small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court".

It cannot be contended by any show of force that the Order passed by the Trial Judge being an interlocutory order, no appeal would lie to the Division Bench or that the provisions of the Arbitration Act giving a right of appeal to a litigant from the order of a Trial Judge to the Division Bench in any way fetter or override the provisions of the Letters Patent.

There are, however, a number of decisions of the various High Courts which have held that the provisions of order 43 Rule 1 clearly apply to a Trial Judge. As early as 1872, the Bombay High Court in Sonba'i's case (supra) held that in regard to appeals against orders of the Trial Judge the practice of the Bombay High Court has been that in all matters the provisions of the Code concerned would be applicable. In this connection, Sargent, Acting C.J., speaking for the court observed as follows:-

"the word "judgment" may be taken to include any preliminary or interlocutory judgment, decree, order, or sentence within the meaning of clause 40, and effect may be given to section 37 by limiting the orders open to appeal to those orders which are expressly declared appealable in the various sections of the Civil Procedure Code, or in other words by incorporating the provisions of the Civil Procedure Code relating to appeals with Sec. IS of the Letters Patent, and holding the word 'judgment' to mean all judgments and orders which are appealable under the provisions of the Civil Procedure Code".

This case was followed by a Division Bench of the Madras High Court which clearly held that an order passed under s. 592 was controlled by s. 588. We have already pointed out that in the Code prior to 1882, order 43 Rule 1 appeared in the shape of s. 588 and even under order 43 Rule 1 an order rejecting an appeal in forma pauperis is not appealable and does not appear in any of the clauses of order 43 Rule 1. The Madras High Court in Rajgopal's case (supra), relying on the decision of the Bombay High Court, observed thus:

> "An order passed under s. 592 of the Code of Civil Procedure rejecting an appeal in forma pauperis is not appealable under s. 588, which provides that no appeal shall lie from orders not specified in that section. It has already been decided in Achaya v. Ratnavelu (ILR 9 Mad. 253) that s. 15 of the Letters Patent is controlled by a similar section in the Civil Procedure Code, which provided that an order shall be final, and that enactments to such effect are not beyond the legislative powers of the Governor-General in Council".

Thus, even in the earlier times the High Court had veered round to the view that s. 588 would be applicable to the High Courts also even in respect of internal appeals in, the High Court.

Similarly, in Ruldu Singh v. Sanwal Singh, Shadi Lal, C.J. Speaking for the court observed thus;-

> Now, section 588 of the old Code, which has now been replaced by section 104 and Order XLIII, rule of the new Code, enacted that an appeal lay from the orders specified in that section and from no other orders"; and it was consequently decided by a Full Bench of that Court in Muhammad Naim-ul-Lah Khan v. Ihsan Ullah Khan (1892) ILR 14 All. 226 that clause 10 of the Letters Patent was controlled in its operation by section 588, and that no appeal lay under the Letters Patent from an order made under the Code if it was not one of the orders enumerated in that section. Section 104 of the new Code, however, expressly saves the right of appeal otherwise provided by 'any law for the time being in force'...It seems to us that the object of the Legislature in enacting sub-section (2) was to make it clear that there was no second appeal under the Code from the orders specified in Sub-section (1) of section 104, and that sub-section (2) was not intended to override the express provisions of the letters patent."

The Lahore High Court relied on the decision of the Privy Council in Hurrish Chunder Chowdrys case (supra). The High Court further held that s. 104 does not in any way take away the right of appeal conferred by the Letters but Patent of the High Court merely bars a second appeal from orders passed under O.43 R. 1 to Division Bench. A contrary view was taken by the Allahabad High Court in Ram Sarup v. Kaniz Ummehani where the following observations were made:-

> "It may, however, be conceded that this saving clause does not occur in sub-section (2) of section
>
> 104. But under the corresponding section 588 of the old Code, where the words were "orders passed in appeal under this section shall be final", their Lordships of the Privy Council in Hurrish Chunder Chowdhry v. Kalisunduti Debi (1882) ILR 9 Cal. 482 observed that section 588, which had the effect of restricting certain appeals, did not apply to a case where the appeal is from one of the Judges of the High Court to the Full Court to the full Court.. In any case section 104 (2) does not contain any express provision which would suggest that the provisions of the Letters Patent have been abrogated. We accordingly hold that under clause 10 of the Letters Patent an

> appeal lies from the order of a single Judge passed in appeal."

With due deference to the Hon'ble Judges we are of the opinion that the decision of the Allahabad High Court on this point is based on a serious misconception of the legal position. It is true that s. 104 was introduced by the Code of 1908 and the aforesaid section, as we have already indicated, clearly saved the Letters Patent jurisdiction of the High Court. From this, however, it does not necessarily follow that the restriction that there is no further appeal from the order of a Trial Judge to a larger Bench would be maintainable or permissible. In the first place, once s. 104 applies and there is nothing in the Letters Patent to restrict the application of s. 104 to the effect that even if one appeal lies to the Single Judge, no further appeal will lie to the Division Bench. Secondly, a perusal of clause 15 of the Letters Patent of the Presidency High Courts and identical clauses in other High Courts, discloses that there is nothing to show that the Letters Patent ever contemplated that even after one appeal lay from the subordinate court to the Single Judge, a second appeal would again lie to a Division Bench of the Court. All that the Letters Patent provides for is that where the Trial Judge passes an order, an appeal against the judgment of the said Trial Judge would lie to a Division Bench. Furthermore, there is an express provision in the Letters Patent where only in one case a further or a second appeal could lie to a Division Bench from an appellate order of the Trial Judge and that is in cases of appeals decided by a Single Judge under s. 100 of the Code of Civil Procedure. Such a further appeal would lie to a Division Bench only with the leave of the court and not otherwise. The relevant portion of cl. 15 of the Letters Patent may be extracted thus:

> "And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort William in Bengal from the 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, 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, 1929) 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."

A perusal of the Letters Patent would clearly reveal two essential incidents-(1) that an appeal shall lie against any order passed by the Trial Judge to a larger Bench of the same High Court, and (2) that where the Trial Judge decides an appeal against a judgment or decree passed by the district courts in the mofussil, a further appeal shall lie only where the judge concerned declares it to be a fit one for appeal to a Division Bench. Thus, the special law, viz., the Letters Patent, contemplates only these two kinds of appeals and no other. There is, therefore, no warrant for accepting the argument of the respondent that if order 43 Rule 1 applies, then a further appeal would also lie against the appellate order of the Trial Judge to a Division Bench. As this is neither contemplated nor borne out by the provisions of the Letters Pantent extracted above, the contention of the respondent on this score must be overruled.

A further second appeal Lying to a Division Bench from an appellate order of the Trial Judge passed under order 43 Rule 1 is wholly foreign to the scope and spirit of the Letters Patent. Un-

fortunately however, the Allahabad High Court in Ram Sarup's case (supra) refused to follow a Division Bench decision in Piari Lal v. Madan Lal and also tried to explain away the Full Bench decision in Ram Sarup's case (supra) where it was clearly pointed out that in such cases no further appeal would lie to the Division Bench under the Letters Patent. The distinction drawn by the Allahabad High Court regarding the application of s. 104 is a distinction without any difference. Sir John Edge, C.J., in Muhammad Naim-ul-lah Khan's case (supra) dealing with this aspect of the matter observed thus:-

> "It appears to me that the Code of Civil Procedure (Act No. XIV of 1882), as did Act No. X of 1877, contemplates a High Court in two aspects. It contemplates a High Court doing the ordinary work of a Court of original and appellate jurisdiction; having the necessary powers of review and revision in certain cases and certain other powers such as are generally found vested in the Courts of the importance of High Courts...whatever those powers may be, it is quite clear to my mind that the power conferred on a High Court under Chapter XLV of the Code of Civil Procedure are special powers and entirely distinct from the ordinary powers required by the High Court in the carrying on of its ordinary judicial business."

and Mahmood, J. Observed thus:

> "To hold then that where this statute of ours, namely, our present Code of Civil Procedure, declares a decree or order non-appealable, such decree or order can be made the subject of consideration by the whole of this Court under the Letters Patent, is to hold that wherever no appeal lies to this Court the ceremony of presenting it to this Court to a Single Judge of this Court who would undoubtedly reject the appeal, makes it the subject of consideration by a Bench of the Court." The other Judges agreed with the view taken by the Chief Justice and Mahmood, J. In Piari Lal's case (supra) which was decided after s. 104 was introduced in the Code of 1908, the following observations were made:-
>
> "A preliminary objection has been taken to the hearing of the appeal based on the Full Bench decision in the case of Muhammad Naimullah Khan v. Ihsan-ullah Khan (1892) ILR 14 All. 226. Section 104 of the Code of Civil Procedure provides for the cases in which an appeal shall lie against an "order'. Clause (ii) provides that "No appeal shall lie from any order passed in appeal under this section". The contention of the respondent in the preliminary objection is that no second appeal lies and reliance is placed upon the authority quoted to show that even a Letters Patent appeal is not permissible. We are of course bound by the Full Bench ruling of this Court. It is contended, however, that the words in section 588 of the Code of Civil Procedure, which was in force when the decision in the Full Bench case was given, differed from the words of the present Code. The only difference is that in the old

> Code the words were "The order passed in appeals under this section shall be final", whereas in the present Code the words are "No appeal shall lie". We cannot see how the change in the words can in any way help the appellant. Possibly the reason for the change is that under the words in the old Code it might have been argued that even a "revision" or a "review of judgment" would not lie against an order passed by an appellate court. We think the preliminary objection must prevail and we accordingly dismiss the appeal with costs."

Thus, in these two cases it was clearly held that where a Trial Judge had passed an order in an appeal against an order passed by the district judge under order 43 Rule 1, a further appeal under the Letters Patent was not maintainable. This view is fully supported by the express language in which clause 15 of the Letters Patent has been couched, as referred to above. Thus the latter decision of the Allahabad High Court in Ram Sarup's case (supra) was clearly wrong in holding that an appeal under the Letters Patent would lie even against an appellate order of the Trial Judge passed under O.43, R. 1 even though it was prohibited by s. 104 (2) of the Code.

Similarly, in Chappan's case (supra) the Court on an interpretation of s. 588 (which now corresponds to the present Order 43 Rule 1 clearly held that an appeal would lie to the High Court against the orders contemplated in various clauses of s. 588 of the Code of 1877. The Court held thus:-

> "The result of this judgment (so far as it applies to the question before us) appears to me to come to this, that if the order made by a single Judge only amounts to an order such as is intended by chapter XLII of the Code, it is not appealable unless it is within section 588."

The Madras case heavily relied on the decision of the Privy Council in Hurrish Chunder Chowdry's case (supra). In Lea Badin v. Upendra Mohan Roy Chaudhury & Ors. while criticising the judgment of Sir Richard Couch, C.J. in The Justice of the Peace for Calcutta (supra) the Court as an alternative argument clearly held that order 43 Rule 1 would apply pro tanto to the Trial Judge and on this ground also the order would be appealable to a Division Bench. In this connection, the celebrated jurist Sir Manmatha Nath Mookerjee, J. Observed as follows:-

> "But there is another and a far simpler ground on which it must be held that an appeal is competent. The order in the present case is one for which a right of appeal is provided in cl. (s) of r. 1 of or 43 of the Code. Under the present Code (Act V of 1908) it cannot be contended that the Code and the Rules made under it do not apply to an appeal from a learned Judge of the High Court "

Another important decision regarding the applicability of order 43 Rule 1 to an order passed by the Trial Judge was rendered by a Full Bench in Mathura Sundari Dassi v. Haran Chandra Shaha & Ors. where Sanderson, C.J. Observed thus:-

> "By the terms of s. 117, the Code is made applicable to the High Court, and O. 43, R. 1 gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that O.9 R. 8 applies. That order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to O. 9, R. 8 and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which-when his application for reinstatement has been refused-gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal."

and Woodroffo 'J' made similar observations:-

> "Whether or not as a question of jurisdiction an appeal lies under clause 15 of the Letters Patent in a case in which an appeal is allowed under the Code, I think it may be said that there are prima facie grounds for holding that an appeal should be held to lie under the Letters Patent where it is allowed under the Code; for the fact that the Legislature has in the Code allowed an appeal in a particular case, a affords to my mind prima facie grounds for supposing that case is of a class which this Court considers appealable under its Letters Patent.. Looking at the nature of the order appealed from, I think I should hold that it is appealable as a 'judgement' under the Letters Patent."

and Mookerjee, J. Observed thus:-

> "The term "Rule" which finds a place in s. 117 is defined in clause 18 of s. 2 of the Code to mean "a rule contained it the First Schedule or made under s. 122 or s. 125." our attention has not been drawn to any such rule which makes O. 43, R, 1, clause (c) inapplicable. On the other hand, O. 49, R. 3 which excludes the operation of other rules, lends support to the contention of the appellant that O. 43, R. 1 clause
>
> (c) is applicable to the present appeal. "S. 104 of the Code of 1908 is materially different from S. 588 of the Code of 1882. It provides that lie from the orders mentioned in the first clause of that section and, save as otherwise expressly provided in the body of the Code or by any law for the time being in force from no other orders." The effect of s. 104 is thus, not to take away a right of appeal given by clause 15 of the Letters Patent, but to create a right of appeal in cases even where clause 15 of the Letters Patent is not applicable.. I hold accordingly that this appeal is competent under Clause (c), R. 1, O. 43 of the Civil Procedure Code.

I am further of opinion that the appeal is competent also under Clause 15 of the Letters Patent."

(Emphasis ours) We find ourselves in complete agreement with the view taken and the reasons given by the three eminent Judges in the aforesaid case which furnishes a complete answer to the arguments of the respondents that order 43, Rule I will have no application to internal appeals in the High Court under the provisions of the Letters Patent.

A similar view was taken in Lea Badin's case (supra) where the following observations regarding the applicability of order 43 Rule I in respect of an order passed by a Trial Judge were made:-

> "As an order refusing an application for the appointment of a receiver based on provision in the indenture of hypothecation, that on a breach of any one of the covenants contained therein the plaintiff's assignor would be entitled to have a receiver appointed, the order has determined a right which is one of the matters in the controversy itself, and so it satisfies the definition of Couch, C.J., as well. The order appealed from in this case is, in our opinion, a judgment' within the meaning of Cl. IS, Letters Patent. We may add that there are decisions of this Court in which orders discharging or refusing to discharge a receiver appointed in a suit, after the suit had come to an end or had become infectious, have been held to be ' judgments' and so appealable...But there is another and a far simpler ground on which it must be held that an appeal is competent. The order in the present case is one for which a right of appeal is provided in cl. (s), R. 1, O. 43 of the Code. Under the present Code (Act S of 1908) it cannot be contended that the Code and the Rules made under it do not apply to an appeal from a learned Judge of the High Court, such a contention was elaborately dealt with and repelled in the case of Malhura Sundari Dassi v. Haran Chandra Shaha & Ors. (AIR 1916 Ca. 361)".
>
> (Emphasis ours) In Toolsee Money Dassee & Ors. v. Sudevi Dassee & ors.

(supra) Maclean, C.J. while relying on the decision of the Judicial Committee in Hurrish Chunder Chowdry's case made the following pithy observations:

> "To my mind the first of these points has been authoritatively decided against the view of the present respondents by the Judicial Committee of the Privy Council in the case of Hurrish Chunder Chowdhry v. Kali Sunderi Debi (10 I. A. 4). I need not travel into the facts of that case, but there their Lordships said at page 494 of the report in the Indian Law Reports: "It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the Court to the Full Court." It is clear from the report that the point was elaborately argued, and the clear expression of their Lordships' opinion must be read in connection with that argument."

and Prinsep, J. who agreed with the Chief Justice, made the following identical observations:-

> "We have it, therefore, that if beyond clause 15 of the Letters Patent, 1865, section 588 of the Code of Civil Procedure gives the right of appeal against any order of the description specified therein, there is no Court of Appeal constituted to hear it, if such order not being a judgment had been made by the Judge on the original Side of the High Court.
>
> ... ...
>
> I understand this to mean that section 588 does not affect any matter coming within clause 15 of the Letters Patent, and if I may venture to say so, the reasons which led to the expression of that opinion and which have not been given in the judgment reported may be those stated by me for arriving at the same conclusion. I have no doubt that we are bound to follow to the fullest extent the opinion expressed by their Lordships of the Privy Council that section 588 of the Code does not apply to the case now before us, and that this matter has thus become settled law".

And Ammer Ali, J. while dissenting from the applicability of s. 588 held that the order appealable under s. 588 was a judgment within the meaning of the Letters Patent. Two decisions of the Rangoon High Court also have consistently taken the view that the provisions of s. 104 read with order 43 Rule I apply to the Trial Judge. In P. Abdul Gaffor v. The Official Assignee (1) the following observations were made:

> For an order made in exercise of the ordinary original civil jurisdiction to be appealable, it must come either under order XLIII, Rule 1 or be a judgment within the meaning of Section 13 of the Letters Patent, so that for the purpose of this application the appellant must establish that it is a judgment within the meaning of section 13".

(Emphasis ours) The question of the applicability of order 43 Rule I to an appeal from the Trial Judge under the Letters Patent was raised and decided by the Jammu & Kashmir High Court in Abdul Samad & Ors. v. The State of J & K (2) a decision to which one of us (Fazal Ali, C.J. as he then was) was a party. After an exhaustive review of various decisions on the subject, the High Court observed as follows:- G The legal position that emerges, therefore, is that orders of the character specified in Section 104 and order 43, Rule I, Civil P.C. excepting clause (JJ) thereof, would be construed as judgments and an appeal against any one of such orders would lie to the.. Division Bench of the High Court notwithstanding the fact that it is passed by one of the judges of the High Court sitting on the original side".

It may be mentioned that like the Presidency High Courts, the High Court of Jammu & Kashmir had also been invested with ordinary civil original jurisdiction.

The question of the applicability of order 43 Rule 1 to an appeal against an order of a Trial Judge to the Division Bench was directly in point and fully considered by a Division Bench of the Calcutta High Court and a Full Bench of the Rangoon High Court. In Kumar Gangadhar Bagla v. Kanti

Chunder Mukerjee & Anr. while dwelling on this aspect of the matter it was observed as follows:

> "Mr. Bose did not seek to argue, that the formal order of the 7th of June, 1935, was one of the appealable orders provided for in the Code of Civil Procedure. On the contrary, he went so far as to aver- with considerable vehemence - that neither sec. 104 nor order XLIII, r. l of the Civil Procedure Code has any application to the High Court. I would point out that it is clear from sec. 117 of Code of Civil Procedure and still clearer from Or. XLIX, r. 3, C.P.C., that both sec. 104 and Or. XLIII, r. 1, do apply to the High Court".

(Emphasis ours) It is manifest from the observations made above that in view of the clear and explicit provisions of s. 117 and order 49 Rule 3 which while exempting other provisions from the jurisdiction of the High Court did not exempt the various clauses of order 43 Rule 1. An identical view seems to have been taken by Sir Page, C.J. in a Full Bench decision of the Rangoon High Court in In re: Dayabhai Jiwandas & Ors. (supra) where the Chief Justice pithily observed as follows :-

> "In many statutes in India, of course, a Right of appeal from an order passed pursuant to the statute is expressly provided, and in such cases an appeal will lie on the terms and conditions therein prescribed. I will not pause to enumerate or discuss these enactments, although many such statutes were cited at the Bar. But, except A where otherwise a right of appeal adhoc is given under some statute or enactment having the force of a statute, the right of appeal from orders that do not amount to "judgment" is regulated by the provisions of the Code of Civil Procedure; (see section 104 and order 43, Rule 1)".

Thus, there appears to be a general consensus of judicial opinions on the question of the applicability of order 43 Rule 1 to Letters Patent appeals.

This now brings us to the second limb of the argument of Mr. Sorabjee that even assuming that order 43 Rule I does not apply to the High Court so far as the Trial Judge of the said court is concerned, there can be no doubt that the orders indicated in various clauses of order 43 Rule 1 possess the attributes and incidents of a final order which conclusively decides a particular issue so far as the Trial Court is concerned. Thus, there can be no difficulty, even without applying order 43 Rule 1 to hold by a process of analogical reasoning that the appeals and orders mentioned in the various sub-clauses would amount to a judgment within the meaning of cl. 15 of the Letters Patent because they contain the traits, trappings and qualities and characteristics of a final order. In other words, the argument advanced was that we could still apply the provisions of order 43 Rule 1 by the process of analogy. We fully agree with this argument because it is manifest that the word 'judgment' has hot been defined in the Letters Patent but whatever tests may be applied, the order passed by the Trial Judge appealed against must have the traits and trappings of finality and there can be no doubt that the appealable orders indicated in various clauses of order 43 Rule I are matters of moment deciding valuable rights of the parties and in the nature of final orders so as to fall `within the definition of 'judgment'.

This Court in Radhey Shyam v. Shyam Behari Singh (1) clearly held that an application under order 21 rule 90 to set aside the auction-sale is a judgment as the proceeding raises a controversy between the parties regarding their valuable rights. In this connection, this Court observed thus :-

"In our view an order in a proceeding under o.

XXI, r. 90 is a "judgment" inasmuch as a proceeding raises a controversy between the parties therein affecting their valuable rights and the order allowing the application certainly deprives the purchaser of rights accrued to him as a result of the auction-sale".

On a parity of reasoning, an order refusing to appoint a receiver or grant an injunction and similar orders mentioned in various clauses of order 43, Rule 1 fall within the tests laid down by this Court in the aforesaid case.

We are aware that there are some decisions which have taken a contrary view by holding that s. 104 read with order 43 Rule I does not apply to a Trial Judge under the Letters Patent. These decisions do not appear to have considered the various shades and aspects and the setting of the provisions of ss. 104 and 117 and order 49 Rule 3 but seem to have proceeded on the basis that the Letters Patent being a special law or a special jurisdiction, the same over-rides s. 104 which in terms does not apply where a special law makes certain special provisions.

We now proceed to discuss these cases briefly. In Pandy Walad Dagadu Mahar & Anr. v. Jammadas Chotumal Marwadi (1) the identical point which is at issue in the instant appeal was not involved and the finding given by the High Court was merely incidental. The Division Bench seems to have relied on a judgment of Sir Basil Scott and Hayward, JJ. where the question was only incidentally dealt with. Martin, J. In Pandy's case observed thus :-

> "Shortly stated, therefore, this Full Bench decision amounts to this,. that appeals under the Letters Patent are governed by the Letters Patent, and appeals under Code are governed by the Code. Further, the Code only deals with appeals from certain Courts and it does not deal with appeals within the High Court from the decision of one Judge of the Court to another. That is in my opinion, the true view of the relative position of the Letters Patent and the Code".

With due respect, a close analysis of this decision would reveal that the Judges followed a fallacious process of reasoning, According to their opinion, the appeals under the Code of Civil Procedure and those under the Letters Patent were, so to say two separate compartments having different spheres of their own. With due deference, we might point out that such a view is based on a total misinterpretation and misconstruction of the true nature and object of the Code of Civil Procedure and the Letters Patent. In fact, as we have pointed out earlier, there is no inconsistency, whatsoever between the Letters Patent and s. 104 read with order 43 Rule l; The first premise of the Court that internal appeals in the High Court were governed by the Letters Patent alone and not by the Code appears to be legally fallacious. We have already pointed out that a large number of decisions, including the Privy Council, have clearly taken the view that although the Letters Patent is a special

law certain provisions of the Code of Civil Procedure in the matter of procedure do apply to appeals against the decision of a Trial Judge to a larger Bench or to quote the Bombay Judges to 'internal appeals'. Secondly, the Court completely overlooked the legal effect of s. 117 and order 49 Rule 3 which completely demolishes the presumptuous process of logic adopted by the court. Thirdly, the Court appears to have overlooked that far from excluding the Code there could be other special Acts which could and did confer additional jurisdiction even in internal appeals to the High Court, viz., from an order passed by a Trial Judge to a larger Bench, for instance, s. 39 of the Arbitration Act or s. 202 of the Indian Companies Act and other similar local or special Acts. If these special Acts could without affecting the jurisdiction of the Letters Patent or overriding the same provided a supplementary or additional jurisdiction, there was no reason why the Code of Civil Procedure also could not do the same particularly when the Trial Judge had to adopt the procedure contained in the Code, starting from the presentation of the plaint to the delivery of judgment. Fourthly, the Division Bench does not seem to have considered the fact that what the Letters Patent did was merely to confer original civil jurisdiction on the High Court to be exercised by a Single Judge, who would undoubtedly be a Trial Judge, but of an elevated status so that only such suits could be filed in the Court of the said Judge as are of a very high valuation which may differ from High Court to High Court. This was done in order that in heavy suits involving substantial questions of fact and law, the hearing of the suit by a senior Court of the status of a High Court Judge would repose, endeanr and generate greater confidence in the people. Thus if, interlocutory orders passed by District courts in the mofussil could be appealable to the High Court, there was no reason why inter locutory orders passed by a Trial Judge could not be appealable to a larger Bench irrespective of the question whether or not they were judgments within the meaning of cl. 15 of the Letters Patent. This appears to us to be the cardinal philosophy of the Code in applying the provisions of order 43 Rule I, to the original suit tried by the Single Judge (Trial Judge).

Furthermore, the concept of internal appeals in the High Court seems to be a legal fiction without any factual existence imported by some of the High Courts in order to get rid of some of the provisions of the Code of Civil Procedure which is totally opposed not only to the aim and object of the Code but also to the very spirit of the Letters Patent. In a later judgment of the Bombay High Court in Vaman Ravji Kulkarni v. Nagesh Vishnu Joshi & Ors.,(1) the following observations were made:-

> "I am, with respect, of opinion that the view taken by the full Bench of the Madras and Calcutta High Courts in the cases referred to above is correct, and that the question must be regarded as having been finally settled by the decision of the Privy Council in 10 I. A. 4. (Hurrish Chunder Chowdry v. Kali Sundari Debi) S. 104. Civil P.C., which refers only to appeals to the High Court from Courts subordinate to it, cannot apply to appeals filed under Cl. 15 of the Letters Patent from a single Judge OF the High Court to a bench. (Wadia, J.) ... ...
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> There can be no doubt that the provisions of the Letters Patent have conferred special powers regarding appeals within the High Court. Those powers are not specifically taken away by s. 104, Civil P.C. and are not, therefore, affected by it . ..Special enactments are not repealed by later general Acts unless there be some express

> reference to the previous legislation or a necessary inconsistency in the two Acts standing together, which prevents the maxim from being applied. Sub-section (2) of s. 104, Civil P.C., does not refer to the Letters Patent and say that in spite of Cl. 15 of the Letters Patent no appeal lies from any order passed in an appeal under Sub-s. (1). Sub-s. (2) is in no way inconsistent with cl. 15 of the Letters Patent and the two can stand together, the former applying to appeals under the Code, and the latter to special appeals within the High Court...I am satisfied that s. 104, Civil P.C . does not control cl. 15 of the Letters Patent, and in spite of the absence of a saving clause in sub-s. (2) of s. 104 does not affect or cut down the right of appeal conferred by the Letters Patent."

(Lokur, J.) As regards the first part of the observations of Wadia, J, we are constrained to observe that the learned Judge has not correctly construed the true ratio of the decision of the Privy Council in Hurrish Chunder Chowdry's case (supra) where, as indicated, the Privy Council has in express terms held that s. 588 (which now corresponds to order 43 Rule 1) clearly applies to appeals against orders of a Trial Judge to a larger Bench of the High Court. Similarly, the observations made by Lokur, J. run against the plain interpretation of s. 104 by assuming that there is a conflict between s. 104 read with order 43 Rule I and the Letters Patent when in fact, as pointed out, there is no such conflict at all-all that s. 104 does is to give an additional jurisdiction apart from the Letters Patent which is in no way unconstitutional with the Letters Patent. We may like to observe here that there is no non-obstante clause in the provisions of the Letters Patent to indicate that the provisions of the Code of Civil Procedure, particularly s. 104 would not apply either expressly or by necessary intendment. In this view of the matter, therefore, we are clearly of the opinion that the Bombay decisions are wrongly decided and must, therefore, be overruled.

In Vishnu Pratap and Ors. v. Smt. Revati Devi and Ors.(l) the Court held that no appeal against an order passed by a Trial Judge under s. 202 of the Companies Act would lie to a Division Bench in view of the Letters Patent. This argument was negatived and overruled in Shankarlal Aggarwal's case (supra) as already discussed above. As regards the applicability of order 43, the following observations were made in Vishnu Pratap's case:

> "It is true that orders 40 & 43 both apply to the High Court but the question here is whether o. 43 makes provision for an appeal from one court to another or it is intended to cover cases of an appeal from one Judge to a bench of the same Court.. While s. 96 deals with original decree, s. 104 Civil P.C. deals with orders, not being decrees, and the orders that are appealable are set out under o. 43, C.P.C. The question of an appeal from one Court to another Court is no doubt governed by the provisions of the Code of Civil Procedure but the provision for appeal from one Judge of a Court to a bench of the same Court is not provided for by the Code and must be governed by the Letters Patent. If s. 104 read with O. 43 makes all these orders appealable then what would be the Court to which appeals would lie from an order passed by a Division Bench and not by a single Judge. We are not satisfied that s. 104 or O. 43 ever intended to deal with appeals from a Judge or Judges of one Court to a larger number of Judges in the same Court. It is no doubt true, as has been held by

> their Lordships of the Judicial Committee. in-'Mt. Sabitri Thakurain v. Savi' (AIR 1921 PC 80) that s. 104 as well as o. 43 apply to High Courts but it does not mean that they give any right to an appeal from an order by a Judge or Judges of that Court to a larger number of Judges of the same Court independently of the Letters Patent of the Court. As we have said if o. 43 or s. 104, Civil P.C., were made applicable per se, without reference to the Letters Patent, then even an order passed by a bench would come under those provisions, but before an appeal can be filed there will have to be a Court constituted for hearing an appeal and the only provision for hearing an appeal, from the judgment of a single Judge, by a bench of two or more Judges of the same Court is contained in the Letters Patent of the Chartered High Courts. An order, to come under the Letters Patent must be a judgment, and, if an order is not a judgment, then cl. 10 of the Letters Patent would not apply and there is no provision for constituting a bench of more than one Judge to hear such an appeal. We, therefore, fail to understand how O. 43 R. 1, or s. 104, Civil P.C.

without any reference to cl. 10 of the Letters Patent, can help the appellants.' In this case also, the line of reasoning adopted by the court is the same as that of the Bombay High Court referred to above.

One of the reasons given is that while order 43 makes provision for A appeal from one court to another, it is not intended to apply to an appeal from one Judge of the High Court to a bench of the same Court. No reasons have been given by the Judges for holding why this is not so particularly in the face of the clear provisions of s. 117 and order 49 Rule 3, as discussed above. Thus, the first part of R the reasoning of the High Court is totally irrelevant and wholly unintelligible. The point at issue is if s. 104 read with order 43, Rule I applies to an order passed by District Courts in the mofussil, why could it not apply to the one passed by the Trial Judge when the Letters Patent does not in any way bar such an appeal.

Another ground taken by the Court is that if order 43 Rule I is made applicable to the High Court then a strange anomaly will arise in that where an appeal lies to the Division Bench, how could a further appeal lie to some other bench of the court. This argument also is based on a misconception of order 43 Rule 1. It is manifest that if order 43 Rule I were to apply to orders passed by the Trial Judge, the order would be one passed by only one Judge of the High Court and, therefore, in the context of the original jurisdiction exercised by a Single Judge of the High Court, the appellate jurisdiction would lie with the Division Bench as contemplated by the Letters Patent and the Rules framed by the High Court. We are unable to see any anomaly or inconsistency in this position. Thirdly, the court seems to have relied on a decision of the Privy Council in Mt. Sabitri Thakurain v. Savi (AIR 1921 PC 80) and has interpreted the ratio of this case to mean that s. 104 would not apply to High Courts which is exactly what the Privy Council does not say. With due respect, therefore, the learned Judges have not correctly appreciated the decision of the Privy Council which has nowhere indicated that order 43 Rule I would not apply to internal appeals in the High Court. On the other hand their Lordships of the Privy Council had held to the contrary as discussed above. For these reasons, therefore, we are of the opinion that this case has also not been correctly decided and we disapprove the reasons given and the decision taken in this case.

We might also notice a full Bench decision of the Nagpur High Court in Madhukar Trimbaklal v. Shri Sati Godawari Upasani Maharaj of Sakori & Ors. (1) where Niyogi, J. Observed as follows :-

> "Clause 10, Letters Patent defines the appellate jurisdiction of the High Court vis-a-vis the judgment passed by a single Judge of that Court. It should be observed that the Civil Procedure Code does not make any provision in this behalf. The right of appeal from a decree of a single Judge to the High Court is not governed by s. 96 or s. 100 or s. 104, Civil P.C., but by cl. 10, Letters Patent.. This right of appeal depends on the special provision made in the Charter. S. 4, Civil P.C., provides that the Code does not affect any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force. Since the special jurisdiction or power is conferred on the High Court by cl. 10, Letters Patent the provisions in the Civil Procedure Code regarding appeals cannot come into operation in regard to an appeal from a single Judge of the High Court to the High Court".

With due respect, we are unable to agree with the opinion expressed by Niyogi, J. who has made a bald statement that the Code of Civil Procedure does not make any provision in regard to an appeal from an order passed by a Trial Judge to a Division Bench and that the right of appeal from a decree of a Civil Judge to a High Court is not governed by s. 100 or s. 104 but by cl. 10 of the Letters Patent of the Nagpur High Court. Here again, the learned Judge seems to have committed an error apparent on the face of the record. An examination of the language of sections 96 to 100 would clearly show that the scope of these sections is quite different from that of s. 104. Sections 96 to 100 expressly deal with the forum of appeal provided by the Code against decrees or orders amounting to decrees passed by the District Court in the mofussil. Section 104 is couched in very general terms and cannot be limited to appeals against orders passed by the courts contemplated in sections 96 to

100. Moreover, s. 104 does not deal with appeal against a decree at all but provides a forum for appeal against orders under order 43 Rule I which are mainly orders of a final or quasi-final nature passed during the pendency of a suit. Section 104, therefore, has a much wider application, as discussed above, and neither overrides the Letters Patent nor is it inconsistent with the same. For these reasons, therefore, we are unable to accept the line of reasoning adopted by the aforesaid High Court in holding that s. 104 does not apply to internal appeals in the High Court and A we accordingly overrule this decision.

A some what identical view was taken by a later decision of the Nagpur High Court in Ratanlal Jankidas Agarwal v. Gajadhar & Ors. (l) Where the following observations were made -

> "Firstly, O. 43 has not been made applicable to appeals from appellate decrees by o. 43, R. 1, though the rules of o. 41 have been made applicable to them. So s. 104 bars an appeal from the order. Moreover, the Civil Procedure Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court.. Power is given to a Division Bench of the High Court to hear appeals from decisions of a single '' Judge of the High Court only under cl. 10 of the Letters

Patent".

For the reasons which we have already given above, we hold that the learned Judges have fallen into the same error which was committed by the earlier Nagpur case. The first reasoning given by Mangalmurti, J. that order 43 is not applicable to appeals from appellate decrees is wholly irrelevant because the question is whether under order 43 Rule 1, an appeal could lie from a Trial Judge to a Division Bench of the High Court. Secondly, the learned Judge says that s. 104 bars a second appeal from the order and that the Code of Civil Procedure makes no provision for appeal within the High Court. Here again, the learned Judge is wrong because we have already pointed out that as far back as Hurrish Chunder Chowdry's case (supra) it was clearly held by the Judicial Committee that s. 588 was applicable even to internal appeals in the High Court. On a parity of reasoning, therefore, on the basis of which we have overruled the decisions of the other High Courts, taking a similar view we find ourselves unable to agree with the view taken by Mangalmurti and Bose, JJ. in the aforesaid case and hold that this case is not correctly decided.

A later decision of the Allahabad High Court also seems to have taken the same view. In Standard Glass Beads Factory & Anr. v. Shri Dhar & Ors. (2) the following observations were made :-

> "Such an order if made by a subordinate court is appealable under or. 43 R. 1, C.P.C.; it is, as we have seen an order from which in England an appeal lies, without leave, to the Court of Appeal. If the narrower view of the meaning of the word 'judgment' be correct such an order when made by a Judge of a High Court in India exercising original jurisdiction would not be appealable".

Here also with due deference to the Judges constituting the Full Bench, we are of opinion that they committed an error in drawing inspiration from the procedure prevailing in England in the court of appeal. In the first place the hierarchy of the Courts in India under the Civil Procedure Code is essentially different from that in the United Kingdom. Secondly, there is no provision existing in the English law corresponding to Order 43 Rule 1 of an appeal from a Trial Judge to a Division Bench under various circumstances. Lastly, this case does not seem to have considered a large number of decisions referred to by us, clearly holding that s. 104 read with order 43 Rule I applies to appeals under the Letters Patent in the High Court. For these reasons, therefore, we hold that this case also was not correctly decided and must be overruled.

Another case taking a contrary view is again a case of the Bombay High Court which also makes a rather interesting reading. In J.K Chemicals Ltd. v. Kreba and Co. (1) Desai, J. speaking for the court observed on this part of the case thus:

> "The reply to the said argument is that the provisions of s. 104 and O. 43, R. I provide for an appeal only from the subordinate Court to the higher Court and not from one part of the Court to the other. It has been held that the provisions relating to appeals contained in the Civil Procedure Code deal with appeals from subordinate Courts to higher Courts and do not deal with appeals from the decisions and decrees of the High Court in the exercise of its ordinary or extra-ordinary civil jurisdiction

> except so far as the appeal to the Supreme Court is concerned. The subject of an appeal from the decision of a single Judge of the High Court to a Division Bench of the same High Court is dealt with only under the Letters Patent and such right is not governed by the provisions of the Civil Procedure Code relating to appeals. This view has been taken consistently by the High Courts in India and also by the Privy Council (see Hurrish Chunder v. Kali Sunderi Debi-(1883) ILR 9 Cal. 482 at p. 494)".

The first part of the observations follows the reasonings of the A two decisions of the Bombay High Court, discussed above, and are therefore open to the same criticism which we have levelled against the previous decisions. Secondly, the court seems to think that all the High Courts in India have consistently taken the view that order 43 Rule 1 does not apply to internal appeals in the High Courts. This is doubtless factually incorrect because we have referred to a large number of decisions which have taken a contrary view. The High Court was, therefore, not quite correct in observing that the High Courts in India had taken a consistent view in regard to this matter. Thirdly, the High Court seems to have relied heavily on the decision of the Privy Council in Hurrish Chunder Chowdry's case (supra) and on Chappan's case (supra) in holding that order 43 did not apply to internal appeals in the High Courts which were governed by the Letters Patent alone. Here also, with due respect, the High Court has gravely erred. We have pointed out while dealing with Hurrish Chunder Chowdry's case (supra) that the Privy Council had clearly laid down that s. 588 applied to the High Court and this position has been understood in this very sense by several judgments discussed above. The High Court, therefore, has not correctly appreciated the real ratio of the Privy Council case, referred to above.

As regards Chappan's case (supra), the conclusion of the High Court is not borne out by the ratio of the Full Bench in the said case. It would appear that the Full Bench in the aforesaid case was concerned with two questions:

> (1) Whether in view of s. 622 of the old Code (which corresponds to s. 115 of the Code of 1908) an order passed by a trial Judge could be revised by a larger Bench, and (2) Whether the right of appeal given by cl. 15 of the Letters Patent against an order passed by a trial Judge was controlled and limited by ss. 588 and 591 of the Code of 1877 (which now corresponds to order 43 Rule 1).

In the instant case we are not concerned with the revisional power but only with what old section 588 was. Far from deciding that s. 588 was not controlled by the Letters Patent, the learned Judge decided to the contrary. To begin with, Benson, J. formulated the questions referred to the Full Bench thus :-

> (1) Whether the jurisdiction exercised by the High Court under section 622, Civil Procedure Code, is included in the expression "appellate jurisdiction" as used in section 13 of the High Court Act (24 and 25 Vict. Chap. 104 and in section 36 of the Letters Patent of 1866, and (2) Whether the right of appeal given by section 15 of the Letters Patent against an order passed by a single Judge of the High Court is controlled and limited by sections 588 and 591, Civil Procedure Code?

> I am of opinion that both of these questions must be answered in the affirmative".

and Shephard, Acting C.J. Observed as follows:

> "Accordingly I think it must be assumed that the judgment of a single Judge acting under section 622 of the Code is open to appeal, unless the right of appeal has been taken away by section 588 of that Code. On that question I entirely agree with Mr. Justice Subramania Ayyar. The question is, in my opinion, concluded by authority which it is beyond our province to criticise".

and Boddam, J. expressed the following opinion :-

> "The result of this judgment (so far as it applies to the question before us) appears to me to come to this, that if the order made by a single Judge only amounts to an order such as is intended by chapter XLIII of the Code, it is not appealable unless it is within section 588".

and Moore, J. Observed as follows :-

> "It is clear, however, that this could not have been done, for the provisions of sections 588 and 591 do, in certain cases, most certainly apply to the High Court. For example, section 588, clause 1, provides that if a District Munsif passes an order under section 20 of the Code, an appeal lies to the District Judge, but that there is no second appeal to the High Court, while if a District Judge passes such an order an appeal can be preferred to the High Court. Whatever view be taken of section IS of the Letters Patent it would have been impossible to include section 588 among those sections that do not apply to the High Court".

Thus, the ratio decidendi of the decision clearly goes to indicate that the Full Bench of the Madras High Court had held in no uncertain terms that s. 588 applied to the High Court and orders mentioned therein passed by a Trial Judge would be appealable to a larger Bench. This, therefore, knocks the bottom out of the decision of the Bombay High Court when Chappan's case (supra) in no way supported the view taken by them. For the reasons given above, we hold that J.K Chemicals's case (supra) was also wrongly decided and can no longer be treated as good law.

It is rather unfortunate that despite clear, explicit, pointed and pragmatic observations of the Privy Council in Hurrish Chunder Chowdry's case (supra) and further clarification by the legislature by introducing s. 104 of the Code of 1908, some of the High Courts n seem to have stuck to the antiquated view that the provisions of order 43 Rule I do not apply to internal appeals within the High Courts.

Thus after considering the arguments of counsel for the parties on the first two limbs of the questions, our conclusions are :-

(1) That there is no inconsistency between s. 104 read with order 43 Rule I and the appeals under the Letters Patent and there is nothing to show that the Letters Patent in any way excludes or overrides the application of s. 104 read with order 43 Rule I or to show that these provisions would not apply to internal appeals within the High Court.

(2) That even if it be assumed that order 43 Rule I does not apply to Letters Patent appeals, the principles governing these provisions would apply by process of analogy.

(3) That having regard to the nature of the orders contemplated in the various clauses of order 43 Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgments within the meaning of cl. 15 of the Letters Patent and hence. appealable to a larger Bench.

(4) The concept of the Letters Patent governing only the internal appeals in the High Courts and the Code of Civil Procedure having no application to such appeals is based on a serious misconception of the legal position.

This now brings us to the second important point which is involved in this appeal. Despite our finding that s. 104 read with order 43 Rule I applies to Letters Patent appeals and all orders passed by a Trial Judge under clauses (a) to (w) would be appealable to the Division Bench, there would still be a large number of orders passed by a Trial Judge which may not be covered by order 43 Rule l. The next question that arises is under what circumstances orders passed by a Trial Judge not covered by order 43 Rule 1 would be appealable to a Division Bench. In such cases, the import, definition and the meaning of the word 'judgment' appearing in cl. 15 assumes a real significance and a new complexion because the term 'judgment' appearing in the Letters Patent does not exclude orders not falling under the various clauses of order 43 Rule 1. Thus the serious question to be decided in this case and which is indeed a highly vexed and controversial one is as to what is the real concept and purport of the word 'judgment' used in cl. IS of the Letters Patent. The meaning of the word 'judgment' has been the subject matter of conflicting decisions of the various High Courts raging for almost a century and in spite of such length of time, unfortunately, no unanimity has so far been reached. As held by us earlier it is high time that we should now settle this controversy once for all as far as possible.

We now proceed to deal with the main controversy as to what is the true scope, meaning and purport of the word 'judgment' used in cl. 15 of the Letters Patent. Numerous authorities on both sides were cited before us in the course of the very able arguments advanced by counsels for the parties and it appears that there are three leading judgments which have spelt out certain tests to determine as to when an order passed by a Trial Judge can be said to be a 'judgment' within the meaning of. cl IS of the Letters Patent. A very narrow view on this point was taken by a Division Bench Of the Calcutta High Court in the case of The Justice of the Peace for Calcutta (supra) where Sir Couch, C.J. On an interpretation of cl. 15 of the Letters Patent observed thus:

> "We think that "judgment" in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

An analysis of the observations of the Chief Justice would reveal that the following tests were laid down by him in order to decide whether or not an order passed by the Trial Judge would be a judgment:

> (1) a decision which affects the merits of the question between the parties;
>
> (2) by determining some right or liability; (3) the order determining the right or liability may be final, preliminary or interlocutory, but the determination must be final or one which decides even a part of the controversy finally leaving other matters to be decided later.

Thus, examining the tests laid down by Sir Richard Couch, C.J,, it seems to us that the view taken by the learned Chief Justice appears to place a very strict and narrow interpretation on the word 'judgment' under which orders deciding matters of moment or valuable right of the parties without finally deciding the suit may not amount to a judgment and hence, not appealable. In giving this interpretation the learned Chief Justice was guided by two considerations: (I) that a liberal interpretation may allow vexed litigants to carry any discretionary order of the Trial Court in appeal, and (2) that it would confer more extensive right to appeal against the Judge sitting on the original side than the right of appeal given to a Trial Judge sitting in the mofussil. We are doubtless impressed with the argument of the Chief Justice and fully appreciate the force of the reasons given by him but we feel that despite those considerations the law must be interpreted as it stands and a court is not justified in interpreting a legal term which amounts to a complete distortion of the word 'judgment' so as to deny appeals even against unjust orders to litigants having genuine grievances so as to make them scapegoats in the garb of protecting vexatious appeals. In such cases, a just balance must he struck so as to advance the object of the statute and give the desired relief to the litigants, if possible. Although it is true that this decision is practically the locus classicus so far as the Calcutta High court is concerned and has been consistently followed by later decisions at the same time it cannot be denied that in a number of cases the conscience of the Judges was so shocked that they tried to whittle down or soften the rigours of this decision so much so that in one case the observations of the Chief Justice were not only not followed but were described as antiquated and in other cases the Judges strongly expressed them selves that the High court should give up its fondness to stick to the principles laid down by the learned Chief Justice. It is not necessary for us to burden this judgment with later decisions of the Calcutta High court in trying to comment on the correctness of the principles laid down by sir Couch, c J. but a few instances may be quite revealing.

In Chandi Charan Saha v. Jnanendra Nath Bhattacharjee and Ors.,(l) Sir Asutosh Mookerjee in his leading judgment modified the strict rule of interpretation of 'judgment' laid down by sir Couch, C.J. and pointed out that the words 'merits of the question between the parties by determining a right of

liability' were not to be confined or restricted to the controversy in a suit itself but could take within its fold any right involved in any application which puts an end to the suit or the proceeding. sir Mookerjee, J. has widened the scope of the observations of sir Couch, c.J and adopted some of the observations of Sir White, C.J. in Tuljaram Row's case (supra) and in this connection observed thus:-

> "It is plain that the expression 'some right or liability is not restricted to the right in controversy in the suit itself on the other hand, if we adopt the wider definition formulated by White C.J. in the case of Tuljaram Row v. Alagappa Chettiar (ILR 35 Mad. 1), the decision is unquestionably a judgment within the meaning of the Letters Patent. The test is, not what the form of the adjudication is, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment: Mathura v. Haran (1915 ILR 43 Cal. 857)."

In Lea Badin's case (supra), the following observations were made:

> "To remove the incongruity which appears in the decision of this Court and to lay down some definite rule by which orders might be tested when it has to be determined whether or not they are 'judgments' within the meaning of the clause, this Court will some day have to abandon its fond adherence to the antiquated definition of Couch, C.J., and boldly acknowledge its allegiance to the tests laid down by White, C.J."

(Emphasis supplied) After making these observations the Court further reiterated the position in the following words.

> "In more decisions than one of this Court this definition of 'Judgment' given by Couch, C.J. has been described as classical, and yet in a long course of decisions this Court has repeatedly expressed the view that the definition is absolutely exhaustive. Treating this definition as not of an inflexible character and yet not expressly purporting to extend it, the Court has in numerous cases emphasised the necessity of scrutinizing the nature of the decision in each particular case in order to find out whether the decision amounts to a 'judgment' within the meaning of the Clause.

In Shorab Merwanji Modi and Anr. v. Mansata Film Distributors and Anr., the following observations were made:

> "On a strict construction of the Calcutta test, the Tight or liability must mean some right or liability which is a subject-matter of controversy in the suit or proceeding but in its application to individual cases, that strict construction has not been adhered to

> and was indeed often departed from by Couch, J., himself who was the author of the test. Orders concerning the jurisdiction of the Court to entertain a suit, as distinguished from matters of the actual dispute between the parties, were held by him to come within the category of judgments."

In Mooammed Felumeah v. S. Mondal & Ors. the Court pithily observed as follows:

> "Now, so far as this Court is concerned, there is a considerable body of judicial opinion, which, while holding that Sir Richard Couch's above definition is classical and of pre-eminent practical importance and usefulness, has consistently refused to regard it as, in any sense. exhaustive or inflexible. Indeed, in essence and truth, it has been accepted merely as the starting point on a broad open field, stretched in front of it in all its vastness and immense magnitude, and Judges have always endeavoured to extend it and expand the different aspects of the term and to give it a wide and extended meaning, though, of course, within certain limits."

The other leading case which puts even a narrower interpretation and in our opinion, a clearly wrong one, on the word 'judgment' is the Full Bench decision of the Rangoon High Court In Re Dayabhai Jiwandas's case (supra) where the following observations were made:

> "I am of opinion that in the Letters Patent of the High Courts the word judgment' means and is a decree in a suit by which the rights of the parties at issue in the suit are determined."

With due respect to the learned Chief Justice and the Judges who agreed with him, we are unable to accept the interpretation of the word judgment' given by the Chief Justice which runs counter to the very spirit and object of the word 'judgment' appearing in cl. 15 of the Letters Patent. The learned Chief Justice seems to have fallen into the error of equating the word 'judgment' with 'decree' as used in the Code of Civil Procedure when, as pointed out above, the words 'judgment' and 'decree' used in the Code cannot form a safe basis to determine the definition of the word 'judgment' in the Letters Patent particularly when the Letters has deliberately dropped the word 'decree from judgment.' We are, therefore, unable to hold that the view taken by the Chief Justice, Sir Page, is correct and accordingly overrule the same.

The next leading case which lays down the test of a 'judgment' and which seems to have found favour with most of the High Courts in India is the test laid down by Sir Arnold White, C.J. in Tuljaram Row's case (supra) where the learned Chief Justice pointedly spelt out various tests and observed thus:-

> "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put

> an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent." I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained) - e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause."

Analysing the observations of the learned Chief Justice it would appear that he has laid down the following tests in order to assess the import and definition of the word 'judgment' as used in cl. IS of the Letters Patent :-

> (1) It is not the form of adjudication which is to be seen but its actual effect on the suit or proceeding;
>
> (2) If, irrespective of the form of the suit or proceeding, the order impugned puts an end to the suit or proceeding it doubtless amounts to a judgment;
>
> (3) Similarly, the effect of the order, if not complied with, is to terminate the proceedings, the said order would amount to a judgment; (4) Any order in an independent proceeding which is ancillary to the suit (not being a step towards judgment) but is designed to render the judgment effective can also be termed as judgment within the meaning of the Letters Patent.
>
> So far as this test is concerned, the learned Chief Justice had in mind orders passed by the Trial Judge granting or refusing ad-interim injunction or appointing or refusing to appoint a receiver.
>
> (5) An order may be a judgment even if it does not affect the merits of the suit or proceedings or does not determine any rights in question raised in the suit or proceedings.
>
> (6) An adjudication based on a refusal to exercise discretion the effect of which is to dispose of the suit, so far as that particular adjudication is concerned, would certainly amount to a judgment within the meaning of the Letters Patent.

Similarly, Krishnaswami Ayyar, J., who agreed with tile Chief Justice in the above case, pointed out that even an interlocutory judgment which determines some preliminary or subordinate point or plea or settles some step without adjudicating the ultimate right of the parties may amount to a judgment. With due respect we think that if the observations of Krishnaswamy Ayyar, J. are carried to its logical limit every interlocutory order would have to be held to be appealable.

So far as the tests laid down by White, C.J., and as analysed by us, are concerned we are inclined to agree generally with these tests though we feel that some of the tests laid down are far too wide and may not be quite correct. While the view taken by Sir Richard Couch, C.J. in The Justice of the Peace for Calcutta (supra) is much too strict, the one taken by Sir White, C.J. is much too wide. The correct test seems to lie somewhere in between the tests laid down by the aforesaid jurists.

We might point out that the tests laid down by the Calcutta High Court have been consistently followed by the Bombay High Court and also by a large majority of the later decisions of the Calcutta High Court in Lea Badin v. Upendra Roy Chaudhury, Kumar Gangadhar v. Kanti Chunder Mukherjee, Shorab Merwanji Modi v. Mansata Film Distributors, Mohammed Felumeah v. S. Mondal.(supra) Some of the decisions have sounded a discordant note and have gone to the extent of characterising the view of Sir Couch, C.J, as being antiquated and have strongly expressed the view that the Calcutta High Court should give up its fondness for the strict test laid down by Sir Couch in The Justice of the Peace for Calcutta's case. On the other hand, the tests laid down by Sir White, C.J. in Tuljaram Row's case have been followed by the Lahore High Court in Ruldu Singh v. Sanwal Singh and by some other High Courts in Standard Glass Beads Factory Shri Dhar & Ors. and later decisions of the Madras High Court as also by Andhra Pradesh High Court in Kuppa Viswappathi v. Kuppa Venkata Krishua Sastry.

A Full Bench of the Allahabad High Court, however, in Mt. Shahzadi Begam v. Alak Nath dissented from the view taken by the Madras High Court and held that the tests laid down by that High Court in the aforesaid case were rather too wide. In this connection, Sulaiman, C.J., speaking for the Court observed as follows :-

> "We would like to point out that the test laid down by the learned Chief Justice of the Madras High Court is put in too wide a language and cannot be accepted as laying down the correct criterion".

Similarly, in a later Full Bench decision of the Nagpur High Court in Manohar Damodar Bhoot v. Baliram Ganpat Bhoot, Hidayatullah. J. (as he then was) who wrote the leading judgment, very pithily described the essential requisites and the exact meaning of the word 'judgment' as used in the Letters Patent and observed thus:

> "A judgment means a decision in an action whether final, preliminary or interlocutory which decides either wholly or partially, but conclusively in so far as the Court is concerned, the controversy which is the subject of the action. It does not include a decision which is on a matter of procedure, nor one which is ancillary to the action even though it may either imperil the ultimate decision or tend to make it effective. The decision need not be immediately executable 'per se' but if left untouched must result inevitably without anything further, save the determination of consequential details, in a decree or decretal orders, that is to say, an executive document directing something to be done or not to be done in relation to the facts of the controversy. The decision may itself order that thing to be done or not to be done or it may leave that over till after the ascertainment of some details but it must not be

> interlocutory having for its purpose the ascertainment of some matters or details prior to the determination of the whole or any part of the controversy".

The pointed observations of the Hon'ble Judge try to synthesize the conflicting views taken by the Calcutta and the Madras High Courts and, in our opinion, they represent the true scope and import of the word 'judgment' as used in the Letters Patent. The learned Judge while making these observations has made an exhaustive analysis of a large number of cases.

Having dealt with the main cases of the various High Courts reflecting different and variant views, we do not think it necessary to multiply authorities on this subject which have been fully debated in the decisions we have referred to. We shall now proceed to refer to the decisions of this Court with respect to the incidental observations made by them regarding the scope and meaning of the word 'judgment' before giving our own view of the matter. Before, however, dealing with the cases of this Court we might indicate that in view of the decisions taken by us regarding the applicability of s. 104 read with order 43 Rule 1 even to internal appeals in the High Court, the controversy regarding the meaning of the word 'judgment' has been largely narrowed down and sufficiently abridged because the orders mentioned in clauses (a) to (w) of order 43 Rule 1 having been held to be appealable, there would be only a few cases left in A which the question as to whether or not the orders passed by the Trial Judge are judgments would arise. After discussing the decisions of this Court, we shall give a list of illustrative cases which may justly be described as 'judgment' within the meaning of the Letters Patent so as to cover almost the entire field though a few cases still may have to be determined according to the principles laid down.

The first decision of this Court which is relevant is Asrumati Debi's case (supra). In this case the only question involved was whether an order transferring a suit under cl. 13 of the Letters Patent satisfied the tests of a judgment as mentioned in cl. 15 of the Letters Patent. This Court referring to the Calcutta and Madras decisions refrained from giving any particular decision except that they held that the mere order of transfer under cl. 13 of the Letters Patent could not be said to be a judgment and was therefore not appealable. This Court pointed out that the order neither affected the merits of the controversy not did it terminate or dispose of the suit. In this connection, the Court observed as follows:

> "The judgment must be the final pronouncement which puts an end to the proceeding so far as the court dealing with it is concerned. It certainly involves the determination of some right or liability, though it may not be necessary that there must be a decision on the merits.
>
> ... ...
>
> We have indicated that the essential features of a 'judgment' are according to both the, Calcutta and the Madras High Courts and all that we need say is that, in our opinion, an order under clause 13 of the Letters Patent does not satisfy the tests of a 'judgment' as formulated by either of these High Courts".

Apart from this what is more important is that the Court clearly observed that as an order granting leave under cl. 12 of the Letters Patent constitutes the very foundation of the suit, hence if by an order such leave is rescinded the suit automatically comes to an end and there can be no doubt that such an order would be a judgment. In this connection, this Court observed as follows:-

> "Leave granted under clause 12 of the Letters Patent constitutes the very foundation of the suit which is instituted on its basis. If such leave is rescinded, the suit automatically comes to an end and there is no doubt that such an order would be a judgment".

Thus, from this case an important test that can be spelt out is that where an order which is the foundation of the jurisdiction of the Court or one which goes to the root of the action, is passed against a particular party, it doubtless amounts to a judgment. As we have already pointed out apart from these observations this Court refused to embark on an enquiry as to in what cases an order passed by a Trial Judge would be a 'judgment' for purposes of appeal before a larger Bench.

Again in Union of India v. Mohindra Supply Co. (supra) this Court clearly held that in enacting s. 104 the intention of the Legislature was to preserve the Letters Patent jurisdiction of the High Court and provided for a right to appeal from the Trial Judge to the Division Bench without affecting the provisions of the Code of 1908. In this connection, the Court observed as follows :-

> "Under the Code, as amended, the view has consistently been taken that interlocutory judgments (i.e., decisions though not amounting to decrees which affect the merits of the questions between the parties by determining some right or liability) passed by single Judges of Chartered High Courts were appealable under the Letters Patent".

We might mention here that the observations of this Court completely demolish the arguments of some of the High Courts that s. 104 does not apply to internals in the High Court because this Court while referring to the Code made specific reference to s. 104 in the previous paragraph. Apart from this, there is no observation by this Court regarding essential requisites of a Judgment. In State of U.P. v. Dr. Vijay Anand Maharaj (supra) the order impugned passed by the Single Judge was an order dismissing an application filed by the applicant to review the order of the Trial Judge. The question for determination was whether the order was a judgment so as to be appealable to the Division Bench. This Court referred to the observations of Hidayatullah, J. extracted in Manohar V. Baliram (supra) and though they did not expressly approve this decision they indirectly seem to have been impressed by the reasons given by Hidayatullah, J. Nothing further was said by this Court because it held that on the facts of that case the order of the Trial Judge dismissing the application for review was A appealable. We might mention here that under clause (w) of order 43 Rule 1 an order granting an application for review is appealable.

On a parity of reasoning, therefore, an order dismissing an application for review would also be appealable under the Letters Patent being a judgment though it is not made appealable under order 43 Rule 1.

In Shankarlal Aggarwal's case (supra) while indicating the divergence of judicial opinion on the subject this Court held that an order under s. 202 of the Indian Companies Act was a judgment within the meaning of Letters Patent and therefore appealable. We might mention here that the Companies Act which confers additional original jurisdiction on the Trial Judge expressly makes an order passed by the Trial Judge under s. 202 appealable and, therefore, it is manifest that any order passed under s. 202 would have to be appealable under the Companies Act and therefore it was rightly construed as a judgment.

In Radhey Shyam v. Shyam Behari (supra) the question was whether in an application under order 21 rule 90 to set aside an auction sale an order passed by the Court would be a judgment affecting valuable rights. This Court held that an order in such proceedings affected valuable rights and was therefore appealable. In this connection, the Court observed as follows:-

> "In our view an order in a proceeding under O. XXI, r. 90 is a "judgment" in as much as such a proceeding raises a controversy between the parties therein affecting their valuable rights and the order allowing the application certainly deprives the purchaser of rights accrued to him as a result of the auction-sale."

Thus, the only point which emerges from this decision is that whenever a Trial Judge decides a controversy which affected valuable rights of one of the parties, it must be treated to be a judgment within the meaning of the Letters Patent.

The last case of this Court to which our attention has been drawn is Shanti Kumar R. Canji v. The Home Insurance Co. Of New York where the court was considering the effect of an order passed by the Trial Judge allowing amendment of the plaint and the question at issue was whether such an order would be a judgment within the meaning of the Letters Patent. The following observations were made by this Court in the aforesaid case.

> "We are in agreement with the view expressed by the High Court at Calcutta in the M.B. Sirkar's case (AIR 1956 Cal. 630) as to when an order on an application for amendment can become a judgment within the meaning of clause 15 of the Letters Patent. If an amendment merely allows the plaintiff to state a new cause of action or to ask a new relief or to include a new ground of relief all that happens is that it is possible for the plaintiff to raise further contentions in the suit, but it is not decided whether the contentions are right. Such an amendment does nothing more than regulate the procedure applicable to the suit. It does not decide any question which touches the merits of the controversy between the parties. Where, on the other hand, an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a judgment within the meaning of clause 15 of the Letters Patent. The reason why it becomes a judgment is that it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It is the final decision as far as the trial court is concerned.

> In finding out whether the order is a judgment within the meaning of clause 15 of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability".

(Emphasis ours) Thus, having noticed the ratio of some of the cases of this Court referred to above, regarding the tests to determine the import and meaning of the word 'judgment' we now proceed to deal with the specific question after interpreting cl.15 of the Letters Patent of the Bombay High Court and the corresponding clauses of Letters Patent of other High Courts. We shall endeavour to interpret the connotation and the import of the word 'judgment' particularly in the light of pertinent and pointed observations made by this Court on earlier occasions as discussed above.

The relevant portion of cl. 15 of the Letters Patent may be extracted thus :-

> "We do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort William in Bengal from the judgment.. ..... of one Judge of the said High Court.. "

Clause 15 makes no attempt to define what a judgment is. As Letters Patent is a special law which carves out its own sphere, it would not be possible for us to project the definition of the word 'judgment' appearing in s. 2 (9) of the Code of 1908, which defines 'judgment' into the Letters Patent:

> "judgment' means the statement given by the Judge of the grounds of a decree or order".

In Mt. Shahzadi Begam v. Alak Nath and Ors., Sulaiman, C.J., very rightly pointed out that as the Letters Patent were drafted long before even the Code of 1882 was passed, the word 'judgment' used in the Letters Patent cannot be relatable to or confined to the definition of 'judgment' as contained in the Code of Civil Procedure which came into existence long after the Letters Patent were given. In this connection, the Chief Justice observed as follows :-

> "It has been held in numerous cases that as the Letters Patent were drafted long before even the earlier Code of 1882 was passed, the word 'judgment' used therein does not mean the judgment as defined in the existing Code of Civil Procedure. At the same time the word 'judgment' does not include every possible order, final, preliminary or interlocutory passed by a Judge of the High Court".

We find ourselves in complete agreement with the observations made by the Allahabad High Court on this aspect of the matter.

The definition of the word 'judgment' in sub-s. (9) of s. 2 of the Code of 1908 is linked with the definition of 'decree' which is defined in sub-s. (2) of s. 2 thus:

> "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include-
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default. Explanation:-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final".

Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-s. (2) of s. 2 cannot be physically imported into the definition of the word 'judgment' as used in cl. 15 of the Letters Patent because the Letters Patent has advisedly not used the terms 'order' or 'decree' anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a Trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds :.

(1) A Final Judgment-a judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench (2) A preliminary judgment-This kind of a judgment may take two forms-(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice under section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the

objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an R order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.

(3) Intermediary or Interlocutory judgment-Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by o. 43 R.1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge in a suit under order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the Trial Judge would not amount to a judgment within the meaning of cl. 15 of the Letters Patent but will be purely an interlocutory order.

Similarly, suppose the Trial Judge passes an Order setting aside an exparte decree against the defendant, which is not appealable under any of the clauses of O. 43 R.1 though an order rejecting an application to set aside the decree passed exparte falls within O. 43 R.l cl. (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The fact, however, remains that the order setting aside the ex-parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

In the course of the trial, the Trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it

will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the Trial Judge.

Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.

We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet amount to a judgment within the meaning of the Letters Patent. Suppose the Trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases, although the order passed by the trial Judge is purely discretionary and interlocutory it causes gross injustice to the defendant who is deprived of a valuable right of defence to the suit. Such an order, therefore, though interlocutory in nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the Letters Patent. This is what was held by this Court in Shanti Kumar's case (supra), as discussed above.

Let us take another instance of a similar order which may not amount to a judgment. Suppose the Trial Judge allows the plaintiff to amend the plaint by adding a particular relief or taking an additional ground which may be inconsistent with the pleas taken by him but is not barred by limitation and does not work serious injustice to the defendant wh o would have ample opportunity to disprove the amended plea taken by plaintiff at the trial. In such cases, the order of the Trial Judge would only be a simple interlocutory order without containing any quality of finality and would therefore not be a judgment within the meaning of cl. 15 of the Letters Patent The various instances given by us would constitute sufficient guidelines to determine whether or not an order passed by the Trial Judge is a judgment within the meaning of the Letters Patent. We must however hasten to add that instances given by us are illustrative and not exhaustive. We have already referred to the various tests laid down by the Calcutta, Rangoon and Madras High Courts. So far as the Rangoon High Court is concerned we have already pointed out that the strict test that an order passed by the Trial Judge would be a judgment only if it amounts to a decree under the Code of Civil Procedure, is legally erroneous and opposed to the very tenor and spirit of the language of the Letters Patent. We, therefore, do not approve of the test laid down by the Rangoon High Court and that decision therefore has to be confined only to the facts of that particular case because that being a case of transfer, it is manifest that no question of any finality was involved in the order of transfer. We would like to adopt and approve of generally the tests laid down by Sir White, C.J. in Tuljaram Row's case (supra) (which seems to have been followed by most of the High Courts) minus the broader and the wider attributes adumbrated by Sir White, C.J. Or more explicitly by Krishnaswamy Ayyar, J. as has been referred to above.

Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the Trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the Trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind.

Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the Trial Judge amounts to a judgment within the meaning of the Letters Patent. We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments:

(1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant (2) An order rejecting the plaint.

(3) An order refusing leave to defend the suit in an action under Order 37, Code of Civil Procedure. (4) An order rescinding leave of the Trial Judge granted by him under clause 12 of the Letters Patent.

(5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under s. 80, bar against competency of the suit against the defendant even though the suit is kept alive. (6) An order rejecting an application for a judgment on admission under order 12 Rule 6.

(7) An order refusing to add necessary parties in a suit under s. 92 of the Code of Civil Procedure. (8) An order varying or amending a decree. (9) An order refusing leave to sue in forma pauperis. (10) An order granting review.

(11) An order allowing withdrawal of the suit with liberty to file a fresh one.

(12) An order holding that the defendants are not agriculturists within the meaning of the special law.

(13) An order staying or refusing to stay a suit under s. 10 of the Code of Civil Procedure.

(14) An order granting or refusing to stay execution of the decree.

(15) An order deciding payment of court fees against the plaintiff.

Here, it may be noted that whereas an order deciding the nature of the court fees to be paid by the plaintiff would be a judgment but this order affects only the plaintiff or the Government and not the defendant. Thus, only the plaintiff or the Government as the case may be will have the right to file an appeal in the Division Bench and not the defendant because the question of payment of court fees is a matter between the Government and the plaintiff and the defendant has no locus in this regard.

We have by way of sample laid down various illustrative examples of an order which may amount to judgment but it is not possible to give such an exhaustive list as may cover all possible cases. Law with its dynamism, pragmatism and vastness is such a large ocean that it is well-nigh impossible for us to envisage or provide for every possible contingency or situation so as to evolve a device or frame an exhaustive formula or strategy to confine and incarcerate the same in a straitjacket. We, however, hope and trust that by and large the controversy raging for about a century on the connotation of the term 'judgment' would have now been settled and a few cases which may have been left out, would undoubtedly be decided by the court concerned in the light of the tests. Observations and principles enunciated by us.

In the instant case, as the order of the Trial Judge was one refusing appointment of a receiver and grant of an ad-interim injunction, it is undoubtedly a judgment within the meaning of the Letters Patent both because in view of our judgment, order 43 Rule 1 applies to internal appeals in the High Court and apart from it such an order even on merits contains the quality of finality and would therefore be a judgment within the meaning of cl. 15 of the Letters Patent. The consistent view taken by the Bombay High Court in the various cases noted above or other cases which may not have been noticed by us regarding the strict interpretation of cl. 15 of the Letters Patent are hereby overruled and the Bombay High Court is directed to decide the question in future in the light of our decision. We, therefore, hold that the order passed by the Trial Judge in the instant case being a judgment within the meaning of cl. 15 of the Letters Patent, the appeal before the Division Bench was maintainable and the Division Bench of the High Court was in error in dismissing the appeal without deciding it on merits. We have already directed the High Court to decide the appeal on merits by our formal order dated April 22, 1981.

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 Art. 226 of the Constitution which are not governed by the Letters Patent but by rules framed under the Code of Civil Procedure under which in some High Courts writ petitions are heard by a Division Bench. In

other High Court 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, In the circumstances we make no order as to costs. AMARENDRA NATH SEN, J. The only question which falls for determination in this appeal by special leave is whether an order passed by a Single Judge on the original side of the Bombay High Court refusing to grant an injunction or to appoint a receiver in an interlocutory application made in the suit, is appealable or not ? In other words, the maintainability of an appeal filed before a Division Bench of the Bombay High Court against an order of a learned single Judge of the High Court dismissing an interlocutory application for injunction and for appointment of a receiver by way of interim relief pending final disposal of the suit in the original side of the High Court, forms the subject- matter of the present appeal.

The question is of some importance, as there appears to be no uniformity of the view amongst the various High Courts on the competence and the maintainability of such an appeal.

The appellant has filed in the original side of the Bombay High Court a suit for specific performance of an agreement dated 12th January, 1979. In the said suit the appellant, as plaintiff in the suit, took out a notice of motion seeking the following reliefs:-

> (a) that pending the hearing and final disposal of the suit, the respondent i.e. the defendant in the suit, be restrained by an order and injunction from in any manner dealing with or disposing of or alienating or A encumbering the right, title and interest in respect of the said lands and the said land or any part thereof or parting possession of the said land or any part thereof;
>
> (b) that pending the hearing and final disposal of the suit, the Court receiver High Court Bombay or some other fit and proper person be appointed receiver of the said lands which forms the subject-matter of the agreement, with all powers under 0.40, rule I of the Code of Civil Procedure;
>
> (c) ad-interims in terms of prayers (a) (b); and
>
> (d) for such further and other reliefs as the nature and circumstances of the case may require.

A learned single Judge dealing with the said application of the appellant on the original side of the Bombay High Court dismissed the said application. Against the order of the learned single Judge, the appellant preferred an appeal to the High Court of Bombay. A preliminarily objection has been raised before the appellate Court as to the maintainability of the appeal on the ground that no appeal lay from the order of the learned Single Judge on the original side of the High Court, as the order could not be considered to be a 'judgment' within the meaning of cl. IS of the Letters Patent and the appeal was incompetent and not maintainable. The appellate Court for reasons recorded in the Judgment upheld the said preliminary objection, holding that the order under appeal was not a judgment and no appeal would lie from the said order and the appeal, therefore was incompetent and not maintainable. Against the order of the Division Bench of the Bombay High Court, the

appellant has preferred this appeal by special leave granted by this Court.

After the hearing of the appeal was concluded, this Court in view of the urgency of the matter passed an order allowing the appeal and remanding the matter to the Bombay High Court for decision of the appeal on merits and this Court observed at the time of the passing of the order that this Court would state reasons later on. The full text of the order has been set out in the judgment of my learned brother Fazal Ali. J.

I have had the benefit of reading the judgment of my learned brother Fazal Ali, J. in advance. I concur generally with the views expressed by my learned brother. 1, however, propose to state my own reasons for the order earlier passed by us.

The learned counsel appearing on behalf of the respective parties invited us only to decide the question of appealability of the order under appeal without going into the merits of the case. The learned counsel for the parties have submitted before us that there is a conflict of decisions on the question of appealability of an order of this kind and maintainability of an appeal from such an order and this Court should resolve the conflict and decide the question of appealability of such an order and necessarily the maintainability of the appeal to a Division Bench of the High Court. It has been further submitted before us that in the event of this Court holding that an appeal lay from the order in question and an appeal to the the Division Bench from the order was competent and maintainable, this Court should remand the appeal to the High Court for decision on merits and should not in this appeal go into the merits of the case. The learned counsel for the parties, in view of the aforesaid submissions made, did not advance any arguments on the merits of the case before us.

The only question with which we are concerned in this appeal, as I have already indicated, therefore, is whether the order of the learned Single Judge refusing to grant an injunction or to appoint a receiver on the interlocutory application of the appellant, is appeal able or not; or, whether the appeal against the order of the learned Single Judge to the Division Bench of the High Court is competent and maintainable or not.

Mr. Sorabjee, learned counsel appearing on behalf of the appellant, has raised two principal contentions. The first contention urged by Mr. Sorabjee is that in view of the provisions contained in S. 104 of the Code of Civil Procedure read with order 43 thereof, the order is appealable under the Code and an appeal from the order becomes clearly maintainable. The other contention raised by Mr. Sorabjee is that the order should in any event be considered to be a judgment within the meaning of clause IS of the Letters Patent, bearing in mind the provisions contained in S. 104 of the Code of Civil Procedure and also order 43 thereof.

In support of his first contention, Mr. Sorabjee has argued that an appeal is a creature of statute and in the absence of any statutory provisions making any other appealable no appeal will A normally lie against any order passed by a single Judge. Mr. Sorabjee contends that cl. I S of the Letter Patent makes such provision for an appeal being filed against any order passed by a learned Single Judge on the original side of the High Court. It is the contention of Mr. Sorabjee that as Cl. 15 of the Letters

Patent makes provision for preferring an appeal against an order passed by a learned Single Judge on the original side, provided the conditions laid down in the said clause are satisfied, Code of Civil Procedure and various other Statutes also make provision regarding appeal from orders passed by a learned Single Judge. Mr. Sorabjee has submitted that the Code of Civil Procedure confers substantive rights of preferring appeals against particular orders specified in the Code. In this connection Mr. Sorabjee has drawn our attention to S. 104 and also order 43 of the Code of Civil Procedure. Mr. Sorabjee argues that the Code of Civil Procedure confers a right of appeal on a litigant in respect of the orders which have been made statutorily appealable by the provisions contained in S. 104 and order 43 of the Code of Civil Procedure. It is the argument of Mr. Sorabjee that the Code of Civil Procedure makes inter-alia general provisions with regard to appeals and also specifically confers on the litigant a right in respect of various orders, just as various other statutes make special or specific provisions with regard to the right of appeal in respect of any order under the particular statute. Mr. Sorabjee has submitted that S. 104 of the Civil Procedure Code and order 43 thereof clearly apply to the original side of a High Court. In support of these submissions, Mr. Sorabjee has drawn our attention to the various provisions of the Code and particularly to Ss. 4, 98-104, 116 to 120, and S. 122 and to order 43 rule 1 thereof. Mr. Sorabjee in this connection has also relied on the following decisions :-

1. Mathura Sundari Dass v. Haran Chandra Shall(1)

2. Lea Badin v. Upendra Mohan Roy Choudhary (2)

3. Union of India v. Mohindra Supply Co. (3)

4. Kumar Gangadhar Bagla v. Kanti Chander Mukherji (4)

5. Sonbai v. Ahmedbhai Habibhai (5) Mr. Sorabjee has criticised the view expressed by the Bombay High Court that S. 104 of the Code of Civil Procedure and order 43 thereof do not apply to an order passed by a learned Single Judge on the original side of the High Court and an order passed by a learned Single Judge on the original side can only become appealable if the order can be said to be a 'judgment' within the meaning of cl. 15 of the Letters Patent. Mr. Sorabjee comments that cl. IS of the Letters Patent does not, in any way, seek to control or curb the provisions contained in S. 104 and order 43 of the Code of Civil Procedure. He submits that a plain reading of the various sections of the Code of Civil Procedure make it clear that the pro visions contained in S. 104 and order 43 of the Code are applicable to the original side of the High Court. It is his submission that the provisions of the Code and the provisions contained in cl. 15 of the Letters Patent are not at all in conflict, as, clause IS of the Letters Patent may make such orders which may not be appealable under the Code, still appealable as judgment under cl. 15 of the Letters. Patent. In other words, it is the submission of Mr. Sorabjee that cl. IS of the Letters Patent and the provisions of the Code are indeed supplementary to each other.

Mr. Sorabjee has fairly submitted that before the Division Bench of the Bombay High Court this argument that the order is appealable under the provisions of the Code and the appeal is, there- t fore, competent was not advanced. It is his submission that this argument was not advanced before the Division Bench of the Bombay High Court, as the view of the Bombay High Court has been that the provisions of S. 104 and of order 43 of the Code of Civil Procedure do not apply to the original side of the Bombay High Court. Mr. Sorabjee has argued that though in this appeal this aspect was not argued before the Division Bench of the Bombay High Court, he is entitled to urge this point before this Court as this point is a pure point of law.

Mr. Sorabjee has next contended that in any event the order under appeal should be considered to be a judgment within the meaning of cl. 15 of the Letters Patent. He argues that the word 'judgment' in clause 15 of the Letters Patent should be construed liberally so as to include within its fold any order which has been made appealable by virtue of the provisions contained in the Code or in any other statute. He submits that such an interpretation will be in conformity with the principles of justice and will truly reflect intention of the Legislature and will avoid any kind of conflict between the provisions contained in cl. 15 of the Letters Patent and A the provisions contained in the Code of Civil Procedure and in any other statute. It is his submission that the word 'judgment' in cl. 15 of the Letters Patent may include various other orders which may not otherwise be appealable under the provisions of the Code or any other Statute but may still become appealable as 'judgment' by virtue of the provisions contained in the Letters Patent. In other words, it is the contention of Mr. Sorabjee that the expression 'judgment' in cl. 15 of the Letters Patent should be so construed as to include necessarily all orders which are appealable under any statute and also in appropriate cases various other orders which are not expressly made appealable by any statute. He contends that the provisions of the Code contained S. 104 and order 43 or in any other statute with regard to the appealability of any order do not have the effect of curtailing or affecting the special jurisdiction and power of the Court of entertaining an appeal from any other order, if the Court is satisfied that the order is in effect a judgment within the meaning of cl. 15 of the Letters Patent. Mr. Sorabjee has submitted that as to the true meaning, effect and import of the word 'judgment' in cl. 15 of the Letters Patent, there is a divergence of judicial opinion, and the word `judgment' has come up for consideration before various Courts in many cases. In this connection, Mr. Sorabjee has referred to the following decisions :-

1. The Justice of the Peace for Calcutta v. The Orientatal Gas Co. Ltd. (1)

2. T.V. Tulzaram Row v. M.K.R.V. Allagappachettiar

3. Ruldu Singh v. Sanwal Singh (3)

4. Shah Hari Dial & Sons v. Sohnamal Beliram (4)

5. In Re: Dayabhai Jiwandas and Ors. v. A.M.M. Muru-

gappa Chettiar (5)

6. Abdul Samad & Ors. v. State of J. & K. (6)

7. Standard Glass Beads Factory v. Shri Dhar & Ors.(1)

8. Sri Raja Vallanki Venkata Chinnayamma Rao Bahadur Zimidarni Garu v. Sri Raja Kotagiri Subemma Rao Bahadur Zimidarni Garu (2)

9. Chitaranjan Mandal v. Shankar Prosad Sahani (3)

10. Manohar Damadar Bhoot v. Baliram Ganpat Bhoot

11. Masanta Film Distributors Calcutta v. Sorab Marwanji Modi (5)

12. J.K. Chemicals Ltd. v. Kreba and Co.(6)

13. Kedar Nath Mitter v. Denobandhu Shaha(7)

14. Shorab Merwanji Modi and Anr. v. Mansata Film Distributors and Anr.(8)

15. M.B. Sarkar and Sons v. Powell and Co.(9)

16. Asrumati Devi v. Kumar Rupendra Deb Rai and Ors.(10)

17. State of U.P. v. Dr. Vijay Anand Maharaj(11)

18. National Bell Co. v. Metal Goods Co. (P) Ltd.(12)

19. Shanti Kumar R. Canji v. The Home Insurance Co. Of New York(13) Mr. Sorabjee has submitted that this Court should lay down the guidelines or enumerate the principles to remove the confusion and resolve the conflict in the sphere of judicial determination as to what constitutes 'judgment' within the meaning of cl 15 of the Letters Patent.

Mr. Kapadia and Mr. Venugopal, learned counsel for the Respondents, have submitted that the provisions of the Code of Civil Procedure contained in S. 104 and order 43 thereof are not applicable to the original side of the Bombay High Court which is a Chartered High Court in view of the provisions contained in cl. 15 of the Letters Patent. They have argued that special jurisdiction has been conferred in the matter of preferring an appeal against an order of a Single Judge on the original side of a Chartered High Court by cl. 15 of the Letters Patent and this special jurisdiction of the High Court cannot in any way be affected by the provisions of the Code. In support of this contention reference has been made to Ss. 3 and 4 of the Code of Civil Procedure and particular reliance has been placed on S. 4. They have also strongly relied on the decision of the Bombay High Court in the case of Vaman Raoji Kulkarni v. Nagesh Vishnu Joshi(1) and also on the decision of the same High Court in the case of J.K. Chemicals Ltd. v. Kreba and Co. (supra). They have submitted that these judgments for cogent reasons recorded therein represent correct law and the view

expressed by the Bombay High Court to the effect that S. 104 and order 43 of the Code of Civil Procedure do not apply to the original side of the Bombay High Court, has been consistently followed by the Bombay High Court and should be upheld by this Court. They have also relied on the following observations of the Judicial Committee in the case of Hurrish Chunder Chowdhry v. Kali Sundari Debia(2) at p. 17:-

> "It only remains to observe that their Lordships do not think that sec. 588 of Act X. Of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court."

They have argued that if the provisions of the Code are not held to be applicable to the original side of the Bombay High Court, then the appeal from the order of the learned Single Judge can only be maintained if the order becomes a 'judgment' within the meaning of cl. 15 of the Letters Patent. They have contended that an order on an interlocutory application refusing to grant an injunction or appoint a receiver cannot be considered to be a 'judgment within the meaning of cl. 1 S of the Letters Patent, as such an order virtually does not decide anything and does not in any way affect the merits of the suit. They have also relied on the decisions which were cited by Mr. Sorabjee and they have placed particular reliance on the decision of the Bombay High Court in the case of J.K. Chemicals Ltd. v. Kreba and Co. (supra). Mr. Kapadia and Mr. Venugopal have both pointed out to us that the question of appealability of the order under the provisions of the Code was not argued before the High Court in the instant case and was sought to be argued for the first time in this Court. Both of them, however, have fairly stated that the question is one of law and one of of considerable importance and the Court should decide the same.

I propose to deal with the question of applicability of the provisions contained in S. 104 and order 43 of the Code of Civil Procedure to the original side of the Bombay High Court in the first instance. Before I deal with the contentions urged by the counsel for the respective parties, it will be convenient to consider the relevant provisions of the Code. S. I of the Code makes it clear that the Act is applicable to whole of India excepting the places mentioned in the said section and the Act, therefore, applies to Maharashtra. S. 3 of the Code provides that for the purpose of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

S. 4 of the Code reads:-

"(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub- section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of lent of agricultural land form the produce of such land."

S. 5 of the Code deals with the applicability of the provisions of the Code to Revenue Courts. S. 100 of the Code deals with appeals from Appellate Decree and S. 100-A which has been introduced into the Code w.e.f. 1.2.1977 by the Amending Act, 104 of 1976 provides that notwithstanding anything contained in Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such Single Judge in such appeal or from any decree passed in such appeal. The material provisions of S. 104 are:-

> "S. 104 (1); An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :-
>
> x x x x
> x x x x
> (ff) an order under S. 35A;
>
> (fa) an order under S. 91 or S. 92 refusing leave to institute a suit of the nature referred to in S. 91 or S. 92 as 'the case may be;
>
> (g) an order under S 95;
>
> (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the Civil prison of any person except where such arrest or detention is in execution of a decree;
>
> (i) any order made under rules from which an appeal is expressly allowed by rules;
>
> Provided that no appeal shall lie against any order specified in clause (i) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.
>
> (2) No appeal shall lie from any order passed in appeal under this section. "
>
> Sections 105 and 106 may also be quoted:- "(1) Save as otherwise expressly provided no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal;
>
> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal the reform, he shall thereafter be precluded from disputing its correctness.

S. 106: Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court." Special provisions relating to the High Courts, not being the court of a Judicial Commissioner, are made in para IX of the Code which consists of five sections namely Ss. 116 to 120 and the said sections are as follows:-

"S. 116: This Part applies only to High Courts not being the Court of a Judicial Commissioner.

S. 117: Save as provided in this Part or in part X or in rules, the provisions of this Court shall apply to such High Courts.

S. 118: Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs:

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation. S. 119: Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneyes. S. 120: The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, secs. 16, 17 and 20. S. 122 empowers the High Courts, not being the Court of a Judicial Commissioner to make rules regulating their own procedure and the procedure of the Civil Courts subjects to their superintendence. S. 129 further provides:

> "Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order or other law establishing of it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

The material provisions contain in O. XLIII of the Code of Civil Procedure may be set out:

> "An appeal shall lie from the following orders under the provisions of S. 104, namely:-
>
> x x x x
> x x x x
>
> (q) an order under rule 2, rule 3 or rule 6 of order XXXVIII:

(r) an order under rule 1, rule 2, rule 2A, rule 4 or rule 10 of O. XXXIX;

(s) an order under rule 1, or rule 4 of order XL.

x x x x

2. The rules of O. XLI shall apply, so far as may be, to appeals from orders."

On a proper analysis of the relevant provisions of the Code there cannot be, in my opinion, any manner of doubt that S. 104 and order 43 of the Code of Civil Procedure apply, to the original side of the Bombay High Court. It is not in dispute and it cannot be disputed that the Code of Civil Procedure applies to the High Court. S. 1 of the Code which provides for territorial extent of the operation of the Code makes this position abundantly clear. The argument is that S. 104 and order 43 of the Code do not have any application to the original side of the High Court, although various other provisions of the Code may apply to the High Court-including its original side. This argument, as we have earlier noticed, is made mainly on the basis of the provisions contained Ss. 3 and 4 of the Code. S. 3 of the Code deals with subordination of Courts. It is no doubt true that a learned Single Judge dealing with any matter on the original side discharges his duties as a Judge of the High Court, and he can, therefore, be in no way subordinate to the High Court. When a division Bench of a High Court hears an appeal from any decree, order or judgment of any Single Judge of the High Court in its original side there can be no question of any subordination of the Judge, presiding over a Bench on the original side of the High Court to the High Court. An appeal admittedly lies to a division Bench of the High Court from any order passed by a learned single Judge on the original side under cl. 15 of the Letters Patent, if the order is a 'Judgment' within the meaning of the said clause. An appeal also admittedly lies from a decree passed by a Single Judge on the original side of the High Court to a division Bench of the High Court. A division Bench, properly constituted, is perfectly competent to hear an appeal from any such order which may constitute a judgment within the meaning of cl. 15 and from any decree by a Single Judge on the original side of the High Court. In the same way, in case of any other order in respect of which right to prefer any appeal has been conferred by a statute, a division Bench of the High Court will be competent to hear such an appeal. S.3 of the Code, in my opinion, has really no bearing on the question and creates no bar to the competence and maintainability of an appeal from an order passed by a Judge on the original side, if the order is otherwise appealable. S. 4 of the Code has been enacted to preserve any special or local law in force.

An analysis of the material part of this section clearly indicates that in the absence of any specific provision to the contrary, no provision in the Code shall be deemed to limit or otherwise affect any special or local law in force or special jurisdiction or power conferred or any special form of procedure prescribed by or under any Jaw for the time being in force. The argument that S. 104 and order 43 of the Code affect the special jurisdiction or power conferred on the High Court under cl. 15

of the Letters Patent is, to my mind, untenable. Cl. 15 of the Letters Patent was enacted to provide for an appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction and the said clause undoubtedly confers power for the hearing of an appeal from a judgment of any judge on the original side of the High Court. Though cl. 15 makes special provisions in relation to appeal from a judgment of a learned single Judge on the original side, yet it cannot be said that the side clause intended to lay down that in no other case an appeal will lie from an order passed by any learned Judge on the original side, even if any specific provision is made in any other statute making any other order appealable. An appeal, it has to be remembered, is a creature of a statute and litigant generally does not have a right of appeal against any decision of a competent Court unless a right of appeal has been specifically conferred on the litigant by law. Cl. 15 of the Letters Patent confers on the litigant a right to prefer an appeal against any judgment. Any order which is considered to be a 'judgment' will be appealable by virtue of the provisions contained in cl. 15 of the Letters Patent. In the same way other statutes may confer on the litigant the right to prefer an appeal against an order; and by virtue of the provisions of the statute such an order shall become appealable. If any other statute confers on the litigant any right to prefer an appeal in respect of any other order, it cannot be said that such a provision creating a right of appeal in any way affects the provisions contained in cl. 15 of the Letters Patent. The special power and jurisdiction of the High court under cl. 15 to entertain an appeal from any judgment is in no way affected and is fully retained;

and in addition to the said power, a High Court may be competent to entertain other appeals by virtue of specific statutory provisions. S. 4 of the Code cannot, therefore, be said to be in conflict with the provisions contained in cl. 15 of the Letters Patent and S. 4 of the Code does not limit or otherwise affect the power and jurisdiction of the High Court under cl. 15 of the Letters Patent. On the other hand, the Code contains specific provisions which go to indicate in which case or to which Court the provisions of the Code, may or may not be applicable. S. S of the Code makes specific provisions regarding the nature and manner of applicability of the Code to Revenue Courts and the Revenue Court has also been defined in the said section. On the other hand, in Ss. 116 to 120 it is convincingly indicated that S. 104 and order 43 of the Code of Civil Procedure apply to the original side of a High Court. Ss. 116 to 120 are contained in part IX of the Code which makes special provisions relating to High Courts (not being the Court of Judicial Commissioner). S. 117 specifically provides that the provisions of the Code shall apply to High Court save as provided in part IX or in part X. S. 120 contained in part IX lays down that the provisions contained in Ss. 16, 17 and 20 of the Code shall not apply to the High Court in the exercise of its original civil jurisdiction. Part X which deals with rules and manner of framing thereof does not have any material bearing on the question of applicability of S. 104 and order 43 of the Code to the original side of the High Court. The effect of the special provisions contained in part IX relating to High Courts, therefore, clearly appears to be that the provisions of the Code have as provided in Part IX or Part X or in rules, apply to the original side of the High Court and Ss. 16,17 and 20 of the Code do not apply to the High Court in the exercise of its original civil jurisdiction. S. 104 of the Code is contained in part VII which deals with appeals. Part VII of the Code dealing with appeals consists of the sections commencing from Ss. 96 to 112. This part VII dealing with appeals makes provisions for an appeal from original decrees, appeals, appellate decrees, appeals from orders, general provisions relating to appeals and also appeals to the Supreme Court. S. 104 of the Code provides for appeals from orders and clearly

stipulates that an appeal shall lie from the orders mentioned therein and save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other order. Order 43 which is attracted by S. 104 of the Code clearly provides that an appeal shall lie from the orders mentioned in rule 1 of o. 43 under the provisions of S. 104 and the orders referred to therein particularly in (q), (r) and (s) clearly indicate that the order in question is an appealable order. As I have earlier observed that an appeal is a creature of a statute and the right to appeal is only enjoyed, if law confers any right. The Code of Civil Procedure clearly makes the order in question an appealable one. The legislature has thought it fit to confer a right on the litigant to prefer an appeal in respect of the orders mentioned in S. 104 of the Code read with order 43 thereof. A Court will be slow to deprive a litigant of the statutory right merely on the ground that the order in question has been passed by a learned Judge on the original side of the High Court. It may further be pointed out that S. 104 which makes the order under appeal and also various other orders referred to therein appealable under the Code, recognises that apart from the order made appealable under the Code there may be other orders appealable by any law for the time being in force and further provides that no appeal will lie from any orders other than the orders expressly provided in the body of the Code or by any other law in force. The right of appeal against a judgment of a learned single Judge on the original side under cl. 15 of the Letters Patent is a right conferred by any other law in force. It may be pertinent to point out in this connection that by incorporating S. 100A in the Code (by the Amending Act 104 of 1976, S. 38), the Legislature has thought it fit to interfere with the right of appeal in certain cases, even if such right had been conferred by Letters Patent or any other law.

This right of appeal under cl. 15 of the Letters Patent is in no way curtailed or affected by S. 104 of the Code of Civil Procedure and S. 104 seeks to confer the right of preferring an appeal in respect of the various orders mentioned therein. In other words, by virtue of the provisions contained in S. 104(1), a litigant enjoys the right of preferring an appeal in respect of various orders mentioned therein, even though such orders may or may not be appealable under cl. 15 of the Letters Patent as a judgment and the right of appeal under cl. 15 of the Letters Patent remains clearly unimpaired. In this connection the following observations of this Court in the case of Union of India v. Mohindra Supply Co. (supra) at p. 511 may be usefully quoted:-

> "The intention of the legislature in enacting the sub-s.(1) of S. 104 is clear: the right to appeal conferred by any other law for the time being in force is expressly preserved This intention is emphasised by s. 4 which provides that in the absence of any specific provision to the contrary nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force. The right to appeal against judgments (which did not amount to decrees under the Letters Patent, was therefore not affected by s. 104(1) of the Code of Civil Procedure, 1908".

It will be apt in this connection to bear in mind the view expressed by the Privy Council in the case of Mt. Savitri Thakurain v. Savi and Anr.,(1) the Judicial Committee held at p. 82-83 as follows:-

> "The orders and rules under the Code are by Section 121 given the same affect as if they had been enacted in the Code, and therefore order 41, Rule 10, is one of the pro

visions of the Code. It applies to appeals in the High Court, including the present appeal, unless any particular section of the Act can be found to exclude it. Section 104(1) is the section relied on for this purpose It prescribes what orders shall be appealable and enumerates them, and among the orders enumerated there is not included such an order as that made by Choudhary, J. Out of the operation of Section 104 there are, however, expressly excepted matters, which are otherwise expressly provided for in the body of the Code. In order to appreciate the full effect of section 104 it should be compared with the corresponding section of the Act of 1882, Section 588. The earlier section enacted that appeals should lie in certain cases, which it enumerated, 'and from no other such orders.' This raised this question nearly whether an appeal, expressly given by Section 15 of the Letters Patent and not expressly referred to in Section 588 of the Code of 1882, could be taken away by the general words of the section 581 and in the wording of section 104 of the Act of 1908 is significant for it runs, 'and same as otherwise expressly provided....by any law for the time being in force, from the other orders'.

Section 15 of the Letters Patent is such a law, and what it expressly provides namely, an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction, is thereby saved. Thus regulations duly made by orders and Rules under the Code of Civil Procedure, 1908 are applicable to the jurisdiction exercisable under the Letters Patent, except that they do not restrict the express Letters Patent appeal."

The effect of sub-section (1) S. 104, therefore, is clearly not to affect any existing special or local law or any special jurisdiction or power conferred and to preserve any existing right of appeal whether under any statute or the Letters Patent and to create a further right of preferring an appeal in respect of the orders enumerated therein. C In the case of Mathura Sundari Dassi v. Haran Chandra Shaha and Ors. (supra), Sanderson, C.J. Observed at p. 362 as follows:

"I would be very loth to hold that this order is not a 'judgment' within the meaning of cl. 15 of the Letters Patent, but it is not necessary in my judgment to give a definite opinion upon it because I think, on the second point, the Code does give a right of appeal. By clause 14 of the Letters Patent it is provided as follows: 'And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making law and regulations'. By the terms of S. 117 the code is made applicable to the High Court, and o. 43. R. 1, gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that O.9, R. 8 applies. That order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to O.9, R. 8, and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which- when his application for

reinstatement has been refused gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the Rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal."

Sri Aushotosh Mookherji in his judgment in the same case at pp. 364-365 held as follows:

"The question, consequently, arises whether O,43, r. 1, clause (c), is applicable to an order under o. IX, r. 9, made by a Judge on the original side of this Court.

On behalf of the appellant, reliance has been placed upon S. 117 of the Code which lays down that 'save as provided in this part or in part X or in rules, the High Court established under the Indian High Courts Act, 1961.' The only provision in Part IX, which may have any possible hearing is that contained in S. 120 which obviously does not touch the present question. The provision in Part X, which deal with the matter, is contained in S. 129: this also does not militate against the contention of the appellant. The term 'rule', which finds a place in S. 117, is defined in clause 18 of S. 2 of the Code to mean 'a rule contained in the first Schedule or made under S. 122 or S. 125'. Our attention has not been drawn to any such rule which makes o. 43, R. 1, Clause (e), inapplicable. On the other hand O.49, R. 3, which excludes the operation of other rules, lends support to the contention of the appellant that o. 43, r. 1, cl. (c) is applicable to the present appeal.

But it has been argued on behalf of the respondents, on the authority of the decision of the Judicial Committee in Hurriah Chandra Choudhary v. Kali Sudari Dasi that the Civil Procedure Code, in so far as it provides for appeals, does not apply to an appeal preferred from a decision of one Judge of a High Court to the Full Court. The true effect of the decision of the Judicial Committee was considered by this Court in Toolses Money Dassesv. Sudevi Dasses (1890) 25 Cal.

361) but it is not necessary for my present purpose to determine its hearing in all its implications, because in my opinion, the law has been substantially altered since that decision was pronounced. S. 104 Of the Code of 1908 is materially different from S. 588 of Code of 1882. It provides that an appeal shall lie from the orders mentioned in the first clause of that section, and save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other orders'. The effect of S. 104 is thus, not to take away a right of appeal given by clause IS of the Letters Patent, but to create a right of appeal in cases even where clause 15 of the Letters Patent is not applicable. I may here observe perethically that in the case of Tooles Money Dasses v. Sudevi Dasses. Princep J. felt pressed by the argument that if an appeal was deemed to have been allowed by the Code of Civil Procedure, there was no provision for the Constitution of a Court to which such an award might be preferred.

> S. 106 of the Code, however, lays down that "where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made.' Consequently, where a right of appeal has been so given, it would be the duty of this Court to constitute a Court of Appeal under S. 13 of the Indian High Courts Act. 1 hold accordingly that this appeal is competent under cl. tc), R. 1, o. 43 of the Civil Procedure Code."

In the case of Lea Badin v. Upendra Mohan Roy Chaudhry (supra), a Division Bench of the Calcutta High Court held at p. 37 as follows:

> "But there is another and far simpler ground on which it must he held that an appeal is competent. The order in the present case is one for which a right of appeal ii provided in cl. (s). R. 1, o. 43 of the Code. Under the pre sent Code (Act 5 of 1908) it cannot be contended that the Code and the Rules made under it do not apply to an appeal from a learned Judge of the High Court; such a contention was elaborately dealt with and repelled in the case of 1918 Cal. 361(4)".

On a plain reading of the various provisions of the Code and on a proper construction thereof I have no hesitation in holding that S. 104 of the Code of Civil Procedure applies to the original side of the High Court and the order in question is clearly appealable by virtue of the provisions contained in S. 104(1) read with order 43 thereof. The authorities to which I have referred also lend support to the view that I have taken. A contrary view expressed by any High Court must necessarily be considered to be wrong and incorrect. The leading decision of the Bombay High Court in the case of Baman Rao Kulkarini v. Naresh Vishnu Joshi (supra) proceeds on an incorrect appreciation and interpretation of the provisions of the Code. As I have earlier discussed, there is no question of S. 104 of the Code of Civil Procedure purporting to control of cl. 15 of the Letters Patent. It may, on the other hand, be said that S. 104 of the Code seeks to supplement cl. 15 of the Letters Patent by conferring a right of appeal in the case of various orders mentioned in sub-section (1) of S. 104, which brings in its purview S. 43 of the Code. The further approach of the Bombay High Court in that case as to subordination of a judge of the High Court sitting singly on the original side, is fallacious and untenable. An appeal under cl. 15 of the Letters Patent from a judge sitting singly on the original side of the High Court becomes competent to a division Bench and a learned judge against whose judgment the appeal is preferred does not become subordinate to the High Court. There is in fact no question of subordination at all.

The observations of the Judicial Committee in the case of Hurish Chandra Choudhary v. Kali Sudari Dasi (supra) at p. 17 relied on by the learned counsel for the Respondents are of no material assistance to them. I have already quoted the said observations of the Judicial Committee. The said observations made in relation to the provisions of S. 588 of the Act 10 of 1877 only go to lay down that the said section which has the affect of restricting certain appeals does not have the affect of restricting the right of appeal under cl. 15 of the Letters Patent and does not apply to a case where an appeal is one under cl. 15 of the Letters Patent. It may further be noted that the law has since the said decision been substantially altered and S. 104 of the Code of Civil Procedure of 1908 is materially different from S. 588 of the Code of 1882. This decision of the Judicial Committee has

already come up for consideration by a division Bench of the Calcutta High Court in the Mathura Sudari Dassi v. Haran Chandra Shaha (supra).

I, therefore, accept the first contention of Mr. Sorabjee that the order in question is appealable under S. 104 (1) of the Code read with order 43 thereof and the said provisions of the Code apply to the original side of the Bombay High Court and the appeal preferred from the order of the learned single judge to the Division Bench of A the Bombay High Court was competent and maintainable.

In view of my accepting the first contention of Mr. Sorabjee it does not really become necessary for me to consider the other contention raised by him, namely, that the order in question is also appealable as a 'judgment' under cl. 15 of the Letters Patent. As elaborate arguments have been advanced on this aspect and various decisions have been cited, my learned brother Fazal Ali, J. has in his judgment also considered this aspect and has dealt with various cases, in deference to the submissions made from the bar that this Court should lay down guidelines as to what will constitute a 'judgment' within the meaning of cl. l S of the Letters Patent.

An order which is appealable under the Code or under any other statute becomes appealable as the statute confers a right on the litigant to prefer an appeal against such an order. Such an order may or may not be appealable as 'judgment' under cl. 15 of the Letters Patent. An order which may be appealable under cl. IS of the Letters Patent as a 'judgment' becomes appealable as Letters Patent confers on the litigant a right of appeal against such an order as 'judgment'. An order appealable under the Letters Patent may or may not be appealable under the Code. A right of appeal is a creature of Statute. A litigant does not have an inherent right to prefer an appeal against an order unless such a right is conferred on the litigant by law. Certain orders become appealable under the Code, as the Code makes such orders appealable. Other Statutes may confer a right of appeal in respect of any order under the Statute. The Letters Patent by cl. 15 also confers a right to prefer an appeal against a 'judgment'. An order which satisfies the requirements of 'judgment' within the meaning of cl. 15 becomes appealable under the Letters Patent. What kind of an order will constitute a 'judgment' within the meaning of cl. 15 of the Letters Patent and will become appealable as such much necessarily depend on the facts and circumstances of each case and on the nature and character of the order passed. The question whether a particular order constitutes a judgment within the meaning of cl. 15 of the Letters Patent to be appealable under the provisions thereof has come up for consideration before the various Courts in a number of decision. Very many decisions have been cited in the present case and they have been considered by my learned brother, Fazal Ali, J. in his judgment. The question indeed, is not free from difficulties and divergent views have been expressed by different Courts and by various learned Judges. This Court had also the occasion to consider as to what may constitute a judgment within the meaning of cl. 15 of the Letters Patent in certain cases. In the case of Shanti Kumar R. Canji v. The Home Insurance Co. Of New York (Supra) this Court referring to the earlier decision of this Court in the case of Asrumati Debi v. Kumar Rupendra Deb Rajkot & ors (supra), observed at p. 550-"This Court in Asrumati Debi's case said that a judgment within the meaning of cl. 15 of the Letters Patent would have to satisfy two tests. First, the judgment must be the final pronouncement which puts an end to the proceedings as far as the Court dealing with it is concerned. Second, the judgment must involve the determination of some right or liability though it may not be necessary that there must be a decision on merits". This

Court further observed at p. 555-"The view of the High Courts of Calcutta and Madras with regard to the meaning of 'judgment' are with respect preferred to the meaning of 'judgment' given by the Rangoon and Nagpur High Court." This Court also held at p. 556-"In finding out whether the order is a 'judgment' within the meaning of cl. IS of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability has to be found out by a Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability." In my opinion, an exhaustive or a comprehensive definition of 'judgment' as contemplated in ch IS of the Letters Patent cannot be properly given and it will be wise to remember that in the Letters Patent itself, there is no definition of the word 'judgment'. The expression has necessarily to be construed and interpreted in each particular case. It is, however, safe to say that if any order has the effect of finally determining any controversy forming the subject- matter of the suit itself or any part thereof or the same affects the question of Court's jurisdiction or the question of limitation, such an order will normally constitute 'judgment' within the meaning of cl. IS of the Letters Patent. I must not, however, be understood to say that any other kind of order may not become judgment within the meaning of cl. IS of the Letters Patent to be appealable under the provisions thereof. As already stated, it is not necessary to decide in the present case whether the order in question would be appealable under cl. IS of the Letters Patent as judgment; and I, therefore, refrain from expressing any opinion on this question.

P.B. R.