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SUBAL PAUL
v.
MALINA PAUL AND ANR.

FEBRUARY 13, 2003

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[V.N. KHARE, CJ., S.B. SINHA AND DR. A.R. LAKSHMANAN, JJ.]

Letters Patent (Calcutta High Court):

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Clause 15—Order passed by Single Judge of High Court in appeal u/s.299 of Indian Succession Act—Letters Patent Appeal filed before Division Bench—Objection as regards maintainability of letters patent appeal overruled by High Court—Held, order passed by Single Judge in appeal u/s.299 was appealable to Letters Patent Bench and the objection with regard to maintainability of appeal was rightly overruled by High Court—Clause 15 of the Letters Patent confers a right of appeal on a litigant against any judgment passed under any Act unless the same is expressly excluded—Clause 15 may be subject to an Act but when it is not so subject to the special provision, the power and jurisdiction of the High Court under Clause 15 to entertain any appeal from a judgment would be effective—Clause 15 of the Letters Patent permits an appeal against the order passed by a Single Judge of the High Court in the second forum—Indian Succession Act, 1925—s.299.

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Sharda Devi v. State of Bihar, [2002] 3 SCC 705; Shah Babulal Khimji v. Javaben D. Kania and Anr., [1981] 4 SCC 8; National Sewing Thread Co. Ltd., Chidambaram v. James Chadwick and Bros. Ltd., AIR (1953) SC 357; Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals Pvt. Ltd. and Ors., [1991] 2 SCC 637 and Prataprai N. Kothari v. John Braganza, [1999] 4 SCC 403 relied on.

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Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasinghji Solanki and Ors., AIR (1988) SC 915 - [1988] 2 SCR 1043; M/s. Tanusree Art Printers and Anr. v. Rabindra Nath Pal, [2000] 2 CHN 213 and (2000) 2 CHN 843; Union of India and Ors. v. Aradhana Trading Co. and Ors., [2002] 4 SCC 447; Chandra Kanta Sinha v. Oriental Insurance Co.Ltd. and Ors., [2001] 6 SCC 158 and Municipal Corporation of Brihanmumbai and Anr. v. State Bank of India, [1999] 1 SCC 123 referred to.

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Bahwant v. Mainabai; AIR (1991) Madhya Pradesh 11; *Jyotirindra Nath Chowdhury v. Pratima Rani Debi*; ILR (1967) 1 Cal. 278, distinguished. A

New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corporation and Ors., [1997] 3 SCC 462 and *Balai Lall Banerjee and Ors. v. Debaki Kumar Ganguly and Ors.*, AIR 1984 Cal.16 held inapplicable. B

Indian Succession Act, 1925

S.299—Order passed under—Nature of—Will—Son of testator applying for probate—Additional District Judge rejecting the prayer—Appeal u/s.299 before Single Judge of High Court allowed—Letters Patent appeal held maintainable by Division Bench of High Court—Held, a final order passed under s.299 adjudicating upon the rights and obligations which are binding between the parties thereto and are enforceable may not be *stricto sensu* a decree within the meaning of s.2(2) CPC, but is a judgment within the meaning of s.2(9) thereof—While determining the question as regards clause 15 of Letters Patent, the Court is required to see as to whether or not the order sought to be appealed against is a judgment within the meaning thereof—Once it is found that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, clause 15 of Letters Patent would be attracted—S.299 expressly provides for an appeal to High Court—The right of appeal, therefore, is not conferred u/s.104 CPC—The words “save as expressly provided by any other Act” were inserted in the said provision in 1908 having regard to difference of opinion rendered in the judgments of various High Courts as regards the applicability of letters patent, and to give effect to the Calcutta, Madras and Bombay High Courts’ decisions—S.104 CPC does not contemplate orders or decree passed under a special statute—The words “in accordance with the provisions of the Code of Civil Procedure, 1908” occurring in s.299 of Succession Act do not refer to any substantive rights of the parties but merely procedural part—A right of appeal of a party in a contentious proceedings is, therefore, to be found in the provisions of s.299 of the Act itself and not in s.104 of the Code of Civil Procedure—Code of Civil Procedure, 1908—S.104—Letters Patent (Calcutta High Court)—Clause 15. C D E F G

Miss Eva Mountstephens v. Mr. Hunter Garnett Orme, ILR (1913) 35 All.448; *G.S. Nayyar v. Smt. Kaushalya Rani and Ors.*, ILR (1974) 2 Delhi 5; *Hurrish Chunder v. Kaisunder*; (1883) 9 Cal.482:10 I.A.4 and *Bannu Bibi v. Mehdi Husain*, (1889) 11 All 375, referred to. H

A *Code of Civil Procedure, 1908"*

S.104—The section merely recognises appeals provided under special statute—It does not create a right of appeal as such—It does not, therefore, bar any further appeal also, if the same is provided for under any other Act for the time being in force—Indian Succession Act, 1925—s.299.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7806 of 2001.

From the Judgment and Order dated 30.8.2000 of the Gauhati High at Assam in L.P.A. No. 1 of 2000.

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Sanjay Parikh, Ms. Vandana Sudan and A.K. Misra for the Appellant.

Ms. Madhu Moolchandani for the Respondents.

The following Order of the Court was delivered :

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The short question that arises for consideration in this appeal is as to whether a letters patent appeal would lie against the judgment of a learned Single Judge of the High Court filed under Section 299 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act').

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When this matter came up before a Bench of two Judges, the Bench was of the view that the aforesaid question requires to be considered by a Bench of three Judges. It is in this way the matter has come up before us.

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The facts giving rise to this appeal are that on 8.12.1986 one Srish Chandra Paul executed his last Will. On 17.3.1988 he died. The appellant herein who is a son of Srish Chandra Paul applied for probate before the Additional District Judge, Agartala. The learned Additional District Judge rejected the prayer for issue of probate. Aggrieved, the appellant preferred an appeal under Section 299 of the Act before the Gauhati High Court. A learned Single Judge of the High Court allowed the appeal and granted letters of administration with a copy of the Will annexed thereto. Aggrieved, the

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respondents preferred a letters patent appeal before a Bench of the High Court. Before the said Bench, the appellant herein raised a preliminary objection that no such appeal is maintainable being barred by Section 104 of the Code of Civil Procedure, 1908. The Bench overruled the objection and directed for hearing of the appeal. It is at this stage the appellant herein filed the present appeal by special leave and by virtue of the interim order passed

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by this Court the hearing in the letters patent appeal was stayed.

Mr. Sanjay Parikh, learned counsel appearing for the appellant reiterated the arguments raised before the High Court. Mr. Parikh submitted that an appeal to the High Court in terms of Section 299 of the Act would be governed by Section 104 of the Code of Civil Procedure. According to the learned counsel, as an order passed by the District Judge in a contentious proceeding is not a decree within the meaning of Section 2(2) of the Code of Civil procedure, the appeal would not lie from a decree as provided for under Section 96 of the Code of Civil Procedure. No formal decree is drawn up for such purpose nor the same can be annexed to the memorandum of appeal. In that view of the matter, sub-section (2) of Section 104 of the Code of Civil Procedure is a bar as regards maintainability of appeal under clause 15 of the letters patent of the Calcutta High Court. The learned counsel in support of the said contention strongly relied upon *Balwant v. Mainabai*, AIR (1991) Madhya Pradesh 11; *Jyotirindra Nath Chowdhury v. Pratima Rani Debi*, ILR (1967) 1 Cal. 278 and *Balai Lall Banerjee and Ors. v. Debaki Kumar Ganguly and Ors.*, AIR (1984) Cal. 16. He would further submit that in terms of clause 15 of the Letters Patent, an appeal would be maintainable when an original order is passed by a Single Judge of the High Court and or when an appellate order is passed in an appeal arising from a decree and not from an order.

According to the learned counsel, by virtue of Section 104 of the Code of Civil Procedure, the judgment under challenge in the High Court not being a judgment and decree passed by the learned Single Judge, no letters patent appeal would lie there against. In support of the said contention, strong reliance has been placed on *Shah Babula Khimji v. Javaben D. Kania and Anr.*, [1981] 4 SCC 8 and *New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corporation and Ors.*, [1997] 3 SCC 462.

The learned counsel appearing on behalf of the respondents, on the other hand, would submit that the question is squarely covered by a recent judgment of this Court in *Sharda Devi v. State of Bihar*, [2002] 3 SCC 705.

It is not disputed that the Indian Succession Act, 1925 is a special Act and Section 299 thereof provides for an appeal against the order passed by the District Judge either refusing or issuing probate, to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908.

Section 268 of the Act Provides that the proceedings for grant of probate and letters of administration shall, save as therein provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure,

- A 1908. The proceedings for grant of probate is initiated by filing an application under Section 276 of the Act. The details which are required to be stated therein have been specified in the said provision. Section 278 of the Act similarly provides for the manner in which an application for grant of letters of administration is to be filed. Sub-section (1) (c) of Section 283 empowers the District Judge to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceeding after issuance thereof. Section 284 of the Act provides for lodging of caveats. Once a caveat is lodged, the proceeding becomes contentious. Section 295 of the Act Provides for procedure in contentious matters whereas Section 299 provides for an appeal from the orders passed by the District Judge in the proceedings.
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Sections 295 and 296 read thus:

- D “295. *Procedure in contentious cases.*—In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be the form of a regular suit, according to the provisions of the Code of the Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.”

- E “299.- *Appeals from orders of District Judge.*—Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.”

- F The provisions referred to hereinbefore clearly go to show that although the contentious proceedings would not be treated as regular suit or upon determinations of the issues raised therein a decree is not to follow the judgment but procedural provisions of the Code of Civil Procedure would be applicable. The words “in accordance with the provisions of the Code of Civil Procedure, 1908” occurring in Section 299 of the Act, therefore, do not refer to any substantive rights of the parties but merely procedural part thereof.
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- H A right of appeal of a party in a contentious proceeding is, therefore, to be found in the provisions of Section 299 of the Act itself and not in Section 104 of the Code of Civil Procedure.

Section 299 of the Act states that all orders passed by the District Judge are appealable. Although *ex facie*, all orders are appealable ones. However the decisions rendered in various jurisdictions point out the inherent limitations contained therein. A

It is interesting to note that the Allahabad High Court in *Miss Eva Mountstephens v. Mr. Hunter Garnett Orme*, ILR (1913) 35 All, 448 held that an order passed in a contentious proceeding for grant of probate and letters of administration with a copy of Will would be a decree. Some other High Courts, however, have taken a contrary view. See *G.S. Nayyar v. Smt. Kaushalya Rani and Ors.*, ILR (1974) 2 Delhi 5. B

It is further interesting to note that procedures have been adopted in some High Courts including the Allahabad, Bombay, Madras, Rajasthan and Patna High Courts to prepare a formal decree but such a procedure has not been adopted in some other. The judgments of different High Courts are also at variance as regards the amount of court fee payable in an appeal filed under Section 299 of the Act. C

It is in the aforementioned context, the question is as to whether the provision of Section 104 of the Code of Civil Procedure is attracted in an appellate proceeding under the Indian Succession Act is required to be considered. D

Section 104 of the Code of Civil Procedure provides that an appeal shall lie from the orders specified 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 orders: E

“(ff) an order under Section 35A: F

(ffa) an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;

(g) an order under Section 95: G

(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 H

A allowed by rules:

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order or an order for the payment of less amount, ought to have been made."

B It is not disputed that Section 299 of the Act expressly provides for an appeal to the High Court. The right of appeal, therefore, is not conferred under Section 104 of the Code of Civil Procedure. The words "save as expressly provided by any other Act" were inserted in the said provisions in 1908 having regard to difference of opinions rendered in the judgments of various High Courts as regards the applicability of letters patent. The High
 C Courts of Calcutta, Madras and Bombay following the decisions of the Privy Council in *Jurish Chunder v. Kaisunder*, (1883) 9 Cal. 482: 10 I.A. 4 held that Section 588 of the Code of Civil Procedure, as it then stood, did not take away the jurisdiction of clause 15 of the Letters Patent whereas the Allahabad High Court in *Bannu Bibi v. Mehdi Husain*, (1889) 11 All. 375 held to the
 D contrary. The said words were, therefore, added in the 1908 Act to give effect to the Calcutta, Madras and Bombay High Courts' decisions.

Had the intention of the Legislature been that an appeal under Section 299 would be governed by the provisions of the Code of Civil Procedure, the Legislature could have used the language as has been done in Section 28 of
 E the Hindu Marriages Act providing that all decrees and orders passed under the Act "may be appealed from under any law for the time being in force."

It is one thing to say that as no decree is prepared, the procedural provisions for preferring an appeal as required under Order 41 Rule 1 of the Code of Civil procedure shall not be applicable and, thus, a copy of the
 F decree is not required to be annexed with the memorandum of appeal but it is another thing to say that a right of appeal is provided under Section 104 of the Code of Civil Procedure itself. Section 104 of the Code of Civil Procedure specifies matters which would appealable and no other. Under the Code of Civil Procedure appeals from orders are provided for in Section 104
 G and Order 43 Rule 1 thereof. The said provisions contain a full list of appealable orders. It does not contemplate orders or decree passed under a special statute.

By reason of Section 104 of the Code of Civil Procedure the bar of appeal under a special statute is saved. A plain reading of Section 104 of the
 H Code of Civil Procedure would show that an appeal shall lie from an appealable

order and no other order save as otherwise expressly provided in the body of this Code of or by any law for the time being in force. Section 104 of the Code merely recognises appeals provided under special statute. It does not create a right of appeal as such. It does not, therefore bar any further appeal also, if the same is provided for under any other Act, for the time being in force. Whenever the statute provides such a bar, it is so expressly stated as would appear from Section 100A of the Code of Civil Procedure.

If a right of appeal is provided for under the Act, the limitation thereof must also be provided therein. A right of appeal which is provided under the Letters Patent cannot be said to be restricted. Limitation of a right of appeal, in absence of any provision in a statute cannot be readily inferred. It is now well-settled that the appellate jurisdiction of a superior court is not taken as excluded simply because subordinate court exercises its special jurisdiction. In G.P. Singh's 'Principles of Statutory Interpretation', it is stated:

“The appellate and revisional jurisdiction of superior courts is not taken as excluded simply because the subordinate court exercises a special jurisdiction. The reason is that when a special Act on matters governed by that Act confers a jurisdiction to an established court, as distinguished from a persona designate, without any words of limitation, then, the ordinary incident of procedure of that court including any general right of appeal or revision against its decision is attracted...”

But an exception to the aforementioned rule is on matters where the special Act sets out a self-contained Code, the applicability of the general law procedure would be impliedly excluded. See *Upadhyaya Hargovind Devshanker v. Dhirenderasinh Virbhadrasinghji Solanki and Ors.*, AIR (1988) SC 915: [1988] 2 SCR 1043.

It is in the aforementioned backdrop the decisions relied upon by Mr. Parikh need be considered.

In *Balwant v. Mainabai's* case (supra), learned Single Judge of the Madhya Pradesh High Court was considering the question as to whether a miscellaneous appeal would be maintainable. It did not decide the question that an appeal shall lie only under Section 104 of the Code of Civil Procedure but merely held that a miscellaneous appeal would be maintainable having regard to the fact that an appeal under Section 299 lies against an order passed by the District Judge.

A In *Jyotrindra Nath Chowdhry's* case (supra), a question arose as to whether an order appointing the Administrator would be appealable. Sen. J. as he then was, observed:

B “The Indian Succession Act is a law for the time being in force. Section 299 of this Act says that every order made by the District Judge by virtue of the powers conferred upon him by the Act shall be subject to appeal to the High Court. Though such an order does not fall within any of the clauses of s.104, C.P.C., still it is appealable because the Indian Succession Act expressly provides otherwise. In other words, such an order falls within the saving clauses of s.104, C.P.C.”

C This decision cannot be said to be an authority for the proposition that an appeal under Section 299 of the Indian Succession Act would be an appeal expressly provided for under Section 104 of the Code of Civil Procedure.

D The Calcutta High Court in that case was concerned with the question as to whether an appeal would be maintainable or not having regard to the fact that the order was an interlocutory one and in that view of the matter the said decision cannot be said to have any application in the instant case.

E In *Balai Lall Banerjee's* case (supra), again a question arose as to whether an order for grant of probate or letters of administration is a decree or not. It was held that as a formal decree was not required to be drawn up, the same is not required to be annexed with the copy of the memorandum of appeal.

F The decisions rendered by various High Courts would show that different views have been taken on various aspects of the matter, namely, as regards the nature of the order passed, the procedure to be adopted, applicability of letters patent of the High Court, amount of court fee payable on a Memo of Appeal etc.

G Despite the fact that Section 299 of the Act states, that all orders shall be appealable, attention of the High Courts was engaged in laying down the law as to whether even an interlocutory order would be appealable or not and/or the extent of jurisdiction of the appellate court in relation thereto or the procedure applicable therefor.

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The orders passed under Section 299 of the Act may be an interlocutory order determining the rights of the parties or a final order. When a final order is passed in a contentious suit, as would be evident from the provisions contained in Section 295 of the Act, the procedures of the Code of Civil Procedure are required to be followed. Therefore, a final order passed between the parties adjudicating upon the rights and obligations which are binding between the parties thereto and are enforceable, although may not be, *stricto sensu* a decree within the meaning of Section 2(2) of the Code of Civil Procedure Code but it is beyond any cavil that the same would be a judgment within the meaning of Section 2(9) thereof.

While determining the question as regards clause 15 of the Letters Patent, the court is required to see as to whether the order sought to be appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, clause 15 of the Letters Patent would be attracted.

The Supreme Court in *Shah Babulal Khimji's* case (*supra*) deprecated a very narrow interpretation on the word 'judgment' within the meaning of clause 15.

This Court said:

"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 be struck so as to advance the object of the statute and give the desired relief to the litigants, if possible."

In *Shah Babulal Khimji's* case (*supra*), the Apex Court in no uncertain terms referred to the judgment under the Special Act which confers additional jurisdiction to the High Court even in internal appeals from an order passed by the Trial Judge to a larger Bench. Letters Patent has the force of law. It is no longer *res integra*. Clause 15 of the Letters Patent confers a right of appeal on a litigant against any judgment passed under any Act unless the same is expressly excluded. Clause 15 may be subject to an Act but when it is not so subject to the special provision the power and jurisdiction of the High Court under Clause 15 to entertain any appeal from a judgment would

A be effective.

This matter may be examined from another angle.

Sub-section (2) of Section 104 of the Code of Civil Procedure provides that no appeal shall lie from any order passed in appeal under "this Section".

B This also shows that if appeal is provided for under any other law, Section 104 of the Code of Civil Procedure would have no application.

The decision of this Court in *Shah Babulal Khimji*'s case (supra) has been considered in some details by a Special Bench of the Calcutta High Court in *M/s. Tamusree Art Printers and Anr. v. Rabindra Nath Pal*, [2000] 2 CHN 213 and 2000 (2) CHN 843. It was pointed out:

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D "If the right of appeal is a creature of a statute, the same would be governed by the said statute. Whether an appeal under Clause 15 of the Letters patent will be maintainable or not when the matter is governed by a Special Statute will also have to be judged from the scheme thereof. (e.g. despite absence of bar, a Letters Patent appeal will not be maintainable from a judgement of the learned Single Judge rendered under the Representation of People Act.)"

E It was pointed out that in *Shah Babulal Khimji*'s case (supra) this Court posed three questions namely:

F "(1) Whether in view of clause 15 of the Letters Patent an appeal under section 104 of the Code of Civil Procedure would lie? 2) Whether clause 15 of the Letters Patent supersedes Order 43 Rule 1 of the code of Civil Procedure? 3) Even section 104 of the CPC has no application, whether an order refusing to grant injunction or appoint a receiver would be a judgment within the meaning of Clause 15 of the Letters Patent?"

The Apex Court answered each of them from a different angle:

G (a) Section 104 of the Code of Civil Procedure read with Order 43 Rule 1 expressly authorizes a forum of appeal against orders falling under various clauses of Order 43 Rule 1 to a Larger Bench of a High Court without at all disturbing interference with or overriding the Letters Patent jurisdiction.

H (b) Having regard to the provisions of section 117 and Order 49 Rule

3 of the Code of Civil Procedure which excludes various other provisions from the jurisdiction of the High Court, it does not exclude Order 43 Rule 1 of the CPC. A

(c) There is no inconsistency between section 104 read with Order 43 Rule 1 and the appeals under Letters Patent, as Letters Patent in any way does not exclude or override the application under section 104 read with Order 43 Rule 1 which shows that these provisions would not apply in internal appeals within the High Court.” B

The Letters Patent establishing the High Court of Judicature at Calcutta is extended to the Gauhati High Court. Clause 15 of the said Letters Patent provides as under:- C

“Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction—And we do further ordain that an appeal to the said High Court of judicature at Fort William in Bengal from the judgment (not being a judgement passed in exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court and not being an order made in exercise of a revisional jurisdiction, and not being a sentence or order passed or made in exercise of the powers of superintendence under the provisions of Section 107 of the Government of India Act, or in exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, 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 fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided.” D E F G

Thus Clause 15 permits an appeal against the order passed by a Single Judge of the High Court in the second forum. H

A This Court in *National Sewing Thread Co. Ltd. Chidambaram v. James Chadwick and Bros Ltd.* AIR (1953) SC 357 held that as regards a judgment passed by a Single Judge of High Court exercising its power under Section 76 of the Trade Marks Act, a Letters Patent Appeal would be maintainable. The said decision has been followed by this Court in *Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals Pvt, Ltd. and Ors.*, [1991] 2 SCC 637.

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C In *Union of India and Ors. v. Aradhana Trading Co. and Ors.* [2002] 4 SCC 447, this Court while referring to *National Sewing Thread Co.'s* case (supra), distinguished the same on the ground that under the Arbitration Act, there exists a specific provision relating to an appeal.

D In *New Kenilworth Hotel (P) Ltd.* (supra), this Court dealt with an order passed by a Single Judge of the High Court in an appeal from or under Order 39, Rule 1 Code of Civil Procedure. In that case, Section 104 of the Code of Civil Procedure was, therefore, clearly attracted. The Court, however, observed:

E “The question then is whether notwithstanding such prohibition, though an order of injunction passed by the learned Single Judge in the appellate jurisdiction under Order 39, Rule 1 is a judgment, as held by this Court in *Shah Babulal Khimji v. Jayaben D. Kania*, an appeal would lie on the basis thereof. It is contended that an appeal would lie to the Division Bench. We find no force in the contention. It is true that the learned Judges comprising the Division Bench as well as the Full Bench of the High Court construed that the ratio in *Shah Babulal Khimji* case would attract item (ii) of the analysis of the learned Judges and, therefore, an appeal would lie to the Division Bench. We are of the view that the learned Judges, with due respect, have not understood the scope of the judgment in *Shah Babulal Khimji* case in its proper perspective. Therein, the learned Single Judge exercising the original jurisdiction of the High Court passed an order in applications filed under Order 40, Rule 1 for appointment of a receiver and issue of injunction order under Order 39, Rule 1.”

G The said decision is not applicable in the instant case inasmuch as the learned Single Judge of the High Court was exercising an appellate power provided under a special statute and not under Section 104 of the Code of Civil Procedure. *New Kenilworth* (supra) was distinguished by this Court in
H *Chandra Kanta Sinha v. Oriental Insurance Co. Ltd. and Ors.*, [2001] 6 SCC

158 and therein *National Sewing Thread Co's* case (supra) was relied upon saying: A

"Learned counsel for the respondents, however, argued that clause 10 provides that an appeal shall lie to the said High Court only from "a judgment passed in exercise of the appellate jurisdiction not being a judgment passed in the exercise of the appellate jurisdiction" and as the judgment of the learned Single Judge was passed in the appellate jurisdiction, a letters patent appeal was not maintainable. In our view, the contention of the learned counsel is based on a misreading of clause 10. He has overlooked the vital words, namely "in respect of a decree or order made in exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court" in the first limb of clause 10. If those words are also read along with the words relied upon by the learned counsel, it becomes clear that the appellate jurisdiction mentioned therein refers to a second appeal under Section 100 CPC (or under any provision of a special Act) which is in respect of a decree or order made in exercise of appellate jurisdiction in the first appeal, filed under Section 96 CPC (or under any provision of a special Act) by a court subject to the superintendence of the High Court. In other words, from a judgment passed by one Judge in second appeal, under Section 100 CPC or any other provision of a special Act no letters patent appeal will lie to the High Court provided the second appeal was against a decree or order of a District judge or a Subordinate Judge or any other Judge subject to the superintendence of the High Court passed in a first appeal under Section 96 CPC or any other provision of a special Act." B C D E

It was further held: F

"In *New Kenilworth Hotel (P) Ltd.* case aggrieved by the order of the trial court passed under Order 39 Rules (1) and (2), an appeal under Section 104(1) CPC read with Order 43 Rule 1(r) was filed before the High Court which was disposed of by one Judge of the High Court. From the order/judgment of one Judge, a letters patent appeal (second appeal) was filed before the Division Bench under Clause 10 of the Letters Patent of the Orissa High Court. The Division Bench of the High Court held that the letters patent appeal was not maintainable. Having regard to the provision of Section 104(2), the appeal before the Division Bench was barred. On appeal to this Court it was held: (SCC p.466, para 10) G H

A “As held earlier, the right of appeal is a creature of the statute and the statute having expressly prohibited the filing of second appeal under sub-section (2) of Section 104, the right of appeal provided under clause 10 of the Letters Patent would not be available.”

B Therefore, reliance on the Judgment of this Court in *New Kenilworth Hotel (P) Ltd.* case will be of no avail to the respondents.”

C We may notice that even in *Municipal Corporation of Brihanmumbai and Anr. v. State Bank of India*, [1999] 1 SCC 123, this Court while interpreting the provisions of Section 218-D and 217(1) of the Bombay Municipal Corporation Act, 1888, held that when an appeal is in the form of second appeal having regard to the bar contained in Section 100A of the Code of Civil Procedure, no further appeal shall lie. It was observed:

D “This section has been introduced to minimize the delay in the finality of a decision. Prior to the enactment of the above provision, under the letters patent, an appeal against the decision of a Single Judge in a second appeal was, in certain cases, held competent, though under Section 100 of the Code of Civil Procedure, there was some inhibition against interference with the findings of fact. The right of taking recourse to such an appeal has now been taken away by Section 100-A of the Code of Civil Procedure (supra). Since an appeal under Section 217(1) of the Act is a first appeal in a second forum/court and an appeal under Section 218-D of the Act is the second appeal in the third forum/court, no further appeal would be competent before the fourth forum/court in view of Section 100-A of the Code of Civil Procedure (supra).”

F In *Prataprai N. Kothari v. John Braganza*, [1999] 4 SCC 403, even in a suit for possession only not based on title, a letters patent appeal was held to be maintainable.

G The decision of this Court in *Sharda Devi v. State of Bihar*, [2002] 3 SCC 705 is also to the same effect, wherein in para 9 it was held:

H “A Letters patent is the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus when a Letters Patent grants to the High Court a power of appeal, against a judgment of a Single Judge, the right to entertain the appeal

would not get excluded unless the statutory enactment concerned A
excludes an appeal under the Letters Patent.”

Section 54 of the Land Acquisition Act. 1894 provides for an appeal
before the High Court and thereafter to the Supreme Court and despite the
same it was held that a letters patent appeal under clause 15 would be
maintainable. B

For the aforesaid reasons, we are of the view that the order passed by
the Single Judge was appealable to Letters Patent Bench and the objection in
regard to maintainability of appeal was rightly overruled by the High Court.
Consequently, this appeal falls and is, accordingly, dismissed. We direct the
High Court to decide the letters patent appeal expeditiously. C

R.P.

Appeal dismissed.