CASE NO.:
Appeal (civil) 689 of 1998

PETITIONER:
P.S. Sathappan (Dead) by Lrs.

RESPONDENT:
Andhra Bank Ltd. & Ors.

DATE OF JUDGMENT: 07/10/2004

BENCH:
N. Santosh Hegde & S. N. Variava & B. P. Singh & H. K. Sema & S.B. Sinha

JUDGMENT:
JUDGMENT
W I T H

CIVIL APPEAL NO. 5385 OF 1998
AND
CIVIL APPEAL NOS. 5389-90 OF 2002

Delivered by
S.B. SINHA, J
S. N. VARIAVA, J,

S.B. SINHA, J

Interpretation of Section 104 of the Code of Civil Procedure (for short, 'the Code') vis-'-vis Clause 15 of the Letters Patent of the High Court of Madras is in question in these appeals.

BACKGROUND FACTS :

Although these appeals involve common questions of law, the factual matrix of the matter would be noticed from Civil Appeal No.689 of 1998.

The First Respondent herein filed a suit against the Appellant herein in the Court of II Addl. Subordinate Judge, Coimbatore which was marked as O.S. No.403 of 1974. The said suit was decreed on or about 15.4.1976. An execution petition was filed by the First Respondent-decree holder for executing the said decree. In the said execution proceeding for realization of the decretal amount the property belonging to the Appellant herein was put to auction. The validity of the said auction came to be questioned by the Appellant by filing an Execution Application on or about 8.10.1979 praying therein for setting aside the court auction sale held on 26.9.1979 in respect of Ginning factory situate at Tirurppur named and styled Sree Krishna Ginning Factory. The said application was marked as Executive Application No. 419 of 1979. The said application was dismissed by the Execution Court on 10.10.1985 against which an appeal was preferred by the Appellant which was also dismissed by a learned Single Judge of the Madras High Court by a judgment and order dated 8.10.1990. A Letters Patent Appeal thereagainst purported to be in terms of Clause 15 of the Letters Patent of the Madras High Court was filed by the Appellant which was dismissed by a Full Bench of the Madras High Court by a judgment and order dated 22.8.1998 holding that in terms of sub-section (2) of Section 104 of the Code, an appeal against an order passed by the Appellate Court under Order XVIII Rule 1 read with Section 104 of the Code, was not maintainable. A certificate of fitness, however, in terms of Article 133 of the Constitution of India was prayed for by the Appellant and granted by the said Full Bench. When the matter was placed before a Division Bench of this Court, it noticed a conflict of opinion between a decision of a 3-Judge Bench of this Court in New Kenilworth Hotel (P) Ltd. vs. Orissa State Finance

Corporation and Others [(1997) 3 SCC 462] and a two Judge-Bench in Resham Singh Pyara Singh vs. Abdul Sattar [(1996) 1 SCC 49], on the one hand, and a Constitution Bench decision in Gulab Bai and Another vs. Puniya [1966 (2) SCR 102], on the other; and referred the matter to a Constitution Bench observing :

"We are aware of the fact that Clause 15 of the Letters Patent applicable to Madras High Court was similar to Clause 10 applicable to Orissa High Court which was construed in the case of New Kenilworth (supra). This Court did not, in New Kenilworth's case, consider the effect of the decision in Gulab Bai's case (supra). Furthermore, reference in Clause 15 of the Letters Patent which excludes the applicability of the same in relation to a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a court subordinate to the superintendence of the High Court would prima facie indicate that it is only where the Single Judge is hearing an appeal from an appellate order of the court subordinate to it that the said clause 15 would not apply.

In our opinion, the matter is not free from doubt, especially in view of the decision of the Constitution Bench in Gulab Bai's case [1966 (2) SCR 102] and it would be appropriate therefore that the papers are placed before Hon'ble the Chief Justice for referring the case to a larger Bench, in view of not only the conflict in decisions which is stated to be there but also in view of the importance of the point in issue, namely, the effect of the provisions of Section 104(2) vis-'-vis Clause 15 of the Letters Patent.

That is how the matter is before us.

SUBMISSIONS :

Mr. R. Sundravardhan, learned Senior Counsel appearing on behalf of the Appellant, would submit that the Letters Patent of a High Court setting out the constitutional power of the court must be held to be a special statute and, thus, in case of a conflict between the provisions thereof and the Code of Civil Procedure, the former would prevail. The learned counsel would contend that the Letters Patent being a special statute, the right to appeal contained in Clause 15 thereof cannot be taken away by reason of sub-section (2) of Section 104 of the Code which is general in nature.

Drawing our attention to the Constitution Bench decision of this Court in Gulab Bai (supra), the learned counsel would contend that therein several decisions including the decision of the Full Bench of the Allahabad High Court L. Ram Sarup vs. Mt. Kaniz Ummehani [AIR 1937 (Allahabad) 165] having been approved, it is beyond any pale of doubt that a right of appeal under clause 15 of the Letters Patent of the Madras High Court would be available to a suitor irrespective of the provisions contained in sub-section (2) of Section 104 of the Code of Civil Procedure.

Mr. Sundravardhan would urge that the nature and character of a Letters Patent being distinct and different from the Code of Civil Procedure, a right of appeal conferred upon the suitor by reason thereof cannot be taken away. In support of the said contention, the learned counsel has relied upon Union of India vs. Mohindra Supply Company [1962 (3) SCR 497], Gulab Bai (supra), Vinita M. Khanolkar vs. Pragna M. Pai and Others [(1998) 1 SCC 500], Central Mine Planning and Design Institute Ltd. vs. Union of India and Another [(2001) 2 SCC 588], Chandra Kanta Sinha vs. Oriental

Insurance Co. Ltd. and Others [(2001) 6 SCC 158], Sharda Devi vs. State of Bihar [(2002) 3 SCC 705], and Subal Paul vs. Malina Paul and Another [(2003) 10 SCC 361].

The decisions of this Court in Resham Singh Pyara Singh (supra) and New Kenilworth Hotel (supra) do not lay down the correct law, Mr. Sundravardhan would submit, having regard to the aforementioned decisions. The learned counsel would argue that once the appellate jurisdiction is exercised by the High Court, Clause 15 of the Letters Patent of the Madras High Court would govern the forum for a second appeal therefrom; the only restriction being that such an order must be a 'judgment'. Strong reliance in this behalf has been placed on Radhy Shyam vs. Shyam Behari Singh [1971 (1) SCR 783].

Mr. Sundravardhan would contend that had the intention of the Parliament been to take away the appellate forum created under Clause 15 of the Letters Patent, it would have expressly been stated in Sub-Section (2) of Section 104 of the Code as has been done by the Parliament while inserting Section 100A in the Code by reason of Code of Civil Procedure amendment Act, 1976 or Code of Civil Procedure Amendment Act, 2002. In any event, the provision of Section 100-A of the Code being not retrospective in operation, the right of the Appellant to prefer an appeal cannot be said to have been taken away. Strong reliance, in this connection, has been placed on Garikapatti Veeraya vs. N. Subbiha Choudhury [1957 SCR 488].

Mr. C.S. Vaidyanathan, learned senior counsel appearing on behalf of the respondents, on the other hand, would contend that having regard to Clause 44 of the Letters Patent of the Madras High Court, it is beyond any doubt or dispute that the provisions thereof are subject to statutory provisions framed by the State Legislature or the Parliament. It was urged that as an order passed under Order XXI, Rule 90 of the Code can be appealed against only in terms of sub-section (1) of Section 104 of the Code, the restrictions by way of a further appeal placed in terms of sub-section (2) of Section 104 would automatically operate. In other words, Mr. Vaidyanathan would submit that sub-section (2) of Section 104 of the Code applies when an order is appealable in terms of sub-section (1) thereof. Drawing our attention to a decision of a 4-Judge Bench of this Court in South Asia Industries Private Ltd. vs. S.B. Sarup Singh and Others [1965 (2) SCR 756], the learned counsel would argue that a right of appeal conferred by reason of Letters Patent can be taken away by a statute either expressly or by necessary implication and in that view of the matter having regard to the legislative scheme contained in Section 104 of the Code, it was not necessary for it to expressly mention that such appeal would not be maintainable irrespective of the fact that the same is provided for under the Letters Patent of different High Courts.

Mr. Vaidyanathan would contend that the decisions of this Court in Mohindra Supply Company (supra) and South Asia Industries Private Ltd. (supra) do not lay down any law contrary to or inconsistent with the decision of this Court in Gulab Bai (supra).

It was urged that while enacting Section 100-A of the Code, the Parliament specifically referred to the Letters Patent of the High Court keeping in view the fact that by reason thereof all appeals provided for thereunder became barred whether under the Letters Patent or special statute.

STATUTORY PROVISIONS :

Clauses 15 and 44 of the Letters Patent of the Madras High Court read as under :

"15. Appeal from the courts of original jurisdiction to the High Court in its appellate jurisdiction.-And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay,

Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court and not being an order made in the exercise of a revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, 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; 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."

"44. Powers of the Indian Legislature preserved.- 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 Legislative Council, and also of the Governor-General in Council under section 71 of the Government of India Act, 1915; and also of the Governor-General, in cases of emergency under Section 72 of the Act, and may be in all respects amended and altered thereby."

Sections 4(1), 100A, 104 and 117 of the Code read as under :

"4. Savings.-(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."

"100A. (as inserted in 1976) Notwithstanding anything contained in any 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."

"100A. (as substituted in 2002) No further

appeal in certain cases. \026 Notwithstanding anything contained in any 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 original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

"104. Orders from which appeal lies \026 (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 :-

[***}

(ff) an order under section 35A;

(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 (ff) 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."

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

Order XLIII, Rule 1 and Order XLIX , Rules 1, 2 and 3 of the Code read as under

"1. Appeal from orders.- An appeal shall lie from the following orders under the provisions of section 104, namely :-
\005 \005 \005"

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;"

"Order XLIX of the Code of Civil Procedure
Chartered High Courts

1. Who may serve processes of High Court.-Notice to produce documents, summons to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants writs of execution and notice to respondents may be served by the attorneys in the suits or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs."

2. Savings in respect of Chartered High Courts.- Nothing in this Schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

3. Application of rules.- The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely :-

(1) rule 10 and rule 11, clauses (b) and (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 and 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."

ANALYSIS :

The Code of Civil Procedure, 1908 (Code) was enacted to consolidate and amend the laws relating to the procedure of the Courts of Civil Jurisdiction. The Code includes rules contained in the Schedule appended thereto. Section 3 provides for the hierarchy of the courts for the purposes of the said Code stating that 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. Sub-section (1) of Section 4 of the Code provides for savings, which is subject to any provisions to the contrary.

By Section 4 of the Code it is not to be inferred that the provisions thereof do not apply to proceedings under special or local laws, but only points out that where there is inconsistency, the rules of the Code shall not prevail.

Section 104 of the Code which occurs in Part VII of the Code provides for appeals from original decrees and orders. Sections 96 to 103 provide for appeals from original and appellate decrees whereas Sections 104 and 105 provide for appeals from orders.

It is not in dispute that an appeal refusing to set aside a court auction sale in terms of Order XXI Rule 92 of the Code would be appealable under Order XLIII, Rule 1 read with Section 104(1)(i) thereof. The special or local law, the provisions whereof may be in conflict with the Code of Civil Procedure as stated in Section 4 is subject to "in the absence of any specific provision to the contrary" which would mean "in the absence of any specific provision to the contrary contained in the Code". Such a provision contrary to the Code may be found in another statute, be it a special or a local law.

Section 104 of the Code has to be read as a whole. Sub-section (1) of Section 104 provides for appeals from the orders specified therein and from no other; save as otherwise expressly provided in the body of the said Code or any law for the time being in force. When the special statute confers a right of appeal, such right is saved, but by reason thereof no right of appeal is created under Section 104 of the Code.

When a right of appeal is conferred under a special statute, the bar contained in sub-section (2) of Section 104 of the Code would not operate and a right of intra-court appeal provided for in the Letters Patent of the High Court subject to any statutory embargo would, thus, be saved. To put the matter differently, if a right of appeal is created by a statute, the same would be governed by the terms thereof. The question as to whether any appeal governed by Clause 15 of the Letters Patent is maintainable or not will have to be judged having regard to the provisions contained therein as also the scheme thereof.

It is not in dispute that an appeal under Order XLIII, Rule 1 of the Code may either lie before the District Court or the High Court. An appealable order may also be passed by a High Court in its original jurisdiction. A right to maintain an appeal indisputably would depend upon the subject matter thereof. Having regard to Section 4 read with Order 49 of the Code only certain provisions of the Code as specified therein would have no application on the original side of the High Court. In the event, an appealable order is passed by the High Court in its original jurisdiction, an appeal may be maintainable both under Section 104 of the Code as also under Clause 15 of the Letters Patent, although the said right arises from two different sources, but as at present advised we need not advert to the effect thereof.

Sections 104 and 105 provide for an integrated scheme. The provisions contained therein must be read as a whole. By reason of sub-section (1) of Section 104, a limited right of appeal has been conferred in relation to the categories of cases specified therein. However, if an order is passed which does not come within the purview of sub-section (1) of Section 104, the right of appeal must be referable to any other provision of the Code, as for example, Section 96 or Section 100 or any other special statute. Section 104 provides for an appeal from an order passed by an appropriate court. Section 104 and Order XLIII of the Code contain provisions as regard appealability of the orders in the cases specified therein and in that view of the matter they must be invoked in their entirety and not in isolation.

A right of appeal is a creature of statute and the said right, thus, can only be enjoyed if law confers the same. The Legislature thought it fit to confer such a right upon the suitor by reason of Section 104 of the Code read with Order XLIII thereof. When a right is granted under a statute, a further right of appeal must receive such construction which would give effect to the plain meaning of the words emphasized in the section.

By reason of sub-section (1) of Section 104, apart from the orders made appealable therein, the Code recognizes that there may be other orders appealable under any other law for the time being in force and further provides that other orders save as otherwise expressly provided in the body of the Code or by any law for the time being in force, would not be appealable ones.

Sub-section (1) of Section 104 of the Code provides for an appeal from the original order whether passed by a subordinate court or High Court exercising an original jurisdiction and not from an appellate order. In other words, it provides for a first appeal. An appeal under Clause 15 of the Letters Patent is saved under Sub-section (1) of Section 104 of the Code when a right of appeal is required to be exercised in relation to an original order. An appellate order is not contemplated by Sub-section (1) of Section

104 of the Code. Letters Patent of a High Court or a special statute also in the context of Section 104(1) of the Code do not speak of an appellate order. Thus, when an appeal under Section 104(1) or the Letters Patent of the High Court is availed of, there is no question of any further appeal unless the same is provided for under the statute itself.

Sections 4 and 104 of the Code, furthermore, must be read together. Appeals under the special statute is saved only to the extent a contrary provision is not contained in other provision thereof.

Confusion in judicial mind has arisen as to whether an appellate order passed by the High Court is also saved in terms of sub-section (1) of Section 104 of the Code of Civil Procedure. As noticed hereinbefore, sub-section (1) of Section 104 provides for an appeal from an original order; but saving clause contained in sub-section (1) of Section 104 postulates that an appeal from an order other than those specified in sub-section (1) thereof shall be maintainable provided a provision therefor exists in the said statute. An appeal under the Letters Patent may, therefore, be availed of in relation to an order which has not been specifically provided for under sub-section (1) of Section 104 of the Code of Civil Procedure, which is otherwise a judgment within the meaning thereof. The saving clause contained in sub-section (1) of Section 104 of the Code of Civil Procedure does not go further and say that even an order passed in appeal from an order specified under sub-section (1) of Section 104 of the Code of Civil Procedure would stand saved.

By reason of Sub-section (1) of Section 104 of the Code, appeals provided for under the statutes including Letters Patent might have been saved but that became necessary only because of appeals irrespective of the source of appeal whether accruing from the Code or any other statute were treated alike. What is, thus, saved is the right of appeal conferred under special statutes. By reason of such saving clause per se a right of appeal is not conferred nor such appeal can be said to have been preferred in terms of Sub-section (1) of Section 104 of the Code. In case a right of appeal is limited or circumscribed by any condition under any special statute, the same would prevail over Sub-section (1) of Section 104 because saving of such right would be subject to such limitations or conditions.

Let us consider this from a slightly different angle.

Sub-section (1) of Section 104 saves Letters Patent Appeal. The remedy of appeal under Letters Patent may be availed of in relation to an order passed by a court other than those enumerated under Sub-section (1) of Section 104 of the Code subject to the condition that the same must be a 'judgment'.

Once, however, a right of appeal either in terms of Sub-section (1) of Section 104 or Letters Patent is availed of, there would not be any further right of appeal from the appellate order in view of Sub-section (2) of Section 104, for the simple reason, that Letters Patent also provides for only one appeal, i.e., from a Single Judge of a High Court to a Division Bench. It may be true that in certain cases, Letters Patent Appeals are available even from an appellate order passed by a learned Single Judge of the High Court to a Division Bench but the same was permissible only when there was no bar thereto and subject to the condition laid down in clause 15 itself. We may notice that when a first appeal or second appeal was disposed of by a Single Judge, a Letters Patent Appeal had been held to be maintainable therefrom only because there existed no bar in relation thereto. Such a bar has now been created by reason of Section 100-A of the Code. No appeal would, therefore, be maintainable when there exists a statutory bar. When the Parliament enacts a law it is presumed to know the existence of other statutes. Thus, in a given case, bar created for preferring an appeal expressly cannot be circumscribed by making a claim by finding out a source thereof in another statute.

For proper construction of Section 104 of the Code, vis-'-vis Clause 15 of the Letters Patent, it is necessary to ascertain the intention of the Parliament. If a right of appeal, it is trite, is a creature of statute, it must be governed thereby. Sub-section (2) of Section 104 clearly states that no appeal from an order passed under sub-section (1) thereof would be maintainable. Proviso appended to Section 104 of the Code provides for a limited right of appeal in respect of clause (ff) of sub-section (1) of Section 104 of the Code which is an indicia of the fact that such a right may be circumscribed. The statute has used the language in the negative and, thus must be construed as mandatory. In view of the fact that an appeal from an order specified in Section 104 of the Code is maintainable only thereunder and from no other it leads to incongruity that in the event the forum is the High Court the appellate judgment would be governed by Clause 15 of the Letters Patent, but in the event the forum is the District Judge, the judgment would be governed by sub-section (2) of Section 104 of the Code. If such a contention is accepted, the same would not only give rise to an anomalous situation which may be culled out from a plain reading of the said provision but also would give rise to different treatment to different classes of litigants, although a right of appeal is available to both the classes from orders of similar nature which possibility should, as far as possible, be avoided. The wordings of Section 104(2) of the Code, in our opinion, do not call for more than one interpretation. Liberal interpretation, as is well known, is the rule.

Furthermore, it is now well-settled that when two interpretations of a statute are possible, the court may prefer and adopt the purposive interpretation having regard to object and intent thereof. [See Swedish Match AB & Anr. Vs. Securities & Exchange Board, India & Anr., 2004 (7) SCALE 158]

The purport and object of enacting sub-section (2) of Section 104 of the Code is to avoid delay in disposal of the matter. When the statutory intention of minimizing the delay in the finality of the decision is manifest, the Court must interpret the provisions accordingly. [See Municipal Corporation of Brihanmumbai and Another vs. State of Bank of India \026 (1999) 1 SCC 123]. Appeals under the aforementioned provision as also under Order LXIII of the Code relate to interlocutory orders. By reason of an order passed thereunder the matter may not be finally disposed of. If the Parliament in the aforementioned situation thought it fit to cut down a further appeal, no exception thereto can be taken. In any event, even if it be held that by reason of Sub-section (2) of Section 104 of the Code a party may be deprived of a Letters Patent Appeal in terms of Clause 15 of the Letters Patent, he would be at liberty to file, in an appropriate case, an application under Article 136 of the Constitution of India before this Court. Even, in a case where the remedy under Section 104(1) is not availed of, in an appropriate case the order may be questioned in the appeal against the ultimate decree in terms of Section 105 thereof.

NATURE AND EXTENT OF POWER OF THE HIGH COURT UNDER LETTERS PATENT :

Letters Patent is a special statue but in the event of a conflict, as would appear from the discussions made hereinafter, the provisions of the Code shall prevail. The power under Clause 15 of the Letters Patent is not a constitutional power of a High Court. Reliance placed on Vinita M. Khanolkar (supra) and Sharda Devi (supra) in which one of us (Variava, J.) was a member is misplaced. This Court in the aforementioned decisions did not lay down a law that the statutory provision providing for an appeal under the Letters Patent was in terms of the constitutional power of a High Court.

The British Parliament passed Indian High Courts Act in August, 1861. The Act of 1861 empowered the crown to establish, by Letters

Patent, High Courts of Judicature at Calcutta, Madras and Bombay. The jurisdiction and powers of the High Courts were to be fixed by Letters Patent. Letters Patent, therefore, is a subordinate legislation.

For history of the establishment of the High Courts of India, reference may be made to Her Majesty the Queen Vs. Burah [(1878) 3 PC 889] and Chunial Basu and Another vs. The Hon'ble Chief Justice of the High Court at Calcutta and Others [AIR 1972 Calcutta 470]

The Letters Patent although is a subordinate legislation but nevertheless would be a law within the meaning of Articles 225 and 372 of the Constitution of India, but the same cannot prevail over a Legislative Act, if clause 44 of the Letters Patent is to be given a proper meaning. The provisions of Letters Patent despite attainment of independence by India are saved by Section 106 of the Government of India Act, 1919, Section 223 of the Government of India Act, 1935, Clause 2(1) of India (Adaptation of Existing Laws) Order, 1949 and Section 18(3) of the Independence Act, 1947. Letters Patent, thus, would undoubtedly come within the meaning of existing law but the status thereof cannot be higher than that of the statute made law. Not only in terms of Clause 44 of the Letters Patent, but having regard to the fact that the same is a subordinate legislation, it would be subject to laws made by a competent legislature.

The Letters Patent is not a statutory enactment although it has the force of law. Clause 44 of the Letters Patent in no uncertain terms states that the provisions thereof would be subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor General-General in Council under Section 71 of the Government of India Act, 1915.

In Black's Law Dictionary, Fifth Edition at page 1278 the expression "Subject to" has been defined as under :
"Liable, subordinate, subservient, inferior,obedient to; governed or affected by; provided that; provided, answerable for. Homan v. Employers Reinsurance Corp,., 345 Mo. 650, 136 S.W. 2d 289, 302"

[See Printers (Mysore) Ltd. vs. M.A. Rasheed and Others \026 (2004) 4 SCC 460]

The provisions of the Letters Patent are also in all respects amenable to amendments and alterations by any Legislative or Parliamentary Acts. The Code of Civil Procedure is a Parliamentary Act. Section 4 of the Code saves only such provisions in relation whereto there does not exist any provision contrary thereto in the Code. The said clause would, thus, apply only when there is no specific provision in the Code to the contrary or in any other provision contained in any other special statute. We have, thus, no hesitation in coming to the conclusion that when an appeal is maintainable only in terms of sub-section (1) of Section 104, sub-section (2) thereof would control such appeal and the limitation provided thereunder on further appeal shall be fully applicable.

The Letters Patent under the seal may be issued for various purposes, but primarily by way of executive function. The Letters Patent, however, may be issued also on the advice of the Privy Council or under a Statute. (See Halsbury's Laws of England, Fourth Edition, Vol. 8, page 677).

In Law Lexicon cum Digest by N.M. Mulchandani, Vol. A to L, at page 932 'Letters Patent' has been defined to mean 'Letters by which the King/ Sovereign makes his grants, whether of lands, honours, franchise or anything else'.

If Letters Patent was to prevail over the Code, no appeal may lie from a judgment of Single Judge to Division Bench in relation to orders specified in Section 104. Conflict in this behalf is sought to be resolved in Shah

Babulal Khimji (supra)

Before adverting further as regard this question, we may notice that in Shah Babulal Khimji Vs. Jayaben D. Kania and Another [(1981) 4 SCC 8], it is stated :

"\005In 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\005"

In Shah Babulal Khimji (supra), Mohd Naimullah Khan Vs. Ihsan Ullah [1892 ILR 14 All 226] and Piarilal Vs. Madanlal [1917 ILR 39 All 191 : AIR 1917 All 325] were approved whereas Ramsarup (supra) and Vaman Ravji Kulkarni Vs. Nagesh Vishnu Joshi and Ors. [AIR 1940 Bom. 216] were expressly overruled.

Unfortunately, before us the overruled decisions in Ram Sarup (supra) and Vaman Ravji (supra) were relied upon. We may notice that recently a Bench of this Court expressed its anguish when an overruled decision was cited. [See State of Orissa Vs. Nalinikanta Muduli [2004 AIR SCW 4713.

It is, therefore, clear that no Letters Patent Appeal would lie against the orders passed in appeals disposed of by a learned Single Judge of the High Court in appeals preferred thereto under Order XLIII Rule 1 read with Section 104 of the Code against the order passed by the subordinate court or district courts.

SCHEME OF THE STATUTE:

The question as to whether a Letters Patent Appeal would be maintainable or not would also depend upon the scheme of the statute.

Such a scheme barring a Letters Patent Appeal is found to be existing in Representation of the People Act. Under Article 329(b) of the Constitution, a Single Judge of a High Court exercises a jurisdiction to hear an election dispute. While doing so he exercises a special jurisdiction. Having regard to the history thereof as also the limited nature of appeal from judgment disposing of an election petition expressly provided under Section 116-A of the Representation of the People Act, it will be evident that a right of appeal under the Letters Patent had been held to have been taken away by necessary implication. . (See N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Ors. 1952 SCR 218, Upadhyaya Hargovind Devshanker Vs. Dhirendrasinh Virbhadrasinhji Solanki and Others, (1988) 2 SCC 1 and Dipak Chandra Ruhidas Vs. Chandan Kumar Sarkar, (2003) 7 SCC 66)

Even in the aforementioned cases also, it has been held that a Letters Patent appeal may be barred by implication.

APPEAL UNDER SPECIAL STATUTE :

The question, however, may be different when an appeal is provided for under a special statute. It is trite that Section 104(1) of the Code saves such an appeal. Section 104, therefore, saves such appeal in view of the appeals provided under the special statute but it does not create a right of appeal as such, and 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 which would include a Letters Patent. Whenever the statute provides such a bar, it is so stated either expressly or by necessary implication.

It is true that Section 100A of the Code contains a non-obstante clause as regard the overriding effect of the said provision over the Letters Patent of the High Court but the same, in our considered opinion, was done by way of ex abundanti cautela. Furthermore, the Code of Civil Procedure (Amendment) Act, 1976 and the Code of Civil Procedure (Amendment) Act, 2002 being subsequent statutes, the same may not have any application in relation to the interpretation of sub-section (2) of Section 104 of the Code.

It is not necessary, in my considered opinion, that the provision restricting a further right of appeal must specifically mention the provisions of the Letters Patent of the High Courts or any other statute inasmuch as the same has to be construed having regard to the scheme thereof. What is recognized under Sub-section (1) of Section 104 of the Code following the decisions of the Calcutta, Madras and Bombay High Courts in Toolsee Money Dassee & Others Vs. Sudevi Dassee & Others [(1899) 26 Cal. 361], Sabhapathi Chetti and Others Vs. Narayanasami Chetti [(1902) 25 Mad. 555] and the Secretary of State for India in Council Vs. Jehangir Maneckji Cursetji [(1902) 4 Bom. L.R. 342] respectively, are those appeals which are provided for under special statute and not an appeal from the appellate order therein. Let us at this juncture notice as to what had been decided in those cases although the position in law is, to some extent, sought to be clarified in Shah Babulal Khimji (supra) which would fall for discussions hereinafter at some details.

In Toolsee Money Dassee (supra), the question which arose for consideration was whether refusing to set aside an award against an order by a Single Judge of the High Court in the original side of the appeal would be governed by Section 588 of the Code of Civil Procedure, 1861. The said contention was rejected on the premise that Section 588 of the Code does not control appeals under special statute. The Court followed Hurrish Chunder Chowdhry Vs. Kali Sunderi Debi [10 IA 4].

In Sabhapathi Chetti(supra), the question which arose for consideration was as to whether an order passed by a judge sitting on the Original Side of the Court dismissing a claim preferred under Sections 278 and 282 of the Code of Civil Procedure by the mortgagees of immovable property which had been attached in execution of a decree is subject to appeal. It was held that Article 15 of the Letters Patent is not restricted by Sections 588 and 591 of the Code of Civil Procedure.

In Jehangir Maneckji Cursetji (supra), the question which arose for consideration was as to whether an order under Section 135 of the Code of Civil Procedure is a judgment within the meaning of Clause 15 of the Letters Patent. It was opined that the same is not a judgment but while doing so an observation was made that Section 588 of the Code of Civil Procedure has not taken away the right of appeal given by Clause 15 of the Letters Patent having regard to the decisions prevailing at the relevant time.

Section 104 of the Code of Civil Procedure requires appeals preferred under the special statute having regard to the aforementioned decisions. The decisions of the Calcutta High Court and the Bombay High Court would indicate that a right of appeal under a special statute was not held to be barred. The Bombay High Court merely held that even though an order under Section 135 although is not an order against which an appeal would lie under Section 588 of the Code of Civil Procedure, still it proceeded to hold that if such an order was a judgment, an appeal under Clause 15 of the Letters Patent would be maintainable. In Jehangir Maneckji Cursetji (supra), as noticed hereinbefore, it was held that an order under Section 135 would be a judgment within the meaning of Clause 15 of the Letters Patent and only in that context it was held that Section 588 of the Code does not govern the Letters Patent Appeal.

Section 104 of the Code opens with the words "an appeal shall lie from the following orders and \005from no other orders". What is, thus, saved

is an appeal which is expressly provided for under any other statute including the Letters Patent of the High Court. The saving clause contained in Section 104(1) of the Code must be literally construed having regard to the fact that the provisions other than specifically mentioned in Order 49 of the Code the other provisions of the Code are applicable even on the original side of the High Court.

To put it pithily, if there is a conflict between an appeal under the Code and the Letters Patent both the provisions have to be read harmoniously so as to save an appeal which is not otherwise provided for. By way of example it may be noticed that when an appeal is maintainable under the Letters Patent by reason of its being a 'judgment' within the meaning of Letters Patent such an appeal would be maintainable despite the fact that no provision therefor has been made in Section 104 thereof. In a case, however, where an appeal may be maintainable both under Sub-section (1) of Section 104 as also the Letters Patent a difficulty may arise to the extent that where the orders sought to be appealed against is not a 'judgment' whether Order XLIII Rule 1 would come into play. But if both the provisions are read together, it may be held that Order XLIII Rule 1 provides for an additional right. So construed, a harmonious meaning can be attributed both to Section 104 of the Code and to Letters Patent but we have no doubt in our mind that if a right of appeal is availed under Sub-section (1) of Section 104 of the Code, no further appeal would be maintainable.

We may notice that sub-section (2) of Section 39 of the Arbitration Act, 1940 does not contain any non-obstante clause. The said provision does not refer to the Letters Patent of the High Court or any other special Act. Despite the same, it was held in Mohindra Supply Company (supra) that a Letters Patent Appeal would be barred by necessary implication.

The point at issue is no longer res integra in view of several decisions of this Court in National Sewing Thread Co. Ltd. vs. James Chadwick and Bros Ltd. [AIR 1953 SC 357], Maharashtra State Financial Corporation vs. Jaycee Drugs and Pharmaceuticals (P) Ltd. and Ors. [(1991) 2 SCC 637], Union of India vs. Aradhana Trading Co. and Ors. [(2002) 4 SCC 447], Sharda Devi (supra), Subal Paul (supra) and Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I and Another [(2004) 9 SCC 512].

SECTION 104 OF THE CODE \026 WHETHER APPLIES TO ORIGINAL SIDE :

The Code indisputably applies to the original side of the High Court. Section 117 and Order XLIX specifically exclude only such provisions of the Code which would not apply to the original side of the High Court. [See Mt. Sabitri Thakurain vs. Savi and Another \026 AIR 1921 PC 80]. Thus, the rest of the code applies.

Although there is a divergence of opinion on this point but it is useful to note that in a 3-Judge Bench decision of this Court in Shah Babulal Khimji (supra), it was held to be applicable. Therein the following questions were raised:

"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 judgement within the meaning of clause 15 of the Letters Patent?"

The answers thereto were rendered from different angles stating :

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.

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.

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."

However, this Court in Shah Babulal Khimji (supra) had not adverted to various questions; but therewith we need not deal with at present.

We may notice that the decision of the Allahabad High Court in L. Ram Sarup (supra) was not approved by this Court in Shah Babulal Khimji (supra), stating :

"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 Section 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 Section 104 applies and there is nothing in the Letters Patent to restrict the application of Section 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 it is

in cases of appeals decided by a Single Judge
under Section 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\005"

(Emphasis supplied)

Referring to Clause 15 of the Letters Patent of the Bombay High Court, it was observed :

" 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 Patent 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. Unfortunately, however, the Allahabad High Court in Ram Sarup's case [ILR 1937 All 386 : AIR 1937 All 165] refused to follow a Division Bench decision in Piare Lal v. Madan Lal [AIR 1917 All 325 : ILR (1917) 39 All 191] and also tried to explain away the Full Bench decision in Muhammad Naimul Khan case [ILR (1892) 14 All 226 : 1892 AWN 14 (FB)] where it was clearly pointed out that in such cases no further appeal would lie to the Division Bench under the Letters Patent\005"

The Court referred with approval the decisions of Mathura Sundari Dassi vs. Haran Chandra Shaha [AIR 1916 Cal 361] and Lea Badin vs. Upendra Mohan Roy Choudhury [AIR 1935 Cal. 35] to hold hat that Order XLIII Rule 1 of the Code will also apply to the proceedings before the original side of the High Court.

The views taken contrary thereto by the other High Courts had been expressly overruled. If the provisions of Section 104 read with Order XLIII Rule 1 of the Code are applicable as regard appealability of the orders in the matters specified therein, the said provisions must be invoked in their entirety and not in isolation. An appeal is the right of entering a superior court and invoking its aid and interposition to redress an error of the Court below. An appeal when expressly provided can be filed as a matter of right and in no other situation. No right of appeal can be inferred by implication or otherwise.

In Shah Babulal Khimji (supra), the decision of the Bombay High Court in Waman Ravji (supra) also did not find favour. [See para 147].

Shah Babulal Khimji (supra) has brought about a synthesis of the Code of Civil Procedure vis-'-vis the Letters Patent. It lays down that an appeal from an order envisaged under Section 104(1) would be maintainable, even if it is not a judgment within the meaning of Clause 15 of

the Letters Patent. An attempt has been made therein to harmonize the Code of Civil Procedure and the Letters Patent. It implies that the Code shall prevail over the Letters Patent if a harmonious construction is out of place.

In Shah Babulal Khimji (supra), it is stated :
"Thus, a combined reading of the various provisions of the Code of Civil Procedure referred to above lead to the irresistible conclusion that Section 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."

In Waman Ravji Kulkarni (supra), a learned Judge of the High Court construing Section 4 vis-'-vis Section 104 of the Code proceeded to hold that unless an appeal under the Letters Patent is specifically excluded, sub-section (2) of Section 104 cannot be read to create a bar as regard maintainability of the appeal under Clause 15 of the Letters Patent. Section 4 of the Code therein, in our opinion, has not been construed in its proper perspective. The said decision also does not lay down a good law.

GULAB BAI:

In Gulab Bai (supra), this Court was concerned with the provisions of appeal specially conferred under Sections 47 and 48 of the Guardians and Wards Act. Such provisions providing for appeal under the Special Act are saved both by reasons of Sections 4 as also 104 of the Code. Section 47 of the said Act provided for an appeal to the High Court from an order made by a court including an order passed under Section 25 (c) making or refusing to make an order for the return of a ward to the custody of his guardian. A question arose as to whether a further appeal would be maintainable in terms of Clause 18(1) of the Rajasthan High Court Ordinance, 1949. It was held that as no finality clause has been attached to the appellate order, such appeal would be maintainable. Gajendragadkar, CJ, speaking for the Constitution Bench pointed out that the finality clause is attached only to Section 47 of the said Act and not to the appellate order stating :
"It is clear that what is made final by s. 48 is an order made under this Act; and the context shows that it is an order made by the trial Court under one or the other provision of the Act. This position is made perfectly clear if the first part of s. 48 is examined. The finality prescribed for the order made under this Act is subject to the provisions of s. 47 and s. 622 of the earlier Code which corresponds to s. 115 of the present Code. In other words, the saving clause unambiguously means that an order passed by the trial Court shall be final, except in cases where an appeal is taken against the said order under s. 47 of the Act, or the propriety, validity, or legality of the said order is challenged by a revision application preferred under s. 115 of the Code. It is, therefore, essential to bear in mind that the scope and purpose of s. 48 is to make the orders passed by the trial Court under the relevant provisions of the Act final, subject to the result of the appeals which may be preferred against them, or subject to the result of the revision applications which may be filed against them. In other words, an order passed on appeal under s. 47 of the Act, or an order passed in revision under s. 115 of the Code, are, strictly, speaking, outside the purview of the finality prescribed for the orders passed under the Act, plainly because they would be final by themselves without any such provision, subject, of course, to

any appeal provided by law or by a constitutional provision, as for instance, Art. 136. The construction of s. 48, therefore, is that it attaches finality to the orders passed by the trial Court subject to the provisions prescribed by s. 47 of the Act, and s. 115 of the Code. That is one aspect of the matter which is material."

A bare perusal of the said judgment would clearly show that had such finality clause been attached to the appellate order, this Court would have come to the conclusion that an appeal thereagainst would also be barred. It is worth noticing that even in Gulab Bai (supra) no law has been laid down to the effect that a right of further appeal can be barred only expressly and not by necessary implication. If a finality clause bars an appeal, the same would be by way of necessary implication only.

Gulab Bai (supra) significantly has not been noticed in any other subsequent decision.

As regard another aspect of the matter, namely, that the provisions of Section 47 of the said Act are expressly saved by Section 48 and which would mean that Section 47 will work out in an ordinary way without any restriction imposed by Section 48; it was observed :

"\005The competence of an appeal before the Division Bench will have to be judged by the provisions of cl. 18 itself. Section 48 saves the provisions of s. 47, and as we have already indicated, considered by themselves the provisions of s. 47 undoubtedly do not create any bar against the competence of an appeal under cl. 18(1) of the Ordinance where the appeal permitted by s. 47 is heard by a learned single Judge of the High Court. Therefore, we are satisfied that the High Court was in error in coming to the conclusion that an appeal before a Division Bench of the said High Court under clause 18(1) of the Ordinance was incompetent."

It will, thus, be safe to arrive at the conclusion that had the finality clause been attached to Section 48 of the said Act, no further appeal would have been held to be maintainable.

The said decision, therefore, is an authority for the proposition that when a finality clause is not attached to an appellate order, the right of appeal expressly provided for by a statute cannot be held to be taken away, but the converse may not be true.

Therein the Bench although noticed the consensus of judicial opinion to the effect that despite finality clause contained in sub-section (2) of Section 588 of the Code of Civil Procedure, 1877, a Letters Patent Appeal would be maintainable but there are no discussion as regard the interpretation of sub-section (2) of Section 104 of the Code. It was furthermore not necessary for the Constitution Bench to consider the said aspect of the matter having regard to its earlier findings that the appellate order contained in Section 47 of the Guardians and Wards Act did not contain any finality clause, as would appear from the following :

"We have referred to these decisions to emphasize the fact that even where the relevant provision of s.588 of the earlier Code made certain appellate orders final, the consensus of judicial opinion was that the said provision did not preclude an appeal being filed under the relevant clause of the Letters Patent of the High Court. In

the present case, as we have already indicated, s. 48 in terms saves the provisions of s.47 of the Act as well as those of s.115 of the Code, and that gives full scope to an appeal under clause 18 of the Ordinance which would be competent when we deal with the question about appeals under s. 47 of the Act considered by itself."

The Constitution Bench, therefore, did not decide the questions raised herein nor was there any occasion for it to do so. No reliance, therefore, can be placed on certain observations made therein as regard the legal position, as it then stood. It is well known that a judgment is an authority for what it decides and not what may even logically be deduced therefrom.

SOUTH ASIA INDUSTRIES PRIVATE LTD. :

In South Asia Industries Private Ltd. (supra), this Court referring to a large number of decisions enumerated the legal position stating :

"\005A statute may give a right of appeal from an order of a tribunal or a Court to the High Court without any limitation thereon. The appeal to the High Court will be regulated by the practice and procedure obtaining in the High Court. Under the rules made by the High Court in exercise of the powers conferred on it under section 108 of the Government of India Act, 1915, an appeal under section 39 of the Act will be heard by a single Judge. Any judgment made by the single Judge in the said appeal will, under cl. 10 of the Letters Patent, be subject to an appeal to that Court. If the order made by a single Judge is a judgment and if the appropriate Legislature has, expressly or by necessary implication, not taken away the right of appeal, the conclusion is inevitable that an appeal shall lie from the judgment of a single Judge under cl. 10 of the Letters Patent to the High Court. It follows that, if the Act had not taken away the Letters Patent appeal, an appeal shall certainly lie from the judgment of the single Judge to the High Court."

(Emphasis Supplied)

This Court referring to the provision contained in Section 39 of the Delhi Rent Control Act, 1958 noticed the scheme of the statute and observed that as finality clause has been attached therein, a further appeal would not be entertained stating :

"\005The Act is a self-contained one and the intention of the Legislature was to provide an exhaustive code for disposing of the appeals arising under the Act. The opening words of section 43 of the Act "save as otherwise expressly provided in this Act" emphasize the fact that the finality of the order cannot be questioned by resorting to something outside the Act\005"

It is, therefore, also an authority for the proposition that a Letters Patent appeal can be held to be barred by necessary implication having regard to the scheme of the statute.

MOHINDRA SUPPLY COMPANY :

In Mohindra Supply Company (supra) the Court upon considering the scope of Section 39 of the Arbitration Act, 1940, held that sub-section (2) thereof prohibits a Second Appeal from an order passed in appeal thereunder. It rejected the contention that despite such bar of appeal, a Letters Patent would be maintainable. Stating that Section 39(2) expressly prohibits a Second Appeal from an order under Section 39(1), it was held :

"The two sub-sections of s. 39 are manifestly part of a single legislative pattern. By sub-s. (1), the right to appeal is conferred against the specified orders and against no other orders; and from an appellate order passed under sub-s.(1) no second appeal (except an appeal to this Court) lies\005"

Section 39 of the Arbitration Act, 1940, it is interesting to note, does not contain a non-obstante clause.

Noticing that there had been a divergence of opinion as regard intra-court appeal, it was opined :

"\005There is clear indication inherent in sub-s.(2) that the expression "second appeal" does not mean an appeal under s. 100 of the Code of Civil Procedure. To the interdict of a "second appeal", there is an exception in favour of an appeal to this Court; but an appeal to this Court is not a second appeal. If the legislature intended by enacting s. 39(2) merely to prohibit appeals under s. 100 of the Code of Civil Procedure, it was plainly unnecessary to enact an express provision saving appeals to this Court. Again an appeal under s. 39(1) lies against an order superseding an award or modifying or correcting an award, or filing or refusing to file an arbitration agreement or staying or refusing to stay legal proceedings where there is an arbitration agreement or setting aside or refusing to set aside an award or on an award stated in the form of a special case. These orders are not decrees within the meaning of the Code of Civil Procedure and have not the effect of decrees under the Arbitration Act. Section 100 of the Code of Civil Procedure deals with appeals from appellate decrees and not with appeals from appellate orders. If by enacting s.39(2) appeals from appellate decrees were intended to be prohibited, the provision was plainly otiose; and unless the context or the circumstances compel the Court will not be justified in ascribing to the legislature an intention to enact a sterile clause. In that premise the conclusion is inevitable that the expression 'second appeal' used in s.39(2) of the Arbitration Act means a further appeal from an order passed in appeal under s.39(1) and not an appeal under s.100 of the Civil Procedure Code\005"

This Court upon further noticing that the Letters Patent is subject to the legislative power of the Governor-General in Council, held :

"\005If by the express provision contained in s.39(1), a right to appeal from a Judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent. If for reasons aforementioned the expression "second appeal" includes an appeal under the Letters Patent, it would be impossible to hold that notwithstanding the express prohibition, an appeal under the Letters Patent from an order

passed in appeal under sub-s.(1) is compeent."

Tracing the history of the Arbitration Act vis-'-vis the provisions of Section 588 of the Code of Civil Procedure, 1877 and Section 104 of the Code, it was held that under Arbitration Act there does not exist any provision similar to Section 4 of the Code of Civil Procedure which would save an appeal under a special statute, opining :

"Under the Code of 1908, the right to appeal under the Letters Patent was saved both by s.4 and the clause contained in s.104(1), but by the Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; the right of appeal can therefore be exercised against orders in arbitration proceedings only under s.39, and no appeal (except an appeal to this Court) will lie from an appellate order.

There is no warrant for assuming that the reservation clause in s.104 of the Code of 1908 was as contended by counsel for the respondents, "superfluous" or that its "deletion from s.39(1) has not made any substantial difference" : the clause was enacted with a view to do away with the unsettled state of the law and the cleavage of opinion between the Allahabad High Court on the one hand and Calcutta, Bombay and Madras High Courts on the other on the true effect of s.588 of the Code of Civil Procedure upon the power conferred by the Letters Patent. If the legislature being cognizant of this difference of opinion prior to the Code of 1908 and the unanimity of opinion which resulted after the amendment, chose not to include the reservation clause in the provisions relating to appeals in the Arbitration Act of 1940, the conclusion is inevitable that it was so done with a view to restrict the right of appeal within the strict limits defined by s.39 and to take away the right conferred by other statutes\005"

The Court was, thus, concerned with the saving clause contained in Section 4 of the Code vis-'-vis sub-section (1) of Section 104 of the Code and not sub-section (2) thereof.

It is true that some stray observations had been made therein to the effect that under the Code of 1908, an appeal did lie under the Letters Patent from an order passed by a Single Judge of a Chartered High Court in an arbitration proceedings even if the order was passed in exercise of appellate jurisdiction, but that was so, because the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved. Furthermore, as has been noticed in Shah Babulal Khimji (supra) that in terms of Clause 15 of the Letters Patent a second appeal could have been maintained only subject to leave granted by the appellate court therefor. No such leave has been taken in this case. The said observation would not mean in absence of any detailed discussion as regard interpretation of the provisions of the Code, that despite bar created thereunder, an appeal would still be maintainable under Clause 15 of the Letters Patent.

Such observations were not only wholly unnecessary but the same did not arise for consideration directly. Furthermore, the questions raised herein were not raised at the Bar nor the Bench had any occasion to consider the same in details. The said decision is also an authority for the proposition

that a Letters Patent Appeal can be barred by necessary implication.

RESHAM SINGH :

The issue which is involved in these appeals was also involved therein. The question which arose for consideration as to whether if a right of appeal is provided under Sub-section (1) of Section 104 of the Code whether a further appeal is barred under Sub-section (2) thereof. Therein, the said question was answered in the affirmative holding:

"5. Section 104 CPC provides for an appeal from the orders provided in Order 43 save as otherwise expressly provided in the body of this Code or by any law for the time being in force and from no other orders. Sub-section (2) envisages that "(2) No appeal shall lie from any order passed in appeal under this Section".
6. It would, therefore, be clear that when an appeal was filed against the order of the City Civil Court, Bombay to the learned Single Judge under Order 43 Rule 1(r) as provided in sub-section (1) of Section 104 by operation of sub-section (2) of Section 104, no further appeal shall lie from any order passed in appeal under this section\005."

NEW KENILWORTH HOTEL (P) LTD. :

In New Kenilworth Hotel (P) Ltd. (supra) also the question which arose for consideration was as to whether Subs-section (2) of Section 104 of the Code bars an appeal against an order passed by the appellate court in terms of Sub-section (1) of Section 104 thereof following Resham Singh (supra). The answer thereto was rendered in the affirmative. Therein it was noticed that Clause 10 of the Letters Patent of the Orissa High Court was in pari materia with Clause 15 of the Letters Patent of the Madras High Court. It was held :
"9. The question, therefore, was whether it was appealable. Since the learned Judge had exercised the original jurisdiction and an appeal would lie to the Division Bench under Order 43, Rule 1, this Court considered that the order of the learned Single Judge was a judgment within the meaning of Section 2(9) of the Code and, therefore, it was appealable. It is seen that the exercise of power by the learned Single Judge was as a first Judge under the Code and, therefore, the order, though it is one passed under Order 43, Rule 1, since it gives a finality as regards that Court is concerned, was held to be a judgment within the meaning of Section 2(9) of the Code. Section 4(1) of the Code does not apply because it envisages that :
"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 under any other law for the time being in force."
Since Section 104(2) expressly prohibits an appeal, against an order passed by the appellate court under Order 43, Rule 1 read with Section 104(1) no ... appeal would lie. As a consequence no letters patent appeal would lie. The view taken in Madhusudan Vegetable Products Co. Ltd. v. Rupa Chemicals [AIR 1986 Guj 156 : (1986) 27 Guj LR

101 : 1986 Guj LH 93] and Firm Chhunilal Laxman Prasad v. Agarwal and Co. [AIR 1987 MP 172 : 1987 MPLJ 165] by the two High Courts is correct in law. The view of the Division Bench in Sashikala Padhi v. Hiren Ghosh [(1991) 71 Cut LT 197] is correct in law. Sukuri Dibya case [(1990) 32 OJD 431 (Civil)] and the Birendra case [(1992) 34 OJD 473 (Civil)] are not good law.

10. It is seen that the very object of introducing these amendments was to cut down the delay in disposal of suits and to curtail the spate remedial steps provided under the Code. 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. As already noted, the main part of clause 10 clearly indicates that "an appeal would lie from the judgment not being a judgment passed in exercise of appellate jurisdiction". Thereby the judgment from an appellate jurisdiction stands excluded under the first part of clause 10 of the letters patent itself. Therefore, the Division Bench of the High Court was right in holding that the letters patent appeal would not lie against an order of the learned Single Judge."

The aforementioned decisions meet our approval.

SOME OTHER CASE LAWS :

Mr. Sundravardhan had placed reliance on L. Ram Sarup (supra) which has been referred to in Gulab Bai (supra) for the proposition that when a matter comes before the High Court even on the appellate side, the appeal from a judgment passed shall be governed by the Letters Patent. We do not agree with the said view and are of the opinion that the decision in Gulab Bai (supra) must be read in the context in which it was rendered.

In the said case, the court was concerned with the construction of sub-section (2) of Section 588 of the Code of Civil Procedure, 1877 which provided for finality clause. Having held that despite such finality clause, as an appeal thereagainst in terms of Clause 15 of the Letters Patent had not been expressly prohibited, the same was maintainable.

We have noticed hereinbefore that in South Asia Industries Private Ltd. (supra), it has clearly been held that filing of appeal may be barred by the Legislature either expressly or by necessary implication.

In Chandra Kanta Sinha (supra), New Kenilworth Hotel (P) Ltd. (supra) was distinguished stating :

"12. 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."

It was further held :

"13. 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)

"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."

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

In Subal Paul (supra), it was held :

"46. We may notice that even in Municipal Corporation of Brihanmumbai and Another vs. 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 :

"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)."

In Prataprai N. Kothari vs. 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."

In this case, we are not concerned with such a situation, as sub-section (2) of Section 104 of the Code would clearly bar such appeals.

In Central Mine Planning and Design Institute Ltd. (supra), the question which falls for our consideration did not fall therein. The only question which was raised was as to whether an order passed under Section 17-B of the Industrial Disputes Act is a judgment within the meaning of Clause 10 of the Letters Patent of Patna High Court.

In Madhusudan Vegetable Products Co. Ltd., Ahmedabad vs. Rupa Chemicals Vapi and Others [AIR 1986 Guj. 156], Majmudar, J. (as His Lordship then was) speaking for a Division Bench of the Gujarat High Court inter alia analyzing the provisions of Section 104 of the Code observed :

"11\005All further appeals from appellate orders under S.104(1) read with O.43, R.1 are expressly barred by S. 104, sub-sec. (2) and S. 105 of the Civil P.C. If any lower appellate Court decides a miscellaneous appeal under O. 43, R.1, only revision lies before High Court. There is no occasion for the High Court to exercise second appellate jurisdiction against appellate orders passed by subordinate Courts. Second appeal lies only against appellate decrees of subordinate Courts as per S. 100, Civil P.C. Hence the words "appellate decree or order" must mean appeal before learned single Judge of the High Court either against appellate decree as per S. 100, Civil P.C. or against original order of subordinate Court under O. 43, Rule 1, Civil P.C."

Yet again in Firm Chhunilal Laxman Prasad vs. M/s Agarwal and Co. and Others [AIR 1987 M.P. 172] , N.D. Ojha, J. (as His Lordship then was) opined :
"5. The effect of the aforesaid decision is that if an order has been passed by a learned single Judge of the High Court either appointing a receiver or granting or refusing injunction under O.39 Rules 1 and 2 in some original proceedings, letters patent appeal would lie against that order treating it to be a judgment. The Supreme Court, however, does not go a step further and say that if the order passed by the High Court was not an original

order, but had been passed in exercise of its appellate jurisdiction u/s. 104 read with O.43 Rule 1 C.P.C., even then a letters patent appeal would lie. Indeed such an argument is not open on the clear language of sub-section (2) of S. 104 C.P.C., which has been held by the Supreme Court to be applicable to a letters patent appeal. Sub-section (2) of Section 104 provides that no appeal shall lie from any order passed in appeal under this section."

The aforementioned two decisions have expressly been approved by this Court in New Kenilworth Hotel (P) Ltd. (supra).

Law in this country, which is prevailing since 1986, has been consistent and we do not see any reason to depart from the said view.

PRECEDENT:

While analyzing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute.

A decision is an authority for the questions of law determined by it. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See Haryana Financial Corporation & Anr. v. M/s. Jagdamba Oil Mills & Anr.[JT 2002(1)SC 482], Union of India & Ors. v. Dhanwanti Devi & Ors[(1996) 6 SCC 44], Dr. Nalini Mahajan v. Director of Income Tax (Investigation) & Ors(2002) 257 ITR 123, State of UP & Anr. v. Synthetics and Chemicals Ltd. & Anr. (1991) 4 SCC 139, A-One Granites v. State of U.P. & Ors. 2001 (1) AIR SCW 848 and Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. and Others [(2003) 2 SCC 111]

Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others [AIR 2004 SC 3894] wherein this Court held:

"\005It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used."

It is further well-settled that a decision is not an authority for the proposition which did not fall for its consideration.

CONCLUSION :

The upshot of our decision would be :

(1) Finality clause contained in a statute, unless attached to an order passed in appeal, would not take away the right of appeal expressly provided for under the special statute;

(2) Letters Patent being a subordinate legislation has the force of law but the same is subject to an Act of Parliament;

(3) If an appeal is maintainable under sub-section (1) of Section 104 of the Code, no further appeal threfrom would be maintainable in terms

of sub-section (2) thereof.;

(4) A right of appeal being creature of a statute, it may provide for a limited right of appeal or limiting the applicability thereof.

(5) Clause 15 of the Letters Patent cannot override the bar created under Section 104 of the Code. Section 104 (1) of the Code must be read with sub-section (2) of Section 104; and by reason thereof saving clause in relation to the Letters Patent would not be attracted. An attempt should be made to uphold a right of appeal only on harmonious construction of Sections 4, 104 and other provisions of the Code.

(6) However, when an appeal is provided for under a Special Act, Section 104 of the Code shall have no application in relation thereto as it merely recognizes such right but does not provide for a right of appeal.

(7) If a higher status is given to a Letters Patent over a law passed by the Parliament including the Code of Civil Procedure, the same would run contrary to the history of the Letters Patent as also the Parliamentary Acts.

(8) The judgment of this Court must be read as a whole and the ratio therefrom is required to be culled out from reading the same in its entirety and not only a part of it;

In view of our foregoing findings, it is not necessary to consider the other submissions made at the Bar.

For the reasons aforementioned, there is no merit in these appeals which are dismissed accordingly. No costs.

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S. N. VARIAVA, J.

We have had the benefit of reading the Judgment of Brother Sinha, J. With the greatest of respect to him we are unable to agree with his view for the following reasons. Facts have been set out in detail by Brother Sinha, J. and need not be repeated here except to state that this Appeal is against the Judgment of the High Court of Madras dated 22nd August, 1997, by which it has been held that a Letters Patent Appeal is not maintainable against an Order passed by a single Judge of the High Court sitting in Appellate Jurisdiction.

Because of the importance of the question involved, this Court by an Order dated 9th August, 2001 referred the matter to a larger Bench. The Order reads as follows:

"Against an application filed before the executing court for setting aside the court auction which was dismissed, an appeal was filed before the High Court. On the dismissal of the same by the Single Judge, a letters patent appeal was filed. A Full Bench relying upon a decision of this Court in New Kenilworth Hotel (P) Ltd. vs. Orissa State Financial Corporation and Others, 1997 (3) SCC 462 came to the conclusion that in view of the provisions of Section 104(2), C.P.C., appeal to the Division Bench was not maintainable. To the same effect are two other decisions of this Court in Resham Singh Pyara Singh vs. Abdul Sattar [1996 (1) SCC 49] and Vinita M. Khanolkar vs. Pragna M. Pai and Others, 1998 (1) SCC 500.

Learned senior counsel for the appellant has

drawn our attention to a decision of the Constitution Bench in Gulab Bai and Anr. vs. Puniya, 1966 (2) SCR 102 and has contended that the observations in the said judgment clearly support his contention that by virtue of provisions similar to Clause 15 of the Letters Patent an appeal could be filed against he judgment of the Single Judge.

We are aware of the fact that Clause 15 of the Letters Patent applicable to Madras High Court was similar to Clause 10 applicable to Orissa High Court which was construed in the case of New Kenilworth (supra). This Court did not, in New Kenilworth's case, consider the effect of the decision in Gulab Bai's case (supra). Furthermore, reference in Clause 15 of the Letters Patent which excludes the applicability of the same in relation to a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a court subordinate to the superintendence of the High Court would prima facie indicate that it is only where the Single Judge is hearing an appeal from an appellate order of the court subordinate to it that the said clause 15 would not apply.

In our opinion, the matter is not free from doubt, especially in view of the decision of the Constitution Bench in Gulab Bai's case [1966 (2) SCR 102] and it would be appropriate therefore that the papers are placed before Hon'ble the Chief Justice for referring the case to a larger Bench, in view of not only the conflict in decisions which is stated to be there but also in view of the importance of the point in issue, namely, the effect of the provisions of Section 104(2) vis-'-vis Clause 15 of the Letters Patent."

The Chief Justice has since placed this matter before a Constitution Bench.

Before us, it has not been disputed that if Section 104 of the Civil Procedure Code did not provide a bar, then in this case a Letters Patent Appeal would be maintainable. It is also not disputed that at the relevant time Section 100A C.P.C. did not bar such an Appeal in this case.

In order to decide whether Section 104(2) C.P.C. would bar a Letters Patent Appeal, one has to first notice the history and the view taken by various Courts in India on this aspect. In the Civil Procedure Codes of 1877 and 1882 the equivalent to Section 104 read with Order 43 Rule I was Section 588. It reads as follows:

"588 \026 An appeal shall lie from the following orders under this Code and from no other such orders:-
\005\005\005\005\005\005\005\005\005\005\005..
The orders passed in appeals under this section shall be final"

To be noted that Section 588 did not contain words to the effect "under a law for the time being in force". However, Section 588 did provide that "an appeal shall lie from the following orders and no other such orders". It also provided that "orders passed

in Appeal under that Section shall be final". These words have the same meaning and effect as the words "no Appeal shall lie from any Order passed in Appeal under this Section". Section 588 by giving a finality to orders passed under that Section precluded further appeals. The question was whether Section 588 also barred a Letters Patent Appeal.

There was a divergence of opinion amongst the High Courts on this point. This question then came up before the Privy Council in the case of Hurrish Chunder Chowdhry vs. Kali Sundari Debia reported in 10 I.A. Pg. 4. The Privy Council held as follows:
"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."

These observations of the Privy Council again led to a conflict of decisions amongst various High Courts. The Bombay, Calcutta and Madras High Courts held that Section 588 did not take away the right of Appeal given under the Letters Patent. On the other hand, the Allahabad High Court took a different view and held that a Letters Patent Appeal was barred under Section 588 C.P.C. In view of this conflict of views the Legislature stepped in and amended the law. It introduced Section 4 and also introduced Section 104 C.P.C., which read as follows:
"4. Savings.- (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 rent of agricultural land from the produce of such land.

104. Orders from which appeal lies.- (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 -
\005\005\005\005\005\005\005\005\005\005\005\005\005\005\005
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 a less amount, ought to have been made.
(2) No appeal shall lie from any order passed in appeal under this section."
To be immediately noted that now the Legislature provides that the provision of this Code will not affect or limit special law unless specifically excluded. The Legislature also simultaneously saves, in Section 104(1), appeals under "any law for the time being in force". These would include Letters Patent Appeals. After this amendment, even the Allahabad High Court changed its view. In the case of L. Ram Sarup vs. Mt. Kaniz Ummehani reported in AIR 1937 Allahabad 165 the earlier view was noted and it was thereafter observed as follows:
"There is however one material distinction between the provisions of the old Code and those of the new

Code. In the Code of 1882 there was no exemption as regards any special law that may be in force for the time being and the Code of Civil Procedure, except as regards certain enactments mentioned in S. 4 and other similar sections, would supersede all such laws. In Cl.35 of the Letters Patent, there was a clear provision that the Letters Patents are subject to the legislative powers of the Governor-General in Council. It was accordingly thought that the Code of Civil Procedure would prevail against the provisions of the Letters Patent. In the new Code of 1908 there is a special provision in S. 4 to the effect that:

> In the absence of any specified 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.

It follows that unless there is any specific provision to the contrary in this Code of Civil Procedure, it cannot affect any special law or special jurisdiction or power which is conferred on the High Court. The Letters Patent undoubtedly confers such special jurisdiction and power. It would therefore follow that the provisions of the Letters Patent are saved by virtue of S. 4, unless there is specific provision to the contrary. We do not find any specific provision in S. 104 showing that that section is intended to apply to Letters Patent appeals as well. The opinion expressed by the Division Bench in Piare Lal's case [AIR 1917 All. 325] has not been followed in other High Courts. It seems to us that it is not necessary to refer this point to a Full Bench because of one important circumstance. At the time when the case of Piare Lal was decided the new Code of Civil Procedure had come into force and its provisions could be considered by the Bench to supersede the provisions of the Letters Patent. Thereafter Cl. 10, Letters Patent, was amended in 1929 when a right of appeal has been allowed from every judgment of a Single Judge where leave is granted. At this latest provision in the Letters Patent has not been superseded by any provision of the Code of Civil Procedure, we think that it must prevail.

It may further be pointed out that Sec. 104(1), C.P.C., itself provides "save as otherwise expressly provided. . . by any law for the time being in force." Accordingly the prohibition contained in that sub-section that an appeal shall not lie from any other order, would not apply to a case where an appeal is provided for under the Letters Patent. It may however be conceded that this saving clause does not occur in sub-s. (2), S. 104. But under the corresponding S. 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 9 Cal 482, at p. 492, observed that S. 588, which has the effect of restricting certain appeals, does not apply to a case where the appeal is from one of the Judges of the High Court to the full Court. Obviously S. 104(2) was intended to apply to appeals where allowable under the Code of

Civil Procedure. In any case S. 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 Cl. 10, Letters Patent, an appeal lies from the order of a Single Judge passed in appeal."

Thus now all High Courts in India were unanimously of the view that Section 104 C.P.C. did not prohibit a Letters Patent Appeal. At this stage it must be mentioned that the abovementioned authority of the Allahabad High Court has been overruled by this Court in Shah Babulal Khimji vs. Jayaben D. Kania reported in (1981) 4 SCC 8. But, as is set out in greater details hereafter, the view that a Letters Patent Appeal is maintainable is specifically approved. The overruling is on another aspect set out hereinafter.

In National Sewing Thread Co. Ltd., Chidambaram vs. James Chadwick and Bros. Ltd. (AIR 1953 SC 357) the question arose whether a Letters Patent appeal under Clause 15 of the Letters Patent of the Bombay High Court was maintainable against the Judgment of a single Judge exercising appellate jurisdiction under Section 76 of the Trade Marks Act, 1940. Holding that such an appeal was maintainable, this Court observed:

"Section 76, Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by S.76 it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under Cl. 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act."

Referring to Clause 44 of the Letters Patent, it was held that the provisions of the Letters Patent were subject to the legislative powers of the Governor General in Legislative Council, and therefore, in the present day context, subject to the legislative power of the appropriate legislature. But this Court found nothing in the Trade Marks Act restricting the right of appeal under Clause 15 of the Letters Patent.

This question was also considered by a four Judges Bench of this Court in the case of Union of India vs. Mahindra Supply Company reported in (1962) 3 SCR 497. In this case, a dispute between the parties was referred to Arbitration. The Arbitrator gave an award. An application was made for setting aside the award. That application was rejected. Against that order an Appeal was preferred to the High Court under Section 39(1) of the Indian Arbitration Act, 1940. A single Judge of the High Court allowed the Appeal and set aside the award. Thereupon a Letters Patent Appeal was filed. The question was whether a Letters Patent Appeal was barred. Section 39 of the Indian Arbitration Act reads as follows:

"(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order:

An order \026

(i) superceding an arbitration;

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

(iii) modifying or correcting a 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 is thus to be seen that Section 39 specifically barred a second Appeal. Also to be noticed that in Section 39 there is no saving clause similar to that in Section 104(1) C.P.C. Further, in the Arbitration Act there is no provision similar to Section 4 C.P.C. It was submitted that, even though Section 39 barred a second Appeal, an analogy should be taken from Section 104 C.P.C. and it must be held that a Letters Patent Appeal was maintainable. In considering this submission the conflict of opinions amongst the various High Courts regarding maintainability of a Letters Patent Appeal, in spite of Section 104 C.P.C., was set out and this Court then held as follows:
"The legislature in this state of affairs intervened, and in the Code of 1908 incorporated s. 4 which by the first sub-section provided:
"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:;
and enacted in s. 104(1) that an appeal shall be from the orders set out 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. The legislature also expressly provided that "no appeal shall lie from any order passed in appeal under this section."
Section 105 was substantially in the same terms as s. 591 of the earlier Code.
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 emphasized 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 a four Judges Bench of this Court, as early in 1962, recognized that the Legislature had now specifically saved a Letters Patent Appeal. This Court then went on to hold that Section 4 C.P.C. provided as follows:
"By this clause, a right to appeal except in the cases specified, from one Judge of the High Court to a Division Bench is expressly granted. But the Letters Patent are declared by Cl. 37 subject to the legislative power of the Governor-General in Council and also of the Governor-in-Council under the

Government of India Act, 1915, and may in all respects be amended or altered in exercise of legislative authority. Under S. 39(1), an appeal lies from the orders specified in that sub-section and from no others. The legislature has plainly expressed itself that the right of appeal against orders passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away. If by the express provision contained in S.39(1), a right to appeal from a judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that cl.(2) does not similarly restrict the exercise of appellate power granted by the Letters Patent. If for reasons aforementioned the expression "second appeal" includes an appeal under the Letters Patent, it would be impossible to hold that notwithstanding the express prohibition, an appeal under the Letters Patent from an order passed in appeal under sub-s. (1) is competent."

This Court however noticed that in the Arbitration Act, there was no provision similar to Section 4 of the Code of Civil Procedure which preserved powers reserved to Courts under special statutes. Under the Code of Civil Procedure, the right to appeal under the Letters Patent is saved both by Section 4 and the clause contained in Section 104(1), but by the Arbitration Act, 1940, the jurisdiction of the Courts under any other law for the time being in force is not saved. The right of appeal could therefore be exercised against orders in arbitration proceedings only under Section 39, and no appeal lay from the appellate order (except an appeal to this Court). The provisions in the Letters Patent providing for appeal, in so far as they related to orders passed in Arbitration proceedings, were held to be subject to the provisions of Section 39(1) and (2) of the Arbitration Act, as the same is a self contained Code relating to arbitration. The aforesaid two decisions were noticed in South Asia Industries (P) Ltd. vs. S.B. Sarup Singh & Ors. (AIR 1965 SC 1442). This Court was called upon to interpret the provisions of Sections 39 and 43 of the Delhi Rent Control Act, 1958 with a view to answer the question whether an appeal was competent under Clause 10 of the Letters Patent of the High Court of Lahore against the judgment of a single Judge in a second appeal under Section 39 of the aforesaid Act.
Section 39 provided an appeal to the High Court against the judgment of the Tribunal only on a substantial question of law. Section 43 read as under:
"Save as otherwise expressly provided under this Act, every order made by the Controller or an order passed an appeal under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding."

It was not even disputed before this Court that the right of appeal conferred by Clause 10 of the Letters Patent could be taken away by law made by the appropriate legislature. Under the Rules an appeal under Section 39 was to be heard by a Single Judge, and under Clause 10 of the Letters Patent an appeal to the High Court lay against the judgment of a single Judge. This Court held that unless the right of appeal was taken away by the appropriate legislature either expressly or by necessary implication, an appeal was competent under Clause 10 against the judgment of the single Judge to the High Court. However, on an interpretation of Section 43 of the Act, this

Court held that the expression "final" put an end to a further appeal and the section imposed a total bar.
The question whether a Letters Patent Appeal would be barred was considered by a Constitution Bench of this Court in the case of Gulab Bai vs. Puniya reported in (1966) 2 SCR 102. In this case, an application under Section 25 of the Guardians and Wards Act was rejected by a Civil Court. This decision was reversed in Appeal by a single Judge of the Rajasthan High Court. Against the decision of the single Judge an Appeal under Clause 18 of Rajasthan High Court Ordinance was filed. The question was whether such an Appeal was maintainable. It was submitted that such an Appeal was not maintainable by virtue of Sections 47 and 48 of the Guardians and Wards Act. Sections 47 and 48 read as follows:
"47. Orders appealable.- An appeal shall lie to the High Court from an order made by a Court,-
(a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or
(b) under section 9, sub-section (3), returning an application; or
(c) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or
(d) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or
(e) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or
(f) under section 32, defining, restricting or extending the powers of a guardian; or
(g) under section 39, removing a guardian; or
(h) under section 40, refusing to discharge a guardian; or
(i) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians, or enforcing the order; or
(j) under section 44 or section 45, imposing a penalty.

48. Finality of other orders.- Save as provided by the last foregoing section and section 622 of the Code of Civil Procedure, 1882, an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise."
Thus Section 47 permitted "an appeal" to the High Court whilst Section 48 gave a finality. The Constitution Bench, inter alia, held as follows:
"Before dealing with this point, two relevant facts ought to be mentioned. The Act was extended to Rajasthan by the Part B States (Laws) Act, 1951 (Act III of 1951) on the 23rd February; 1951; but before the Act was thus extended to Rajasthan, the Ordinance had already been promulgated. Clause 18(1) of the Ordinance provides, inter alia, that an appeal shall lie to the High Court from the Judgment of one Judge of the High Court; it accepts from the purview of this provision certain other judgments with which we are not concerned. It is common ground that the judgment pronounced by the learned single Judge of the High Court on the appeal preferred by the respondent before the High Court, does not fall within the category of the exceptions

provided by clause 18(1) of the ordinance; so that if the question about the competence of the appeal preferred by the appellants before the Division Bench of the High Court had fallen to be considered solely by reference to clause 18(1), the answer to the point raised by the appellants before us would have to be given in their favour. The High Court has, however, held that the result of reading ss. 47 and 48 together is to make the present appeal under clause 18(1) of the Ordinance incompetent. The question arises before us is: is this view of the High Court right?"

This Court then considered the effect of Sections 47 and 48 of the Guardians and Wards Act and held as follows:

"The finality prescribed for the order made under this Act is subject to the provisions of S.47 and S.622 of the earlier Code which corresponds to S.115 of the present Code. In other words, the saving clause unambiguously means that an order passed by the trial Court shall be final, except in case where an appeal is taken against the said order under S.47 of the Act, or the propriety, validity, or legality of the said order is challenged by a revision application preferred under S.115 of the Code. It is, therefore, essential to bear in mind that the scope and purpose of S.48 is to make the orders passed by the trial Court under the relevant provisions of the Act, final, subject to the result of the appeal which may be preferred against them, or subject to the result of the revision applications which may be filed against them. In other words, an order passed on appeal under S.17 of the Act, or an order passed in revision under S.115 of the Code, are, strictly speaking, outside the purview of the finality prescribed for the orders passed under the Act, plainly because they would be final by themselves without any such provisions, subject, of course, to any appeal provided by law or by a constitutional provision, as for instance, Art. 136. The construction of S.48, therefore, is that it attaches finality to the orders passed by the trial Court subject to the provisions prescribed by S.47 of the Act, and S.115 of the Code."

Thus even though Section 48 provided for a finality it still saved appeals permitted by Section 47 and revisions under Section 622 of the then Civil Procedure Code (Section 115 of the present Civil Procedure Code). This Court then went on to hold as follows:

"The question as to whether an appeal permitted by the relevant clause of the Letters Patent of a High Court can be taken away by implication, had been considered in relation to the provisions of s. 588 of the Codes of Civil Procedure of 1877 and 1882. The first part of the said section had provided for an appeal from the orders specified by clauses (1) to (29) thereof, and the latter part of the said section had laid down that the orders passed in appeals under this section shall be final. Before the enactment of the present Code, High Courts in India had occasion to consider whether the provision as to the finality of the appellate orders prescribed by s. 588 precluded an appeal under the relevant clauses of the Letters Patent of different High Courts. There was a conflict of decisions on this point. When the matter was raised before the Privy Council in Hurrish Chunder Chowdhry v. Kali Sundari Debia (10 I.A. 4 at p. 17.); the Privy Council thus tersely

expressed its conclusion:
"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".
Basing themselves on these observations, the High Courts of Calcutta, Madras, and Bombay had held that s. 588 did not take away the right of appeal given by clause 15 of the Letters Patent, vide Toolsee Money Dassee & Others v. Sudevi Dassee & Others ((1899) 26 Cal. 361.), Sabhapathi Chetti and others v. Narayanasami Chetti ((1902) 25 Mad. 555.), and The Secretary of State for India in Council v. Jehangir Maneckji Cursetji ((1902) 4 Bom. L.R. 342.) respectively. On the other hand, the Allahabad High Court took a different view, vide Banno Bibi and others v. Mehdi Husain and Others ((1889) 11 Alld. 375.), and Muhammad Naim-ul-Lah Khan v. Ihsan-Ullah Khan ((1892) 14 Alld. 226 (F.B.)). Ultimately, when the present Code was enacted, s. 104 took the place of s. 588 of the earlier Code. Section 104(1) provides that 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. It will be noticed that the saving clause which refers to the provisions of the Code, or to the provisions of any law for the time being in force, gives effect to the view taken by the Calcutta, Madras and Bombay High Courts. In fact, later, the Allahabad High Court itself has accepted the same view in L. Ram Sarup v. Mt. Kaniz Ummehani (A.I.R. 1937 Alld. 165.)."
The above observations are in context of the matter before it. The Constitution Bench was considering whether Letters Patent Appeals can be barred. The observations were necessitated and have been made to emphasize that Letters Patent cannot be excluded by implication. This is clear from the following observations:

"We have referred to these decisions to emphasize the fact that even where the relevant provision of s. 588 of the earlier Code made certain appellate orders final, the consensus of judicial opinion was that the provisions did not preclude an appeal being filed under the relevant clause of the Letters patent of the High Court"

Thus, a Constitution Bench of this Court has held that the words "under any law for the time being in force" in Section 104(1) saves Letters Patent Appeals. This decision is binding on this Court.

Faced with the situation it was submitted that the above observations have been made only in the context of Sections 47 and 48 of the Guardians and Wards Act. It was submitted that therefore these observations cannot be applied to a case where an Appeal is under Section 104 itself. This argument overlooks sub-clause (1) of Section 104 C.P.C. which now categorically saves Appeals under any law for the time being in force. Thus if any other law for the time being in force permits an appeal the same would be maintainable irrespective of Section 104(2) C.P.C. As stated above, this would include a Letters Patent Appeal. Also, the observations quoted above are not in the context of Sections 47 and 48 of the Guardians and Wards Act, but in the context of whether a Letters Patent Appeal can be

barred. That was the question before the Court. The Constitution Bench was considering whether a Letters Patent Appeal was maintainable. It was then submitted that this authority does not take into consideration and does not refer to sub-clause (2) of Section 104. It was submitted that as sub-clause (2) of Section 104 was not considered a fresh look is required. Once it is noted that Section 104(1) saves such Appeals there is no need to refer to or mention Section 104(2). Section 104(2) cannot lay down anything contrary to Section 104(1). To be remembered that Legislature has now put in the saving clause in order to give effect to the Bombay, Madras and Calcutta views. If an interpretation, as sought to be given by Mr. Vaidyanathan, is accepted then there would be a conflict between sub-clause (1) and sub-clause (2) of Section 104. Sub-clause (1) would save/permit a Letters Patent Appeal whereas sub-clause (2), on this interpretation, would bar it. In our view, there is no such conflict. As seen above, Section 104(1) specifically saves a Letters Patent Appeal. Sub-clause (2) can thus only apply to such appeals as are not saved by sub-clause (1). In other words sub-clause 2 of Section 104 can have no application to appeals saved by Section 104(1). Also it is well established rule of interpretation that if one interpretation leads to a conflict whereas another interpretation leads to a harmonious reading of the Section, then an interpretation which leads to a harmonious reading must be adopted. In the guise of giving a purposive interpretation one cannot interpret a Section in a manner which would lead to a conflict between two sub-sections of the same Section. We clarify that, as stated above, there is no conflict, but if the interpretation, suggested by Mr. Vaidyanathan, were to be accepted then there would clearly be a conflict. The only way a conflict can be avoided is to hold that sub-clause (2) only bars such Appeals as are not saved by sub-clause (1) of Section 104.

In the case of Shah Babulal Khimji (supra) a suit for specific performance was filed. Interim reliefs of appointment of Court Receiver and injunction were refused by a single Judge of the High Court. The Appeal preferred before the Division Bench was dismissed as not maintainable on the ground that the impugned Order of the Single Judge was not a Judgment as contemplated by Clause 15 of the Letters Patent of the High Court. It was also held that Section 104 read with Order 43 Rule 1 only applied to appeals from Subordinate Courts to the High Court.

Thus in Shah Babulal Khimji's case (supra) this Court was concerned with an order passed by a single Judge on the original side of the High Court, which, if it amounted to a judgment, was admittedly appealable under Clause 15 of the Letters Patent. The only question, therefore, which arose before this Court was whether the order of the learned single Judge refusing to grant an injunction or appoint a receiver on the Interlocutory Application of the appellant was a judgment, and consequently whether an appeal against the order of the learned single Judge to the Division Bench of the High Court was competent and maintainable under Clause 15 of the Letters Patent. This Court took the view that the word 'judgment' in the Letters Patent should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. It was held that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. Their Lordships came to the conclusion that the order passed by a single Judge on the original side refusing to appoint a receiver and grant an injunction amounted to a judgment and was therefore appealable under Clause 15 of the Letters Patent.

Though the question did not directly arise for

consideration, in the Judgment of Fazal Ali, J. there is a discussion on the interplay of Section 104 and Letters Patent. The relevant portions read as follows:

"15. We would first deal with the point relating to the applicability of Section 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.

16. In order, however, to appreciate the applicability of Section 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 Section 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 Section 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 Section 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 Sections 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 Section 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.

17. 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, therefore, did not contemplate any other appeal except those mentioned in Sections 588 and 591.

18. 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 Sections 588 to 591 a serious controversy arose between the various High Courts regarding the interpretation of Section 588. The Bombay and Madras High Courts held that under Clause 15 of the Letters Patent of the said High Courts, an appeal could lie only from orders passed under Section 588 and not even under the Letters Patent. In Sonba'i v. Ahmedbha'i Habibha'i [(1872) 9 Bom HCR 398] a Full Bench of the Bombay High Court held that under Clause 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 Section 588 and 591 of the Code of 1877. The Madras High Court in Rajgopal (In re L.P.A. No. 8 of 1886 [ILR 9 Mad 447]) took the same view. Then came the decision of the Privy Council in the case of Hurrish Chunder Chowdry v. Kali Sundari Debia [10 IA 4 : ILR (1883) 9 Cal 482] which while considering Section 588 made the following observations :

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 is from one of the Judges of the Court to the Full Court.

This judgment gave rise to a serious conflict of opinions in the High 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 Section 588 it could be appealable provided it was a judgment within the meaning of Clause 15 of the Letters Patent of the respective High Courts (Toolsee Money Dassee v. Sudevi Dassee [ILR (1899) 26 Cal 361]; Secretary of State v. Jehangir [(1902) 4 Bom LR 342]; Chappan v. Moidin Kutti [ILR (1899) 22 Mad 68]). However, the Allahabad High Court in Banno Bibi v. Mehdi Husain [ILR (1889) 11 All 375] held that if an order was not appealable under Sections 588 and 591 of the Code of 1877 it could not be appealable 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 [ILR (1892) 14 All 226 : 1892 AWN 14 (FB)].

19. 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 Section 588, the Judicial Committee in Hurrish Chunder Chowdry's case [10 IA 4 : ILR (1883) 9 Cal 482] had made it clear that appeals would lie under Section 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 Section 588 would not lie to a larger Bench of the High Court. In other words, the Privy Council intended to lay down clearly that Section 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 Section 588 could be appealable to a larger Bench under the Letters Patent if those orders amounted to judgment within the meaning of Clause

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 Section 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 Section 104, the conflict between the various High Courts still continued as to whether or not Section 104 would apply to internal appeals in the High Court. That is the question, which we shall now discuss."

(emphasis supplied).

The Court then went on to consider whether Section 104 applied to internal appeals in the High Court. The Court considered various provisions to conclude that Section 104 applied even to internal appeals in the High Court. The entire discussion is lengthy and not relevant for our purposes. But during the course of that discussion at a number of places the interplay of Letters Patent and Section 104 was considered. To that extent, the observations are relevant for our purpose and are accordingly set out:

"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 Section 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 Section 4, the provisions of Section 104 do not seek to limit or affect the provisions of the Letters Patent."

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28. We find ourselves in complete agreement with the arguments of Mr. Sorabjee that in the instant case Section 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 Clause 15 of the Letters Patent. What Section 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."

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"30. We have already shown that a perusal of these observations leaves no room for doubt that the Privy Council clearly held that Section 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 Section 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 Section 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 [AIR 1921 PC 80], their Lordships observed as follows:

Section (sic Clause) 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.

31. 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. [(1962) 3 SCR 497 : AIR 1962 SC 256], this Court made the following observations :

The intention of the legislature in enacting sub-section (1) of Section 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 Section 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 Section 104(1) of the Code of Civil Procedure, 1908.

32. Thus, this Court has clearly held that the right to appeal against judgments under the Letters Patent was not affected by the Section 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 Section 104 read with Order 43 Rule 1 of the Code of 1908." Similarly, in Shankarlal Aggarwal's case [(1964) 1 SCR 717 : AIR 1965 SC 507] this Court while construing the provisions of Section 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 Section 104 or Order 43, Rule 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 Section 104 and Order 43, Rule 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 Clause 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.

33. There is yet another aspect of the matter which shows that Section 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 Section 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, Section 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."

It now remains to be shown why the case of Ram Sarup (supra) was overruled. The relevant portion reads as follows:

"38. The Lahore High Court relied on the decision of the Privy Council in Hurrish Chunder Chowdry's case [10 IA 4 : ILR (1883) 9 Cal 482]. The High Court further held that Section 104 does not in any way take away the right of appeal conferred by the Letters Patent of the High Court but merely bars a second appeal from orders passed under Order 43 Rule 1 to Division Bench. A contrary view was taken by the Allahabad High Court in Ram Sarup v. Kaniz Ummehani [ILR 1937 All 386 : AIR 1937 All 165] 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 Chowdry v. Kali Sundari Debia [10 IA 4 : ILR (1883) 9 Cal 482] observed that Section 588, which has 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.... 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.

39. 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 Section 104 was introduced by the code 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 Section 104 applies and there is nothing in the Letters Patent to restrict the application of Section 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 it is in cases of appeals decided by a Single Judge under Section 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 Clause 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.

40. A perusal of the Letters Patent would clearly reveal two essential incidents \026 (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 when the Trial Judge decides an appeal against a judgment or decree passed by the district courts in the mofussil, a further appeal shall only lie 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 Patent extracted above, the contention of the respondent on this score must be overruled.

41. 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. Unfortunately, however, the Allahabad High Court in Ram Sarup's case [ILR 1937 All 386:AIR 1937 All 165] refused to follow a Division Bench decision in Piare Lal v. Madan Lal [AIR 1917 All 325:ILR (1917) 39 All 191] and also tried to explain away the Full Bench decision in Muhammad Naimul Khan case [ILR (1892) 14 All 226: 1892 AWN 14 (FB)] where it is 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 Section 104 is a distinction without any difference"

Much emphasis is sought to be put on the sentence, i.e. "Once Section 104 applies and there is nothing in the Letters Patent to restrict the application of Section 104 to the effect that even if one appeal will lie to the Single Judge, no further appeal will lie to the Division Bench" and it is submitted that the Court was laying down that a further appeal will not lie even if Letters Patent permitted. The sentence cannot be read in isolation. It must be read in the context of all that is stated before it. It is already held that Section 104 read with Order 43 Rule 1 C.P.C. confers additional powers of appeal to a larger Bench within the High Court. When read in context the sentence only means that in case of Orders not covered by Letters Patent a further appeal will not lie. This is also clear from the subsequent sentence that there is nothing else in Letters Patent which permits a further appeal barred by Section 104(2) C.P.C. As set out above, Section 104(2) only bars appeals against Order passed in appeal under the Section. Thus Section 104(2) does not bar appeals permitted by any law in force. Also to be noted that principle in Ram Sarup's case (supra), that Section 104 did not bar a Letters Patent appeal was specifically accepted. It is also accepted that Letters Patent is a special law. However on the wordings of the concerned Letters Patent as noticed, it was held that the Letters Patent did not permit a second appeal. Had the Letters Patent permitted a second appeal, on the ratio laid down earlier, a Letters Patent Appeal would have been held to be maintainable. In our case it is an admitted position that the concerned Letters Patent permits an appeal.

It must also be mentioned that, as set out hereinabove, their Lordships considered the relevant portion of Clause 15 of the Letters Patent which has been extracted in the judgment, but unfortunately another relevant portion of Clause 15 has been missed. If Clause 15 of the Letters Patent of the Bombay High Court is read in its entirety it leaves no manner of doubt that it provides for an appeal to the said High Court from the judgment of one Judge of the said High Court, subject to certain exceptions enumerated therein. The first part of Clause 15 contemplates two types of orders passed by a Single Judge of the High Court against which an appeal shall lie to the High Court \026 First an order of the Single Judge exercising Original Jurisdiction which amounted to judgment; and second, orders of a Single Judge of the High Court exercising appellate jurisdiction subject to the orders specified, which were excepted, such as a

judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, or an order made in the exercise of revisional jurisdiction etc. etc. Clearly, therefore, Clause 15 of the Letters Patent contemplates an appeal against the judgment of a Single Judge of the High Court exercising appellate jurisdiction, provided the judgment appealed against is not one which was preferred against an appellate order, meaning thereby that no Letters Patent Appeal would lie against an order passed by a Single Judge in Second Appeal, or an order passed in revisional jurisdiction, The latter part of Clause 15, however, provides that an appeal shall lie to the High Court from a judgment of the Single Judge in exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal. Thus under Clause 15 a Letters Patent Appeal is competent even against an order passed by the High Court in Second Appeal provided the Judge deciding the case declares that the case is fit for appeal. In substance, therefore, Clause 15 of the Letters Patent of the Bombay High Court provided for an appeal \026 (1) against a judgment of a Single Judge of the High Court ; (2) against a judgment of a Single Judge of the High Court exercising appellate jurisdiction, except in cases where the Single Judge is sitting in Second Appeal or where he exercises the revisional jurisdiction; and (3) judgment of the High Court even if passed in Second Appeal provided the Judge certifies it as fit for appeal to a Division Bench. Since the relevant portion of the Letters Patent was not extracted in the judgment, Their Lordships came to the conclusion set out above viz.:

"40. A perusal of the Letters Patent would clearly reveal that essential incidents \026 (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 Patent extracted above, the contention of the respondent on this score must be overruled."

We are of the opinion that in reaching this conclusion the Court missed the relevant portion of Clause 15 of the Letters Patent of the Bombay High Court. Reliance cannot, therefore, be placed on this judgment for the proposition that under Clause 15 of the Letters Patent of the Bombay High Court no appeal to a Division Bench from the order of the Single Judge in exercise of appellate jurisdiction is maintainable.

Thus the unanimous view of all Courts till 1996 was that Section 104(1) C.P.C. specifically saved Letters Patent Appeals and the bar under 104(2) did not apply to Letters patent Appeals. The view has been that a Letters Patent Appeal cannot be ousted by implication but the right of an Appeal under the Letters Patent can be taken away by an express provision in an

appropriate Legislation. The express provision need not refer to or use the words "Letters Patent" but if on a reading of the provision it is clear that all further Appeals are barred then even a Letters Patent Appeal would be barred.

For the first time in the case of Resham Singh Pyara Singh vs. Abdul Sattar reported in (1996) 1 SCC 49 a contrary view was adopted by a 2 judge bench of this Court. In this case there was an Appeal, before a Single Judge of the High Court, against an order of the City Civil Court granting an interim injunction. The question was whether a Letters Patent Appeal was maintainable against the order of the Single Judge. This Court, without considering any of the other previous authorities of this Court, without giving any reasons whatsoever, did not follow the ratio laid down in Shah Babulal Khimji's case, (which was binding on it) held as follows:

"6. It would, therefore, be clear that when an appeal was filed against the order of the City Civil Court, Bombay to the learned Single Judge under Order 43 Rule 1(r) as provided in sub-section (1) of Section 104 by operation of sub-section (2) of Section 104, no further appeal shall lie from any order passed in appeal under this section. In Khimji case [(1981) 4 SCC 8] the suit was filed on the original side of the High Court and the learned Single Judge on the original side passed an interlocutory order. Against the orders of the learned Single Judge, though it was an interlocutory order, since the appeal would lie to the Division Bench under the Letters Patent, this Court held that against the interlocutory orders passed by the Single Judge, Letters Patent Appeal would be maintainable. That ratio, therefore, is clearly inapplicable to the facts in this case."

Then in the case of New Kenilworth Hotel (P) Ltd. vs. Orissa State Finance Corporation and Ors. reported in (1997) 3 SCC 462 the question, whether a Letters Patent Appeal was maintainable, again arose. In this case a status quo order was passed by the trial Court. In Appeal, a single Judge of the High Court, vacated the Order of status quo. Attention of this Court was drawn to the 3 Judge Bench decision in the case of Shah Babulal Khimji (supra) and to the 2 Judge Bench decision in the case of Resham Singh Pyara Singh (supra). Shah Babulal Khimji's case being a 3 Judge Bench decision would prevail over Resham Singh Pyara Singh's case. It was also a binding decision on this Bench yet surprisingly the Court followed Resham Singh Pyara Singh's case. Of course the other decisions of this Court do not appear to have been brought to the attention of the Court. In this case it was also held that the concerned Order was not covered by Clause 10 of the Letters Patent. The following observations make this clear:

"It would, thus, be seen that clause 10 of the Letters Patent consists of only two parts. In the first part, an appeal shall lie from a judgment of a learned Single Judge to the Division Bench not being a judgment passed in exercise of the appellate jurisdiction or revisional jurisdiction. In other cases, where the learned Single Judge exercises the appellate jurisdiction, if he certifies that it is a fit case for an appeal to the Division Bench. Notwithstanding the prohibition contained in the latter part of clause 10, an appeal would lie."

With greatest of respect to the learned Judges it must be mentioned that it has been omitted to be noticed that the concerned Letters Patent had three limbs as set out in Central

Mine Planning & Design Institute Ltd. vs. Union of India reported in (2001) 2 SCC 588. In this case the three limbs have been noted. It is held as follows:

"8. A close reading of the provision, quoted above, shows that it has three limbs : the first limb specifies the type of judgments of one Judge of the High Court which is appealable in that High Court and the categories of judgments/orders which are excluded from its ambit; the second limb provides that notwithstanding anything provided in the first limb, an appeal shall lie to that High Court from the judgment of one Judge of the High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act (now Article 225 of the Constitution of India), on or after 1-2-1929 passed in exercise of appellate jurisdiction 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 where the Judge who passed the judgment declares that the case is a fit one for appeal; and the third limb says that the right of appeal from other judgments of Judges of the said High Court or such Division Court shall be to "us, our heirs or successors in our or their Privy Council, as hereinafter provided."

Thus it is clear that the cases of Resham Singh Pyara Singh and New Kenilworth Hotel (P) Ltd. lay down wrong law and are overruled.

It must now be noticed that even after the aforementioned two decisions this Court has continued to hold that a Letters Patent Appeal is not affected.

In the case of Vinita M. Khanolkar vs. Pragna M. Pai reported in (1998) 1 SCC 500 an Appeal had been filed against an Order passed under Section 6 of the Specific Relief Act. It was contended that such an Appeal was barred by sub-section (3) of Section 6 of the Specific Relief Act. This Court agreed that Section 6(3) of the Specific Relief Act barred such an Appeal but went on to consider whether Section 6(3) could bar a Letters Patent Appeal. In this context this Court held as follows:

"3. Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under letters patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by learned counsel for the respondents that if clause 15 of the Letters Patent is invoked then the order would be appealable. Consequently, in our view, on the clear language of clause 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by learned Single Judge of the nigh Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed."

The question whether a Letters Patent Appeal was maintainable against the Judgment/Order of a single Judge passed in a First Appeal under Section 140 of the Motor Vehicles Act was considered by this Court in the case of Chandra Kanta Sinha vs. Oriental Insurance Co. Ltd. reported in (2001) 6 SCC 158. In

this case, it was held that such an Appeal was maintainable. It is held that the decision of this Court in the case of New Kenilworth Hotel (P) Ltd. (supra) was inapplicable.

Thereafter in the case of Sharda Devi vs. State of Bihar reported in (2002) 3 SCC 705 the question again arose whether a Letters Patent Appeal was maintainable in view of Section 54 of the Land Acquisition Act. A three Judges Bench of this Court held that a Letters Patent was a Charter under which the High Courts were established and that by virtue of that Charter the High Court got certain powers. It was held that when a Letters Patent grants to the High Court a power of Appeal, against a Judgment of a single Judge, the right to entertain such an Appeal does not get excluded unless the statutory enactment excludes an Appeal under the Letters Patent. It was held that as Section 54 of the Land Acquisition Act did not bar a Letters Patent Appeal such an Appeal was maintainable. At this stage it must be clarified that during arguments, relying on the sentence "The powers given to a High Court under the Letters patent are akin to the constitutional powers of a High Court" in para 9 of this Judgment it had been suggested that a Letters Patent had the same status as the Constitution of India. In our view these observations merely lay down that the powers given to a High Court are the powers with which that High Court is constituted. These observations do not put Letters Patent on par with the Constitution of India.

In the case of Subal Paul vs. Maline Paul reported in (2003) 10 SCC 361, the question was whether a Letters Patent Appeal was maintainable against an Order passed by a single Judge of the High Court in an Appeal under Section 299 of the Succession Act, 1925. It was held that an Appeal under Section 299 was permitted by virtue of Section 299 and not under Section 104 C.P.C. Section 299 of the Indian Succession Act, 1925 reads as follows:

"299. Appeals from orders of District Judge.\027 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 (5 of 1908), applicable to appeals."

Thus Section 299 permitted an Appeal to the High Court in accordance with the provision of CPC. That provision was Section 104. The Order passed by the Single Judge was an Order under Section 104. The further Appeal was under Letters Patent only. Section 299 of the Indian Succession Act did not permit it. The Letters Patent Appeal was saved/permitted by the words "any other law for the time being in force" in Section 104(1). It was thus held that Clause 15 of the Letters Patent permitted a right of Appeal against Order/Judgment passed under any Act unless the same was expressly excluded. It was held that the bar under Section 104 (2) would not apply if an Appeal was provided in any other law for the time being in force. Thus this authority also recognizes that an appeal permitted by "any other law for the time being in force" will not be hit by Section 104(2).

Thus, the consensus of judicial opinion has been that Section 104(1) Civil Procedure Code expressly saves a Letters Patent Appeal. At this stage it would be appropriate to analyze Section 104 C.P.C. Sub-section (1) of Section 104 CPC provides for an appeal from the orders enumerated under sub-section (1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by any law for the time being in force. Sub-section (1) therefore contemplates three types of orders from which appeals

are provided namely,
1) orders enumerated in sub-section (1).
2) appeals otherwise expressly provided in the body of the Code
and
3) appeals provided by any law for the time being force. It is not disputed that an appeal provided under the Letters Patent of the High Court is an appeal provided by a law for the time being in force.
As such an appeal is expressly saved by Section 104(1).
Sub-clause 2 cannot apply to such an appeal. Section 104 has to be read as a whole. Merely reading sub-clause (2) by ignoring the saving clause in sub-section (1) would lead to a conflict between the two sub-clauses. Read as a whole and on well established principles of interpretation it is clear that sub-clause (2) can only apply to appeals not saved by sub-clause (1) of Section 104. The finality provided by sub-clause (2) only attaches to Orders passed in Appeal under Section 104, i.e., those Orders against which an Appeal under "any other law for the time being in force" is not permitted. Section 104(2) would not thus bar a Letters Patent Appeal. Effect must also be given to Legislative intent of introducing Section 4 C.P.C. and the words "by any law for the time being in force" in Section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent. As Appeals under "any other law for the time being in force" undeniably include a Letters Patent Appeal, such appeals are now specifically saved. Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in sub-clause (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a Letters Patent Appeal. However when Section 104(1) specifically saves a Letters Patent Appeal then the only way such an appeal could be excluded is by express mention in 104(2) that a Letters Patent Appeal is also prohibited. It is for this reason that Section 4 of the Civil Procedure Code provides as follows:

"4. Savings.- (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 rent of agricultural land from the produce of such land."
As stated hereinabove, a specific exclusion may be clear from the words of a statue even though no specific reference is made to Letters Patent. But where there is an express saving in the statute/section itself, then general words to the effect that "an appeal would not lie" or "Order will be final" are not sufficient. In such cases, i.e., where there is an express saving, there must be an express exclusion. Sub-clause (2) of Section 104 does not provide for any express exclusion. In this context reference may be made to Section 100A. The present Section 100A was amended in 2002. The earlier Section 100A, introduced in 1976, reads as follows:
"100A. No further appeal in certain cases.-
Notwithstanding anything contained in any 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."

It is thus to be seen that when the Legislature wanted to exclude a Letters Patent Appeal it specifically did so. The words used in Section 100A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the Legislature knew that in the absence of such words a Letters Patent Appeal would not be barred. The Legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 in the C.P.C. Thus now a specific exclusion was provided. After 2002, Section 100A reads as follows:

"100A. No further appeal in certain cases.- Notwithstanding anything contained in any 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 original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

To be noted that here again the Legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100A no Letters Patent Appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100A nor Section 104(2) barred a Letters Patent Appeal.

Applying the above principle to the facts of this case, the appeal under Clause 15 of the Letters Patent is an appeal provided by a law for the time being in force. Therefore, the finality contemplated by Sub-section (2) of Section 104 did not attach to an Appeal passed under such law.

It was next submitted that Clause 44 of the Letters Patent showed that Letters Patent were subject to amendment and alteration. It was submitted that this showed that a Letters Patent was a subordinate or subservient piece of law. Undoubtedly, Clause 44 permits amendment or alteration of Letters Patent but then which legislation is not subject to amendment or alteration. CPC is also subject to amendments and alterations. In fact it has been amended on a number of occasions. The only unalterable provisions are the basic structure of our Constitution. Merely because there is a provision for amendment does not mean that, in the absence of an amendment or a contrary provision, the Letters Patent is to be ignored. To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters Patent. As has been held in Vinita Khanolkar’s case (supra) and Sharda Devi’s case a Letters Patent is the Charter of the High Court. As held in Shah Babulal Khimji’s case (supra) a Letters Patent is the specific law under which a High Court derives its powers. It is not any subordinate piece of legislation. As set out in aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the concerned High Court. Civil Procedure Code is a general law applicable to all Courts. It is well settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see

no conflict between Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 C.P.C. only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100A.

It was also sought to be argued that if such be the interpretation of Section 104 CPC, it may create an anomalous situation and may result in discrimination in as much as an appeal under the Letters Patent will be available against an order passed by the High Court on its original side, whereas such an appeal will not be available in a case where the order is passed by the High Court in its appellate jurisdiction. A similar argument was urged before this Court in South Asia Industries (P) Ltd. (supra) but the same was repelled in the following words:-

"The arguments that a combined reading of cls. 10 and 11 of the Letters Patent leads to the conclusion that even the first part of cl.10 deals only with appeals from Courts subordinate to the High Court has no force. As we have pointed out earlier, cl.11 contemplates conferment of appellate jurisdiction on the High Court by an appropriate Legislature against orders of a Tribunal. Far from detracting from the generality of the words "judgment by one Judge of the said High Court", cl. 11 indicates that the said judgment takes in one passed by a single Judge in an appeal against the order of a Tribunal. It is said, with some force, that if this construction be accepted there will be an anomaly, namely that in a case where a single Judge of the High Court passed a judgment in exercise of his appellate jurisdiction in respect of a decree made by a Court subordinate to the High Court, a further appeal to that Court will not lie unless the said Judge declares that the case is a fit one for appeal, whereas, if in exercise of his second appellate jurisdiction, he passed a judgment in an appeal against the order of a Tribunal, no such declaration is necessary for taking the matter on further appeal to the said High Court. If the express intention of the Legislature is clear, it is not permissible to speculate on the possible reasons that actuated the Legislature to make a distinction between the two classes of cases. It may, for ought we know, the Legislature thought fit to impose a limitation in a case where 3 Courts gave a decision, whereas it did not think fit to impose a limitation in a case where only one Court gave a decision".

We find ourselves in respectful agreement with the reasoning of this Court in the aforesaid decision. The same reasoning would apply in respect of the submission that if it is held that Section 104(2) did not bar a Letters Patent Appeal an anomalous situation would arise in as much as if the matter were to come to the High Court a further Appeal would be permitted but if it went to the District Court a further Appeal would not lie. An Appeal is a creature of a Statute. If a Statute permits an Appeal, it will lie. If a Statute does not permit an Appeal, it will not lie. Thus for example in cases under the Land Acquisition

Act, Guardian and Wards Act and the Succession Act a further Appeal is permitted whilst under the Arbitration Act a further Appeal is barred. Thus different statutes have differing provisions in respect of Appeals. There is nothing anomalous in that. A District Court cannot be compared to a High Court which has special powers by virtue of Letters Patent. The District Court does not get a right to entertain a further Appeal as it does not have "any law for the time being in force" which permits such an Appeal. In any event we find no provisions which permit a larger Bench of the District Court to sit in Appeal against an order passed by a smaller Bench of that Court. Yet in the High Court even, under Section 104 read with Order 43 Rule 1 C.P.C., a larger Bench can sit in Appeal against an order of a Single Judge. Section 104 itself contemplates different rights of Appeals. Appeals saved by Section 104(1) can be filed. Those not saved will be barred by Section 104(2). We see nothing anomalous in such a situation. Consequently the plea of discrimination urged before us must be rejected.

Under these circumstances, the Order of the High Court cannot be sustained. It is hereby set aside. The appeals are accordingly allowed with no order as to costs. The matters are remitted back to the High Court for decision on merits.