

MANU/BH/0136/1965

Equivalent Citation: AIR1965Pat472

**IN THE HIGH COURT OF PATNA  
FULL BENCH**

Letter Patent Appeal No. 111 of 1959

Decided On: 16.02.1965

Appellants:**Asho Devi**

**Vs.**

Respondent:**Dukhi Sao and Ors.**

**Hon'ble Judges/Coram:**

*R.L. Narasimham , C.J., R.K. Choudhary and Udai Sinha , JJ.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Lalnarain Sinha, M.M. Gajadhar, Harilal Agarwal and Phanindra Kumar Sinha, Advs.*

*For Respondents/Defendant: R.S. Chatterji, Devendra Prasad Sharma, Ramdeo Prasad Singh and Pradvamna Narain Singh, Advs.*

**JUDGMENT**

**R.L. Narasimham, C.J.**

**1.** This is an appeal by the plaintiff against the judgment of a single judge of this Court reversing the judgment of the third Subordinate Judge, Patna, and dismissing the plaintiff's suit for recovery of a certain sum said to have been due to her from the defendant in full payment of the price of goods (grains) supplied together with interest and other charges The defendant's plea was one of complete denial of the so-called purchase of grains from the plaintiff There was no documentary evidence, such as voucher signed by the defendant, to prove the plaintiff's claim and the plaintiff relied solely on. the oral evidence of her brother. P. W. 2. corroborated by the evidence of two other witnesses, namely, P. Ws. 1 and 3 The trial court was inclined to believe these witnesses, but the learned single Judge on appeal held that the plaintiff's version was highly improbable specially in view of the serious discrepancies in the evidence of the witnesses and the absence of any documentary evidence in support of the supply of grains by the plaintiff to the defendant. He was also inclined to accept the defendant's claim that there was a transaction of sale between the parties and that a sale deed was executed and registered by the defendant, though the entire consideration money was not paid Apparently, the suggestion seems to have been that the plaintiff brought the suit with a view to escape liability for payment of the balance of the consideration money due on the sale deed.

**2.** Mr. Lalnarain Sinha, for the appellant, wanted to canvass in this court also the finding of fact, namely, the belief or otherwise of the plaintiff's evidence of sale of the grains to the defendant. He was, however, confronted with the decision of a Division Bench of this Court (Mahapatra and Tarkeshwar Nath, JJ.) in Ramsarup Singh v. Muneshwar Singh, MANU/BH/0021/1964 : AIR 1964 Pat 76, where it was held on a construction of Clause 10 of the Patna Letters Patent that in an appeal

against the first appellate judgment of a single Judge the restrictions imposed by Section 100 C. P. C. would apply and that the Division Bench will not be justified in interfering with mere findings of fact. Mr. Sinha, however, invited our attention to a subsequent Bench decision (Misra and G.N. Prasad. JJ.) in *Jugal Kishore Bhadani v. Union of India*, 1965 BLJR 24: (MANU/BH/0055/1965 : AIR 1965 Pat 196), where the aforesaid view was not followed on the ground that it was in the nature of an obiter dictum. That Division Bench was of the view that in the absence of any restrictive words in Clause 10 of the Letters Patent, a Division Bench hearing an appeal from the first appellate judgment of a single judge of this Court was entitled to go into facts. There is a later (unreported) judgment of Mahapatra and A.B.N. Sinha, JJ. in *Nilkanth Mahton v. Munshi Singh*, L. P. A. Nos. 134 of 1958 and 3 of 1959. D/-7-10-1964: (Now reported in MANU/BH/0038/1965 : AIR 1965 Pat 141), in which the Bench reiterated the view taken in AIR 1984 Pat 76, and held that the said view was not an obiter dictum. In view of this sharp conflict between two Division Benches of this Court as to the scope of an appeal from the first appellate judgment of a single Judge, I thought it advisable to refer the entire appeal to a Full Bench consisting of three Judges. We are indeed grateful to Counsel for both sides for having given us their valuable assistance in deciding this somewhat difficult question, which is the main question for consideration before the Full Bench.

**3.** Clause 10 of the Patna Letters Patent (omitting immaterial portions) refers to three classes of appeals that may be heard by a Division Bench: (1) appeals from the judgment of a single Judge in exercise of his original jurisdiction; (2) appeals from the judgment of a single Judge in first appeals; and (3) appeals from the judgment of a single Judge in second appeals. The said clause does not give an indication as to whether the scope of an appeal in respect of the aforesaid three classes will be the same, the only restriction being that an appeal from a second appellate judgment of a single Judge will not lie unless he certifies that it is a fit case for appeal. It is true that ordinarily the same words occurring in a statute, specially in the same clause or section, must be given the same meaning unless there is repugnancy in the subject or context, but it is also well settled that however wide the language of a statutory provision may be, some restricted meaning may have to be given to the statutory expression in the light of the context. To quote the classic words of Viscount Simonds in the House of Lords case in *Attorney General v. Prince Ernest Augustus of Hanover*, 1957 AC 486 at page 461:

"For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the, same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can by those and other legitimate means, discern the statute was intended to remedy".

Thus, both the textual context and what may be compendiously called historical context will have to be taken into consideration in arriving at a correct conclusion regarding the true scope of the expression "appeal" (its colour and content) occurring in Clause 10 of the Letters Patent.

**4.** The Patna Letters Patent were granted by the Crown in 1916 and the clauses are almost identical with the clauses of the Letters Patent granted to the three High Courts of Calcutta, Madras and Bombay in 1865 in pursuance of the well-known

Charter Act of 1861 (24 and 25 Victoria, Chapter 104). The relevant clause is Clause 15 which prior to the amendment made in 1928 was as follows:

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, 1915, 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 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) or of such Division Court, when ever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the judges of the said High Court at the time being; but that the right of appeal from other judgments of the 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".

It will be noticed that in the unamended Clause 15 (corresponding to Clause 10 of the Patna Letters Patent) there was no provision for a single Judge granting a certificate of fitness for an appeal against his judgment delivered in exercise of his second appellate jurisdiction. On the other hand, the clause merely provided for an appeal from the judgment of one of the Judges of the High Court which would ordinarily include all the three classes of appeals mentioned above without any restriction whatsoever. But the Civil Procedure Code of 1859 (Chapter VIII) was in force at that time and only two classes of appeals were provided in that Code. First appeals were provided in Section 332 (known as regular appeals) and second appeals (described as special appeals) were provided in Section 372 (Chapter X). The language of Section 372 of the Code of Civil Procedure of 1859 is very similar to the language of Section 100 of the Code of Civil Procedure (1908) and restricted special appeals (Second appeals) to questions of law only. The second appellate Court refined to in Section 372 is the Sudder Court which was in existence prior to the constitution of High Courts under the Charter Act. The Letters Patent also refers to the Code of Civil Procedure (see Clause 37). One of the main objects of the Charter Act of 1861 was to abolish the Supreme Court and the court of Sudder Dewani Adalat and to vest in the High Courts constituted under the Charter Act the powers and authorities of those Courts.

In the famous despatch of the then Secretary of State Sir Charles Wood dated the 14th May, 1862, the provisions of the Letters Patent were clearly explained and I may quote paragraphs 22 and 23 of his despatch:

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

It will appear from a subsequent clause in the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India".

A scrutiny of the aforesaid paragraphs of the despatch shows that Clause 15 of the Letters Patent implemented the recommendation of the Law Commission and provided for (1) appellate jurisdiction of the High Court in all matters which were till then exercised by the Sudder Dewani Adalat and (2) a new appellate jurisdiction in civil cases against a judgment passed in exercise of original jurisdiction. It is also clear that the proceedings in the High Court were intended to be regulated by the provisions of the Code of Civil Procedure. There can be no doubt that the despatch of the Secretary of State may be looked into in construing the provisions of the Letters Patent (See Sir Lawrence Jenkins' observation in Upendra Nath Bose v. Bindeshri Prasad, AIR 1916 Cal 843 at p. 848). Thus if the provisions of the unamended Clause 15 of the Letters Patent be carefully construed in the light of the provisions of the Code of Civil Procedure of 1859 then in force and the object with which the High Courts were constituted under the Charter Act, the reasonable inference is that the expression appeal mentioned in Clause 15 was intended to include (1) all classes of appellate jurisdiction till then exercised by the Sudder Dewani Adalat and (2) a new appellate jurisdiction against judgment delivered in exercise of original jurisdiction.

I have already shown that the appellate jurisdiction of the Sudder Dewani Adalat was limited to questions of law when they were exercising second appellate jurisdiction (Section 372). Hence, as pointed out in the despatch of the Secretary of State, when all the appellate jurisdiction then exercised by the Sudder Dewani Adalat was transferred to the High Court by Clause 15, the inference is that when the High Court exercised the second appellate jurisdiction it was subject to the restrictions imposed by Section 372. It is immaterial as to whether the second appeal arose from the first appellate judgment of a court "subordinate" to the High Court or from the judgment of single Judge of a court. When Section 372 was inserted in the Code of 1859, the intention obviously was that finality should be given to findings of facts of the first appellate court even though that court may be a court "subordinate" to the High Court, such as the Court of the Subordinate Judge or District Judge. It is difficult to appreciate how a different policy or principle was intended when Clause 15 was inserted in the Letters Patent so far as the right of appeal from the first appellate judgment of a single Judge was concerned. The author of the Letters Patent could not possibly have intended to place the judgment of a single Judge of the High Court in a more vulnerable position than that of a subordinate court.

**5.** The Patna Letters Patent were granted in 1916. The Civil Procedure Code of 1908 was then in force and it was well-known to the author of the Letters Patent (His Majesty) that by virtue of Section 100 of the Code of Civil Procedure an appeal to the High Court even from the judgment of a subordinate court exercising appellate powers was limited to questions of law only. With that knowledge when no distinction was expressly made in Clause 10 of the Patna Letters Patent between the scope of appeals from first appellate judgments of a single judge and from second appellate judgments of a single Judge, the reasonable inference should be that the exercise of jurisdiction in respect of such classes of appeals would be regulated by the provisions of the Code of Civil Procedure, namely, by the provision of Section 100 C. P. C.

**6.** In 1928 the Letters Patent of all the High Courts were amended in the light of the recommendation of the Civil Justice Committee of 1925 and a provision was made requiring the grant of a certificate of fitness by a single Judge before his second appellate judgment could be taken on appeal before a larger Bench of the same High Court, See Pollock. J.'s observation in Madhukar Trimbaklal v. Shri Sati Godawari Opasani Maharaj, MANU/NA/0008/1939 : AIR 1940 Nag 39 (F.B.). But apart from the

requirement about a certificate of fitness from the single Judge concerned, there was no distinction either before the amendment or after the amendment of 1928 in the exercise of jurisdiction by the appellate court in respect of appeals from first appeals and appeals from second appeals. If there was no such distinction prior to the amendment of 1928, it is difficult to imagine how could there be any distinction subsequently specially as the provisions of the Code of Civil Procedure dealing with the subject remain intact.

**7.** Section 117 of the Code of Civil Procedure expressly makes the provisions of the Code applicable to High Courts. Hence Sections 100 and 101 would become applicable to appeals heard by the High Courts. Hence when Section 117 is read with Sections 100 and 101 of the Code of Civil Procedure, the result would be that where the High Court exercises its jurisdiction as a second appellate Court (in the numerical sense) its jurisdiction should be exercised only in the manner indicated in Sections 100 and 101 of the Civil Procedures Code.

Mr. Sinha placed reliance on Section 4(1) of the Code of Civil Procedure which says that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect the jurisdiction or power conferred by any special or local law. There is no doubt that Section 4 of the Code of Civil Procedure should also be taken into consideration in construing the scope and extent of the expression "appeal" occurring in Clause 10 of the Letters Patent. But as the said clause is entirely silent as to how the appellate jurisdiction should be exercised in all classes of appeals and the other provisions of the Letters Patent show that the exercise of jurisdiction is intended to be regulated by the provisions of the Code of Civil Procedure as expressly provided in Section 117 C. P. C., the reasonable view is that so far as exercise of second appellate jurisdiction is concerned, Sections 100 and 101 must be taken to be "specific provisions to the contrary" within the meaning of Section 4(1) of the Code of Civil Procedure. If it was intended that Sections 100 and 101 should not apply when the High Courts exercise second appellate jurisdiction under Clause 10 of the Letters Patent, an express provision on the lines of Sub-section 3 of Section 98 of the Code of Civil Procedure would have been inserted in Section 100 itself.

**8.** There was some argument as to whether Section 101 of the Code of Civil Procedure is an independent provision or else whether it is meant to assert emphatically in a prohibitive form the main principles laid down in Section 100 of the Code of Civil Procedure in an enabling form. Mr. Sinha urged that inasmuch as Section 100 of the Code in express terms refers to appeals from appellate judgments passed by a court subordinate to the High Court and as a single Judge of a High Court is not a subordinate court to a Division Bench of the same High Court, Section 100 in forms cannot apply to appeals heard by the Division Bench against the first appellate judgment of a single Judge. He further urged that the same restriction will apply in construing Section 101 of the Code of Civil Procedure also.

In my opinion, it is not necessary to decide whether Section 101 of the Code of Civil Procedure is an independent provision and wider in scope than Section 100. The insertion of a separate section and limiting the reference to Section 100 to "ground" only in Section 101 seem to indicate that it is an independent provision which is meant to apply to all classes of second appeals whether against the appellate judgment of a court subordinate to the High Court or other classes of second appeals (in the numerical sense) as provided in special or local laws subject of course to the paramount consideration that there is no express provision to the contrary in such

special or local laws. But even if Section 101 of the Code of Civil Procedure is taken as not wider in its scope than Section 100 of the Code, nevertheless by virtue of Section 117 of the Code, both these Sections must be held to apply mutatis mutandis to second appeals referred to in Clause 10 of the Letters Patent.

9. Mr. Sinha then cited the case of *Hurrish Chunder Chowdry v. Kali Sundari Debia* 10 Ind App 4 (PC), where their Lordships of the Judicial Committee while construing Section 588 of the Code of Civil Procedure of 1877 (corresponding to Section 104 of the Code of Civil Procedure) said that the provisions of this section do not apply to appeals from one of the Judges of the High Court to the Full Court. After this decision was given there were several decisions of the various High Courts on Section 104 of the Code of Civil Procedure but the matter is now concluded by the decision of their Lordships of the Privy Council in *Mt. Sabitri Thakrains v. Savi*, MANU/PR/0008/1921 : AIR 1921 PC 80 where they pointed out the amendment made to Section 104 in view of the decisions of the various High Courts and further expressed themselves in the following terms:--

"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.

These observations were made while construing Section 104 in the light of Section 117 of the Code of Civil Procedure. They show that though jurisdiction is conferred by Clause 10 of the Letters Patent, the exercise of jurisdiction under the said clause will be regulated by the provisions of the Civil Procedure Code. Sections 100 and 101 of the Code of Civil Procedure should be held to be similarly regulating the manner in which second appellate jurisdiction must be exercised by the High Court under the Letters Patent. Mr. Sinha, however, contended with considerable ingenuity that inasmuch as Sections 100 and 101 completely shut out appeals on facts, to that extent they, *protanto*, oust the jurisdiction of the second appellate Court and hence they cannot appeal in construing Clause 10 of the Letters Patent because the jurisdiction conferred by that clause cannot be taken away except by express statutory provision. There is, however, a fundamental distinction between a statutory provision which merely regulates or restricts exercise of powers on the one hand and a statutory provision which in the guise of such regulation or restriction practically annihilates the power. Here also if it could be reasonably held that by virtue of the restrictive provision of Section 100 of the Code of Civil Procedure the power of a second appellate Court is rendered practically nugatory, there may be some force in the contention of Mr. Sinha. But the restriction of the exercise of second appellate jurisdiction to questions of law only is a well-known feature of the civil procedure in India which has been continuing from 1859 even prior to the establishment of the High Courts. When with that knowledge the authors of the Letters Patent did not expressly say in the appropriate clause that the provisions of Section 100 of the Code of Civil Procedure shall not apply to second appeals from appellate judgment of a single Judge, the reasonable view would be that the said provision is only in the nature of regulating or restricting the exercise of the jurisdiction by the appellate Court and not taking away the jurisdiction altogether.

The following observations of their Lordships in AIR 1921 PC 80, may be cited in this connection:--

"The High Court order as to security for costs is not a limit on the right to

appeal, nor does it take the right to appeal away, but it is a rule of procedure now applicable to the appeal under the Letters Patent under the words 'any law for the time being in force' which are contained in Section 104"

In a later Full Bench decision of the Allahabad High Court in *Mt. Abhilakhi v. Sada Nand*, AIR 1931 AH 244 the aforesaid decision of the Privy Council was followed and it was held that by virtue of Section 117 the provisions of the Code of Civil Procedure would apply to the High Courts in exercise of their appellate civil jurisdiction in Letters Patent Appeals. It is true that their Lordships differed on some other point, but that does not affect the principle under discussion here.

**10.** The point under discussion before this Full Bench does not appear to have been fully considered in any of the previous decisions. Mr. Sinha referred to the case of *Umarao Chund v. Bindraban Chand* 1LR 17 All 475, but there 'context' in which the expression "appeal" in Clause 10 of the Letters Patent should be construed was not discussed. The same comments apply to the case of *Bawa Singh v. Jagdish Chand*, AIR 1960 Punj 573, and to the other decisions referred to in the dissentient judgment of my learned brother, Sinha. J.

**11.** In the view which I have expressed above, I would hold that the decision of the Division Bench of this Court in MANU/BH/0021/1964 : AIR 1964 Pat 76, lays down the correct law regarding the scope of an appeal from the first appellate judgment of a single judge and that the view taken by another Division Bench of this Court in, 1965 BLJR 24: (MANU/BH/0055/1965 : AIR 1965 Pat 196), regarding the scope of such appeals is, speaking with great respect, too wide

**12.** For these reasons the finding of fact by the learned single Judge, though it is a judgment of reversal, must be taken as binding on us. The plaintiff's case depended entirely on the oral evidence of her witnesses and the learned single Judge for the reasons given in his judgment refused to believe them specially as there was no documentary evidence in support of the same. The only point of law that could possibly be urged is that the learned single Judge's discussion of the evidence adduced by the defendants was somewhat unsatisfactory. But though he has not discussed the evidence of the defendants' witnesses at such great length as he had done while discussing the plaintiff's evidence, nevertheless he has given reasons to show why he was preferring the defendants' evidence. Merely because the discussion of this portion of the evidence is not exhaustive, it cannot be said that any error of law arises which would justify our interference in second appeal.

**13.** In the result, I would affirm the judgment of the learned single Judge and dismiss the appeal with costs.

**R.K. Choudhary, J. (Concurring)**

**14.** I agree with Hon'ble C. J.

Letters Patent Appeal No. 111 of 1959.

**Udai Sinha, J. (Dissenting)**

**15.** I have considered the judgment prepared by My Lord the Chief Justice, to which my learned brother Choudhary, J. has concurred, but I regret that on the question of law which has arisen in this appeal, I have come to a contrary conclusion. The course of this litigation has been mentioned by my Lord the Chief Justice and it is not

necessary for me to repeat it. I will deal with the question of law raised, first, and for the reasons given in that context, I shall deal with the appeal as a whole for its disposal.

**16.** The question of law has arisen because of the conflicting views recently expressed in three decisions of this Court, upon the interpretation of the scope of an appeal under Clause 10 of the Letters Patent of this Court, from the judgment of a learned single Judge of this Court, deciding an appeal from an original decree. In the case reported in MANU/BH/0021/1964 : AIR 1964 Pat 76, a Division Bench of this Court has held that the scope of such an appeal will be in the nature of a second appeal, under the Code of Civil Procedure, where findings of fact cannot be re-opened. In the case reported in 1965 BLJR 24: (MANU/BH/0055/1965 : AIR 1965 Pa 196), another Division Bench of this Court has held disagreeing with the first decision, that all questions are at large in the Letters Patent appeal from a judgment passed by a learned single Judge in a first appeal. In a third decision, namely Letters Patent Appeal No. 134 of 1958 and analogous. D/- 7-10-1964: (MANU/BH/0038/1965 : AIR 1965 Pat 141), the first view expressed in Ramsarup Singh's case, MANU/BH/0021/1964 : AIR 1964 Pat 76, has been reiterated. Thus, this appeal has been referred to this Bench for decision.

**17.** The contention raised on behalf of the plaintiff appellant is that all matters decided by the learned single Judge are open for reconsideration by this Bench, whereas it is argued on behalf of the respondents that, this Letters Patent appeal can be only on the grounds mentioned in Section 100 of the Code of Civil Procedure. Reliance is placed on behalf of the respondents on Section 101 of the Code, which states:

"No second appeal shall lie except on the grounds mentioned in Section 100".

Having heard learned counsel for the parties, it appears to me, that the argument of the counsel for the appellant ought to prevail and that this Bench is entitled to review the entire evidence on record to ascertain whether the judgment of the learned single Judge is correct or not. So far as Clause 10 of the Letters Patent of this Court is concerned, there is no indication as to the powers of a Letters Patent Bench hearing an appeal from a first appeal, and it is urged on behalf of the respondents that the power of the Bench is restricted by Sections 100 and 101 of the Code of Civil Procedure, read with Sections 108 and 117. According to the counsel for the respondents this appeal is in the nature of a second appeal in the High Court and, therefore, the limitations mentioned in Section 100 Sub-section (1) will apply and the scope of this appeal is thereby necessarily restricted. I am, however, of the opinion that Sections 100 and 101 of the Code cannot be made applicable in the case of a Letters Patent appeal from the judgment of the learned single Judge of this Court, deciding a first appeal.

No doubt Section 117 of the Code has made, applicable the provisions of the Code of Civil Procedure to this Court, except for the saving clause mentioned in that section, but I do not find any implication in Section 117, which restricts the scope of this appeal, in terms of Section 100. It may be that the Code of Civil Procedure applies to the High Court even in deciding appeals under Clause 10 of the Letters Patent, but that cannot mean that every section of the Code applies to this appeal, irrespective of the purport and the wordings of that particular section. It appears to me that Sections 100 and 101 are part of the same scheme and unless Section 100 applies in terms,

Section 101 cannot apply. Section 100 applies to appeals to the High Court from decrees passed in appeals by courts subordinate to the High Court. A Single Judge deciding a first appeal may be a Court immediately below the Court hearing a Letters Patent appeal, but he is not a Court subordinate to the High Court, as has been said by their Lordships of the Supreme Court, in the case of *Ladhi Parshad v. Karnal Distillery Co. Ltd.* reported in MANU/SC/0061/1962 : AIR 1963 SC 1279, in order to make the restrictions of Sections 100 and 101 applicable to this appeal under the Letters Patent, the words of Section 100 will have to be read as if it covers an appeal to the High Court from a judgment passed in a first appeal by a single Judge of the High Court. This alteration, in my opinion, will amount to legislation, and not to a mere interpretation of the section for the purpose of making it applicable to a Letters Patent appeal from a first appeal.

If a Letters Patent appeal from a first appeal, decided by a single Judge of this Court, is taken to be a second appeal within the meaning of Section 101 of the Code of Civil Procedure, then there does not appear to be any provision with respect to the scope of a Letters Patent Appeal from a judgment of a single Judge made in exercise of the appellate jurisdiction. If the restrictions of Sections 100 and 101 have to be made applicable to a Letters Patent appeal from a second appeal then, sec. 101 will have to be read as, "No third appeal shall lie except on the grounds mentioned in Section 100". Therefore. the conclusion ought to be that Sections 100 and 101 apply only to appeals to the High Court from decrees passed in appeals by any court subordinate to the High Court, it may be that the Letters Patent of this Court came after the Civil Procedure Codes were enacted, but neither there is any conflict between Sections 100 and 101 of the Code of Civil Procedure and Clause 10 of the Letters Patent, nor is there any ambiguity in the Letters Patent on the question under consideration. I may not be understood to hold that in "intra-Court" Letters Patent appeals from second appeals, Sections 100 and 101 have no bearing. They have, and the Letters Patent Bench has, to scrutinise whether the judgment of the single Judge passed in second appeal is right or wrong, in view of Section UK), which applied to him. It may not be out of place to mention that the expression "judgment" in Clause 10 of the Letters Patent of this Court has a well- established meaning, in the sense of a decision which affects the merits to the questions between the parties by determining some right or liability and Clause 10 of the Letters Patent governs appeals from judgments of a single Judge exercising original jurisdiction as well as from judgments in exercise of the appellate jurisdiction. In my opinion. Mm scope of a Letters Patent appeal from the judgment of a single Judge exercising original jurisdiction and that from a judgment in exercise of the appellate jurisdiction must be the same and there is no contra indication in Section 117 of the Code of Civil Procedure. I do not find any indication in Section 108 to the contrary either.

An appeal ought to mean removal of a cause from an inferior to a superior court for testing the soundness of the decision appealed against and I do not see why the powers of a Letters Patent Bench hearing an appeal from a first appeal should be restricted to the grounds mentioned in Section 100, merely because numerically it is a second appeal, From the decisions referred to before as, it appears that a similar point had arisen as early as in 1895, in the case reported in ILR 17 All 475. It was held that in an appeal from the judgment of the single Judge of the High Court under the Letters Patent, the appellate Bench was entitled to consider the entire evidence in the case. The following observation may be usefully quoted:--

"It was also suggested although the point was not pressed, that in this Letters Patent Appeal we were bound by the findings of fact of our brother

Knox and that the appeal before us could not be dealt with in the same way in which a first appeal to this Court might be dealt with. That contention would place an appeal under Section 10 of the Letters Patent in the same position as an appeal to which Chapter XLII of Act No XIV of 1882 applies. Chapter XLII limits the right of appeal from a decree passed in appeal by a court subordinate to the High Court, and only applies when the appeal is one from a decree passed in appeal by a court subordinate to the High Court. The appeal to this High Court having been a first appeal, and not an appeal to which Chapter XLII of Act No. XIV of 1882 applies the parties to the appeal are entitled to question not only the law, but the findings of fact of the Judge of this court from whose judgment or decree this appeal has been brought under Section 10 of our Letters Patent. It would be otherwise if the appeal to this court had been an appeal to which chapter XLII of Act No. XIV of 1882 applied. Then the Bench sitting in the Letters Patent Appeal would be bound by the same rule which bound the single Judge from whose decree or order the appeal was brought. We hold that an appeal lay from the judgment or order of our brother Knox, and that the parties were entitled to have this Bench consider not only the Law, but the evidence in the Case".

Chapter XLII dealt with appeals from appellate decree and Sections 100 and 101 of the present Code of Civil Procedure correspond (with a slight variation in Section 100) to Section 584 of Chapter XLII of Act XIV of 1882. Chapter XLI dealt with first appeals.

It has been said in AIR 1910 Cal 843 (FB), that all points necessary to be investigated for determination of the question of correctness of the decree appealed against were open for consideration in a Letters Patent Appeal from the first appellate decree. In Upendra Nath's case, AIR 1916 Cal 843 (FB), Mullick and Stephen, JJ., hearing a first appeal had differed in their conclusions, with the result that the decree of the trial court was confirmed in accordance with Clause 36 of the Letters Patent of the Calcutta High Court as it then was. Thereupon, there was an appeal under Clause 15 of the Letters Patent and the appeal was allowed on merit. Questions of fact were allowed to be agitated and certain facts found were not disturbed, because the trial court and both the learned Judges of the Division Bench had come to concurrent conclusions and not because the facts could not have been investigated in the Letters Patent Appeal.

A similar case was decided by the Bombay High Court in the case of Velji Bhimsey Co. v. Bachoo Bhaidas, reported in, MANU/MH/0032/1924 : AIR 1925 Bom 118. A suit having been dismissed by Mr. Justice Mulla, the two Judges of the appellate Court had differed on appeal and a Letters Patent Appeal was filed under Clause 15 of the Letters Patent. The appeal was dealt with on merit and as a matter of fact, the respondent's cross-objection was allowed and a decree for damages for Rs 100 in favour of the plaintiff was increased to Rs. 300 by the Letters Patent Bench. A decision of the Madras High Court in the case of M. Parama Sivan Pillai v. Ramasami Chettiar, reported in MANU/TN/0014/1933 : AIR 1933 Mad 570 (FB), is also in point. There was an appeal in the High Court against an order appointing a receiver. It was held by the learned single Judge that the court below had no power to appoint a receiver. There was an appeal under the Letters Patent and the order of the learned single Judge was set aside on the ground that a simple mortgagee was not disentitled to obtain the appointment of a receiver, merely on the ground that no personal remedy subsists, to proceed against the other properties of the mortgagor, if other circumstances justify such an appointment. But, as a matter of fact, the appeal was

disposed of on merit also. Ramesam, J., stated at page 575 thus:--

Where interest is allowed to accumulate into heavy arrears, and the security became inadequate thereby 1 should say that such a case may be a fit one for the appointment of a receiver. Again where a defendant mortgagor or a purchaser from him undertakes to pay the interest during the pendency of the suit and until the property is brought to sale, the appointment of a receiver ought to be refused. But where a person in the position of defendant 3 in this case has not paid any amount for several years towards the mortgage debt and where, as has been found by the Subordinate Judge and Pandalai, J., there are no merits in favour of the appellant, that would be a fit case for the appointment of a Receiver". Anantakrishna Ayyar. J., in his judgment stated thus:--

"As the learned Judge has agreed with the Subordinate Judge on merits that, if the Court has jurisdiction in this matter, the order appointing receiver was justified by the circumstances, it follows that the Letters Patent Appeal must be allowed and the decision of the Subordinate Judge restored with all costs in the High Court".

Cornish. J., stated thus:

"It is admitted that the present case is a proper one for a receiver to be appointed and I think that the Court had power to make the appointment".

Thus, the appointment of receiver was approved by the Letters Patent Bench on merit. It may be stated at this place that this decision has been noticed by the Supreme Court, in the case of Union of India v. Mohindra Supply Co., reported in AIR 1962 SC 250, with approval, although on the question of a right of appeal under the Letters Patent.

In the Full Bench decision of the Nagpur High Court, reported in MANU/NA/0008/1939 : AIR 1940 Nag 39 (FB), there is a dictum to the effect that the right of appeal from a decree of the single Judge of the High Court is not governed by Section 96 or Section 100 or Section 104 of the Code of Civil Procedure, but by Clause 10 of the Letters Patent. It appears to me that if the right of appeal is governed by the Letters Patent the limitations of Section 100 cannot be imported in an appeal from a first appeal, unless there is any definite pointer to that effect either in the Letters Patent or in the Civil Procedure Code. There is none in the Letters Patent and I do not find any such indication in the Code. Before going to the next decision cited before us, I may state Unit this Full Bench decision of the Nagpur High Court was approved in the case of Ramji Singh v. Mt. Chhulghhana Kuer, reported in AIR 1958 Pal 655 (FB), upon the question that had arisen in the Full Bench of this Court. It may not be out of place to mention in this context that in Ramji Singh's case, MANU/BH/0208/1958 : AIR 1958 Pat 655 (FB), the case of Ram Sarup v. Mt. Kaniz Ummehani, reported in MANU/UP/0056/1936 : AIR 1937 All 165 was also approved, and the Letters Patent Appeal of the Allahabad High Court was disposed of on merit and not as if it were governed by Sections 100 and 101 of the Code of Civil Procedure. The matter that had gone to the Letters Patent Bench on appeal was from an order passed by a single Judge on appeal from an order.

In the case of Bholabhai v. Rattan Chand, reported in AIR 1958 Punj 260, it was held that there was no rule of law by which a Letters Patent Bench was debarred from examining and reversing a finding on question of fact given by the single Judge. Apparently, the view of the Punjab High Court has been consistent--vide the case

reported in AIR 1960 Punj 573. A point similar to the one that has arisen in the instant case had also arisen in the case of Venkataramayya v. Kesavanarayana, reported in MANU/AP/0188/1963. It was held therein that there was no rule of law that any finding of fact arrived at by a single Judge of the High Court in a first appeal cannot be reopened in an appeal under the Letters Patent. It was held that an appeal under the Letters Patent is in the nature of re-hearing of the appeal. Therefore, it appears to me that the Letters Patent Bench hearing the appeal in 1965 BLJR 24: (MANU/BH/0055/1965 : AIR 1965 Pat 196), was entitled to enter into the facts of the case and decide all the matters that had been agitated before the learned single Judge in the first appeal. In substance, my view is that the Letters Patent Bench hearing an appeal from the judgment of a learned single Judge can do what the learned Judge himself could have done, and, therefore, all matters are at large before this Bench.

**18.** On the evidence on record, however, I am of the opinion that the judgment of the, learned single Judge in this case was a correct one and no case for interference has been made out. The entire oral evidence adduced by the plaintiff has been reviewed and disbelieved and the learned counsel for the plaintiff has failed to show why the evidence adduced on behalf of the plaintiff should be accepted, in spite of serious infirmities in the evidence. According to the evidence of Halkhori Singh (P. W. 1), the defendant had purchased Masuri from the plaintiff's shop in his presence, 100 bags had been weighed before him. But, in cross examination, it was elicited that more than 200 bags of Masuri were sold to the defendant and weighed before him. These two statements are irreconcilable. This witness had reached the plaintiff's shop when the sun was about to set and he returned after half an hour. According to Ram Saran Singh (P. W. 2), brother of the plaintiff, the weighing of the grains purchased by the defendant began at about 11 a.m. Matukdhari Singh (P. W. 3) had seen the weighing of the Masuri when he was passing by the plaintiff's shop, and according to him, he had gone there at 3 p. m. All these contradictions must lead to one and only one conclusion, and that is to the effect that the plaintiff has failed to prove by cogent and reliable evidence the sale on which the plaintiff's case is based.

It may be noticed that all that is mentioned in the plaint is that the defendant had purchased grains (worth more than Rs. 7,000) on Paus Badi 4, 1356 Fasli. It is difficult to hold that if Masuri worth that amount of money had been sold, the plaintiff would have mentioned only grains and not the actual grains sold. P. W. 2 has stated in his cross-examination that the plaint had been drafted on his instructions and he had told the lawyer that Masuri was sold and at what rate it had been sold. If these were true, then no lawyer would have omitted to mention that Masuri had been sold. The rate at which Masuri is said to have been sold is also not mentioned in the plaint. The plaintiff's case, made out in court is, therefore highly improbable. P. W. 1 has stated that he was not the plaintiff's servant or Karpardaz and it was not a fact that in this suit he had given the Vakalatnama to the plaintiff's lawyer on plaintiff's behalf. This evidence is untrue. On the plaintiff's Vakalatnama there is an endorsement to the effect that the plaintiff's pleader had received this Vakalatnama through Halkhori Singh, Karpardaz of the plaintiff. There is not the slightest doubt in my mind that this Halkhori Singh is plaintiff's witness No. 1 examined in this case. P. W. 3 did not remember any detail about his own transactions and it is difficult to accept his evidence regarding the sale by the plaintiff to the defendant. It was elicited from P. W. 3 in cross-examination that he had seen the defendant purchasing grains from the plaintiff on another occasion, but the witness did not remember the year of that transaction. It is, therefore, difficult to accept the evidence of P. W. 3 regarding the transaction which is the basis of this suit.

Learned counsel for the appellant has made out a grievance regarding the comment made by the learned single Judge to the effect that the Yaddasht brought in the Court by P. W. 2 was not filed in this case. It is contended that this comment was not justified. This aspect of the matter is really academic, if the evidence of the plaintiff's witnesses is disbelieved on merit, and in connection with the Yaddasht, I find, that the evidence given by P. W. 2 regarding part payments, after refreshing his memory from this document, does not tally with the details mentioned in paragraph 4 of the plaint. According to the plaint, Rs. 500 had been paid on Magh Sudi 6, 1357 Fasli, whereas P. W. 2 has deposed that Rs. 500 had been paid on the 2nd Kagun, 1357 Fasli. Then, according to the plaint, Rs. 50.15.0 had been paid on Kagun Sudi 11, 1357 Fasli, whereas the evidence of P. W. 2 is that Rs. 58.15.0 had been paid on the 26th Fagun. P. W. 2 has deposed that Rs. 10 had been paid on the 21st Magh. There does not appear to be any specific reference to this payment in paragraph 4 of the plaint, although somehow or other the total has been shown as Rs. 1638-9-0. The Yaddasht story must be entirely untrue. It is clear therefore, that no fact has been established by the evidence adduced by the plaintiff.

Learned counsel for the appellant has urged that the oral evidence adduced by the defendant had not been scrutinised and if that evidence is rejected as false, then it will lend support to the plaintiff's case of sale. It is difficult to hold that this is such a case that rejection of the defendant's case, based on some sale deeds relied upon by him can lead to any inference in support of the truth of the plaintiff's case. The plaintiff's case must succeed on the evidence adduced on her behalf or not at all. and in my opinion, the plaintiff has failed to show that the judgment under appeal is erroneous.

**19.** For the reasons given above, the appeal is dismissed with costs.

### **ORDER**

**20.** The opinion of the majority is that a better Patent Appeal from the first appellate judgment of a single Judge is controlled by the provisions of Section 100 of the Code of Civil Procedure. Unanimously it was decided that the appeal should be dismissed with costs.

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