FULL BENCH

*Before R. S. Narula C.J., Gurnam Singh and Harbans Lal, JJ.*

BHAGWAN SINGH—*Appellant.*

*versus*

SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR—*Respondent.*

First Appeal from the Order No. 191 of 1974

October 3, 1977.

*Sikh Gurdwaras Act (VIII of 1925)—Sections 7, 8, 12, 14(1) and 34—Code of Civil Procedure (V of 1908)—Order 6 Rule 17 and Order 41 Rule 22—Failure of petitioner to allege and plead his status as a hereditary office holder—Amendment of the petition to plead such status—Whether can be allowed—Preliminary order allowing such amendment—Whether appealable under section 34—Such order—Whether can be challenged in appeal against the final order—Final order—Whether can be supported on the ground that the preliminary order was incorrect.*

*Held* that if there are absolutely no averments in a particular petition in relation to the hereditary office which may be proved by the petitioner in evidence, such a petition will be incompetent in its inception and amendment may not be allowed. However, if, foundation is laid in the petition, but some lacuna is left inadvertently or due to any reason, the Tribunal will certainly have the jurisdiction to allow the petition to make a better statement and to make good the lacuna. It is one thing to say that the Tribunal does not have the jurisdiction at all to allow amendment under any circumstances but quite another to say that the Tribunal has the jurisdiction to allow amendment under Order 6 rule 17 of the Code, but the discretion should be exercised in a judicial manner keeping in view the peculiar facts and circumstances of each case.

(Para 11)

*Held* that there is no right inherent in any one to prefer an appeal against a judicial decision. A right of appeal is created by a statute and is circumscribed by the limits laid down in the relevant provision creating the right. The plain language of section 34(1) of the Sikh Gurdwaras Act, 1925 shows that an appeal under that provision would lie only against "the final order" passed by the Tribunal determining "any matter.....under the provisions of the Act". An

order passed by the Tribunal allowing amendment of a petition is not a "final order" within the meaning of section 34(1). The decision to permit amendment or not to do so is one under the Code of Civil Procedure as applied to the proceedings under the Act. It is a mere procedural matter and does not by itself decide the real matter in controversy between the parties. Thus, no appeal lies under section 34(1) of the Act against an order allowing an amendment and, therefore, sub-section (2) of Section 34 does not create any bar to a challenge being made against such order in the appeal against the final order.

(Paras 15 and 18)

*Held* that it is open to a respondent to challenge the findings of the Tribunal on preliminary issues under the first part of sub-rule (1) of rule 22 of Order 41 of the Code and that nothing contained in section 34 of the Act militates against the same.

(Para 25)

*Case referred by Hon'ble Mr. Justice Harbans Lal and Hon'ble Mr. Justice Gurnam Singh to a Full Bench for deciding important questions of law involved in the case vide order dated January 17, 1977. The Full Bench consisting of Hon'ble the Chief Justice Mr. R. S. Narula, Hon'ble Mr. Justice Gurnam Singh and Hon'ble Mr. Justice Htrbans Lal decided the question of law and returned the case to the Division Bench on October 3, 1977.*

*First Appeal from the order of the court of the Sikh Gurdwaras Tribunal, Punjab, Chandigarh, dated the 17th July, 1974, whereby the petition of the petitioner-appellant under section 8 of the Sikh Gurdwaras Act, 1925, was dismissed.*

T. S. Mangat, Advocate, *for the appellant.*

Narinder Singh, Advocate, *for the respondent.*

JUDGMENT

*R. S. Narula, C. J.*

(1) Section 7(1) of the Sikh Gurdwaras Act, 1925 (Punjab Act No. VIII of 1925 as amended up to date), hereinafter called the Act, provides *inter alia* that any fifty or more eligible Sikh worshippers of a gurdwara may forward a petition to the State Government praying to have the gurdwara declared to be a Sikh Gurdwara. Sub-section (2) of section 7 prescribe the contents of such a petition and of

the lists to be appended thereto. Section 7(3) enjoins on the State Government the duty to notify the petition with its accompanying list by publication of the same and also give such other notice thereof as may be prescribed. Sub-section (4) of that section requires the State Government to send by registered post a notice of the claim to any right, title or interest included in the list to each of the persons named in the list as being in possession of such right, title or interest. The publication of the notice under sub-section (3) furnishes statutory conclusive proof of compliance with the requirements of sub-sections (1) to (4) of section 7 by operation of sub-section (5) thereof.

(2) The notification under section 7(3) of the Act in respect of the gurdwara known as Dharamshala Bhai Bir Singh, Patiala, was issued by the Punjab Government and published in the official gazette of the State on December 22, 1961. Section 8 of the Act provides *inter alia* that when such a notification [notification under sub-section (3) of section 7] is published in respect of any gurdwara, any hereditary office-holder of the gurdwara may forward a petition to the State Government (which must reach the Secretary to the Government within ninety days from the date of the publication of the notification) claiming that the gurdwara is not a Sikh Gurdwara; and may in such petition make a further claim that the hereditary office-holder may be restored to office on the ground that such gurdwara is not a Sikh Gurdwara.

(3) On the publication of the notification under section 7(3) of the Act dated December 22, 1961, the petitioner-appellant (hereinafter referred to as the appellant) filed a petition dated February 3, 1962, under section 8 of the Act wherein he claimed that "Dharamshala Bhai Bir Singh" was neither a gurdwara nor a Sikh institution and that some of the property mentioned in the notification belongs to the Dharmshala Bhai Bir Singh and the remaining is the private property of the appellant who is the *mahant* of the Dharamshala. The appellant made no averment in his petition regarding his being an hereditary office-holder. In fact, he did not say anything in the petition in that regard beyond making the averment at several places that he is "the *mahant* of the Dharamshala".

(4) In pursuance of the provisions of section 14(1) of the Act requiring the State Government to forward all petitions received by it under the provisions of sections 8 and 10 (amonvst some other sections) to the Sikh Gurdwaras Tribunal constituted under section 12 of the Act (hereinafter called the Tribunal), the State Government

forwarded the appellant's petition under section 8 to the Tribunal with the State Government's forwarding letter dated February 2, 1963. Sub-section (2) of section 14 provides that the forwarding of the petition by the State Government is conclusive proof that the petition was received by the Government within the prescribed time. In exercise of the powers conferred on the Tribunal under section 15(1) of the Act, the Tribunal allowed the Shiromani Gurdwara Parbandhak Committee, Amritsar (hereinafter called the respondent) to become a party to the proceedings before the Tribunal to contest the petition. While contesting the petition, the respondent in its initial written statement dated 20th July, 1964 took up a preliminary objection to the following effect:—

> "According to section 8 it is only a hereditary office-holder who can file a petition. The petitioner does not claim any such status; on the other hand, he claims to be an office-holder only. Hence his petition merits dismissal on this short ground only, as he is not a hereditary office-holder."

The above mentioned objection gave rise to the issues—"(i) Is the petition maintainable in its present form and (ii) is the petitioner an hereditary office-holder ?" These issues and the third one to the effect (iii) whether the institution in dispute is a Sikh Gurdwara or not were framed on July 29, 1964. The first two issues were treated as preliminary and the case was adjourned for the appellant's evidence on those issues to September 8, 1964. On the date fixed for evidence, i.e. on September 8, 1964, the appellant made an application under Order 6 rule 17 of the Code of Civil Procedure for leave to amend the claim petition so as to add at the end of original paragraph 13 of his petition, the following passage:—

> "The Dharamshala and its properties have come to the petitioner from his Guru Sumand Singh who in his turn got it through inheritance from his Guru. The petitioner is a hereditary office-holder and as such is entitled to make this petition."

In its writen reply to the application contesting the same, the respondent took up the following preliminary objection:—

> "That the Tribunal is not a court which can take petitions directly. It is a court which is to dispose of petitions

forwarded to it for disposal. The original petition as framed is silent on the point of *locus standi*. According to law, therefore, the petition merits dismissal. Amendment if permitted shall deprive the respondent of a valuable right vested in it. Such an amendment is therefore forbidden according to authorities under 0.6 R. 17 of C.P.C. even if the Tribunal be of the view that provisions of C.P.C. apply. In this case the omission by the petitioner to claim this position appears to be intentional and not accidental. The appointment of *mahants* has been in the hands of Patiala ruler through Deohri Mohalla etc. The Deohri Mohalla had been in managing possession of this Gurdwara for several years. The amendment therefore, may not be allowed."

In paragraph 5 of the written reply, the respondent further stated:—

"The point in dispute is not necessary for the adjudication of this petition. Absence of claiming as a hereditary office-holder warrants dismissal of the petition. Amendment would be setting up of totally new case for the first time by depriving the respondent of its vested right."

Notwithstanding the contest, the Tribunal allowed the amendment by its order dated September 14, 1964, on payment of Rs. 32 as costs. In reply to the amended petition, a preliminary objection was again taken up by the respondent in its written statement dated September 29, 1964, in the following words:—

The petition does not contain any mention of the custom prevalent in the Gurdwara. He is, therefore, not a hereditary office-holder. The petition merits dismissal because of petitioner's failure to give details of custom. The Gurdwara has been in actual management of Deohri Mohalla and they have appointed *mahants*."

That led to the framing of the following issue in place of the original issue No. 1 in addition to the issues Nos. 2 and 3 which had already been framed in the first instance:—

"Whether the petitioner can maintain the petition as a hereditary office-holder without alleging any custom about the mode of succession ?"

Since no evidence was required on the newly-framed first issue, it was ordered to be treated as preliminary and October 14, 1964, was fixed for arguments on it. On that day (October 14, 1964) the appellant filed another application for amendment of his petition. Therein he sought to introduce the following passage at the end of the already amended paragraph 13 of his petition:—

> "The mode of succession to the Dharamsala and its properties is from Guru to Chela. The petitioner Mahant Bhagwan Singh succeeded to the Dharamsala and its properties from his Guru Sumand Singh who in turn succeeded to the same from his Guru Punjab Singh who in turn succeeded to the same from his Guru Prem Singh who succeeded to the same from his Guru Guru Bhup Singh who succeeded to the same from his Guru Sukha Singh so on and so forth."

That application was also opposed by the respondent but was allowed by the order of the Tribunal dated October 28, 1964, on payment of Rs 50 as costs. In reply to the second amended petition, a fresh written statement was filed by the respondent, against contesting the petition. The third application for amendment of the petition moved by the appellant and the proceedings in respect thereof are not relevant for our purposes.

(5) The preliminary issue "Whether the petitioner can maintain the petition as a hereditary office-holder without alleging any custom about the mode of succession ?" was disposed of by the order of the Tribunal dated November 23, 1964.

(6) On behalf of the respondent, it was contended that an assertion *simpliciter* about the petitioner being an hereditary office-holder is not sufficient to merit an adjudication on the question whether a gurdwara notified under section 7(3) of the Act is or is not a Sikh Gurdwara and that the Tribunal has jurisdiction to enter upon an inquiry into the issue only if the petitioner claims the hereditary office by virtue of some prevailing custom. On behalf of the appellant and others similarly situated (since a composite order was written by the Tribunal in a group of cases involving the same preliminary point), it was argued that a petition cannot be thrown out merely on the ground that no custom of succession is pleaded therein by the person who claims to be the hereditary office-holder. The

Tribunal (Shamsher Bahadur, J., President, and Shri Gurcharan Singh Member) decided the abovementioned preliminary issue in its order dated November 23, 1964, in favour of the appellant and held in the following words that his petition is clearly maintainable:—

> "It cannot follow as a matter of inference that succession on basis of hereditary right involves a question of custom which must be specifically pleaded. It may be observed that the proceedings under the Sikh Gurdwaras Act are not in the nature of *quo warranto* against the holders of offices, but the primary questions to be determined are those relating to the title or properties attached to the institution popularly understood as "historic Gurdwaras" as in section 3 of the Act and for adjudicating the nature of an institution under section 8 whether, it is in fact a Sikh Gurdwara or not. For an enquiry under section 8, it would be unnecessary to determine fully the title of the present office-holders who may present petitions under the Act. All that is required to find out is that they hold *prima facie* qualifications of having acquired the office either on some recognised principle of succession or by nomination by the office-holder."

By now it is the common case of both sides that the abovementioned decision of the Tribunal on the preliminary issue was erroneous and that the converse of that proposition is correct in view of the binding judgment of the Full Bench of this Court (Dhillon, Harbans Lal and S. P. Goyal, JJ. in *Mahant Budh Das and Mahant Purna Nand* v. *Shiromani Gurdwara Parbandhak Committee* (1) to which detailed reference is hereinafter made.

(7) Both sides are further agreed before us that if the law laid down by the Full Bench were to be applied to the case before us, there is no doubt that the appellant not having even claimed in the original petition submitted by him to the State Government (which was forwarded to the Tribunal) hereditary office-holder, the petition could not be allowed to be amended so as to add that plea without which the petition disclosed no cause of action, but the right of the respondent to invoke the judgment of the Full Bench in the present case would depend on the answers which we return to the questions referred to us. The remaining facts leading to the framing of those

(1) F.A.O. 52 of 1966 decided on 3rd June, 1977.
I.L.R. 1977 (ii) Page 819.

questions and the making of this reference may first be surveyed. After deciding the preliminary issue about the maintainability of the petition by its order dated November 23, 1964, the Tribunal (Gurdev Singh, J. President, and Sarvshri Joginder Singh Rekhi and Amrit Lal Bahri, Members) recorded the evidence of the parties on the remaining issues and decided the same by its final order dated July 17, 1974. It was held by Shri Amrit Lal Bahri that the appellant was proved to be an hereditary office-holder but the institution was proved to be a Sikh Gurdwara and, therefore, the appellant's petition was liable to be dismissed. Shri Joginder Singh Rekhi, the other Member of the Tribunal, did not express his opinion on the question whether the appellant was or was not a hereditary office-holder but agreed with Shri Amrit Lal Bahri that the institution was proved to be a Sikh Gurdwara and also, therefore, agreed that the petition of the appellant was liable to dismissal. Gurdev Singh, J. the then President of the Tribunal, decided both the issues and held that the appellant had failed to prove himself to be a hereditary office-holder and the institution was proved to be a Sikh Gurdwara. Consequently the petition of the appellant was dismissed. Not satisfied with the judgment and decree of the Tribunal, the appellant has come up to this Court in appeal under section 34 of the Act. At the hearing of the appeal before the Division Bench (Gurnam Singh and Harbans Lal, JJ.), it was contended on behalf of the appellant that he had proved himself to be a hereditary office-holder and that the institution was not a Sikh Gurdwara. On behalf of the respondent, not only the unanimous finding of all the three Members about the institution being a Sikh Gurdwara was sought to be supported but was in addition contended that the finding of the Tribunal dated November 23, 1964, on issue No. 1 (the preliminary issue) was incorrect. On the second question the appellant raised preliminary objections to the effect that the respondent having neither filed any appeal against the orders of the Tribunal allowing the amendment of his claim petition nor having perferred any appeal against the decision of the Tribunal dated November 23, 1964, on the preliminary issue, section 34(2) of the Act was an absolute bar to the contention now sought to be raised by the respondent on those counts. It was argued on behalf of the respondent that the claim petition submitted by the appellant under section 8 of the Act not having contained any averment about the appellant being a hereditary office-holder and the appellant having failed to allege any custom regarding the mode of succession despite

the petition having been allowed to be amended twice, the finding of the Tribunal on issue No. 1 (the preliminary issue) about the petition being maintainable was liable to be reversed. This led to the framing of the following three questions by the Division Bench for reference to the Full Bench:—

(1) Whether the Sikh Gurdwara Tribunal was competent and had the jurisdiction to allow the amendment of the petitioner by its two orders, dated September 14, 1964 and October 14, (should be 28), 1964, thereby enabling the petitioner-appellant to allege and plead his status as a hereditary office-holder, the custom and the mode of succession in that behalf;

(2) Whether it is open to the respondent to challenge the correctness of the orders of the Tribunal, dated September 14, 1964, and October 14 (should be 28, 1964), allowing the amendment of the petition in the present appeal against the final order of the Tribunal dismissing the petition under section 8 of the Act, when the aforesaid orders were not challenged by the respondent under section 34 of the Act; and

(3) Whether it is open to the respondent to challenge the finding of the Tribunal on issue No. 1, regarding custom as embodied in its order dated November 23, 1964, in favour of the petitioner-appellant as no appeal was filed against the said order under section 34 of the Act."

These are the circumstances in which this case has come up before us for answering the above-quoted three questions.

(8) So far as the first question is concerned, it admittedly stands answered and concluded by the judgment of the Full Bench in the case of *Mahant Budh Dass and Mahant Purna Nand* (1) (supra). The relevant facts of that case may be noticed at this stage. In response to a notification under section 7(3) of the Act, Mahant Jiwan Mukta Nand filed a composite petition under sections 8 and 10 of the Act with the State Government which was forwarded to the Tribunal. The respondent to whom the notice of the petition was issued, contested it, *inter alia,* on the ground: (i) that the Mahant was not the hereditary office-holder and had no *locus standi* to file the petition; and (ii) that the Gurdwara was a Sikh Gurdwara. As soon as

issue about the Mahant being or not being a hereditary office-holder was framed, he (his legal representative) made an application for amendment of his petition so as to incorporate therein that the Mahant was a hereditary office-holder and as such was entitled to put in the claim under sections 8 and 10. The amendment was allowed by the Tribunal. Two issues were thereafter framed, the first relating to the maintainability of the petition and the second about the Mahant being or not being a hereditary office-holder. The Tribunal decided both the issues in favour of the Mahant. On the main issue framed earlier about the nature of the institution, the Tribunal, however, held that the Gurdwara was a Sikh Gurdwara and consequently dismissed the petition. F.A.O. 52 of 1966 was filed by the Mahant against that judgment. The appeal was originally heard by a Division Bench of two Judges who could not come to an agreement on some of the preliminary matters. On the difference of opinion between them on the three questions [namely: (i) whether the Tribunal has the jurisdiction to allow amendment of the petition; (ii) whether the petition originally filed contained necessary pleas, as required by section 8 of the Act; and (iii) whether the institution was a Sikh Gurdwara or not], the matter was referred to a Full Bench of Dhillon,Harbans Lal and Goyal, JJ. Before the Full Bench it was argued on behalf of the Mahant as below:—

> ".....it is not necessary to specifically allege and plead in the petition under section 8 of the Act by the objector in reply to the notification under section 7(3) of the Act that the petitioner was a hereditary office-holder and that succession to the institution was by inheritance under custom and also as to what the custom was. It was further stressed that in the present case, necessary averments as required under section 8 of the Act had been made in the petition. It was also urged that even if some lacuna or defect had been left, the same had been made good by amending the petition under Order VI rule 17 of the Code, that the provisions of the Code including Order VI rule 17, were applicable to the proceedings before the Tribunal and that the learned Tribunal was fully competent and had the jurisdiction to allow the amendment. Consequently, the order allowing the amendment of the present petition was perfectly in accordance with law."

(9) On the other hand, it was argued on behalf of the respondent (Shiromani Gurdwara Parbandhak Committee) on the above-mentioned point that—

> "..... the petition under section 8 of the Act could be filed only by one of the two categories of persons, namely, either any hereditary office-holder or any twenty or more worshippers of Gurdwara each of whom is more than 21 years of the age and was at the commencement of this Act, a resident of a Police Station area in which the Gurdwara is situated. If the petitioner or the petitioners do not belong to either of these two categories, the petition will be incompetent and will be no petition in the eye of law. It was also stressed that the Tribunal has the jurisdiction to decide the petition which is competent and valid under section 8 of the Act and as such, the Tribunal has no jurisdiction to allow any amendment of the petition as originally submitted under section 8 of the Act. It was further argued that though under sub-section (9) and (11) of section 12 of the Act, the provisions of the Code were applicable, yet the same were subject to the provisions of the Act. A combined reading of section 8 and 12 of the Act clearly leads to the conclusion that the provision regarding amendment of the petition was not available to the Tribunal and thus the order of the Tribunal allowing amendment of the petition in the present case cannot be sustained. On facts, it was contended that necessary averments had not been made in the original petition and the same was incompetent and should have been thrown out on this ground alone and this being the position, the Tribunal could not go into the remaining question as to whether it was a Sikh Gurdwara or not."

After hearing the parties, the Full Bench gave its decision on the various points to the following effect:—

> "..... the Tribunal while deciding the petition on merits, has the jurisdiction and competence to decide the questions as to whether the petition had been properly made by the hereditary office-holder or that the petitioners were, in fact, hereditary office-holders or not.
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> * * * * *
>
> So far as the petition under section 8 of the Act by the hereditary office-holder is concerned, it has been the consistent

view of the Lahore High Court and this Court that the necessary allegations and averments which may constitute the cause of action or may be relevant for establishing the *locus standi* of the petitioner have to be pleaded in the petition."

(10) Thereafter the Full Bench referred to the earlier judgments of the High Court (*Sunder Singh and others* v. *Mahant Narain Das and others*, (2) *Arjan Singh and another* v. *Harbhajan Das and others*, (3), *Basant Singh* v. *Kartar Singh and others* (4) and *Hari Kishan* v. *The Shiromani Gurdwara Parbandhak Committee*, (5) and concluded as below :—

"In our considered opinion, this is the correct position of law. Unless the petitioner makes the necessary averments in his petition regarding his *locus standi* and competence to file the petition as envisaged under section 8, the petition cannot be heard on merits."

On behalf of the Mahant, reliance was sought to be placed on the judgment of a Division Bench of this Court in (*Shiromani Gurdwara Parbandhak Committee* v. *Dharam Dass* (6). The contention of the Mahant based on *Dharam Dass's case* was disposed of by the Full Bench in the following language:—

"In our opinion, the decision in *Dharam Dass's case* (supra), inasmuch as it has held that it is not necessary to allege in the petition the facts to show that the petitioner was a hereditary office-holder does not lay down good law. If it were held otherwise, then the petition under section 8 will be competent by even a stranger though he may have nothing to do with the institution as an office-holder. We fail to understand as to how the petitioner under section 8 will be entitled to lead evidence to prove that he is a hereditary office-holder of the institution concerned

(2) A.I.R. 1934 Lahore 920.
(3) A.I.R. 1937 Lahore 280.
(4) A.I.R. 1936 Lahore 213
(5) A.I.R. 1976 Pb. and Haryana 130.
(6) F.A.O. 177 of 1963 decided on 8th January, 1970.

unless he has laid the foundation in the petition by pleading the necessary facts. The law is well settled that a party cannot be allowed to go beyond his pleadings and that evidence though adduced and brought on the record outside the pleadings cannot be looked into for any purpose."

(11) The Full Bench made it clear that so long as a petition warrants the construction that the petitioner has pleaded that he was a hereditary office-holder, the petition has to be held to be competent and maintainable but if from the averments in the petition it cannot be spelt out that the petitioner was a hereditary office-holder, such a petition is not maintainable as, in fact, it is no petition in the eye of law. The Bench held—

"if there are absolutely no averments in a particular petition in relation to the hereditary office which may be proved by the petitioner in evidence, such a petition will be incompetent in its inception and amendment may not be allowed. However, if foundation is laid in the petition, but some lacuna is left inadvertently or due to any reason, the Tribunal will certainly have the jurisdiction to allow the petitioner to make a better statement and to make good the lacuna. It is one thing to say that the Tribunal does not have the jurisdiction at all to allow amendment under any circumstances but quite another to say that the Tribunal has the jurisdiction to allow amendment under Order VI rule 17 of the Code, but the discretion should be exercised in a judicial manner keeping in view the peculiar facts and circumstances of each case."

Thereafter the Full Bench went into the actual pleadings of the parties in that case and held that what had been originally stated by the Mahant in his petition amounted to an averment to the effect that he was a hereditary officer-holder, with which finding based on the facts of that case, we are not concerned.

(12) The learned counsel for the appellant neither would nor did contend that the original petition filed by the appellant in the case before us could, in any manner be considered to imply that the appellant was a hereditary office-holder.

(13) Not only are we bound by the decision of the Full Bench on the first question but we are also in full agreement therewith. Consequently, we answer the first question in the negative, i.e., in favour of the respondent and against the appellant.

(14) On the second question about the entitlement of the respondent to question the validity or legality of the orders of the Tribunal allowing amendments of the petition, the main argument of the appellant is that the orders allowing amendment were appealable under sub-section (1) of section 34 of the Act and no such appeal having been preferred there against, the questioning of the validity thereof is now expressly barred by the mandatory provision of sub-section (2) of section 34. Section 34 reads as under :

> "34. (1) Any party aggrieved by a final order passed by tribunal determining any matter decided by it under the provisions of this Act may, within ninety days of the date of such order, appeal to the High Court.
>
> (2) No appeal or application for revision shall lie against an order of a tribunal except as provided for in sub-section (1).
>
> (3) An appeal preferred under the provision of this section shall be heard by a Division Court of the High Court."

This submission of the appellant immediately leads to two questions, namely, (i) whether the order allowing amendment of the petition is appealable under section 34(1) of the Act; (ii) if so, does sub-section (2) of section 34 create any such bar as is contended by the appellant. It is the common case of both sides that no appeal was preferred by the respondent against any of the orders permitting the appellant to amend his petition.

(15) There is no right inherent in any one to prefer an appeal against a judicial decision. A right of appeal is created by a statute and is circumscribed by the limits laid down in the relevant provision creating the right. The plain language of section 34(1) shows that an appeal under that provision would lie only against "the final order" passed by the Tribunal determining "any matter.....under the provisions of this Act". We have first to see whether an order allowing amendment of a petition is a "final order" within the meaning of section 34(1) or not. The basic authority wherein the correct interpretation and true construction of the expression "final order" was

determined is the judgment of the Privy Council in *V. M. Abdul Rahman and others* v. *D. K. Cassim and Sons and another*, (7). It was held by their Lordships [while construing the expression "final order" as occurring in section 109(a) of the Code of Civil Procedure at that time] that the test of finality is whether the order finally disposes of the rights of the parties. It was held that where the order does not finally dispose of those rights but leaves them to be determined by the Courts in the ordinary way the order is not final. Their Lordships further observed that the mere fact that the order goes to the root of the suit, namely, the jurisdiction of the Court to entertain it, does not make it a final order and that finality must be a finality in relation to the suit. It was clarified that if after the order the suit is still a live suit in which the rights of the parties have still to be determined it cannot be called a final order. Practically to the same effect was the decision of the Full Bench of the Allahabad High Court in *Savitri Devi* v. *Rajul Devi and others*, (8). The expression "final order" occurring in Article 133(1) of the Constitution of India was being construed by the Allahabad High Court in *Savitri Devi's* case. The dictum of the Privy Council in V. M. Abdul Rahman's case (supra) was made the basis of the judgment by the Full Bench. Their Lordships laid down the following tests for determining whether a judgment would be final or not for purposes of conferring the right of certificate under Article 133(1) of the Constitution from a High Court :—

(i) It should terminate the proceedings in the High Court.

(ii) It should determine the rights and liabilities of the parties.

(iii) The determination of the rights and liabilities should be on merits and should further be final and conclusive so as to cover the entire range of substantive rights and liabilities which formed the subject-matter of the real controversy in the suit.

Pronouncement was also made by the Federal Court on this subject in *Mohammad Amin Brothers Ltd. and others* v. *The Dominion of India and others*, (9). This Court held to the same effect in *Kuldip*

(7) A.I.R. 1933 Privy Council 58.

(8) A.I.R. 1961 Allahabad 245.

(9) A.I.R. (37) 1950 Federal Court 77.

*Singh* v. *Maqbul Kaur*, (10). The law on the subject has been finally laid at rest by their Lordships of the Supreme Court in *M/s. Jethanand and Sons* v. *State of Uttar Pradesh*, (11). The expression "final" occurring in Article 133(1) of the Constitution was being construed by their Lordships of the Supreme Court. The ratio of the judgment of the Privy Council on the point in *V. M. Abdul Rahman's* case was approved by the Supreme Court. Their Lordships made it clear that if after the order the civil proceeding still remains to be tried and the rights in dispute between the parties have to be determined, the order is not a final order within the meaning of Article 133.

(16) The appellant has placed reliance on the Division Bench judgment of this Court in *Hari Ram* v. *Niranjan Lal etc.*, (12). The question that cropped up for decision before the learned Judges was whether an order allowing or dissallowing an amendment of pleadings does or does not amount to a "case decided" within the meaning of section 115 of Code of Civil Procedure so as to permit a revision of such an order under that section. The Division Bench answered the question in the affirmative and held that an order allowing or disallowing an amendment of pleadings amounts to a "case decided" and is revisable by the High Court under section 115 of the Code. We have not been able to appreciate as to what assistance the appellant can draw from the dictum of the Division Bench in *Hari Ram's case*. The expression "case decided" does not occur in section 34(1) of the Act. In order to determine whether a particular order is or is not appealable under section 34(1) we cannot import expressions or phrases which do not occur in the provision and interpret the same in the light of such non-existent phrases.

(17) The learned counsel for the appellant then referred to the judgment of the Supreme Court in *Shanti Kumar R. Canji* v. *The Home Insurance Co. of New York*. (13). Their Lordships were dealing in that case with the meaning of the word "judgment" contained in clause 15 of the Letters Patent of the Bombay High Court (corresponding to clause 10 of the Letters Patent of our High Court). While

(10) A.I.R. 1958 Pb. 313.
(11) A.I.R. 1961 S.C. 794.
(12) 1971 Current L. J. 208.
(13) A.I.R. 1974 S.C. 1719.

construing the said expression for the purpose of deciding whether a Letters Patent appeal does or does not lie against an order passed by a learned Single Judge allowing amendment of pleadings it was held as below :—

> "..... If an amendment merely allows the plaintiff to state a new cause of action or to ask a new relief all that happens is that it is possible for the plaintiff to raise further contentions in the suit, but it is not decided whether the contentions are right. Such an amendment does nothing more than regulate the procedure applicable to the suit. It does not decide any question which touches the merits of the controversy between the parties. Where, on the other hand, an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a judgment within the meaning of clause 15 of the letters patent. *The reason why it becomes a judgment is that it is a decision effecting the merits of the question between the parties by determining the right or liability based on limitation.* It is the final decision as far as the trial court is concerned."

(Emphasis supplied by me).

Firstly, the expression "final order" does not appear to me to be synonymous for all purposes with the word "judgment". Secondly, the general law laid down by their Lordships is contained in the first two sentences of the portion of their judgment quoted above. The ratio of the judgment is that all that happens on an amendment being ordinarily allowed is to permit a new cause of action or a new relief or a new ground being added; and that such addition merely entitles the plaintiff to raise further contentions in the suit, but the order allowing amendment does not at all decide whether the contentions sought to be raised by an amendment are correct or not. Their Lordships have made it clear that such an amendment does nothing more than regulate the procedure applicable to the suit and does not decide any question which touches the merits of the controversy between the parties. Counsel for the appellant has, however, relied on the exception to the above rule carved out by the Supreme Court. Assuming that there is no difference between the word "judgment" as occurring in the Letters Patent of the High Court and the expression "final order" as occurring in section 34(1) of the Act, the question that

arises is whether the amendment allowed by the Tribunal on the two occasions in question in the instant case took away from the respondent the defence of immunity from any liability by reason of limitation. To ask that question is to answer it. No such result has accrued by the order allowing the amendment. The decision of the Tribunal allowing the amendment has not at all affected the merits of the question between the parties by determining any right or liability based on limitation. The decision of the Tribunal allowing the amendment is no doubt final on that point so far as the Tribunal is concerned, but it does not decide on merits any matter in controversy between the parties. The decision of the matter in controversy between the parties on that point would depend upon (1) whether the appellant had or had not directly or indirectly pleaded in the original petition that he was an hereditary office holder and (ii) if he had not so pleaded, what is the effect of such a plea not having been raised initially even if it was allowed to be added subsequently by way of amendment. The orders of the Tribunal allowing the amendment do not at all reflect on any of the two aspects of the controversy between the parties. The appellant cannot, therefore, in my opinion derive any benefit from the authoritative pronouncement of the Supreme Court in *Shanti Kumar's* case.

(18) The above discussion leads to the irresistible conclusion that none of the orders passed by the Tribunal allowing the amendment of the appellant's petition was a final order within the meaning of section 34(1) of the Act. I am further of the opinion that the appellant cannot, in the circumstances of this case, cross even the second hurdle provided by section 34(1) of the Act, namely, that the order against which an appeal lies must be one whereby any matter has been determined "under the provisions of this Act". Learned counsel for the appellant was not able to place his fingers on any provision of the Act under which the decision relating to amendment would determine any right. The decision to permit amendment or not to do so is one under the Code of Civil Procedure as applied to the proceedings under the Act. It is a mere procedural matter and does not by itself decide the real matter in controversy between the parties. For the foregoing reasons, I hold that no appeal lay under section 34(1) of the Act against the orders allowing the amendment and, therefore, the question of considering any supposed bar created by sub-section (2) of section 34 does not arise so far as the second question referred to us is concerned.

(19) There being no statutory bar to the raising of the objection in question by the respondent, it has still to be seen whether any provision of the general law specifically authorises the respondent to support the final decision of the Tribunal dismissing the appellant's petition under section 8, on any ground on which the Tribunal has not dismissed it. This point is common to question Nos. 2 and 3 referred to us, and shall, therefore, be answered by me while dealing with the third question. Inasmuch as I am going to hold that the respondent is entitled to support the judgment of the Tribunal by questioning the correctness of its earlier orders in favour of the appellant in exercise of the respondent's right under Order XLI rule 22 of the Code, I answer the second question also against the appellant and in favour of the respondent.

(20) This takes me to question No. 3. As already stated, the preliminary issue which was decided in favour of the appellant by the order of the Tribunal dated November 23, 1964, was "whether the petitioner (the appellant before us) can maintain the petition as an hereditory office holder without alleging any custom about the mode of succession?" Whether the appellant had or had not alleged any such custom and whether he could or could not maintain the petition without specifically pleading such a custom are matters with which we are not concerned in this reference. The Bench hearing this appeal on its merits may have to dwell upon and decide those points. All that we are called upon to decide is whether sub-section (2) of section 34 of the Act creates a bar in the way of the respondent questioning the correctness of the decision of the Tribunal on that preliminary issue in this appeal. Incidentally, we have to decide whether, even if there is no such bar, the respondent has any statutory right to support the judgment and final decision of the Tribunal on the additional ground that the preliminary issue was not correctly decided and the final judgment dismissing the appellant's petition has to be upheld for that additional reason.

(21) So far as the bar pleaded by the appellant under section 34(2) of the Act is concerned, it appears to us that the contention is based on a misreading of that provision. Firstly, sub-section (2) of section 34 does not at all apply to any right of a respondent in an appeal but is a mere fetter on the right of someone aggrieved by the final order of the Tribunal who has to prefer an appeal. The direct question that arises for invoking the bar under section 34(2) is: whether the person against whom the bar is being pleaded

wants to prefer an appeal or an application for revision against any order of the Tribunal? If not, sub-section (2) does not come into the picture at all. All that is sought to be achieved by sub-section (2) is to make it clear beyond doubt that no party to any case before the Tribunal has any right of appeal or revision except within the four corners of sub-section (1). The second sub-section of section 34 does not make any dent on the power, authority or entitlement of a respondent available to him under the general law for supporting the final order passed by the Tribunal. The general law specifically authorising a respondent to support the judgment of the lower Court is contained in the following language in sub-rule (1) of rule 22 of Order XLI of the Code of Civil Procedure, 1908:—

> "22. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."

It is the common case of both sides, that we have to decide the questions referred to us in the light of sub-rule (1) of rule 22 of Order XLI of the Code as it existed prior to its amendment by section 87 of the Code of Civil Procedure Amendment Act 104 of 1976. Item (z) of sub-section (2) of section 87 of the said amending Act of 1976 makes this clear beyond any doubt. Rule 22(1) of order XLI of the unamended Code confers on a respondent to an appeal two distinct rights, namely:—

> (i) to support the decree or order under appeal not only by showing that the grounds on which the order is based in his favour are correct but also by canvassing that the same should have been the result of the case on additional grounds on which the lower Court has given findings against the respondent during the course of the trial of the case in the lower Court; and

(ii) to attack the decree or order of the lower Court in respect of reliefs not granted to the respondent by the Court below and to claim those additional reliefs.

Whereas the first of the two rights conferred by the rule is unconditional, the second one is made conditional on the respondent filing cross-objection in writing within the prescribed time. Where the decree or order appealed against is entirely in favour of the respondent and there is nothing more that the respondent can ask for in the case in its ultimate analysis, there can be no question of his filing any cross-objections. If while dismissing the claim against him the trial Court has based its decision on only one of the several defence taken by him, the respondent can, while supporting the decision of the trial Court at the hearing of an appeal against that decision by the unsuccessful plaintiff, also challenge the findings of the trial Court rejecting his other defence. It makes no difference whether the decisions adverse to the interest of the respondent on such points had been given by the trial Court in the course of its final judgment or had been given in the course of interlocutory orders or on preliminary issues at some earlier stages of the trial of the case. Though there may certainly be some dispute about the right of the respondent to support the decree on such other grounds in respect of matters which were not raised by the respondent in the Court below, there is no doubt that the respondent is entitled to do so on points actually raised by him in the trial Court but decided against him.

(22) Mr Mangat, the learned counsel for the appellant, submitted that the right of the respondent to support the decree conferred by the first part of sub-rule (1) of rule 22 of Order XLI of the Code is confined to points decided by the judgment under appeal and not to points decided by the trial Court in any earlier orders even if those were not appealable. The learned counsel relied in support of this proposition on the judgment of the Bombay High Court in *R. S. Rammohanrai Jaswantrai Desai and others* v. *Somabhai Nathabhai Patel and others* (14), of the Rajasthan High Court in *Suraj Narain* v. *Debi Narain and others* (15), and of their Lordships of the Supreme Court in *Ramanbhai Ashabhai Patel* v. *Dabhi Ajit Kumar Fulsinji and others* (16). The argument of Mr Mangat was that since the

(14) A.I.R. 1950 Bombay 161.
(15) A.I.R. 1957 Rajasthan 358.
(16) A.I.R. 1965 S.C. 669.

respondent could not prefer any appeal against any part of the final order of the Tribunal he can have no right to support the order by questioning the correction of the decision of the Tribunal on the preliminary issue. None of the cases referred to by Mr Mangat lays down any such law. All that was held in the Bombay case was that where a party cannot appeal from a decree he cannot file any cross-objections to it. Similarly, in the Rajasthan case it was held that cross-objections can lie only in respect of the decree against which the appeal has been filed. Nor did the Supreme Court lay down any such law as is suggested by Mr Mangat in *Ramanbhai Ashabhai Patel's case* (supra). The point decided by their Lordships in this connection related to the impact and applicability of Order XLI rule 22 of the Code of civil appeal admitted to the Supreme Court by grant of special leave under Article 136 of the Constitution. As the Supreme Court has its own rules of procedure, the rules contained in the Code do not by themselves apply to proceedings before that Court. Their Lordships held that though normally a party, in whose favour the judgment appealed from has been given, will not be granted special leave to appeal from it, considerations of justice require that the Supreme Court should in appropriate cases permit a party placed in such a position to support the judgment in his favour even upon grounds which were negatived "in that judgment" Emphasis has been laid by Mr Mangat on the words "in that judgment" used by the Supreme Court in the ratio of its decision in *Ramanbhai's case.* Whereas the judgments of the Bombay and Rajasthan High Courts in the two cases referred to above deal with cases of cross-objections and not with a case covered by the first part of rule 22(1) of Order XLI of the Code, the decision of the Supreme Court is not based on an interpretation of Order XLI rule 22(1) of the Code but is directed to supply to the limited extent allowed by their Lordships a lacuna left in the Supreme Court Rules. The last case to which Mr Mangat referred in this connection is the judgment of the Supreme Court in *Thepfulo Nakhro Angami* v. *Shrimati Rayoluei alias Rani M. Shaiza* (17). *T. N. Angami's* case was an appeal to the Supreme Court against the judgment of the High Court in an election petition. The appellant contended that the charge of corrupt practice found by the High Court was in fact not made out.

(17) A.I.R. 1972 S.C. 43.

The counsel for the respondent contended that even without preferring an appeal against the decision of the High Court he was entitled to submit that the charges in respect of which the returned candidate (the appellant) had been absolved by the High Court in fact stood proved and he sought permission of the Supreme Court to raise those questions while defending the appeal of the election-petitioner. Objection was taken by the appellant to the course which the respondent sought to adopt. Their Lordships held that the questions stood decided by their earlier judgment in *Ramanbhai Ashabhai Patel's case* (supra). The Supreme Court rejected the contention of the appellant to the effect that the decision in ***Ramanbhai*** *Ashabhai Patel's* case was confined to an appeal by special leave and had no application to an appeal under section 116(A) of the Representation of the People Act. I am unable to find anything in the judgment of their Lordships in *T. N. Angami's case* which can help the appellant. In any case, none of these judgments relied upon by the appellant lends support to his proposition that no decision given by a Court against the interest of the respondent can be questioned by him in the course of the hearing of an appeal against the final order which is in favour of the respondent.

(23) Mr. Mangat then placed before us the decision of the Supreme Court in *Satyadhyan Ghosal and others* v. *Smt. Deorjin Debi and another,* (18). Dealing with the question of the principle on which the doctrine of *res judicata* is based, their Lordships observed that primarily it applies as between past litigation and future litigation, but the principle also applies as between two stages in the same litigation, to this extent that a Court—whether the trial Court or a higher Court having at any earlier stage decided in one way will not allow the parties to agitate the matter again at a subsequent stage of the same proceedings. From this dictum of their lordships, Mr. Mangat wants to spell out the proposition that the decision of a lower Court at an earlier stage of a case cannot be questioned at the appellate stage. The principle of *res judicata* does not distinguish between an appellant and a respondent. It binds both sides equally. What is, therefore, stated by their Lordships of the Supreme Court regarding decisions at earlier stage of a litigation applies to the Court which has given that decision and not a higher Court. It is clear from a perusal of the judgment that the Court—whether the trial Court or the appellate Court—cannot reopen its own decision given at an

(18) A.I.R. 1960 S.C. 941.

earlier stage. The argument that even a higher Court cannot question it does not stand to reason. This is also clear from the judgment of the Supreme Court in *Satyadhyan's case*. Their Lordships have expressly held that an interlocutory order, which had not been appealed from either because no appeal lay against it or because no appeal was preferred against it, can be challenged in an appeal from the final decree or order. The Supreme Court judgment in *Satyadhyan's* case does not, therefore, lend any support to the proposition canvassed by Mr. Mangat in this behalf.

(24) The decision of their Lordships of the Supreme Court in the case of *Virdhachalam Pillai* v. *Chaldean Syrian Bank Ltd., Trichur and another,* (19) appears to me to support the respondent's contention rather than that of the appellant. The relevant passage of that judgment is contained in paragraph 32 of the A.I.R. report in the following words:—

> "Learned counsel for the appellant raised a short preliminary objection that the learned Judges of the High Court having categorically found that there was an antecedent debt which was discharged by the suit-mortgage loan only to the extent of Rs. 59,000 and odd and there being no appeal by the Bank against the finding that the balance of the Rs. 80,000 had not gone in discharge of an antecedent debt, the respondent was precluded from putting forward a contention that the entire sum of Rs. 80,000 covered by Exs. A and B went for the discharge of antecedent debts. We do not see any substance in this objection, because the respondent is entitled to canvass the correctness of findings against it in order to support the decree that has been passed against the appellant."

The last sentence in the above-quoted passage of the judgment of their Lordships leaves no doubt in my mind that the respondent is entitled to canvass the correctness of the findings given against it by the Tribunal in order to support the final decision of the Tribunal dismissing the appellant's petition under section 8. The judgment of the Calcutta High Court in *Assistant Controller of Customs for Prevention and others* v. *The New Central Jute Mills Co., Ltd.,* (20), also supports the respondent's contention.

(19) A.I.R. 1964 S.C. 1425.

(20) A.I.R. 1973 Calcutta 91.

(25) For the reasons assigned above, I would answer question No. 3 also in favour of the respondent and hold that it is open to the respondent to challenge the findings of the Tribunal on preliminary issue No. 1 contained in the Tribunal's order dated November 23, 1964, under the first part of sub-rule (1) of rule 22 of Order XLI of the Code and that nothing contained in section 34 of the Act militates against the same.

(26) Mr. Mangat addressed several other arguments on the merits of the controversy including a submission based on the judgment of the Oudh Chief Court in *B. Parbhu Narain Singh and others* v. *B. Jitendra Mohan Singh and another,* (21), and the judgment of the Calcutta High Court in *Jogesh Chandra Sen* v *Sm. Kiron Bala Saha,* (22), to the effect that once an amendment is allowed the parties must have the case decided according to the amended pleadings and cannot ask the Court which allowed the amendment or even a higher Court to ignore the amendment. Such points do not call for our decision as they do not arise out of the three questions referred to us. Similarly, the submission of Mr. Mangat that the acceptance of costs conditional on which the amendments were allowed estops the respondent from questioning the orders allowing the amendments does not call for our decision. It would be open to the appellant to argue all these matters before the Bench which hears this appeal in consequence of and in the light of the answers returned by us to the three questions referred to this Bench.

(27) For the foregoing reasons, we answer all the three questions referred to us in favour of the respondent and direct that the appeal may now be laid before the Division Bench for hearing and disposal in accordance with law in the light of our answers. The costs of this reference shall abide the result of the appeal.

*N. K. S.*

(21) A.I.R. 1948 Oudh 307.
(22) A.I.R. 1977 Calcutta 167.

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