FULL BENCH

Before A. N. Bhandari, C. J., Harnam Singh and Kapur, JJ.

MOHINDRA SUPPLY COMPANY, KASHMERE GATE, DELHI,—*Appellant.*

versus

GOVERNOR-GENERAL IN COUNCIL through SECRETARY, DEPARTMENT OF SUPPLY,— *Respondent*

1953

October, 1st

Letters Patent Appeal No. 82 of 1948

Arbitration Act (X of 1940)—Section 39—Letters Patent —Clause 10—Right of appeal given by Clause 10 of the Letters Patent—Whether taken away by section 39(2) of the Arbitration Act—Appeal and Second Appeal—Meaning of—Letters Patent Appeal—Nature of—Arbitration Act and Code of Civil Procedure—Respective Scope of—Letters Patent—Whether special law vis-a-vis *Arbitration Act— Interpretation of Statutes—Statutes in* pari materia*—Words judicially constructed—Interpretation of—Rules stated.*

Held, per Full Bench

Held, that the right of appeal given by clause 10 of the Letters Patent has not been taken away by section 39 of the Indian Arbitration Act, 1940, and that a Letters Patent Appeal lies against the decision of a Single Judge in an appeal under section 39 of the said Act.

Held, that an appeal means the removal of a cause or a suit from an inferior to a superior Judge or Court for re-examination or review. A Letters Patent Appeal, however, is not such a removal from an inferior to a superior Court, but is an appeal within the High Court. A Judge of the High Court sitting alone performs a function directed to be performed by the High Court under clause 26 of the Letters Patent and is not a Court subordinate to or separate from the High Court. Section 39(1) of the Arbitration Act, therefore, does not affect Letters Patent Appeals. It can have no application to cases where the Court passing the order and the Court to which an appeal is taken are not two separate Courts.

Held, that the words "Second Appeal" in section 39(2) of the Arbitation Act, bear the meaning given to those words under section 101 of the Code of Civil Procedure, and apply only to appeals from an appellate order of a District Judge to the High Court and not to an appeal from one Judge of a High Court to two or more Judges of the same Court. Even if the word "Second" is used to indicate another appeal, the reference must be to an appeal which is taken from an appellate Court of inferior jurisdiction to a second appellate court of superior jurisdiction.

Held, that the Code of Civil Procedure and the Indian Arbitration Act are Acts in *pari materia*; the former prescribes the procedure for trial of a case in a Court and the latter prescribes the procedure before an arbitral tribunal and subsequently before a Court dealing with matters arising therefrom. They are thus so closely related to each other as to form one family and must, therefore, be read and construed together.

Held, that where there are different Statutes in *pari materia* though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory to each other.

Per Harnam Singh, J.

Held, that in section 39(2) of the Arbitration Act, the concluding words have been added out of abundant caution to exclude the argument that the appeal given by sections 109 and 110 of the Code of Civil Procedure, is a second appeal within section 39(2) of the Act. When the Arbitration Act was passed, an appeal to His Majesty in Council was allowed from a judgment of a Division Bench or a larger Bench of the High Court and not from a judgment of a Single Judge. The Legislature, therefore, should not be deemed to have taken away the right of appeal to a Division Bench from a judgment of Single Judge while preserving a right of appeal to His Majesty in Council from a judgment, decree or final order passed on appeal by a Division Bench of the High Court or by any other Court of final appellate jurisdiction.

Per Kapur, J.

Held, that the Arbitration Act is not a special Act, *vis-a-vis* the Letters Patent. On the other hand, it is clause 10 of the Letters Patent, which is a special Act, as it provides for intra-Court appeals. Without this provision no such appeal would lie for no other provision exists for appeals from the judgment of one judge of a High Court to two or more judges of the same Court.

Held, that the recognised rules of interpretation of statutes are that :—

(i) if Acts of a Legislature use forms of words which have received judicial construction, in the absence of anything in the Acts showing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that the Parliament in subsequent statutes did so use them ;

(ii) that statutes in *pari materia* should receive a uniform construction notwithstanding even slight variation of phrase, the object and intent being

the same. A change of language effected by the omission in a latter statute of words which occurred in an earlier one would make no difference in the sense when the omitted words of the earlier statute were unnecessary;

(iii) in interpreting words and phrases it is permissible to refer to the previous history and decided cases as also to external evidence such as extraneous circumstances.

Case-law reviewed.

Letters Patent Appeal under clause 10 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Falshaw, dated the 14th September, 1948, in re: *F.A.O., No. 6-E of 1947.*

A. N. GROVER and D. K. KAPUR, for Appellant.

D. K. MAHAJAN for Advocate-General, for Respondent.

ORDER OF REFERENCE

Weston, C. J. WESTON, C. J. These are two appeals under clause 10 of the Letters Patent against a judgment of Mr. Justice Falshaw given on the 14th of September, 1948, in appeals preferred by the Governor-General in Council against orders of a Subordinate Judge at Delhi making two awards rules of the Court and passing decrees in accordance therewith.

A preliminary point has been taken that these appeals are not competent. The argument is based upon clause (2) of section 39 of the Arbitration Act. Clause (1) provides that an appeal shall lie from certain orders passed under the Act. There is no dispute that the appeals before the learned single Judge were competent. Clause (2) of section 39 is as follows:—

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

It is claimed that although these are appeals under the Letters Patent, they are nevertheless second appeals and, therefore, are not competent

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This point had arisen before in the Lahore High Court in *Hanuman Chamber of Commerce Ltd. Delhi* v. *Jassa Ram-Hira Nand* (1), when a Bench of that Court held that an appeal of the same nature as the present is competent. The opinion expressed by Mr. Justice Mahajan was in these words:—

> "The expression 'second appeal' has seldom been used in respect to appeals which arise within this Court and which are very commonly described as 'inter-Court appeals'. I am, therefore, of the opinion that subsection (2) of section 39 does not take away the right that has been conferred on a litigant under Clause 10 of the Letters Patent of this Court. It seems to me that this subsection only refers to two kinds of appeals that are mentioned in the Code of Civil Procedure, namely those a right to which is conferred by section 100, Civil Procedure Code, and those the right to which is given by sections 109 and 110 of the Code."

This view, however, has not been followed by other High Courts. The most recent pronouncement is of the Bombay High Court in *Madhavdas Devidas Punekar* v. *Vithaldas Vasudeodas Punekar* (2). The learned Judges there referred to the decision in *Hanuman Chamber of Commerce* v. *Jassa Ram* (1), which was followed by this High Court in *Banwari Lal* v. *Hindu College, Delhi* (3), and expressly dissented from that opinion. The learned Judges also referred to the view expressed by the Madras High Court in *Penugonda Radhakrishnamurthy* v. *V. A. Y. Ethirajulu Chetty and Co.* (4), also contrary to that given in *Hanuman Chamber of Commerce* (1), *and Banwari Lal's* (3), cases. It is very desirable that there should be a concurrence of judicial opinion on an important

(1) A.I.R. 1948 Lah. 64
(2) 54 B.L.R. 94
(3) A.I.R. 1949 E.P. 198
(4) I.L.R. 46 Mad. 564

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point such as this. I do not mean to say that this High Court must follow other High Courts' opinion against its conscience, but in the present state of the authorities I think it is proper that the question should be re-examined by this Court and finally decided and I consider, therefore, that this matter should go to a Full Bench.

The decision seems to turn upon whether the expression "second appeal" appearing in section 39 (2) of the Arbitration Act is to be given a technical meaning as an appeal covered by section 100 of the Code of Civil Procedure. I myself do not understand the necessity for giving to the expression "second appeal" such technical meaning. The words "second appeal" do not in fact appear in section 100 at all although they form a marginal note to the section. The words "second appeal" do appear in section 101 and certain following sections. There can be no doubt that the Letters Patent of this High Court is to be regarded as general law as contrasted with the special law of section 39 of the Arbitration Act, and the general right of appeal given by Clause 10 of the Letters Patent must give way if by section 39 it is provided that no such appeal lies. The purpose of section 39 is very obvious. It is consistent with the general scheme of the Arbitration Act, namely, to minimize the amount of proceedings in Court and facilitate quick settlement of disputes, which is the primary justification for arbitration procedure. It is not necessary, however, for me to attempt any further opinion on the matter. It will be dealt with in due course by a Full Bench.

As the case has been argued before us exhaustively on its merits, I think we should give our decision. In my opinion, if the appeals are competent, they should be allowed. If the Full Bench decides that the appeals are not competent, then, of course, they will have to be dismissed. I proceed now to give my reasons why the appeals, if competent, should be allowed.

The facts of the matters are as follows. One award was in favour of the Sunshine Metal Works

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of Delhi, and was for an amount of Rs. 54,000 and the other was in favour of Mohindra Supply Company for an amount of Rs. 47,250. The awards arose out of claims for damages preferred by the two firms in respect of contracts entered into by them with the Supply Department of the Government of India for supplying what is called solidified fuel. In the case of the Mohindra Supply Company the contract also provided for the supply of Tommy Cookers but no dispute in regard to this item of supply arose. The contract in the case of the Sunshine Metal Works was executed on the 3rd of May 1943, and in the case of Mohindra Supply Company on the 14th of August, 1943, and in each instance 100,000 lbs of solidified fuel were contracted to be supplied by the firm. Each contract was in writing and was made subject to what is called the General Conditions of Contract contained in W.S.B. 133. The contracts themselves, however, contained a number of clauses. Taking that of Sunshine Metal Works, it is headed by "Description of the commodity described as solidified fuel, units of one pound, quantity to be supplied being 100,000 lbs., and the price to be paid is given as Rs. 1-2-0 per pound. Then follows a paragraph numbered 1 which reads as follows:—

"I. Particulars governing supply :—

(a) Specification :—

Conforming to specification No. R.I.A.S.C. 85, copy already with you.

(b) Maker's name or brand :—Own make.

(c) Country of origin :—India."

Then follows paragraph 2 headed "Delivery Schedule and Despatch Instructions" and under this line appears the Roman figure II—

"II. Date of Delivery :—(Date to be tendered)

Item No.	*Unit*	*Quantity*	*Day*	*Month*	*Year*
2	lb	100,000	30	6	43

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Then follows Roman figure III—

"III. Packing and Marking :—

The Store is required to be packed in new or well-cleaned hermetically sealed four gallon tins of the Kerosene oil type and each tin shall contain 30 lbs. nett. Two such tins shall be repacked in a strong, trade wooden case iron-hooped, steel strapped or wired. The packing shall be sufficiently strong to withstand rough handling during transit by road, rail or sea, and shall conform to the requirements of the Railway and pamphlet No. 14."

Then follows Roman figure IV headed "Place of Delivery" with certain terms of delivery which are not material. Then follows Roman figure V headed "Inspection" and then Roman figure VI dealing with payment. Then follow certain other conditions which also are not material. This document signed "for the Chief Controller of Purchase (Supply)" is on a typed sheet of paper. On a similar typed sheet of paper is the contract of Mohindra Supply Company and the only difference which need be noticed between the two is that in paragraph 2, again headed "Delivery Schedule and Despatch Instructions." The Roman figure under this paragraph begins with "I" and the words "Packing and Marking appear under the figure "II".

The questions raised under the two contracts so far as the solidified fuel is concerned are practically identical and it is enough to give the facts so far as the Sunshine Metal Works is concerned. This firm, purporting to act in accordance with the contract, tendered 49,980 lbs. of solidified fuel. This tender was rejected on the 16th of May 1944 with a note of the Inspector "Burning time low". I may perhaps mention that in the case of the fuel tendered by the Mohindra Supply Company there was not a refusal on this ground. Thereafter 48.000 lbs. of solidified fuel were tendered by the Sunshine

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Metal Works which were rejected on the 17th of June, 1944 with an endorsement of the Inspector "Rejected on account of consignment being packed in second-hand containers and tins not provided with press in lids". It appears that the Sunshine Metal Works protested that under the terms of the contract second-hand containers were permissible. The Inspector was asked by the Supply Department to make a fresh inspection having regard to the terms of the contract and on the 28th of July, 1944 the 48,000 lbs. were again rejected for the following reasons endorsed on the inspection form—

> "Tins are rusty and are not in first class condition. Tins not provided with press in lids."

There was some suggestion afterwards of an undertaking given by the Sunshine Metal Works to remedy the defects, but the case of the firm is that the goods were properly packed and that their tender had been wrongly rejected. On the 6th of December 1944 the firm wrote asking that the matter be referred to arbitration. On the 12th of December 1944 a reply was sent from the Directorate-General of Supply appointing Mr. P. S. Sood, Assistant Director, Textiles, arbitrator on behalf of the Governor-General but without prejudice to the right of the Government to contend that the matter was one in respect of which the decision of the Inspector was final and that the arbitrators were not competent to adjudicate upon it. On the 19th of February, 1946 an application was filed on behalf of Government in the Court of Mr. Tara Chand, Sub-Judge, 1st Class, Delhi, under section 33 of the Arbitration Act. This application referred to Clause 21 of the General Conditions of Contract which was the arbitration clause of that contract and which exempted from the scope of arbitration "any matters the decision of which is specially provided for by these conditions". The application claimed that the rejection of the stores was within the sole discretion of the Inspector whose decision was final, and that, therefore, no arbitration could be conducted relating to

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this rejection. On the 20th of February 1946, an application was filed, again by Government, asking for temporary injunction to restrain the arbitration proceedings. By order made on the 27th of February 1946 the learned Judge rejected this application mainly on the ground that the proceedings were taken by Government after the arbitration had been going on for more than a year. On the 19th of March 1946, the award was made by the arbitrators in favour of the Sunshine Metal Works for the amount stated in the beginning of this judgment. Objections were filed to this award and the companion award in favour of Mohindra Supply Company and by order dated the 8th of April 1947 the objections were dismissed and the awards in both matters were made rules of the Court.

The two appeals against this order, as already indicated, were allowed by Mr. Justice Falshaw who set aside the awards and the orders of the Court below making them rules of the Court.

If it is found that the rejection of the goods made by the Inspector was within his powers, there can be no doubt that, as under the terms of the contract itself such rejection was made final and binding, then by reason of the saving part of clause 21 of the General Conditions of Contract termed W. S. B. 133 that rejection could not be the subject of arbitration. The power of the Inspector to reject is given in clause 13 of W. S. B. 133 the material part of which is sub-clause (iii) which reads as follows:—

> " (iii) Inspector.—Final Authority and to certify performance—
>
> (a) The Inspector shall have power before any stores or parts thereof are submitted for inspection to certify that they cannot be in accordance with the contract owing to the method of manufacture not being satisfactory, or

(b) to reject any stores submitted as not being in accordance with the particulars.

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(iv) Inspection and rejection—The whole of a consignment may be rejected if, on inspection, a portion up to 4 per cent of the consignment at the sole discretion of the Inspector is found to be unsatisfactory."

Sub-clause (v) may be mentioned. It deals with the consequences of rejection and provides *inter alia* that following rejection the Secretary, Department of Supply, may terminate the contract and recover any loss sustained thereby from the contractor, and it is paragraph (d) of this sub-clause which provides that the Inspector's decision as regards rejection shall be final and binding on the parties.

Returning to sub-clauses (iii) and (iv) the power of the Inspector applicable to the present case must be taken to be that stated in sub-clause (iii) (b) namely his power to reject the solidified fuel submitted as not being in accordance with the particulars. The solidified fuel was rejected not because the fuel itself was in any way defective but because its packing was not in accordance with the terms of the contract. If therefore the packing can be said to fall within what are called "particulars" the Inspector undoubtedly had sole discretion to reject the fuel on the grounds stated by him and his rejection must be taken to be final.

Sub-clause (x) of clause 1 reads as follows—

(x) The term 'particulars' shall mean the following:—

(a) Specification.

(b) Drawing.

(c) Sealed pattern denoting a pattern sealed and signed by the Inspector.

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(d) Certified or sealed sample denoting a certified copy of the sealed pattern or sample sealed by the purchaser for guidance of the Inspector.

(e) Trade Pattern denoting a standard of the B.S.I. or other standardizing authority or a general standard of the industry and obtainable in the open market.

(f) Proprietary make denoting the product of an individual firm.

(g) Any other details governing the construction, manufacture and/or supply as existing for the contract."

In the case of many commodities the packing may well be an unimportant term of a contract for supply. In the case of other commodities the packing may be very important, and I think it may be assumed that in the case of solidified fuel packing must be a very important feature in a contract for supplying that commodity. In such event it would of course be open to the buyer namely Government to insist that packing should be taken to be a part of the commodity itself. The contract in the present case could well have been specified to be a contract for the supply of solidified fuel in containers of a particular description. If this had been done no difficulty would have arisen, for the containers even if they did not fall within the term "specification" in clause 1(x) (a) would clearly come within the meaning of sub-clause (x) (g) of clause 1. This, however, was not done. The contracts themselves described the goods to be supplied simply as solidified fuel. The decription which heads the contracts makes no mention whatever of the containers or any other form of packing. Further under the heading "particulars governing supply" there is no mention whatever of packing, and "packing and marking" appear together under the second clause of the contract which is headed "Delivery Schedule and Despatch Instructions."

This last fact makes the present case clearly distinguishable from a case disposed of by my learned brother *Governor General of India in Council* v. *Messrs Magason and Company* (1), in which there was a similar contract for the supply of chutney. In that case a consignment was rejected by the Inspector for defects of packing. The judgment of my learned brother, however, shows clearly that in that contract under the heading "Particulars governing supply" one of those particulars was that packing should be in accordance with the terms specified in the contract. Had this been so in the present instance, there would be no difficulty but as it was not, the decision which was relied upon by Mr. Justice Falshaw cannot govern the present case.

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In the Form W.S.B. 133 there is a clause No. 9 which is headed "Packing" and which makes the contractor responsible for proper packing, free supply of packing materials and proper marking of each bale or package containing a packing note with certain details. It is not the case that the Inspector is the sole authority in all matters concerning the contract. I have already mentioned that following rejection it is the Secretary, Department of Supply, who is to terminate the contract or allow re-submission or purchase elsewhere. Clause II of Form W.S.B. 133 provides that the time for and the date of delivery shall be deemed to be of the essence of the contract. On failure of delivery within the period prescribed the Secretary, Department of Supply, became entitled at his option (a) to recover damages from the contractor, (b) to purchase elsewhere and (c) to cancel the contract. It is clear that it is no part of the function of the Inspector to reject goods on the ground of late delivery; that is a matter entirely for the Secretary, Department of Supply. Clause 20 provides that on insolvency of the contractor or on committing any breach by him of the contract not specially provided for in W.S.B. 133, the Secretary, Department of Supply, has power to declare the contract at an end.

(1) F.A.O. No. 8-E of 1947

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It seems to me that the function of the Inspector must be restricted strictly to the powers expressly given to him and if "packing" in any particular case cannot be brought within the term "particulars" then the Inspector can have no power to reject. This result it may well be was never intended by whoever was responsible for drawing up W.S.B. 133. It appears that a correction was made on the 1st of September 1943 by which a further sub-paragraph was added to clause 9 of the Form giving express power to the Inspector to reject consignments of goods not packed and marked in accordance with the instructions. This correction of course cannot affect contracts such as the present entered into before the 1st of September 1943.

It has been contended on behalf of the Department that packing can properly be brought within the definition of "particulars" under part (g) of sub-clause (x) of clause 1 of W.S.B. 133. Reliance is placed upon the word "supply" which appears in (g) and it is contended that the word "supply" means or at least includes the process of delivery and, therefore, must include any detail material to the process of delivery and in particular the packing of the goods. The form W.S.B. 133, can hardly be said to be a work of art. It represents a set of conditions imposed by the Department upon contractors and I do not suppose for one moment that contractors understand it or attempt to understand it. The word "supply" when used as a noun may connote either article itself or the process of bringing it to the purchaser. As the Department claims that in sub-clause (g) the word "supply" is used in the latter sense, it is of interest to see if this sense is required by the context wherever else the word "supply" is used in the document as a noun. The conclusion, I think, must be that this sense is not required by the context elsewhere in the document. In clause 1(ii), the word appears in the context "the contractor with whom the order for the supply is placed" and the substitution of goods for supply would, I think, do no violence to the meaning. In clause 5(iv), it is said "if neither a specification nor a drawing exists

then the sealed pattern or certified sample thereof will govern supply in all respects" and in the following sub-clause (v), the word "supply" appears in a similar context where again I am not able to accept that supply must be taken to include not only the article but also all things connected with process of delivery. These examples, I think, are enough to show that when packing is not expressly included in the particulars stated in the contract it is not reasonable to bring packing within the category of particulars as a detail governing the supply as existing in the contract. I think, therefore, that on the terms of the contract the packing was something which had been placed outside the particulars and was a matter upon which the Inspector was not competent to reject. There was no rejection by the Secretary, Department of Supply, on this ground. There was, therefore, no legal rejection of goods and the contractor was entitled to recover.

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A further point has been made under section 35 of the Arbitration Act. It is suggested that in view of the application filed on behalf of Government on the 19th of February, 1946, the further proceedings of the arbitrator were invalid and the award made later on the 19th of March, 1946 is invalid. It is to be remembered that the companion application filed on the 20th of February, 1946, by which a temporary injunction restraining the arbitration proceedings was sought on behalf of Government, was dismissed on the 27th of February, 1946.

For an application or other legal proceeding to render further proceedings in an arbitration matter invalid it is necessary under section 35 of the Arbitration Act, that the application or legal proceeding shall cover the whole of the subject-matter of the reference. It is difficult, therefore, to place the application made on behalf of Government on the 19th of February, 1946, under section 35 of the Arbitration Act. The contention then raised was not as to the existence or validity of the arbitration agreement but a decision was sought that as the

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rejection by the Inspector was final under the contract, this rejection could not be challenged in arbitration proceedings. The point, therefore, was the scope of the arbitration agreement and not its existence or its validity. There is authority *A. M. Mair and Co.* v. *Gordhandas Sagarmull* (1), and *Ruby General Insurance Co., Ltd.* v. *Pearey Lal Kumar and another* (2), that where recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them, the matter will come within the arbitrator's jurisdiction. Clearly, in the present instance it was necessary for the arbitrator to consider whether the dispute was or was not one specially excluded by these conditions. Whether or not the application under section 33 was competent, I do not think it satisfied the necessary condition of section 35 of the Act. It raised only a point of jurisdiction of the arbitrator, and although a finding of absence of jurisdiction might well be fatal to the whole arbitration, nevertheless the objection to jurisdiction was not a legal proceeding for the whole of the subject-matter of the reference. It is upon this ground rather than upon the absence of formal notice taken by Mr. Justice Falshaw, that I would agree with his conclusion that the proceedings of the arbitrator were not affected by the application purporting to be under section 33.

If these appeals are competent, I consider that they should be allowed and the orders of the original Court restored.

BHANDARI, J.—I agree that the question as to whether the appeals are competent should be referred to a larger bench and that if the answer is in the affirmative the appeal should be allowed.

JUDGMENT

Harnam Singh, J.

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HARNAM SINGH, J. In Letters Patent Appeals Nos. 82 and 83 of 1948, the following question has been referred for decision to this Bench :—

"Whether the right of appeal given by clause 10 of the Letters Patent, is taken

(1) A.I.R. 1951 S.C. 9
(2) A.I.R. 1952 S.C. 119

away by section 39 of the Indian Arbitration Act, 1940, hereinafter referred to as the Act."

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Section 39 of the Act, reads :—

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

An order—

(i) superseding an arbitration ;

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

(iii) modifying or correcting an award ;

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

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

(vi) setting aside or refusing to set aside an award :

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

2. *No second appeal* shall lie from an order *passed in appeal under this section*, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council."

Basing himself upon *R. Wright and Partner, Limited* v. *Governor-General in Council* (1), and *Madhavdas Devidas and others* v. *Vithaldas Vasudevdas Punekar and others* (2), counsel for the respondent urges that section 39(1) of the Act by necessary implication takes away the right of appeal given by clause 10 of the Letters Patent.

(1) I.L.R. 1948 (2) Cal. 265
(2) I.L.R. 1952 Bom. 570

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In *R. Wright and Partner, Limited* v. *Governor-General in Council* (1), the facts were these. On 30th March, 1946 the Supplies Department applied under section 33 of the Act, for the determination of the true scope and effect of the arbitration clause contained in the contract between the parties and for declaration that the rejection of the supplies by the Inspectorate being final, the arbitrator or arbitrators have no jurisdiction to decide the scope and validity of such rejection or to adjudicate upon any claim or demand in respect thereof. Gentle, J., by his order, dated the 17th of June, 1946, decided that in the events which happened, the arbitration clause does not come into operation at all and that the arbitrator or arbitrators appointed thereunder have no jurisdiction to decide the propriety or otherwise of the decision of the Inspector, or to adjudicate upon any claim or demand in reference thereto. From the order passed by Gentle, J., on the 17th of June, 1946, R. Wright and Partner, Limited, appealed under section 39 of the Act. In challenging the competency of the appeal the respondent urged a double-barrelled objection. In the first place, it was said that the appeal was barred under section 39 of the Act. In the second place, it was said that even if section 39 of the Act does not prevent the appeal, there is no appeal under clause 15 of the Letters Patent, inasmuch as the order under appeal was not made pursuant to section 108 of the Government of India Act, 1915.

In deciding the objection Mukherjea, J., (Harries, C.J., concurring), said—

> "Now, so far as the the first point is concerned, the language of section 39 of the Indian Arbitration Act seems to us to be perfectly clear. It allows appeals from certain orders which are specified in the section and expressly provides that no other order made under the Act would be appealable."

In *R. Wright and Partner, Limited* v. *Governor-General in Council* (1) the question that arose for decision was whether from the order passed by a Single Judge of the High Court, which

(1) I.L.R. 1948 (2) Calcutta 265

did not fall within section 39(1) of the Act, an appeal was competent under clause 15 of the Letters Patent. That point does not arise in the present case and I refrain from expressing any opinion on that point.

R. Wright and Partner, Limited v. *Governor-General in Council* (1), does proceed, in part on the ground that section 39(1) of the Act, applies to Letters Patent appeals as well. For the reasons appearing hereinafter, I must say with all respect that in taking this view their Lordships have not properly construed the words occurring in section 39(1) of the Act.

In *Madhavdas Devidas and others* v. *Vithaldas Vasudevdas Punekar and others* (2), Bavdekar and Chainani, JJ., held that section 39(1) of the Act, by necessary implication takes away the right of appeal given by clause 15 of the Letters Patent constituting the High Court of Bombay.

In that case, Bavdekar, J. (Chainani, J., concurring), said—

> "The combined effect of the words 'and from no others' and the omission of the words 'and save as otherwise expressly provided in the body of this Code or by law for the time being in force' is, so far as section 39(1) is concerned, to take away the right of appeal under clause 15 of the Letters Patent."

Sections 588, 589 and 591 of the Code of Civil Procedure, 1882, corresponded to sections 104, 106 and 105 of the Code of Civil Procedure, 1908.

Section 588 of the Codes of 1877 and 1882 provided *inter alia* :—

> "An appeal shall lie *from the following orders under this Code* and from no other such orders."

(1) I.L.R. 1948 (2) Cal. 265
(2) I.L.R. 1952 Bom. 570

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Section 104 of the Code of Civil Procedure, 1908, reads *inter alia* :—

> "An appeal *shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the* time being in force, from no other orders."

From what I have said above, it is plain that in re-enacting section 588 of the Code of Civil Procedure, 1882, the Legislature omitted the words *"under this Code"* occurring after the words "an appeal shall lie from the following orders". That necessitated the addition of the words "and save as otherwise expressly provided in the body of this Code or by any other law for the time being in force" in section 104 (1) of the Code.

In the opening part of section 39(1) of the Act the law contained in section 588 of the Codes of 1877 and 1882 has been restored by the use of the words *"passed under this Act"* after the words "an appeal shall lie from the following orders". In the Act there is no provision except section 39 for appeals and the appeals under section 39 (1) being limited to appeals under the Act where the appeals are from one inferior Court to another the saving of appeals provided 'by any other law for the time being in force' was rendered unnecessary.

In *Hurrish Chunder Chowdhry* versus *Kali Sunderi Debi* (1), Sir R. P. Collier delivering the judgment of their Lordships of the Privy Council said—

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

As stated hereinbefore, section 588 of the Code of 1877 provided appeals from certain *orders* passed

(1) I.L.R. 9 Cal. 482 (P.C.)

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under the Code and directed that no other orders passed under the Code would be appealable. Section 588 of the Code of Civil Procedure, 1877, dealt with appeals from orders passed *under the Code* just as section 39(1) of the Act deals with orders *passed under the Act*. Section 104 of the Code of Civil Procedure provides that appeals shall lie from the orders specified in subsection (1) of that section and from no other orders. Section 39 (1) of the Act limits a party's right of appeal against orders passed under the Act to the cases specified in clauses (i) to (vi). The words "*and from no other orders*" occurring in section 39 (1) of the Act are perfectly explicit and *forbid appeals from orders passed under the Act* except those enumerated in the section. From the language used by the Judicial Committee in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1), it is plain that the reason why section 588 of the Code of 1877 was held by their Lordships not to be applicable to an appeal under clause 15 of the Letters Patent, was that the appeal is from one of the Judges of the Court to the Full Court whereas section 588 read with section 589 of the Code dealt with appeals from an inferior Court to a superior Court. In my judgment, *Hurrish Chunder Chowdhry* versus *Kali Sunderi Debi* (1), governs the present case.

That section 39 (1) of the Act does not affect Letters Patent appeals is plain from the language used in section 39(1) of the Act. Section 39(1) of the Act provides the forum of appeal in cases mentioned in that section by enacting that an appeal shall lie to the Court authorised by law to hear appeals from original decrees of the Court passing the order. For the reasons given in *Hurrish Chander Chowdhry* v. *Kali Sunderi Debi* (1), I hold that section 39(1) of the Act can have no application to cases where the Court passing the order and the Court to which an appeal is taken are not two separate Courts. Indisputably, a Judge of this Court sitting alone performs a function directed to be performed by the High Court under clause 26

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of the Letters Patent. For authorities on this point *Wahid-ud-Din* v. *Makhan Lal* (1), *Debendra Nath Das* v. *Bijudhendra Mansingh* (2), and *Jamna Dass* v. *A. M. Sabapathy Chetty* (3), may be seen.

Basing himself upon *Tulsi Persad Bhakt* v. *Banavek Missar* (4), counsel urges that a Division Bench of the Court hearing Letters Patent appeals should be regarded to be a Court different from the Court of a Single Judge. In *Tulsi Persad Bhakt* v. *Banavek Missar* (4), Lord Davey said—

> "Their Lordships think that no question of Law, either as to construction of documents or any other point, arises on the judgment of the High Court, and that there are concurrent findings of the two Courts on the oral and documentary evidence submitted to them. That being so, the present appeal cannot be entertained."

In *Tulsi Persad Bhakt* v. *Banavek Missar* (4), the suit out of which the appeal arose was for foreclosure of two mortgages. That suit came up in the first instance before Wilson, J., sitting on the original side of the High Court of Calcutta. In that suit one of the points that arose for decision was whether the first defendant was at the date of the first mortgage a minor. In deciding that point Wilson, J., found that the evidence given in the case was strong to show that at the time the mortgage in suit was executed the defendant was not a minor. In Letters Patent appeal from that judgment the finding given by Wilson, J., in the original jurisdiction was affirmed by Petheram, C.J., Pigot and Prinsen, JJ. In delivering the judgment of their Lordships of the Privy Council Lord Davey observed that from the concurrent finding of fact no appeal was competent. In that judgment I am unable to see any support for the proposition that a Judge of the Calcutta High Court sitting alone does not perform a function directed to be performed by that Court by clause 36 of the Letters Patent.

(1) A.I.R. 1944 Lah. 458
(2) I.L.R. 43 Cal. 90 (D.B.)
(3) I.L.R. 36 Mad. 138 (D.B.)
(4) I.L.R. 23 Cal. 918

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From R. Wright and Partner, Limited v. *Governor-General in Council* (1), and *Madhavdas-Devidas and others* v. *Vithaldas Punekar and others* (2), it is plain that the basis for the decision was the assumption that the legislature while enacting section 104 of the Code of Civil Procedure, 1908, put in the words "and save as otherwise expressly provided in the body of the Code or by any law for the time being in force" to set at rest the conflict between the High Courts of Calcutta, Madras and Bombay on the one side and Allahabad High Court on the other side, as to whether the right of appeal under clause 15 of the Letters Patent was taken away by section 588 of the Code of Civil Procedure, 1882. For that view *Mussummat Sabitri Thakurani* v. *Savi and another* (3), may be seen.

In *Mussummat Sabitri Thakurani* v. *Savi and another* (3), Lord Sumner, delivering the judgment of their Lordships of the Privy Council said—

> "In order to appreciate the full effect of section 104 it should be compared with the corresponding section of the Act of 1882, section 588. The earlier section enacted that appeals should lie in certain cases, which it enumerated, 'and from no other such orders.' This raised this question neatly, whether an appeal, expressly given by section 15 of the Letters Patent and not expressly referred to in section 588 of the Code of 1882 could be taken away by the general words of section 588 'and from no other such orders.' The change in the wording of section 104 of the Act of 1908 is significant, for it runs, 'and save as otherwise expressly provided * * * by any law for the time being in force, from no other orders.'
>
> Section 15 of the Letters Patent is such a law, and what it expressly provides, namely, an appeal to the High Court's

(1) I.L.R. 1948 (2) Cal. 265
(2) I.L.R. 1952 Bom. 570
(3) A.I.R. 1921 Privy Council 80

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appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction is thereby saved."

For the reasons appearing hereinbefore, I must say with all respect that the change in the wording of section 104 of the Code of Civil Procedure had nothing to do with the conflict stated above. That change was necessitated by the omission in section 104 of the Code of 1908 of the words "*under this Code*" which occurred in section 588 of the Codes of 1877 and 1882.

Basing himself upon *Penugonda Radhakrishnamurthy* v. *V. A. Y. Ethirajulu Chetty and Co.* (1), and *Madhavdas Devidas Punekar and others* v. *Vithaldas Vasudevdas Punekar and others* (2), counsel urges that section 39 (2) of the Act takes away the right of appeal given by the Letters Patent. In *Hunuman Chamber of Commerce, Limited* v. *Jassa Ram-Hira Nand* (3), and *Banwari Lal-Ram Deo* v. *The Board of Trustees, Hindu College, Delhi* (4), it was held that the right of appeal given by clause 10 of the Letters Patent is not affected by section 39 (2) of the Act.

In *Penugonda Radhakrishna Murthy* v. *V. A. Y. Ethirajulu Chetty & Co.* (1), the umpire awarded the first respondent a sum of rupees 600 but the award was not made within the time allowed by law. Two applications were filed in the City Civil Court for an order extending the time allowed to the umpire for the passing of his award. The Principal Judge of the City Civil Court refused the applications on the ground that by granting them the opposite party would lose valuable rights. The first respondent appealed to the High Court under section 39 of the Act. In deciding that appeal Kuppuswami Ayyar, J., thought that the applications for the extension of time should have been granted and allowed the appeal. In the Letters

(1) I.L.R. 1945 Mad. 564
(2) I.L.R. 1952 Bom. 570
(3) A.I.R. 1948 Lah. 64
(4) A.I.R. 1949 E.P. 165

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Patent appeal from the judgment given by Kuppuswami Ayyar, J., objection was taken to the competency of the appeal. In deciding that objection Sir Lionel Leach, C.J., and Shahabuddin, J., said—

> "This objection is sound. It is true that clause 15 of the Letters Patent, if it stood alone, would allow the appeal; but clause 44 of the Letters Patent says that the provisions are subject, *inter alia*, to the Legislative Council. The Indian Arbitration Act is an Act of the Central Legislature and the provisions of section 39 must prevail."

In *Penugonda Radhakrishna Murthy* v. *V. A. Y. Ethirajulu Chetty and Co.* (1), no reasons are given for the opinion expressed.

Madhavdas Devidas Punekar and others v. *Vithaldas Vasudevdas Punekar and others* (2), the Court found that the appeal referred to in section 39 (1) of the Act was a first appeal and any appeal from an order given in that appeal would be a second appeal. In these circumstances the question that arises for decision is whether section 39 (2) of the Act takes away the right given by clause 10 of the Letters Patent. Section 39(2) reads:—

> "No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council."

In *Hunuman Chamber of Commerce, Limited* v. *Jassa Ram Hiranand* (3), *and Banwari Lal-Ram Deo* v. *The Board of Trustees, Hindu College, Delhi* (4), it was said that the words 'second appeal' occurring in section 39 (2) of the Act have been used in that section in the same sense in which they have been used in section 100 of the Civil Procedure Code. In *Madhavdas-Devidas Punekar and*

(1) I.L.R. 1945 Mad. 564
(2) I.L.R. 1952 Bom. 570
(3) A.I.R. 1949 Lah. 64
(4) A.I.R. 1949 East Punjab 165

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others v. *Vithaldas-Vasudevdas Punekar and others* (1), Bavdekar, J., (Chainani, J., concurring said—

> "Now, the words 'second appeal' are well-known to everyone, who uses the Code of Civil Procedure, and the marginal note of section 100 shows that the draftsman of the Code intended that the appeal which was provided for by section 100 should be technically known as a second appeal. Their Lordships of the East Punjab High Court, as a matter of fact, in *Banwari Lal* versus *Hindu College, Delhi* (2), took the view that the words 'second appeal' were used as a technical expression to denote certain appeals, which were defined and known as second appeals in the Code of Civil Procedure of 1908. The difficulty which we find, however, with regard to this interpretation is that, whereas the Code of Civil Procedure uses the words 'second appeal' in regard to a well-defined set of appeals, which all lay to the High Court, *and which are all appeals from decrees,* if we look at the appeals which would lie, if an appeal was provided from an order passed in appeal under section 39 (1) of the Arbitration Act with rare exceptions, the appeals would be appeals from orders, and will not be appeals from decrees. We fail to understand how then we can possibly give the words 'second appeal' the interpretation which it is sought to be placed upon them by the learned Advocate who appears on behalf of the appellant."

That the grounds set forth in section 100 of the Code of Civil Procedure have been extended to *second appeals* under various local or special enactments is plain from the provisions of section 75 of

(1) I.L.R. 1952 Bom. 570
(2) A.I.R. 1949 East Punjab 165

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the Provincial Insolvency Act, 1920. The section provides, *inter alia,* that a person aggrieved by the *decision* of a District Court on appeal from a *decision* of a subordinate Court under section 4 of that Act may appeal to the High Court on any of the grounds mentioned in subsection (1) of section 100 of the Code of Civil Procedure, 1908. In several cases to be found in law reports it is stated that proviso II to section 75(1) of the Provincial Insolvency Act, 1920, provides a *second appeal* against a decision given by a District Court on appeal under section 4 on grounds on which a second appeal is allowed from a decree passed on appeal in ordinary suits.

From the order passed by executive officer under section 140 of the Calcutta Municipal Act, 1923, an appeal lies to the Court of Small Causes under section 141 of that Act. In *Corporation of Calcutta* versus *Sheikh Kiamuddin* (1), it was held that an appeal to High Court from the order passed on appeal by the Court of Small Causes under section 142 (3) of the Calcutta Municipal Act, 1923, is not a second appeal within section 101 of the Code of Civil Procedure.

Section 101 of the Code of Civil Procedure provides that no *second appeal* shall lie except on the grounds mentioned in section 100.

In my opinion there is no justification for the assumption that section 101 of the Code of Civil Procedure does not contemplate second appeals from orders passed on appeal. As stated above an appeal under the second proviso to section 75 (1) of the Provincial Insolvency Act, 1920, falls within the definition of the expression 'second appeal' occurring in section 101 of the Code of Civil Procedure, 1908.

As pointed out in *Banwari Lal* v. *Hindu College, Delhi* (2), the Act is merely a collection of the rules contained in Schedule II of the Code since repealed and in the Arbitration Act, 1899, also since repealed, with some modifications, additions and alterations. Section 41 of the Act expressly provides for the provisions of the Code applying to

(1) A.I.R. 1927 Cal. 802
(2) A.I.R. 1949 East Punjab 165

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all proceedings before the Court and to all references under Schedule II of the Act in relation to arbitration proceedings. That being so, the words 'second appeal' in the Act must connote what they do connote in the Civil Procedure Code. In *Tribeni Prasad Singh* v. *Ramasray Prasad Chaudhry* (1), Limitation Act and the Civil Procedure Code were held to be in *pari materia* because both of them relate to the law of procedure. In my opinion, the Indian Arbitration Act, 1940, and the Civil Procedure Code are so closely related to each other as to form one 'family.' Indeed, the Act prescribes the procedure for the trial of a cause entrusted to a tribunal of the parties' choice for decision and for the enforcement of such decision while the Code of Civil Procedure prescribes the procedure for the trial of a cause by a Tribunal established and maintained by the State and for the enforcement of the decision of such tribunal. Till 1940 the provisions of the Act were to a large extent, included in the Code of Civil Procedure and even now, are, to a considerable extent, controlled by the provisions of the Code. If so, the Act and the Code of Civil Procedure must be read and construed together.

Maxwell in the Treatise on interpretation of Statutes (ninth edition) states the law in the following words at pages 35-36:—

> "Where there are different statutes in *pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system and as explanatory to each other."

For the foregoing reasons, I have no doubt that the words 'second appeal' occurring in section 39 (2) of the Act bear the meaning given to these words under section 101 of the Code of Civil Procedure, 1908. As stated above, second appeals referred to in section 101 of the Code are not necessarily appeals from decrees passed on appeal.

(1) I.L.R. 10 Pat. 670

In *Madhavdas Devidas and others* v. *Vithaldas Vasudevdas Punekar and others* (1), Bavdekar, J., thought that the concluding words of section 39 (2) of the Act imply that the legislature thought that appeals to the Supreme Court of India under sections 109 and 110 of the Code of Civil Procedure are second appeals within section 39 (2) of the Act.

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In *Ramlal Hargopal* v. *Kishanchand and others* (2), Lord Phillimore said—

> "There is nothing in section 104 to take away the general right of appealing to the Crown given by section 109, and the preliminary objection taken on behalf of the respondents fails."

In Section 39 (2) of the Act the concluding words have in my opinion been added out of abundant caution to exclude the argument that the appeal given by sections 109 and 110 of the Code is *second appeal* within section 39 (2) of the Act.

From a perusal of section 39 (2) of the Act it is plain that that provision expressly reserves the right of appeal to the Supreme Court of India as provided for in sections 109 and 110 of the Code of Civil Procedure. Indisputably, the law in different parts of the country at the time when the Act was passed was that appeal to His Majesty in Council was allowed from a judgment of a Division Bench or a larger Bench of the High Court and not from a judgment of a single Judge. That being the position of matters, I do not think that the legislature should be deemed to have intended to take away the right of appeal to a Division Bench from a judgment of a single Judge while preserving a right to appeal to His Majesty in Council from a judgment, decree or final order passed on appeal by a Division Bench of the High Court or by any other Court of final appellate jurisdiction.

For the foregoing reasons I would answer the question referred to us for decision in the negative.

KAPUR, J. In these two appeals (Letters Patent Appeals Nos. 82 and 83 of 1948), a reference has been made to this Full Bench to determine the

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(1) I.L.R. 1952 Bom. 570
(2) I.L.R. 51 Cal. 361 (P.C.)

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correctness of two judgments, one of the Lahore High Court—*Hanuman Chamber of Commerce, Ltd.* v. *Jassa Ram-Hira Nand* (1),—decided by Abdul Rashid, C. J., and Mahajan, J., and the other of this Court—*Banwari Lal* v. *Hindu College, Delhi* (2), decided by a Bench consisting of Ram Lal, C. J. and Achhru Ram, J. In both these cases it was held that in spite of section 39(2) of the Arbitration Act of 1940, appeal lies under clause 10 of the Letters Patent, against a judgment of a Single Judge given in appeal under section 39(1) of that Act. This reference was made by a Bench of this Court consisting of Weston, C. J. and Bhandari, J., because of the opinion given by a Division Bench of the Bombay High Court in *Madhavdas Devidas Punekar* v. *Vithaldas Vasudeodas Punekar* (3).

In order to determine the correctness or otherwise of the judgment of this Court and that of the Lahore High Court it is necessary to go into the history of section 39 of the present Arbitration Act. In the Civil Procedure Code of 1882 sections, which were in Chapter XLIII, dealing with appeals from orders, provided :—

> "588. ORDERS APPEALABLE.—An appeal shall lie from the following orders under this Code, and from no other such orders :—
>
> * * * * *
>
> (25) orders under section 514, superseding an arbitration ;
>
> (26) orders under section 518, modifying an award ;
>
> * * * * *
>
> The orders passed in appeals under this section shall be final."
>
> "S. 589. .....

(1) A.I.R. 1948 Lah. 64
(2) A.I.R. 1949 E.P. 165
(3) I.L.R. 1952 Bom. 570

> When an appeal from any order is allowed by this Chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made ....."

Section 591 of that Code was as follows :—

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

The Code of 1882 was replaced by the Code of 1908. Part VII of this Code, deals with appeals. Section 104 provides for appeals from orders and the relevant portion before the Indian Arbitration Act of 1940, was as follows :—

> "104—An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :—
>
> (a) An order superseding an arbitration where the award has not been completed within the period allowed by Court ;
>
> (b) an order on an award stated in the form of special case ;
>
> (c) an order modifying or correcting an award ;
>
> (d) an order filing or refusing to file an agreement to refer to arbitration ;
>
> (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;

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(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court ;
* * * * *

(i) any order made under rules from which an appeal is expressly allowed by rules :

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

(2) No appeal shall lie from any order passed in appeal under this section."

Section 105(1) which corresponds to S. 591 of 1882 provides—

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

Section 106 of this Code re-enacts the second part of section 589 of the previous Code, practically in identical terms.

After the Indian Arbitration Act, 1940, came into force sub-clauses (a) to (f) of the Code of 1908, were repealed. Before 1940 certain orders made in proceedings under Schedule II of the Code of Civil Procedure, which has now been repealed by the Indian Arbitration Act of 1940, were appealable.

Section 39 of the Indian Arbitration Act, provides as follows :—

"39(1)—An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised

by law to hear appeals from original decrees of the Court passing the order :—

An order—

(i) superseding an arbitration ;

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

(iii) modifying or correcting an award ;

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

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

(vi) setting aside or refusing to set aside an award :

Provided that the provisions of the section shall not apply to any order passed by a Small Cause Court ;

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council." These last four words have been replaced by "the Supreme Court".

It will thus be noticed that the Legislature has culled the various sections dealing with appeals in arbitration matters from the Code of Civil Procedure and enacted them in section 39 of the Arbitration Act, almost in the same words with this difference that the phrase "and save as otherwise expressly provided in the body of this Code or by any other law for the time being in force" which was introduced in section 104 of Code of 1908, has been omitted in section 39(1) of the Act. And whereas in section 588 of the Code of 1882, the words used were "the orders passed in appeal

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under this section shall be final", in section 104(2) in the Code of 1908 the Legislature said "No appeal shall lie from any order passed in appeal under this section" and in section 39(2) "No second appeal shall lie . . . ."

The second part of section 589 of the Code of 1882, was re-enacted in the Code of 1908, as section 106 and it has been introduced in section 39(1) of the Arbitration Act in the following words:—

> "An appeal shall lie.....to the Court authorised by law to hear appeals from the Court passing the order".

The question for determination is whether the interpretation given to the words used in section 588 of the Code, or in section 104(1) of the Code of 1908, read with section 589 of 1882 or 106(1) of 1908, should be different when they are re-enacted without the additional phrase of section 104(1) in section 39(1) of the Arbitration Act or whether the meaning given to the word 'final' as interpreted in regard to section 588 of the Code of 1882 or the interpretation of section 104(2), will be inapplicable to the words of section 39(2) of the Act.

In section 588 of the Code of 1877 (Act X of 1877), which corresponds to section 588 of the Code of 1882, restrictions against appeals were provided in the same terms as those contained in section 588 of the Code of 1882, and the question arose in *Hurrish Chunder Chowdhry* v. *Kali Sundari Debi* (1), as to whether Letters Patent Appeals were affected by the wording of this section. Sir Robert P. Collier delivering the judgment of the Privy Council said at page 17—

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

(1) 10 I.A. 4

There was certain amount of difference of opinion as to the effect of the decision of their Lordships between the various Courts in India, but ultimately it was decided by Calcutta, Madras and Bombay High Courts that this section did not affect appeals under the Letters Patent, but the High Court of Allahabad held otherwise.

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In *Toolsee Money Dassee* v. *Sudevi Dassee* (1), the Calcutta High Court held that this section had no effect on the Letters Patent. This was a judgment of a Bench of that Court consisting of three Judges. The learned Chief Justice referring to the observations of their Lordships of the Privy Council in *Hurrish Chunder Chowdry's case* (2), said—

> "To my mind the language of the Judicial Committee is not very aptly described as 'a mere observation'.....In my opinion then the first question is concluded by the decision of the Privy Council" (and that question was whether an appeal from the judgment of a Single Judge was barred because of section 588, Civil Procedure Code)."

Prinsep, J., said at page 371—

> "Without clause 15 of the Letters Patent, although an appeal might lie under the Code of Civil Procedure, 1882, there would be no Court constituted to hear the appeal against a judgment, decree or order on the Original Civil Jurisdiction of the High Court, for clause 16 relates to a different matter, and it would confer no such appellate jurisdiction, and the portions of the Code of Civil Procedure, which relate to appeal to Her Majesty in Council, would give the right of appeal only in a small number of cases of a special character, either in regard to the points of issue or the

(1) I.L.R. 26 Cal. 361
(2) 10 I.A 4

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value of the subject-matter of the particular suit. We have it, therefore, that if beyond clause 15 of the Letters Patent 1865, section 588 of the Code of Civil Procedure, gives the right of appeal against any order of the description specified therein, there is no Court of Appeal constituted to hear it, if such order not being a judgment had been made by the Judge on the Original Side of the High Court. There would be another difficulty, which it is inconceivable that the Legislature should have contemplated. If irrespective of clause 15 of the Letters Patent, an appeal lies under section 588 of the Code, it must be against an order passed by any Divisional Court exercising the Original Civil Jurisdiction of the High Court. To what Court would it lie? There is no Court constituted by the Letters Patent or by any local law to hear it. Clause 16 of the Letters Patent does not apply, nor does clause 15. Then, again, if such an order be appealable, it would be appealable if passed by a Division Court consisting of more than one Judge. The Court might have consisted of the majority or even of all of the Judges of the High Court. I would also point out that the same difficulty would arise if an order of remand be passed by a Division Court hearing an appeal whether that appeal be from the High Court in its original Jurisdiction or from a subordinate Court such as the Court of a District Judge or Subordinate Judge. These considerations lead me to conclude that it was never intended by the Legislature to alter the effect of clause 15 of the Letters Patent by such indirect legislation. If it had been intended to do so the alteration in the law would have been expressly declared, and such difficulties as I have indicated would have been provided for."

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Ameer Ali, J., at page 378, said—

> "The effect, therefore, of acceding to the objection taken by the learned counsel for the respondents, would be to cut down by implication the provisions of clause 15 of the Letters Patent, which I think would be against all principle; for a right or power vested by statute can be taken away or divested only by express enactment and not by mere suggestion based upon inferences. In my opinion section 588 of the Code of Civil Procedure, applies only to orders made by subordinate Courts, which derive their powers from the Code..... But the powers of the High Court are not derived from the Code, and consequently an order of a Judge of the High Court exercising its Original Civil Jurisdiction, though made in accordance with the procedure laid down in the Code, can hardly be said to be made 'under the Code'. Besides, section 589 of the Code indicates to my mind that the preceding section was applicable only to the orders of subordinate Courts."

The Madras High Court in *Chappan* v. *Moidin Kutti* (1), held an appeal under the Letters Patent not to be barred by section 588 and also that this section did not control clause 15 of the Letters Patent. Subramania Ayyar, J., after giving the definition of the word 'appeal' as being "the removal of a cause or a suit from an inferior to a superior Judge or Court for re-examination or review", observed at page 84—

> ".....an appeal lies if the particular order amounts to a judgment within the meaning of clause 15 of the Letters Patent; unless the said clause has, as contended before us, been modified by section 588 of the Code of Civil Procedure. This

(1) I.L.R. 22 Mad. 68

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contention is, however, opposed to the ruling of the Judicial Committee in *Hurrish Chunder Chowdry* v. *Kali Sundari Debi* (1), in which their Lordships laid down that that section does not apply to a case such as the present where the appeal is from one of the Judges of the Court to the Full Court. I am unable to persuade myself, as I have already stated on a previous occasion, that the observations of the Committee on the point are mere *obiter dicta*. The contention that section 588 modified clause 15 was not only distinctly raised but was also strongly pressed by counsel in the argument. Their Lordships had, therefore, to give a decision upon the soundness or unsoundness of the contention. That, it appears to me, they did in unmistakeable terms."

At page 99, Moore, J., said—

> "For the foregoing reasons I am of opinion that it was not the intention of the Legislature that the provisions of section 15 of the Letters Patent should be affected by section 591 of the Civil Procedure Code."

This matter was again considered by the Madras High Court in *Sabhapathi Chetti* v. *Narayansami Chetti*, (2), and it was held that Article 15 of the Letters Patent was not restricted by sections 588 and 591 of the Code of Civil Procedure. At page 558 a reference was made to the judgment of their Lordships of the Privy Council in *Hurrish Chunder Chowdry's* case (1). The judgment then proceeded to say—

> "The provision made by section 15 of the Letters Patent for appeals from one or more Judges of the High Court, to other Judges of the same Court is entirely

(1) 10 I.A. 4
(2) I.L.R. 25 Mad. 555

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foreign to the provisions of the Civil Procedure Code, relating to appeals from one Court to another. The matter is placed beyond all reasonable doubt, by section 597 of the Code of Civil Procedure, which occurs in the chapter relating to appeals to the King in Council. It is provided in that section, among other things, that no appeal shall lie to His Majesty in Council from a judgment of one Judge of a High Court or of one Judge of a Division Court. The obvious reason for such restriction is that the party should not be permitted to appeal directly to the King in Council from the judgment of a Single Judge of the High Court, whether passed in the exercise of Ordinary Original Civil Jurisdiction or of Appellate Civil Jurisdiction but that he should, in the first instance, appeal, under section 15 of the Letters Patent, to the other Judges of the High Court. The result of holding that no appeal would lie under section 15 of the Letters Patent, from an order of a Single Judge in the exercise of Original Civil Jurisdiction when such order is not a decree or an order specified under section 588 of the Code of Civil Procedure or from an order of a Single Judge, passed in appeal, from any of the orders, specified in section 588 of the Code of Civil Procedure, would be that such orders would be final and no appeal would lie, either to other Judges of the High Court or to the King in Council, although from a final order passed by a District Judge in appeal from any of the orders mentioned in section 588, an appeal would lie direct to the King in Council under section 595(a). The fact that sections 588 and 591 of the Code of Civil Procedure, are applicable to the High Court, does not affect the question now under consideration. They are applicable to the High Court, in that

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appeals from orders of the Subordinate Courts lie to the High Court under section 588 of the Code of Civil Procedure and section 591 prohibits appeals from such Courts to the High Court, except in the cases provided for by section 588".

The same Court held in *Muthuvaien* v. *Pariasami* (1), that the word 'final' in section 588 of the Code is used in the section simply in the sense that there shall be no second appeal to a Court of a higher grade and is not inconsistent with the provisions of clause 15 of the Letters Patent. The same principle was applied in another Full Bench decision—*Dhanaraju* v. *Balakissendas* (2).

The Bombay High Court in *the Secretary of State for India in Council* v. *Jehangir Maneckji Cursetji* (3), following *Hurrish Chunder's case* (4), has taken the same view and held that section 588 of the Code of Civil Procedure, does not take away the right of appeal given by clause 15 of the Letters Patent.

It thus appears that the view taken by the three Presidency High Courts of Calcutta, Madras and Bombay was that the right of appeal given under clause 15 of the Letters Patent is not restricted by the wording of sections 588 and 591 of the Code of Civil Procedure. And according to the Madras view *Sabhapathi Chetti* v. *Narayanasami Chetti* (5), if no appeal under clause 15 of the Letters Patent is competent because of section 588 of the old Code then, it would lead to this anomalous position that in such cases there would be no appeal to the Privy Council against the judgment of the High Court as appeal would neither lie under clause 15 of the Letters Patent to two Judges nor to King in Council because of section 111 of the Code of 1908 or the corresponding section of the Code of 1882

(1) 13 M.L.J. 497
(2) I.L.R. 52 Mad. 563 (F.B.)
(3) 4 Bom. L.R. 342
(4) 10 I.A. 4
(5) I.L.R. 25 Mad. 555

(section 597) although a final order passed by the District Judge in appeal would be appealable direct to the King in Council. I am taking the position before the Constitution of 1950.

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The Allahabad High Court in *Banno Bibi* v. *Mehdi Hussain* (1), held that no appeal lies against the order of a Single Judge refusing an application to appeal in *forma pauperis* and this because of sections 588 and 591 and that the observations of the Privy Council in *Hurrish Chunder's case* (2), must be confined to the facts of that case. The same Court in *Muhammad* v. *Ishanullah* (3), took the view that no appeal lay against the order of a Single Judge amending a decree of the Court. Mahmood, J., at page 235, was of the opinion that section 588 amends clause 10 of the Letters Patent. Thus the Allahabad Court held that because of section 588 of the Code of Civil Procedure a Letters Patent appeal against the order of a Single Judge was not competent.

In the Code of 1908, section 588 of the Code of 1882 was replaced by and re-enacted as section 104. In the first subsection of this section (104) the Legislature added the words "save as otherwise expressly provided by any other law for the time being in force". According to Mulla's Civil Procedure Code (1941 Edition), page 380, these words were meant for the purpose of including the Letters Patent and were added to give effect to the Calcutta, Madras and Bombay judgments. This was the view taken by the Lahore High Court in *Ruldu Singh* v. *Sanwal Singh* (4), and the Madras High Court in *Paramasivan* v. *Ramasami* (5), held following its previous decisions under the old Code that an order passed under Order XLIII, Rule 1 of the new Code is not final but is subject to appeal under the Letters Patent. The Allahabad High Court, however, in spite of the saving clause adhered to its own opinion for some time (see

(1) I.L.R. 11 All. 376
(2) 10 I.A. 4
(3) I.L.R. 14 All. 226 (F.B.)
(4) I.L.R. 3 Lah. 183
(5) I.L.R. 56 Mad. 915

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Piari Lal v. *Madan Lal* (1), but it was subsequently held by that Court also that a Letters Patent appeal would lie. See *Ram Sarup* v. *Kaniz Ummehani* (2).

I may now discuss the nature of an appeal under clause 10 of the Letters Patent which corresponds to clause 15 of the Letters Patent of the High Courts of Calcutta, Madras and Bombay. 'Appeal' means "the removal of a cause or a suit from an inferior to a superior Judge or Court for re-examination or review". In *Attorney-General* v. *Sillem* (3), Lord Westbury, L.C., said—

> "It is the right of entering a superior Court and invoking its aid and inter—position to redress the error of the Court below".

According to Subramania Ayyar, J., "the two things, which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior Court and the power on the part of the former to review decision of the latter." *Chappan* v. *Moidin Kutti* (4).

This has been put by Story thus:—In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other Court whose judgment or proceedings are to be revised."

In *the Secretary of State for India* v. *British India Steam Navigation Co.* (5), reference is made to commentary on American Jurisprudence by Andrews, Volume II, page 1510, where it is pointed out "that appellate procedure embraces two distinct modes of its exercise, namely, first the record of the inferior tribunal may be brought to the superior tribunal and the decision reviewed, affirmed, reversed or modified; or, secondly the superior tribunal may check the exercise or usurpation of

(1) I.L.R. 39 All. 191
(2) I.L.R. (1937) All. 386.
(3) 10 H.L.C. 704
(4) 22 Mad. 68 at p. 80
(5) 9 I.C. 183 at p. 185

power in inferior tribunals. . . ." Quotations in this case are given from Law Dictionary by Bouvier where appeal has been defined as the removal of a cause from a court of inferior to one of superior jurisdiction for the purpose of obtaining a review and trial, and from Law Dictionary by Sweet where it is defined as a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court or Court of Appeal. A Letters Patent appeal, however, is not such a removal from an inferior Court to a superior Court but is an appeal within the High Court itself. It is a domestic affair. It has been described as an intra-court appeal, i.e., an appeal in the Court itself, and one Judge of the High Court sitting alone is not a different Court from two Judges of the same Court sitting in appeal against his judgment under the Letters Patent. Both a Single Judge and a Division Bench of two Judges are the High Court whether the case is on the original side or is in the exercise of appellate jurisdiction and both perform the functions directed to be performed by the High Court. (See clause 26 of the Letters Patent).

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In *Wahid-ud-Din* v. *Makhan Lal* (1), it was held by a Full Bench (Blacker, J., dissenting) that for purposes of section 110 of the Code of Civil Procedure, a Judge sitting singly on the Appellate side cannot be considered to be a Court immediately below the Bench hearing the Letters Patent appeal. At page 249, Din Mohammad, J., said—

> "It is true that ordinarily the term 'appeal' means the judicial examination by a higher Court of the decision of an inferior Court, but despite this definition I cannot reconcile myself to the position that a Judge sitting alone can be characterised as a tribunal inferior to the Letters Patent Bench, merely because the Bench has power to modify or reverse his judgment. It is not with an idea of implying any subordination of the Court of the Single Judge to the Letters

(1) I.L.R. 1945 Lah. 242

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Patent Bench that such an appeal is provided for by Letters Patent, it is merely with a view to provide a further safeguard in the interests of the litigant that the domestic rules framed by the High Court permit a case to be heard by a Judge sitting alone. It is not disputed that a Judge sitting alone may, in view of the importance involved in a case, decline to dispose of it himself and refer it straight-away to a larger Bench. Would this course be open to an inferior or subordinate tribunal. . . . . ."

Jenkins, C. J., dealt with this matter in *Dabendra Nath Das* v. *Bibudhendra Mansingh* (1), and it was there held that a Judge sitting alone is not a Court subordinate to the High Court. At page 93, the learned Chief Justice said—

> " This appears to me to be the true result of the Letters Patent and the Code, for the Code makes no provision for an appeal within the High Court, that is to say from a Single Judge of the High Court. This right of appeal depends on clause 15 of the Charter.
>
> And there I may point out that a Judge sitting alone is not a Court subordinate to the High Court but performs a function directed to be performed by the High Court (clause 36, Letters Patent). And thus no decision of a Single Judge can be revised under section 115 of the Code. "

In *Jamna Dass* v. *A. M. Sabapathy Chetty* (2), it was held that the original side of the High Court is not a different court from the appellate side; and the Court is one, but exercises both original and appellate jurisdiction. *Muthuvaien* v. *Pariasami* (3), also refers to appeal from one Judge of the High Court to the High Court.

(1) I.L.R. 43 Cal. 90
(2) I.L.R. 36 Mad. 138
(3) 13 M.L.J. 497

On behalf of the respondents, Mr. D. K. Mahajan, referred to a judgment of their Lordships of the Privy Council in *Tulsi Persad Bhakat* v. *Benayek Misser* (1), where at page 921, their Lordships, said—

> "Their Lordships think that no question of law, either as to construction of documents or any other point, arises on the judgment of the High Court, and that there are concurrent findings of the two Courts below on the oral and documentary evidence submitted to them."

and he wishes us to conclude that their Lordships meant to say that a Single Judge of a High Court and a Division Bench of two Judges hearing appeals under the Letters Patent form two Courts; but I am unable to draw this conclusion from the language used by their Lordships.

Next in support of the argument that appeals under clause 10 of the Letters Patent are barred under section 39(2) of the Arbitration Act, it is submitted that the first subsection of that section is a good index of the intention of the Legislature. It is contended that (1) the words of the first subsection show that the right of appeal under the Letters Patent has been expressly taken away and reliance is placed on clause 25 of the Letters Patent: (2) that no words corresponding to the saving clause which had been introduced into section 104(1) of the Code of Civil Procedure in 1908, to put an end to the controversy between the different Courts find place in section 39(1) of the Arbitration Act; (3) that *qua* the appeals under the Code, the Letters Patent may be a special Act, but as the Arbitration Act is an amending and consolidating Act, section 39 will apply to all appeals in arbitration matters and (4) *vis-a-vis* the Letters Patent the Arbitration Act is a special Act and on the principle *generalie specialibus non derogant* it will prevail as against clause 10 of the Letters Patent.

(1) I.L.R. 23 Cal. 918

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In my opinion, in the present case the real question to be considered is whether the appeal under the Letters Patent is barred because of the language of section 39(2) of the Arbitration Act and the question of appeal under the first subsection of section 39 only arises because it has been submitted that the first subsection has taken away the right of appeal under the Letters Patent which would throw some light on the interpretation to be put on subsection (2) of section 39.

Two judgments have been quoted before us where it was held that section 39(1) of the Arbitration Act does affect the right of appeal under the Letters Patent. These are : *R. Wright and Partners, Ltd.* v. *Governor-General in Council* (1), and *Vithal Das* v. *Madhav Das* (2). The former case no doubt was on the original side of the Calcutta High Court and, therefore, interpretation of section 39(1) directly arose, but the latter case was under section 39(2) and the first subsection of that section was discussed because an argument similar to the one before us was raised in that Court.

I may now discuss the principles which govern statutes which are *in pari materia* or are of similar scope or of similar subjects or what is the effect of the same section being removed from one statute and re-enacted in another statute.

(i) Section 39 (1) is not very different from section 588 of the Code of 1877, as amended in 1879 and the corresponding section 588 of the Code of 1882. In that section (588) the words were—

> "An appeal shall lie from the following orders under this Code and from no other such orders. . . . ."

In section 39(1) the language is almost the same. The amendment made in section 104(1) of the 1908 Code has not been continued in section 39(1) of the Act. It merely says :—

> "An appeal shall lie from the following orders passed under this Act. . . . . "

(1) I.L.R. (1948) 2 Cal. 265 : 52 C.W.N. 224
(2) I.L.R. 1962 Bom. 570.

When the words are the same or identical as they are in section 588 of the Code of 1882 and in section 39(1) of the Arbitration Act, the interpretation to be put upon these sections should not and cannot be different. As a matter of fact section 39(1) is a re-enactment of section 588 of 1882. In other words if section 588 of the Code of 1882 has been interpreted in one way, section 39(1) should receive the same interpretation. It is a recognised rule of interpretation of statutes that if Acts of a Legislature use forms of words which have received judicial construction, in the absence of anything in the Acts showing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that the Parliament in subsequent statutes did so use them. (See *D'Emden* v. *Pedder*, (1), which was adopted by their Lordships of the Privy Council in *Webb* v. *Outrim* (2)). See also *Jay* v. *Johnstone* (3), *Jhari Singh* v. *Emperor* (4), *R.* v. ~~*Sattor*~~ (5), and other cases discussed later on in this judgment.

(ii) Both the Civil Procedure Code and the Indian Arbitration Act of 1940, are Acts which are *in pari materia*, the former prescribes the procedure for trial of a cause in a Court and the latter prescribes the procedure before an arbitral tribunal and subsequently in a Court dealing with matters arising therefrom. In *Tribeni Prasad Singh* v. *Ramasray Prasad Chaudhuri* (6), the Limitation Act and the Code of Civil Procedure, were held to be *in pari materia* because both of them are procedural laws. In Craies on Statute Law, page 130, it is stated—

> "Both statutes are made *in pari materia*, and whatever has been determined in the construction of one of them is a sound rule of construction for the other."

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(1) (1904) 1 Austr. C.L.R. 91 at p. 110
(2) (1907) A.C. 81, 89
(3) (1893) I.Q.B. 25, 28
(4) A.I.R. 1920 Pat. 249
(5) (1881) 8 Q.B.D. 267, 272, 274
(6) I.L.R. 10 Pat. 670

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"When a particular form of legislative enactment" said Griffith, C. J., in D'Emden v. Pedder (1), "which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which had been so put upon them." So firmly established is this rule that even in regard to a Dominion or Colonial Act, it has been said "that an Act of a Colonial Legislature where the English law prevails must be governed by the same rules of construction as prevail in England, and that English authorities upon an Act *in pari materia* are authorities for the interpretation of the Colonial Act. I think, it is true as a general principle." (See *Catterall* v. *Sweetman* (2). This decision was approved of by the Judicial Committee of the Privy Council in *Trimble* v. *Hill* (3).

In Maxwell on Interpretation of Statutes at page 35, it is stated—

> "Probably, the rule as to the exposition of one Act by the language of another is satisfactorily and most comprehensively laid down in the broad statement of Lord Mansfield, that :
>
> 'Where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system and as explanatory to each other'.
>
> Where a Colonial Legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such

(1) (1904) 1 Austr. C.L.R. 91 at p. 110
(2) (1845) 9 Jur. 951, 954
(3) (1880) 5 A.C. 342

construction should be adopted by the Court of the Colony (*Trimble* v. *Hill* (1)).

And at page 330 of Maxwell relying on *Murray* v. *East India Company* (2), it is stated that statutes *in pari materia* should receive a uniform construction notwithstanding even slight variation of phrase, the object and intent being the same.

(iii) In Maxwell on Interpretation of Statutes, page 40, subnomine " Interpretation of Acts of Similar Scope", it is stated :—

> "The construction which has been put upon Acts of similar scope or similar subjects, even though the language should be different may for a similar reason be referred to."

I have already discussed the interpretation of words used in Acts which are *in pari materia*.

(iv) Another rule of interpretation is that "a change of language effected by the omission in a later statute of words which occurred in an earlier one would make no difference in the sense when the omitted words of the earlier statute were unnecessary." Maxwell page 329; *R.* v. *Ingham* (3); *Liverpool Borough Bank* v. *Turner* (4).

R. v. *Ingham* (3), is very apt instance of this principle. It was held in *Withipole's case* that the word 'Indictment' used in an earlier Statute, 11 Hen. 4, included 'inquisition'. In order to get rid of technicalities it was enacted in section 30 of 14 and 15 Vict. Ch. 100 that the word 'Indictment' shall be understood to include 'inquisition' but this statute was repealed and was replaced by 14 and 15 Vict. Ch. 100, the 6th section of which omitted to include the word 'inquisition' in the definition of 'Indictment'. It was argued in *R.* v. *Ingham* (3), that the intention of the Legislature was to go back

(1) (1880) 5 A C. 342
(2) 106 E.R. 1167, 1171
(3) 10 L.T. 456: 33 L.J. Q.B. 183
(4) 30 L.J. Ch. 379

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to the law before the enactment of 14 and 15 Vict. Ch. 100. Repelling this contention Cockburn, C.J., observed—

> "I cannot imagine that it was the intention of the Legislature to have restored them (technicalities) and so throw difficulties in the way of administration of justice. I cannot suppose that, after ten years it should have been thought necessary by the Legislature to interfere to restore the law to what it was before the 14 and 15 Vict. without any reason whatever being assigned for so doing."

In Maxwell on Interpretation of Statutes, page 330, the law has been stated thus :—

> "Even where the omitted words were material to the sense, but might be implied, the omission would not, in itself, be considered material if leading to consequences not likely to be intended."

In *Murray* v. *East India Company* (1), Abbott, C.J., observed :—

> "The several statutes of limitation being all *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same."

Relying on this at page 330 of Maxwell on Interpretation of Statutes is given the following rule which would apply to the present case also :

> "It has, indeed, been said that generally statutes *in pari materia* ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intent being the same. It has frequently been laid down in America that mere change of phraseology is not to be deemed to alter the law."

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(1) 106 E.R. 1167 at p. 1171

The word 'appeal' connotes, as appears from the discussion above given, taking a cause from an inferior Court to a superior Court. And section 39(1) seems to imply two different Courts and does not in my opinion apply to intra-Court appeals or appeals from one Judge of a High Court to two or more Judges of the same Court, because a Single Judge of the High Court is as much the High Court as a Bench of two Judges of the same Court. The words in section 39(1) "An appeal shall lie.....to the Court authorised by law to hear appeals from the Court passing the order" are as I have said above taken from the second part of section 589 of the Code of 1882. And it was held in *Toolsee Money Dasi* v. *Sudevi Dassee* (1), that "section 589 indicates that section 588 was applicable only to orders of subordinate Courts" (per Amir Ali, J.). These words occurring in section 39(1) of the Act must on the principles of interpretation discussed above have the same meaning and refer to an appeal from a subordinate Court to another.

Even in the absence of the saving clause added in 1908 [in section 104 (1) of the Code] the Privy Council had held in *Hurrish Chunder's case* (2), that section 588 of the Code of 1882 did not affect appeals under clause 15 of the Letters Patent. The contention that section 588 modified clause 15 was raised before the Privy Council in that case but they in unmistakeable terms said that it did not. *Chappan* v. *Moidin Kutti* (3).

(v) It is, in my opinion, not correct to say that the Arbitration Act is a special Act and the Letters Patent is a general Act because clause 10 of the Letters Patent deals only with intra-Court appeals and cannot be called a general provision. It provides for appeals in the High Court itself and without this provision no such appeal would lie for no other provision exists for appeals from the judgment of one Judge of a High Court to two or more Judges of the same Court. The Letters Patent and the rules made under section 27 thereof have

(1) 26 Cal. 361, 379
(2) 10 I.A. 4
(3) 22 Mad. 68, 84

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been held to be a "special law" under section 29 of the Indian Limitation Act. *The Punjab Co-operative Bank, Ltd.* v. *The Official Liquidator, Punjab Cotton Press, Ltd.*, (in *liquidation*) (1).

(vi) It is true that the Arbitration Act is an amending and consolidating Act but so was the Code of 1882 and so is the Code of 1908. It only means this that these Acts are complete as far as they go, and if the meaning is plain no heed is to be paid to the previous Law but the rule laid down in *Bank of England* v. *Vagliano* (2), would still apply. And it cannot be said that the construction put on words in Acts which are *in pari materia* or are of a similar scope or similar subjects is to be disregarded. Applying these principles of interpretation to the facts of the present case I am of the opinion that—

(i) As the words used in section 39(1) of the Arbitration Act are essentially the same as those used in sections 588 and 589 of the Code of 1882 and section 104(1) of the Code of 1908 without the addition made in that section and these words have already received a particular interpretation, they should receive the same interpretation in section 39(1). If section 588 was held not to be bar to appeals under the Letters Patent, section 39(1) cannot be a bar.

(ii) The mere fact that there has been an alteration in the new statute, i.e., section 39(1) of the Act by omitting the additional phrase added in 1908, would not show that there was any intention to alter or modify the effect of paragraph 10 of the Letters Patent or take away by such legislation the vested right of appeal. See *Toolsee Money's case* (3). There is nothing to indicate that by this variation the object and intention have also been varied or that the object was to prefer the old Allahabad view to the view taken by

(1) I.L.R. (1941) Lah. 191, 210
(2) (1891) A.C. 107, 144-45.
(3) 26 Cal. 361, 373, 378.

the other Courts or to revive the conflict between the Courts.

(iii) The words of section 39(1) do not refer to intra-Court appeals but appeals from inferior to superior Courts and do not by implication or expressly take away the right of appeal under Letters Patent.

Besides, the word used in section 39(1) of the Arbitration Act, is 'order' and not 'judgment' and I need not say that the two words are not synonymous. In many cases this has been pointed out and even under the Arbitration Act of 1899 an order under section 17 (which corresponds to section 34 of the present Act) refusing to stay proceedings was held not to be a judgment and, therefore, not appealable [*Ah. Kway* v. *Administrator-General, Burma* (1)], dissenting from *Joylall* v. *Gopiram* (2), so also an order returning the award for want of notice of filing to be given to the parties [*Abowath* v. *Abowath* (3)]. This distinction between an 'order' and a 'judgment' has been accepted by all Courts beginning with the *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (4), right up to the present, and now the Supreme Court also in *Asrumati Debi* v. *Kumar Rupendra Deb* (5), have pointed out this distinction. But if the argument of Mr. Mahajan is accepted then there will be no distinction between an "order" as used in section 39 of the Arbitration Act, and judgment as used in clause 10 of the Letters Patent. In *R. Wright and Partner, Ltd.* v. *Governor-General in Council* (6), a case on which this part of Mr. Mahajan's argument was based, Mukherjea, J., with whom Harries, C. J., agreed, held that no appeal lay against an order passed under section 33 of the Indian Arbitration Act holding that the arbitration agreement was inoperative. At page 267 of the report although it is said—"It is against this order that the present appeal has been taken",—the

(1) I.L.R. 7 Rang. 481
(2) I.L.R. 47 Cal. 611
(3) I.L.R. 6 Rang. 25
(4) 8 Bengal Law Reports 433
(5) 1953 S.C.A. 319
(6) I.L.R. (1948) 2 Cal. 265

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appeal was held to be incompetent on the ground that an order under section 33 is not appealable because (i), section 39(1) "is perfectly explicit and it forbids appeal from all orders excepting those enumerated in the section." (P. 270) and (ii) because the words which were introduced in section 104 of the Code of 1908, to put an end to the controversy which arose after the decision in *Hurrish Chunder's case* (1), had not been repeated in section 39 (page 269). The learned Judge recognises that there is a difference between appeals under the Code and appeals under the Letters Patent, but this principle was held not to be applicable as section 39(1) applies to all appeals in arbitration cases including appeals in the same Court as the Arbitration Act is an amending and consolidating Act, and "vis-a-vis the Letters Patent the Arbitration Act is certainly a special Act" and on the principle *generalia specialibus non derogant.*

I have already given my reasons for taking a contrary opinion on all these points and I do not think it necessary to repeat them.

The opinion, that I have expressed was also the opinion of a Bench of this Court in *Banwari Lal* v. *Hindu College, Delhi* (2), and I respectfully agree with this view supported as that judgment is by the rules of interpretation to which a reference has already been made.

The Bombay High Court has taken the same view in *Madhavdas* v. *Vithaldas* (3), which has been taken by the Calcutta High Court in regard to section 39(1), but it is not necessary to say anything more than I have already said in connection with the Calcutta judgment in *R. Wright and Partner, Ltd.* v. *Governor-General in Council* (4).

As I have said above in the present case we are really concerned with section 39(2) of the Act and not with section 39(1). Now although a saving clause was added in the first subsection

(1) 10 I.A. 4
(2) A.I.R. 1949 E.P. 165
(3) I.L.R. 1952 Bom. 570, 573-4
(4) I.L.R. (1948) 2 Cal. 265

of section 104 of the Code of Civil Procedure, no such words were added in the second subsection, and both sections 588 and 591 of the Code of 1882 and section 104(2) of the Code of 1908, were intended to apply to appeals which were allowed under the Code but they did not affect appeals under the Letters Patent. No express provision suggesting that Letters Patent appeals have been abrogated by section 104(2) has ever been suggested and there is no reason why such an interpretation should be introduced in construing section 39(2) of the Arbitration Act. In *Ram Sarup* v. *Kaniz Ummehani* (1), at page 388, Sulaiman, C. J., observed as follows :—

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> "It may further be pointed out that section 104(1) of the Civil Procedure Code itself provides: 'Save as otherwise expressly provided ... by any law for the time being in force.' Accordingly the prohibition contained in that subsection that an appeal shall not lie from any other orders would not apply to a case where an appeal is provided for under the Letters Patent. It may, however, be conceded that this saving clause does not occur in subsection (2) of section 104. But under the corresponding section 588 of the old Code, where the words were "orders passed in appeal under this section shall be final," their Lordships of the Privy Council in *Hurrish Chunder Chowdry* v. *Kali Sundari Debi* (2), observed that section 588, which had the effect of restricting certain appeals, did not apply to a case where the appeal is from one of the Judges of the High Court to the Full Court. Obviously section 104(2) was intended to apply to appeals where allowable under the Code of Civil Procedure. In any case section 104(2) does not contain any express provision which would suggest that the provisions of the

(1) I.L.R. (1937) All. 386
(2) 10 I.A. 4

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Letters Patent have been abrogated. We accordingly hold that under clause 10 of the Letters Patent an appeal lies from the order of a Single Judge passed in appeal."

It shows, therefore, that the mere fact that certain words (the saving clause in this case) are added in the first subsection of section 104 of the Code of Civil Procedure, is no ground for saying that that clause is also introduced into section 104(2) of the Code, which is the clause restricting appeals from appellate orders.

It was then submitted that the phrase 'second appeal' had been used in a numerical sense, that is an appeal which is brought against an order of one Court to another Court under section 39(1) would be a first appeal and any appeal from that order would be what the respondent's counsel calls a second appeal. Now the phrase 'second appeal' is a well-known legal connotation and is well-known to lawyers. Mahajan, J., with whom Rashid, C.J., agreed observed in *Hanuman Chamber of Commerce, Ltd., Delhi* v. *Jassa Ram-Hira Nand* (1):—

> "The expression 'second appeal' has seldom been used in respect of appeals which arise within this Court and which are very commonly described as 'inter-Court appeals'. I am, therefore, of the opinion that subsection (2) of section 39 does not take away the right that has been conferred on a litigant under clause 10 of the Letters Patent of this Court. It seems to me that this subsection only refers to two kinds of appeals that are mentioned in the Code of Civil Procedure, namely, those a right to which is conferred by section 100, Civil Procedure Code, and those the right to which is given by sections 109 and 110 of the Code."

(1) A.I.R. 1948 Lah. 64

In *Banwari Lal's case* (1), similar meaning was given to the words 'second appeal'.

It is a well-known principle of construction that where the Legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted: *Vide Jay* v. Johnstone (2). See also *D'Emden* v. *Pedder* (3).

In *Jhari Singh* v. *Emperor* (4), it was held that where the Legislature uses in an Act a legal term it must be presumed that the term has been used in that sense and in no other sense. The word used in that case was 'trespass'.

In *Queen* v. *Slator* (5), Denman, J., said at page 272—

> "But it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well-known legal term."

Hawkins, J., observed at page 274—

> "I am of opinion that the Court ought not, when a word having so well-known a meaning as the word indictment occurs in a statute, to stretch the ordinary well-known meaning in order to carry out the suggested intention of the Legislature."

And the third learned Judge, Bowen, J., at page 274, observed—

> "The whole of the argument fails if it is not shown that there is a popular use of the term 'indictment' as including information. There is certainly no such popular use of the term among lawyers, and if it is among persons ignorant of the law it is an incorrect use of the term."

(1) A.I.R. 1949 E.P. 165
(2) (1893) I.Q.B. 25
(3) (1904) 1 C.L.R. 91, 110 (Australia)
(4) A.I.R. 1920 Pat. 349
(5) (1881) 7 Q.B.D. 267

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Here the word that the learned Judges were interpreting was 'indictment.'

In interpreting words and phrases it is permissible to refer to the previous history and decided cases as also to external evidence such as extraneous circumstances: see *Henrietta Muir Edwards* v. *Attorney-General for Canada* (1).

The Bombay High Court in *Madhavdas Devidas Punekar* v. *Vithaldas Vasudeodas Punekar* (2), has taken a contrary view on the question of the interpretation of the words 'second appeal' as used in section 39(2) of the Arbitration Act. They are of the opinion that second appeal lies only against a decree and is not applicable to orders; the word 'second' must be read in its numerical sense. I am, however, unable to agree with this. This takes no notice of the rules of construction of statutes given above. The fact that the Legislature has chosen to use words which have a definite connotation to lawyers is a ground for holding that the words mean what they have been interpreted to mean or have come to have that meaning by a long course of practice and not for giving them a different meaning.

Even if the word "second" is used to indicate another appeal the reference must be to an appeal which is taken from an appellate Court of inferior jurisdiction to a second appellate Court of a superior jurisdiction.

In some of the earlier decided cases the words 'second appeal' were used in connection with appeals from the appellate orders of District Judges under section 588 of the Code of 1882. In *Nana Kumar Roy* v. *Golam Chunder Dey* (3), it was said—

> "Being of opinion that the sale in question is not invalidated by the omission referred to, we think that the first question must be answered in the negative, inasmuch as appeal from an order dismissing an application under section 311 of

(1) 1930 A.C. 124, 127
(2) I.L.R. 1952 Bom. 570, 575
(3) I.L.R. 18 Cal. 422 at p. 426

the Code cannot be subject-matter of second appeal."

Similarly in *Bhagbut Lall* v. *Narku Roy* (1), it was said—

> "As at present advised we think that no second appeal lies from this order "(and the reference was to an appellate order under section 588 of the Code)."

In *Gopi Koeri* v. *Gopi Lal* (2), when an objection was taken by Mr. Woodroffe that having regard to the provisions of section 588 of the Code of Civil Procedure, no second appeal lay from the Judge's order, the learned Judges said at page 802, as follows :—

> "We think that the preliminary objection that has been raised by Mr. Woodroffe, on behalf of the respondent ought to prevail, that objection being that no second appeal lies to this Court in this case, because the order of the Court of Appeal below is an order falling within section 588 of the Code of Civil Procedure.
>
> This appeal will accordingly be dismissed with costs."

Similary in *Aubhoya Dassi* v. *Pudmo Lochun Mondon* (3), the learned Judges used the words 'second appeal' in the following circumstances :—

> "This is a second appeal from an order setting aside a sale in execution of a decree.
>
> The order in question purports to have been made under section 312 of the Code, and a preliminary objection has been raised that, under the provision of the last paragraph of section 588, no second appeal will lie."

(1) I.L.R. 21 Cal. 789, 791,
(2) I.L.R. 21 Cal. 799
(3) I.L.R. 22 Cal. 802 at p. 804

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In *Kanti Chunder Mookerjee* v. *Saligram* (1), the words 'second appeal' were used in regard to an appellate order setting aside an order granting a review of judgment.

Sir Shadi Lal, C. J., presiding over a Division Bench in *Ruldu Singh* v. *Sanwal Singh* (2), observed—

> "It seems to us that the object of the Legislature in enacting subsection (2), was to make it clear that there was no second appeal under the Code from the orders specified in subsection (1) of section 104, and that subsection (2) was not intended to override the express provisions of the Letters Patent."

In *Muthuvaien* v. *Pariasami* (3), these words were again used in connection with appeals under section 588. The Bench said at page 498—

> "The word 'final' is used in the section simply in the sense that there shall be no second appeal to a Court of a higher grade, and in this view it is not inconsistent with the provision made by section 15 of the Letters Patent in appeals from the judgment of one Judge of the High Court to the High Court."

This case clearly shows that the second appeal if the words are used in a numerical sense are used in the sense of an appeal to a superior Court from the order of an inferior Court and has no reference to intra-Court appeals.

It will be noticed that in all these cases where the phrase 'second appeal' was used it was in connection with appeals to the High Court from appellate orders of the District Judge. In no case was an appeal from a Single Judge of the High Court to two Judges of the same Court under the Letters Patent referred to as a second appeal. We must assume that the framers of the Act must have been

(1) I.L.R. 24 Cal. 319
(2) I.L.R. 3 Lah. 188 at p. 193
(3) 13 M.L.J. 497

aware of the sense in which the phrase 'second appeal' was used by the Courts and particularly by such distinguished Judges as Bhashyam Ayyangar, J., and Sir Shadi Lal, C.J. If it was the intention of the framers to take away a right of Letters Patent appeal, there was nothing easier than to say so in express words. I may again refer to the observations, which have been quoted at another place, of Cockburn, C.J., in *R.* v. *Ingham* (1), and of Prinsep and Ameer Ali, JJ., in *Toolsee Money's case* (2), in regard to taking away of rights or powers vested under statutes.

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Our attention was drawn to a judgment of their Lordships of the Privy Council where the words 'second appeal' were used.

Their Lordships in *Ram Lal Hargopal* v. *Kishanchand* (3), where a preliminary objection was taken that by virtue of the Code of Civil Procedure of 1908, no appeal lay to His Majesty in Council, because under section 104 of the Code no appeal "is to lie from any order passed in appeal on the question of filing or refusing to file an award", and that the order of the Court of the Judicial Commissioner was an order passed in appeal from the decision of the District Judge refusing to file the award, Lord Philimore, delivering the judgment of the Privy Council, observed at page 370—

> "Their Lordships think that the objection fails. They construe the provision in subsection (2) of section 104 as dealing with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond

(1) 10 L.T. 456
(2) I.L.R. 26 Cal. 361
(3) I.L.R. 51 Cal. 361

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the District Judge where the sum in dispute is small. In this respect it runs parallel with section 100, which limits second appeals from appellate decrees by District Judges. That section deals with decrees only while the decisions of these arbitration questions are styled orders. There is, therefore, nothing in section 104 to take away the general right of appealing to the Crown given by section 109, and the preliminary objection taken on behalf of the respondents fails."

This case no doubt explains that section 100 uses second appeals in connection with appeals against appellate decrees but it does not in any way help the respondents, nor does it support the construction that the respondents contend for.

Reference may here be made to a judgment of the Madras High Court in *Penugonda Radhakrishanamurthy* v. *V. A. Y. Ethirajulu Chetty* (1), where effect was given to a preliminary objection that no appeal lay from the order of a Single Judge to two Judges because of subsection (2) of section 39 of the Arbitration Act. In this case no reasons are given and I am unable to derive any assistance from it and it was not followed by the Lahore Court in *Hanuman Chamber's case* (2), and if I may say so with respect rightly so.

I now come to another submission of Mr. Mahajan and which seems to have some support from the Judgment of the Bombay Court in *Madhavdas Devidas Punekar* v. *Vithaldas Vasudeodas Punekar* (3), and that is that appeals to King in Council were saved by express words used in subsection (2) of section 39 but there are no words saving appeals under the Letters Patent. If the Legislature wanted to provide for appeals to the Privy Council and at the same time take away appeals from one Single Judge to two Judges, then in my opinion they would have worded the section differently. If

(1) I.L.R. 1945 Mad. 564
(2) A.I.R. 1948 Lah. 64
(3) I.L.R. 1952 Bom. 570

we give effect to the contention of Mr. Mahajan then disregarding the Constitution for the moment, the logical conclusion would be that an appeal would be competent under section 109 of the Code of Civil Procedure to the Privy Council from a final order passed by the District Judge in appeal, but if the matter was beyond Rs. 5,000 then the judgment of a Single Judge of the High Court would be final because of section 111 of the Code of 1908. In other words, we have to hold that the Legislature had provided for appeals to the Privy Council from judgments of District Judges but not from judgments of the High Court where they happened to be judgments of Single Judges. This, in my opinion, would be an anomalous if not an absurd interpretation and as has been stated by Maxwell at page 212 unjust and absurd interpretations should be avoided. The rules of the High Courts generally provide that appeals from orders in arbitration matters covered by section 39(1) are heard by a Single Judge and if an appeal to two or more Judges under the Letters Patent is barred then the provision for appeals to the Privy Council would really be illusory and no appeal would be competent from the judgment of a Single Judge to the Privy Council. (See section 111 of the Civil Procedure Code).

In my opinion, the providing of an appeal to the King in Council presupposes an appeal to two Judges under the Letters Patent. The reason why no appeal lay to the King in Council from the judgment of a Single Judge of a High Court was that appeal was provided under the Letters Patent against the judgment of a Single Judge. And if we accept the correctness of the interpretation of the Bombay High Court put on section 39(2) then in all cases, where a first appeal from an order lies to the High Court and would under the rules in force be heard by a Single Judge, appeal to the Privy Council would be barred. I am, therefore, of the opinion that the correct way of interpreting section 39(2) of the Arbitration Act, is to use the words 'second appeal' in the sense that they have been always understood by the lawyers, because it is only then that the words in subsection (2) can be interpreted rationally and without any absurdity

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and both section 39(2) and the provisions of clause 10 of the Letters Patent will be reconciled.

In *Ramlal Hargopal's case* (1), their Lordships of the Privy Council did not accede to the objection that section 104 was a bar to appeals under section 109 or 110 of the Civil Procedure Code. There is no reason why the same principle should not be applied to interpret section 39(2) which does not take away the right of appeal under clause 10 of the Letters Patent to the High Court from the judgment of a Single Judge of the High Court.

It is only necessary now to refer to the cases which have taken contrary view to the one that has been taken in this Court or in the Lahore Court that the words 'second appeal' as used in section 39(2) refer to an appeal under the Letters Patent. *Ranchhoddas Purshottam and Co.* v. *Ratanji Virpal and Co.* (2), was a case in which it was held that no appeal to the Privy Council lies from an order of a Single Judge under section 33 of the Arbitration Act, challenging the validity of an arbitration agreement, as it was barred by section 111 of the Code of Civil Procedure. There was no question raised as to an appeal under the Letters Patent nor was any reference made to clause 15. The Madras High Court in *Penugonda Radhakrishanamurthy* v. *V. A. Y. Ethirajulu Chetty* (3), held that no Letters Patent appeal lay, but no reasons were given. The Calcutta High Court case *R. Wright and Partner, Ltd.* v. *Governor-General in Council* (4), was a case under section 39(1) and I have already dealt with that. The only other case is *Madhavdas Devidas Punekar* v. *Vithaldas Vasudeodas Punekar* (5), and I have already discussed the reasons why I find myself unable to agree with the view taken by the Bombay High Court and would prefer to follow the opinion given by two Bench decisions one of this Court and

(1) I.L.R. 51 Cal. 361
(2) 45 Bom. L.R. 384
(3) I.L.R. 1945 Mad. 564
(4) I.L.R. (1948) 2 Cal. 265
(5) I.L.R 1952 Bom. 570

the other of the Lahore High Court. With great respect I am, therefore, of the opinion that the view taken by the Lahore High Court in *Hanuman Chamber's case* (1), and by this Court in *Banwari Lal's case* (2), is correct and should be followed in this Court.

I am, therefore, of the opinion that—

(1) section 39 of the Indian Arbitration Act is a re-enactment of section 588 and second part of section 589 of the Code of 1882 and also of section 104 of the Code of 1908, minus the phrase added in that Code and a portion of section 106, and the interpretation which has been put on sections 588 and 589 of the Code would apply equally to section 39 of the Arbitration Act;

(2) in section 39 of the Arbitration Act as in section 588 of the Code of 1882 or section 104 of the Code of 1908, the word used is 'order' and, therefore, this section cannot restrict an appeal which would fall under clause 10 of the Letters Patent of this Court which is against a judgment;

(3) the mere fact that a saving clause was introduced in section 104(1) of the Code of 1908, and words similar to that saving clause do not find place in section 39 is no ground for interpreting section 39 in a manner different from the interpretation which was put on section 588 of the Code of 1882;

(4) the Arbitration Act is not special Act vis-a-vis the Letters Patent: on the other hand it is clause 10 which is a special Act as it provided for intra-Court appeals;

(1) A.I.R. 1948 Lah. 64
(2) A.I.R. 1949 E.P. 165

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(5) the words 'second appeal' must be construed in its ordinary connotation as it is understood by lawyers ;

(6) even if it were to be used in the sense that it was used in cases decided under section 588, it applies only to appeals from an appellate order of a District Judge to the High Court but it is not used in the sense of an appeal from one Judge of a High Court to two or more Judges of the same Court ;

(7) there is no modification of clause 10 of the Letters Patent by section 39 of the Arbitration Act either expressly or by necessary intendment ; and

(8) the fact that appeals were expressly provided to the King in Council presupposes that an appeal would lie from the judgment of a Single Judge to two or more Judges of that Court under clause 10 of the Letters Patent, otherwise the appeal to the King in Council would be only an illusory right. The same argument would apply to appeals to the Supreme Court.

I have now seen the judgment prepared by my learned brother Harnam Singh, J., and for reasons which I have given in this judgment, I agree in the answer proposed.

Bhandari, C.J.

BHANDARI, C. J.—I agree that for the reasons recorded in the preceding judgments the right of appeal conferred by clause 10 of the Letters Patent, has *not* been taken away by section 39 of the Indian Arbitration Act, 1940.

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