

(ii) that where risk notes 'A' and 'B' are both executed, it is not open to the consignor to agitate in a Court of law that packing was proper; and

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(iii) that because the appellants have executed risk notes 'A' and 'B' they are not entitled to get advantage of the provisos (a) and (b) of risk note 'B'.

Kapur, J.

In the result, this appeal fails and is dismissed with costs.

SONI, J.—I agree.

Soni, J.

### CIVIL REVIEW

*Before Khosla and Falshaw, JJ.*

SUBA SINGH,—*Defendant-Petitioner*

*versus*

NEKI AND OTHERS,—*Plaintiffs-Respondents.*

1952

August, 29th

Review Application No. 37 of 1951

*Code of Civil Procedure (V of 1908), sections 114 and 151—Review—Order passed by High Court in Letters Patent appeal—Whether can be reviewed.*

*Held*, that the wording of section 114, Civil Procedure Code, covers an order passed in a Letters Patent appeal. There can be no doubt that judgments, passed in Letters Patent appeals are recognised by the Code of Civil Procedure, under section 109, Civil Procedure Code, they being appealable to Supreme Court or not so appealable. The fact that the Letters Patent appeal is filed under the provisions of the Letters Patent and not according to the procedure laid down in Civil Procedure Code makes no difference whatsoever to the petition for review. If the judgment under review is appealable it falls under section 114 (a) and if it is not so appealable it falls under section 114 (b).

*Held further*, that if an error patent on the record could not be corrected under section 114, Civil Procedure Code, it could be corrected by entertaining an application for review under the inherent jurisdiction of the Court.

*Abhilakhi v. Sada Nand* (1) and *Inder Mahton and others v. Ramkrishun Missir and others* (2) dissented from.

Review application under Order 47, Rule I, Civil Procedure Code, against the judgment and Decree of Mr Justice Khosla, and Mr Justice Falshaw, dated the 27th July 1951, affirming that of Mr Justice Kapur, reversing that of Shri Maharaj Kishore, District Judge, Delhi, dated the 6th August 1947 and restoring the decree of the trial Court.

SHAMAIR CHAND and P. C. JAIN, for Petitioner.

D. K. MAHAJAN, for Respondents.

#### JUDGMENT

**Khosla, J.**

KHOSLA, J. This is an application for the review of our order passed in L.P.A. No. 94 of 1949. The appeal was dismissed on the ground that it had not been properly filed. The appeal purported to be on behalf of Suba Singh and his two minor brothers through the guardianship of Suba Singh. It was brought to our notice that an officer of the Court had been appointed as guardian *ad litem* of the minors. He was not removed and Suba Singh was not substituted in his place. The appeal should therefore have been filed by the officer of the Court. Suba Singh was not the properly appointed guardian and so the appeal was dismissed not having been properly filed. It is this order of dismissal which is sought to be reviewed by the present petition.

A preliminary objection is taken by Mr Daya Krishan Mahajan that no application for the review of an order passed in a Letters Patent appeal lies. He has drawn our attention to the wording of section 114 of the Civil Procedure Code and two reported decisions of the Allahabad and Patna High Courts respectively. In *Abhilakhi v. Sada Nand* (1), a Full Bench of three Judges was constituted to consider this point. Two of the Judges took the view that no application for the review of an order passed in a Letters Patent appeal could be made. Mukerji, J., however

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(1) I.L.R. 53 All. 535.

(2) A.I.R. 1931 Pat. 409

dissented from this view. I have carefully considered the wording of section 114, Civil Procedure Code, and am constrained to observe with great respect that the majority of the learned Judges constituting the Full Bench were not justified in holding that section 114 does not apply to an order passed in a Letters Patent appeal. The question which the learned Judges considered was whether section 114 of the Civil Procedure Code does or does not apply to Letters Patent appeals. The point for consideration, however, is a wholly different one, namely whether the wording of section 114, Civil Procedure Code, covers an order passed in a Letters Patent appeal. Section 114 does not govern the procedure of appeal filed under the Letters Patent; it merely deals with the question of review. The section reads as follows:—

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“114. Subject as aforesaid, any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed by this Code, or
- (c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

There can be no doubt that judgments passed in Letters Patent appeals are recognised by the Code of Civil Procedure. Such orders are either appealable to the Supreme Court or not appealable and section 109 of the Civil Procedure Code shows that appeals under the Civil Procedure Code are allowed from orders passed in Letters Patent appeals. Therefore it is clear that sections 114(a)

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and (b) cover such judgments. A judgment passed in a Letters Patent appeal is either appealable to the Supreme Court under the Civil Procedure Code or not so appealable. The fact that the Letters Patent appeal itself is filed under the provisions of the Letters Patent and not according to the procedure laid down in the Civil Procedure Code makes no difference whatsoever to the petition for review. All we have to consider is whether the judgment under review is appealable or not. If it is appealable it falls under 114(a) and if it is not so appealable it falls under 114(b). In my view no other interpretation can be placed upon the wording of section 114 and I am constrained to differ from the view expressed by the majority of the Allahabad Judges in the case referred to. The Patna Case is *Inder Mahton and others v. Ramkishun Missir and others* (1). In this case Courtney-Terroll, C. J., held, following the Allahabad High Court, that no application for the review of an order passed in a Letters Patent appeal lay. I have carefully considered the reasoning given by the learned Chief Justice but I find myself unable to accept his interpretation of section 114, Civil Procedure Code. There are decisions of the Bombay and Madras High Courts to the contrary—*vide* A.I.R. 1927 Bom. 232 and I.L.R. 40 Mad. 651.

It will indeed be surprising if an error patent on the record in a Letters Patent appeal could not be corrected when such error can be corrected in almost every other type of orders which Courts pass, and if section 114, Civil Procedure Code, was not intended to cover an order passed in a Letters Patent appeal I should be inclined to entertain an application for review under the inherent jurisdiction of this Court, but for reasons which I have stated above I am clearly of the view that section 114 covers such cases. There is therefore no force in the preliminary objection and I would entertain the application for review.

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(1) A. I. R. 1931, Pat. 409

On merits there is considerable force in the argument of Mr Shamair Chand that the appeal having been filed by Suba Singh, major, on his own behalf also it was competent at least in so far as his claim was concerned. Suba Singh could not file the appeal on behalf of his minor brothers because he was not the properly appointed guardian *ad litem* to represent their interests, but his own interests in the appeal were properly represented and therefore the dismissal of his appeal was due to an error and this error can be rectified in review. Mr Shamair Chand has also drawn our attention to the provisions of Order 41, Rule 4, Civil Procedure Code, whereby if one of several plaintiffs appeals successfully the appeal of the others may also be allowed. On this point Mr Daya Krishan Mahajan has cited before us 48 P.L.R. 141. That case, however, differs from the present one inasmuch as we have before us the case of minors and Order 41, Rule 4, Civil Procedure Code, does not say anything about the non-appearing plaintiffs (or defendants) being made parties to the appeal. In the circumstances I would allow the application of Suba Singh made both on his own behalf and on behalf of his minor brothers. It is scarcely necessary to say that the appeal on merits must succeed for the reasons given in our judgment in L.P.A. No. 90 of 1949.

The result is that the appeal of Suba Singh and his minor brothers is allowed but we make no order as to costs.

FALSHAW, J.—I agree.

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