SPECIAL BENCH.

Before Rankin C. J., C. C. Ghose, Suhrawardy, B. B. Ghose and Page JJ.

RAM CHARAN GOLDAR

v.

HAMID ALI.*

1928.

July 6.

Letters Patent Appeal—Appeal from judgment of Division Bench, the judges being equally divided in opinion—Certificate of Judge against whose judgment appeal contemplated, if necessary.

There is no question of grant of certificate, under the Letters Patent of 1928, in the case of two Judges composing a Division Bench differing in opinion, as the Letters Patent contemplates only the case of the judgment of a single Judge.

Still less is there, therefore, any question of an appeal from the refusal to grant such a certificate.

CIVIL RULE.

Second Appeal No. 809 of 1925 was heard on the 9th February, 1928, by Cuming and Mukerji JJ. The learned Judges having delivered dissentient judgments in the case, the appeal was dismissed, under section 98 of the Code of Civil Procedure, in accordance with the judgment of Cuming J. On the 23rd February, 1928, the plaintiffs appellants filed an application before Cuming J. praying that he might declare the case to be a fit one for appeal under clause 15 of the Letters Patent, as amended in December, 1927. The application was refused on the 24th February, 1928. The appellants then filed an appeal against the judgment of Cuming J., dated the 24th February, 1928, refusing to declare the case to be a fit one for appeal, making the principal defendants respondents in the said appeal.

The petitioners then moved the Court and obtained this Rule calling on the principal defendants respondents in the said S.A. No. 809 of 1925 to show cause why the appeal against the judgment of Cuming

*Civil Rule No. 546 S of 1928.

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J., dated the 24th February, 1928, should not be admitted.

Dr. Sarat Chandra Basak (with him *Babu Prabodh Chandra Kar*), for the petitioners, contended that there can be no retrospective effect of the amending Letters Patent of 1928 in suits filed before January 14, 1928, on which date the Letters Patent came into force, inasmuch as, in such cases, there is a vested right of appeal.

Dr. Naresh Chandra Sen Gupta (with him *Babu Nagendranath Chaudhuri*), for the opposite party, contended that in the present case, there was no vested right. It was a contingent right depending on the happening of more than one event, viz., the trial of the appeal by a single Judge or upon a difference of opinion between two Judges composing a Division Bench, hearing the appeal, in which s. 98, C. P. C. did not apply. The right of appeal not being a vested one, the principle that there can be no retrospective effect has no application.

[RANKIN C. J. Has the amending Letters Patent any application to a case which is tried by two or more Judges.]

Dr. Basak conceded that it was doubtful whether the amending Letters Patent had any application.

RANKIN C. J. In this case, the plaintiffs, who are the applicants before us, brought their suit on the 25th November, 1919. A Second Appeal was preferred to this Court in 1922 and, by the decree in that appeal, the case was remanded to the lower appellate court, which came to its decision on the 3rd December, 1924. From that decision, a Second Appeal was filed again to this Court on the 6th March, 1925. This was heard on the 9th February, 1928, by my learned brothers, Mr. Justice Cuming and Mr. Justice Mukerji, who differed in opinion. Mr. Justice Cuming took the view that the appeal should be dismissed. Mr. Justice Mukerji took the view that the appeal should be allowed. Very unfortunately, instead of

acting under the proviso to section 98 of the Civil Procedure Code, whereby the matter on which they differed could have been referred to one or more Judges of the Court, the procedure followed by that Bench was that the decree of the lower court was declared to be confirmed under the opening words of sub-section (2) of section 98.

After the Second Appeal had been brought to this Court in 1925, but before the hearing, the amending Letters Patent, which came into force on the 14th January, 1928, were passed. In these circumstances, the plaintiffs, who had failed in their appeal, presented to this Court a Letters Patent Appeal from the decision of the Division Bench and that appeal has been ordered to be accepted and registered, subject to any objection that may be taken by the respondents at the hearing of the appeal as regards its competency. In addition to presenting the Letters Patent Appeal, however, the plaintiffs presented another appeal. It appears that, on the 24th February, 1928, they applied to Mr. Justice Cuming, purporting to act under the amended Letters Patent, for a certificate that the case was a fit one to be taken on appeal and the learned Judge refused that certificate on the same day. Thereupon, the plaintiffs presented an appeal from that order of refusal and, on that appeal being presented, a Rule (No. 546 S of 1928) was issued calling upon the respondents to show cause why that appeal should not be admitted. That is the only Rule before us as regards this case.

Now, when the matter is examined, it is found to stand in this way: By the Letters Patent as they stood before the recent amendment, a provision was made by clause 15 for an appeal, first of all, from the judgment in certain cases "of one Judge of the said "High Court or of one Judge of any Division Court "pursuant to section 13" of the Indian High Courts Act; and, in the second place, from the judgment in certain cases "of two or more Judges of the said "High Court or of such Division Court, whenever "such Judges are equally divided in opinion and do

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"not amount in number to a majority of the whole of "the Judges of the said High Court at the time "being." By the amending Letters Patent, clause No. 15 is dealt with in this way: For that clause, an amended clause is substituted and, when the amended clause is examined, it appears that, as regards the first matter, namely, the judgment of a single Judge, it is provided first, that no appeal shall lie from a judgment in the exercise of the jurisdiction to hear appeals from appellate decrees, but to that there is an exception, viz., that an appeal shall lie in such a case where the Judge who passed the judgment declares that the case is a fit one for appeal.

As regards the second of the two matters, which I have mentioned as being dealt with by clause 15 as it originally stood, namely, an appeal from the judgment of a Division Bench of two or more Judges, where the Judges are equally divided in opinion, the amendment made by the amending Letters Patent is to omit that provision altogether. Upon that state of facts in the circumstances of the present case, it appears that various questions arise. But one question which does not arise in any circumstances is the question of there being any necessity to have a certificate as a condition of bringing a Letters Patent Appeal. That certificate is a condition attached by the amending Letters Patent only to the case of a judgment of a single Judge, and the right of appeal given in the case of a difference of opinion where the Judges are equally divided is dealt with in the amended Letters Patent by being deleted altogether. In that view, it is clear that, whether or not Mr. Justice Cuming refused the certificate on the ground that he had no jurisdiction to give one or on any other ground, his decision was, in fact, right because there was no jurisdiction to give such a certificate and no such certificate could have operated anything. In this view, it appears to me that the present appeal from the refusal to give such a certificate must come to nothing and that the present Rule calling upon the respondents to show cause why this appeal should not be admitted must be discharged.

There is no question in such a case of granting a certificate; still less of any appeal from the refusal to grant such a certificate.

It remains to make quite clear that, when the appeal which has been registered against the decree dismissing the Second Appeal comes on for hearing, the question whether the effect of the amending Letters Patent is to take away the right of appeal which formerly would have existed will be disposed of by the Court. As regards that question, it is a special question and is not an easy question. It is entirely a separate question from the question which has been argued in the other Rule (No. 545 S of 1928)* in which we have reserved judgment. In my opinion, it is more correct to allow that question to be determined in due course at the decision of the appeal. In fact, we have no right to dispose of that Second Appeal here and now, without consent of parties, and, in any case, learned advocate for the plaintiffs prefers that the question of his clients' right of appeal should be determined under the existing order when their appeal comes on for hearing and not now.

The only other question that remains is the question of costs of this Rule. It is perhaps unfortunate for the parties that we have required this matter to be argued twice. But it is a new question and, in my judgment, it is not a case in which we ought to make either party pay costs. There will be no order as to costs. The Rule will be discharged.

C. C. GHOSE J. I agree.

SUHRAWARDY J. I agree.

B. B. GHOSE J. I agree.

PAGE J. I agree.

S.M.

Rule discharged.

*Reported at page 512, *poste*.