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January 23.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood and Mr. Justice Knox.

MUHAMMAD NAIM-UL-LAH KHAN (DEFENDANT) *v.* IHSAN-ULLAH KHAN (PLAINTIFF).

Civil Procedure Code, ss. 206, 582, 588, 591—*Letters Patent, North-Western Provinces, s.* 10—*Amendment of decree—Order of a Single Judge of the High Court amending an appellate decree—Appeal from such order.*

Whether an order made by a single Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of which he had been a member is an order made under s. 206 read with ss. 582 and 632 of the Code of Civil Procedure, or by virtue of the inherent power which the High Court has in the exercise of its appellate civil jurisdiction to amend its own decrees, it is one to which the provisions of Chapter XLIII of the Code of Civil Procedure are applicable, and from such order no appeal under s. 10 of the Letters Patent will lie. *Hurrish Chunder Chowdhry* v. *Kalisunderi Debia* (1) discussed.

This was a reference made by Edge, C.J., and Straight, J., to a Bench of four Judges. The plaintiffs-appellants in the Letters Patent appeal out of which this reference arose, had brought a suit in the Court of the Subordinate Judge of Saháranpur for the recovery of certain property detailed in schedules marked A, B, C, and D attached to their plaint. Before a defence was filed or issues framed the plaintiffs applied to be allowed to amend their plaint by making certain additions to the property detailed in schedules A and B. This application was granted, and a note was made in the plaint of the increase in the amount claimed; but the list of the property so added was inadvertently omitted to be attached to the plaint. The plaintiffs' suit was in part decreed and in part dismissed by the Subordinate Judge, and the plaintiffs in consequence appealed to the High Court. In that appeal a decree was passed by consent modifying the decree of the Court of first instance. Subsequently to the decision of that appeal the plaintiffs applied to the Court of first instance for amendment of its decree by inserting a detail of the property added on the petition for amendment of plaint, which application was granted.

(1) L. R., 10, I. A. 4; S. C. I. L. R., 9 Calc., 432.

From the order on that application, however, an appeal was preferred to the High Court by the defendants, and this appeal was decreed on the ground that after an appeal had been preferred and decided, the Court of first instance had no jurisdiction to pass any order under s. 206 of the Code of Civil Procedure. The plaintiffs, therefore, applied to the High Court for amendment of its decree in the manner previously prayed for in the Court of first instance. That application came before Tyrrell, J., as the remaining Judge of the Bench which had passed the decree, and was granted by him. From that order the defendants appealed under s. 10 of the Letters Patent, and on the appeal coming on for hearing the plaintiffs-respondents took a preliminary objection that the appeal did not lie.

Pandit *Sunder Lal*, for the appellants.

The Hon. *G. T. Spankie* and Munshi *Ram Prasad*, for the respondents.

EDGE, C. J.—This Letters Patent appeal came on to be heard by a Bench of two Judges, when an objection was taken on behalf of the respondent to the appeal that no appeal lay. It was urged, on the other hand, that an appeal lay. The Bench was referred to a case decided by their Lordships of the Privy Council and to certain decisions of this Court and the High Court of Calcutta. Thereupon the question as to whether the appeal lay was referred to a Bench of four Judges.

The appeal was brought from an order of our brother Tyrrell by which he amended a decree of this Court on an appeal, so as to bring it into accordance with the judgment which had been delivered in the case. The Judges who were parties to that judgment were Sir Comer Petheram, the then Chief Justice of this Court, and our brother Tyrrell. At the time when the application to amend the decree was made, Sir Comer Petheram had ceased to be a member of this Court, and, following the usual practice of this Court, the application was heard by the Judge who was a party to the judgment, and was still a member of

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the Court, and he made the order which was questioned in this appeal.

The question which we have to decide depends upon the consideration of s. 10 of our Letters Patent, the statutes relating to the legislative powers of the Governor-General of India in Council, and of the Code of Civil Procedure, as amended. The Letters Patent applying to this Court were issued on the 11th June 1866, and consequently long prior to the Code of Civil Procedure with which we have to deal. It is not contested, and indeed it could not be, that the Governor-General in Council has power to make laws which this Court is bound to carry out and to observe. That is provided for by s. 22 of 24 and 25 Victoria, chapter 67, and by subsequent legislation, and that power of the Governor-General in Council is in terms reserved by s. 5 of our Letters Patent. The right of appeal is a right which is created by statute, or, as in this case, Letters Patent—the Letters Patent being an authority having the force of law. By s. 10 of those Letters Patent, so far as we need consider them in this case, a right of appeal to the Court from the judgment, not being a sentence or order passed or made in any criminal trial of one Judge of the Court, was given. The question is whether that right of appeal has been curtailed or limited by subsequent legislation of the Governor-General of India in Council. In my opinion the judgment referred to in s. 10 of the Letters Patent is the express decision of a Judge of the Court which leads up to and originates an order or decree.

Our brother Tyrrell, in making the order for the amendment of the appellate decree of this Court in the case, was acting in the exercise of the appellate jurisdiction of the Court, and, as I think, under s. 206 coupled with ss. 582 and 632 of the Code of Civil Procedure (Act No. XIV of 1882). It is true that the High Court of Bombay has held that s. 206 of the Code of Civil Procedure does not apply to a High Court on its original side or on its appellate side. That it does not apply to a High Court on its original side is manifest from s. 638, which excludes the application

of that section to a High Court in the exercise of its original civil jurisdiction. But, having regard to ss. 582 and 632, I must regard s. 206 as applicable to a High Court on its appellate side, as I regard those sections as practically extending to the appellate side of the Court the earlier provisions, so far as they are applicable to a High Court on its appellate side. It appears to me that if the Legislature had intended that s. 206 should not, so far as may be by reason of ss. 582 and 632, be applicable to a High Court on its appellate side, it would, when excluding by s. 638, s. 206 from application to a High Court on its original side, have likewise excluded the application of s. 206 to a High Court on its appellate side. I may be wrong in the effect which I attribute to ss. 582 and 632 of the Code of Civil Procedure, but I think I am correct in saying that it is the duty of the Legislature when dealing with procedure to lay down in specific and clear language what such procedure shall be, and not to leave Courts and litigants in doubt as to what it intends the procedure to be. Ss. 582, 587 and 647 of the Code of Civil Procedure are fair examples of a method of drafting and legislation which should be avoided, unless the Legislature desires to create confusion and uncertainty, and to leave it in doubt as to whether it or its advisers knew what was the procedure required.

It is not very material in the present case to decide whether s. 206 applies or not. If it does not apply, the Court which has to exercise appellate civil jurisdiction must have an inherent jurisdiction to bring its decrees into accordance with its judgments, and our brother Tyrrell in that event passed his order in the exercise of the appellate jurisdiction of the Court within the meaning of s. 591 of the Code. The question before us really turns on the effect of the sections contained in chapter XLIII of the Code of Civil Procedure. S. 588 of the Code commences by enacting—"an appeal shall lie from the following orders under this Code and from no other such orders." S. 591 provides that, "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,

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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."

In the case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debia* (1), their Lordships of the Privy Council, at page 17, said :— "It only remains to observe that their Lordships do not think that s. 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." I have had occasion to comment on that decision, and to examine to the best of my ability its bearing, in the case of *Bunno Bibi* v. *Mehdi Husain* (2). Whether the view which I then took of the meaning of their Lordships of the Privy Council was correct or not I am not now going to discuss. On looking again at that case it has struck me further that if Mr. Justice Pontifex in that case was acting or assuming to act under s. 244 of the then Code of Civil Procedure, an appeal undoubtedly lay. It is not necessary to consider whether he had any jurisdiction in that particular case to act under s. 244. It has also struck me that if he was not supposed to be acting under s. 244, then he must be supposed to have been acting under some power which he conceived he had under chapter XLV, which relates to appeals to Her Majesty in Council, and this leads up to what I am now going to say.

It appears to me that the Code of Civil Procedure (Act No. XIV of 1882), as did Act No. X of 1877, contemplates a High Court in two aspects. It contemplates a High Court doing the ordinary work of a Court of original and appellate jurisdiction, having the necessary powers of review and revision in certain cases, and certain other powers such as are generally found vested in the Courts of the importance of High Courts. It also contemplates that the High Courts in India should, in certain matters relating to appeals to Her Majesty in Council, act for and on behalf of Her Majesty in Council, exercising powers more in the nature of ministerial powers than in the nature of judicial powers. Whatever those powers may be, it is quite clear to my mind that the powers

(1) L. R. 10 I. A. 4; I. L. R. 9 Calc., 462. (2) I. L. R. 11 All., 375.

conferred on a High Court under Chapter XLV of the Code of Civil Procedure are special powers and entirely distinct from the ordinary powers required by the High Court in the carrying on of its ordinary judicial business. It would be impossible to read Chapters XLIII and XLV together. If the sections contained in Chapter XLIII were to be applied to matters coming under Chapter XLV, that is, to matters arising in appeals to Her Majesty in Council, a difficulty would at once arise; for, although s. 588 limits appeals from orders under the Code to the orders specified in s. 588, we find on turning to Chapter XLV that, by ss. 601 and 611, for example, an appeal is given from certain orders made in India in cases falling under that chapter, and those orders are not orders which are included as orders from which an appeal may lie under s. 588. S. 611 provides a procedure by reference for the appeals from the orders referred to in that section. That section enacts:—"The orders made by the Court which enforces or executes the order of Her Majesty in Council, relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the enforcement or execution of its own decrees."

I have consequently come to the conclusion that Chapter XLIII cannot be applied to orders made in appeals in cases which are under appeal to Her Majesty in Council. If that view be correct, an appeal in the case which went to the Privy Council from the High Court of Calcutta would apparently have lain from the order of Mr. Justice Pontifex, whether he had or had not jurisdiction to make that order.

It may be said that there may be other matters in the Code of Civil Procedure—orders other than orders made in cases falling under Chapter XLV to which the sections in Chapter XLIII do not apply. It may be said, for instance, that they do not apply to an order made on an application for review of judgment under section 623. With regard to that, even assuming for a moment, I am not going to decide it, that Chapter XLIII does not apply at all to applications for review of judgment, we find that section

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629 provides that where the Court makes an order rejecting the application that order shall be final, and where the Court admits the application, an immediate appeal is given by the same section against the order admitting the application. With regard to orders made in revision under section 622 of the Code of Civil Procedure (Act No. XIV of 1882), it appears to me that, whether Chapter XLIII of the Code applies or not, it could not have been contemplated by the Legislature that there should be any appeal against an order made under section 622 of the Code. Section 622 can only be applied by a High Court in cases in which no appeal lies to the High Court. It is a section which has been always treated and always considered, by this Court at any rate, as giving purely discretionary power to the High Court to enterfere or not. It was a section which obviously was not intended to create or be the foundation of appeals in cases in which no appeal had lain, and, looking at the object of that section and the cases to which that section would apply, that is, cases in which no appeal lay to the High Court, I cannot believe that such an anomaly was intended as would exist if, from the orders passed under section 622 in revision, a party has a right of appeal when no appeal lay in the original case to this Court. However, to come back to the subject in hand, I do not think it necessary to refer to the other decisions which have been passed with regard to the rights of appeal under section 10 of our Letters Patent and the corresponding sections of the Letters Patent of other High Courts. They have frequently been referred to; but I may confine myself to saying, in conclusion, that I think the order which was passed by our brother Tyrrell when he decided to amend the decree in the case, was an order from which an appeal is excluded by Chapter XLIII of the Code of Civil Procedure. It was an order passed by a Judge not on an appeal, but in the matter of an appeal in this Court, and in the exercise of the appellate jurisdiction of this Court.

I would answer this reference by saying that an appeal did not lie under section 10 of the Letters Patent from the order of our brother Tyrrell.

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STRAIGHT, J.—I am entirely of the same opinion as the learned Chief Justice, and I have nothing to add.

MAHMOOD, J.—This reference assumes significance, because I think, though limited to this particular order of my brother Tyrrell, dated the 21st December 1889, it raises, as the argument of the learned counsel for the parties has shown, some important questions of principle—important not only as questions of law, but also as questions relating to the practice of this Court and the practical working thereof.

It is in this view that I desire to deliver a separate judgment by saying as the first observation therein, that I agree in the conclusion arrived at and the answer given by the learned Chief Justice and my brother Straight to the question referred to the Full Bench.

That question is simply this:—Whether when a Judge of this Court, namely, a chartered High Court, acting under section 206 of the Code of Civil Procedure, as that section is rendered applicable by dint not only of section 582 of the Code in appeals but also by reason of s. 632 of the Code of Civil Procedure, makes an order, rightly or wrongly, with jurisdiction, an order of that character is one which can be made the subject of an appeal under section 10 of the Letters Patent?

It must be said, and indeed there can scarcely be any doubt, that section 22 of statute 24 and 25, Victoria, Chapter 67, usually called the India Councils Act, gives ample power to the Governor-General in Council to legislate for India, and those powers are so broad and extensive that they have quite recently been made the subject of consideration by the whole of this Court, where they were considered in the case of *Abdulla* v. *Mohan Gir* (1).

The next enactment is again an Act of Parliament, 24 and 25 Victoria, Chapter 104, wherein the powers of the Governor-General in Council to legislate for India, which were given to him under the earlier enactments, have been preserved.

(1) I. L. R. 11, All., 490.

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Next come the Letters Patent under which this Court has been established, and section 28, and more fully section 35 of those Letters Patent, not only preserve the power of the Governor-General in Council to legislate, but direct us as Her Majesty's Judges to abide by such legislation and carry out its mandates.

I have dwelt upon these preliminary matters in order to give the answer which I am going to give, and limiting it to the case now before me without expressing any opinion as to any other class of orders made by a Judge of this Court, either in the exercise of original civil or appellate jurisdiction. The order of my brother Tyrrell was undoubtedly made, as it seems to me, under section 206 of the Code. It is clear that an order such as that, when made by a Court in the Mofussil, is not appealable, because it is excluded by section 588 of the Code of Civil Procedure. It must be taken to be an unappealable order, and it was indeed upon this ground that in the two Full Bench cases referred to in the referring order, namely, the case of *Surta* v. *Ganga* (1) and *Raghunath Das* v. *Raj Kumar* (2) where my judgments were upheld by the whole Court, the turning point was that an order under section 206 being an unappealable order can be made the subject of the visitatorial functions of this Court under section 622 of the Code of Civil Procedure. When these cases were before the Division Bench, I had the misfortune of differing upon this point, as to the non-appealability of the orders made under section 206, because, if those orders can be made appealable to this Court, this Court, under the express prohibition of section 622, had no power to interfere in revision.

If orders under s. 206, such as were concerned in the two cases referred to, when made either by Courts of original or appellate jurisdiction in the districts, are not appealable, it becomes necessary to investigate whether, as is contended by Pandit *Sundar Lal*, the order of my brother Tyrrell, which is now under consideration, is to be rendered appealable. The learned vakil has of course relied upon the solitary ground which he could urge, namely, the some-

(1) I. L. R. 7, All., 875. (2) I. L. R. 7, All., 876.

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what broad and general provisions of s. 10 of the Letters Patent, and he was quite within his rights when he contended that, whenever under the law a right of appeal is distinctly given, that right is not to be taken away, unless there is express legislation or authority which can abrogate the right so conferred. The proposition thus put is simply the converse of the other well-known rule, that no right of appeal exists unless it is given by statute or by any other authority which would be binding upon the Court.

Whilst conceding the soundness of this part of the argument I hold, as the learned Chief Justice has explained, that the provisions of s. 10 of the Letters Patent have been so amply modified by the various provisions of the enactments passed by the Governor-General in Council under the authority of the Indian Councils Act, resulting in this last enactment, namely, the Code of Civil Procedure (Act No. XIV of 1882), that we are bound to take into account the provisions of that enactment and to refer back to s. 10 of the Letters Patent to see whether those general provisions have or have not been abrogated or modified.

I am of opinion that they have been modified, so far as the question arising in this case is concerned. S. 588 of the Code of Civil Procedure limits the right of appeal to a certain class of orders, and declares that none other than those contained within the four corners of that section are appealable. There are various other sections of the Code also which render decrees and orders non-appealable, and I may, by way of illustration, refer to the last part of s. 522 as to arbitration decrees and also to s. 325 of the Code of Civil Procedure, which is nearer in connection with the facts of this case, because here also a decree was passed upon a compromise.

To hold then that where this statute of ours, namely, our present Code of Civil Procedure, declares a decree or order non-appealable, such decree or order can be made the subject of consideration by the whole of this Court under the Letters Patent, is to hold that wherever no appeal lies to this Court the ceremony of presenting it to this Court to a single Judge of this Court, who

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would undoubtedly reject the appeal, makes it the subject of consideration by a Bench of the Court. It seems to me that it would be defeating the whole policy of the statute as to the finality of decisions.

I refrain from referring to the various rulings which have been cited in the course of the argument. I am anxious to avoid referring to them, not only because it would lengthen my judgment, but also because, so far as my own view in this case is concerned, it proceeds upon what I have said, and it is independent of the *ratio* adopted in those cases.

To hold that an erroneous order passed by a Judge of this Court, whether in the exercise of original civil jurisdiction or in the exercise of appellate civil jurisdiction under s. 206, is non-appealable to the whole of this Court, may appear at first sight to be a hardship; but it is not so. This Court under the Code of Civil Procedure is the Court of highest appeal in this part of the country, and it is as such a Court, and in no other capacity, that it exercises its powers of revision such as those contemplated by s. 622 of the Code and s. 25 of the Provincial Small Cause Courts Act. These powers can be exercised only by a Court of higher jurisdiction than the Court which made the erroneous order within the meaning of those sections.

A Judge of this Court when acting erroneously under s. 206, may be so acting, but his action cannot be made subject of revisional jurisdiction by this Court, because that jurisdiction does not exist, any more than it exists in cases where an erroneous decree is passed by a Bench of two Judges, which decree, even if erroneous cannot be made the subject of appeal under s. 10 of the Letters Patent. The remedy, if any, lies by invoking the power of Her Majesty in Council as the higher tribunal. I think that to maintain that the whole of this Court has revisional jurisdiction upon a decree made by a Judge of this Court, is to hold that orders and decrees which are distinctly rendered final and non-appealable by the Code of Civil Procedure become non-final and appealable by dint of s. 10 of the Letters Patent.

I wish to add one more observation, and that is this: that in the two Full Bench cases to which I have referred, reported in the 7th volume of the Allahabad Reports, the point now under consideration was not raised, and also having carefully considered what was ruled by the learned Chief Justice and my brethren Straight and Tyrrell in *Naubat Ram* v. *Harnam Das* (1), and again by the learned Chief Justice and my brother Tyrrell in *Banno Bibi* v. *Mehdi Husain* (2), I consider that nothing which has fallen from his Lordship the Chief Justice to-day is inconsistent with the *ratio* upon which those cases proceeded, and those two rulings are wholly consistent with each other.

My answer to the reference, therefore, is the same as that given by the learned Chief Justice.

KNOX, J.—In the case before us the prayer addressed to this Court was that the Court might be pleased to rectify a mistake which, it was alleged, had found its way into a decree passed by the Court on the 12th January 1886. My brother Tyrrell considered that the decree as framed needed amendment, and passed accordingly his order amending the decree so as to carry out the intention of the Court which passed that decree. There is nothing on the record, so far as I can see, which shows that this order made by him was an order passed under s. 206, as rendered applicable by ss. 582 and 632 of the Code of Civil Procedure. It may or may not have been so. I am satisfied that, independently of these sections, this Court has power to amend its decrees. I am not free from some doubts whether s. 206, or rather the last two paragraphs of it, were intended to apply to the appellate jurisdiction of Courts governed by the Code of Civil Procedure. At present I incline to the view that s. 579 was intended to be, so far as appeals are concerned, the correlative section to 206, which applies, at any rate primarily, to decrees in original suits, and was intended to be complete in itself. But from this standpoint also no appeal would lie from the order passed, as the order in any event was clearly made in the exercise of the appellate jurisdiction of the Court

(1) Weekly Notes, 1888 p. 37. (2) I. L. R., 11 All., 375.

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within the meaning of s. 591 of the Code. I concur with the learned Chief Justice that the order passed by my brother Tyrrell when he decided to amend the decree, was an order from which an appeal was excluded by Chapter XLIII of the Code, and I therefore answer the reference in the terms given by him.

APPELLATE CIVIL.

1892
May 10.

Before Mr. Justice Tyrrell and Mr. Justice Knox.

MADHO DAS (PLAINTIFF) *v.* RAM KISHEN AND OTHERS (DEFENDANTS.)*

Mortgage, equitable—Deposit of title-deeds in Calcutta—Immoveable property in mofussil—Act IV of 1882 *(Transfer of Property Act), s.* 59.

It is not necessary to the validity of a mortgage by deposit of title-deeds under s. 59 of the Transfer of Property Act (IV of 1882) that the property to which the title-deeds relate should be situated within the limits of one of the towns where such mortgages are allowed.

Varden Seth Sam v. *Luckpathy Royjee Lallah* (1) and *Manekji Framji* v. *Rustomji Naserwanji Mistry* (2) referred to.

This was a suit brought in the Court of the Subordinate Judge of Mirzapur by one Madho Das, against Ram Kishen, an insolvent, and the official assignee for the recovery of a sum of Rs. 135,304-12-9 with interest, and, in default of payment, for sale of certain immoveable property of the first defendant's situated in Benares, Mirzapur and Ghâzipur. The suit was based on an alleged equitable mortgage said to have been entered into by the defendant Ram Kishen in February 1888, by deposit of the title-deeds relating to the property in suit with the plaintiff's firm in Calcutta. Ram Kishen did not defend the suit but the official assignee appeared and pleaded, *inter alia*, that the title-deeds in question were either never voluntarily delivered by the defendant Ram Kishen to the plaintiff, but were wrongfully obtained by him, or if they were voluntarily delivered, such delivery did not

* First appeal No. 138 of 1890 from a decree of W. T. Martin, Esq., District Judge of Mirzapur, dated the 9th April 1890.

(1) 9 Moo. I. A., 303. (2) I. L. R., 14 Bom., 260.