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mistakes or to restore an application that has been dismissed by himself for the default of a party provided the defaulting party has shown good cause. For the reasons given above, in my opinion the Special Judge had jurisdiction to restore the application.

Learned counsel for the opposite party contends that no revision lies from the order of the learned District Judge because under section 45 of the Act the order of the Special Judge was appealable. In view of my decision on the first point it appears to me redundant to express any opinion on the second point as it does not arise. In the result I dismiss the application with costs.

APPELLATE CIVIL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

1938 *September*, 16

LAKSHMI NARAIN (PLAINTIFF) *v.* MUHAMMAD AKBAR (DEFENDANT)*

Letters Patent, section 10—*"Judgment"—Order refusing to set aside the abatement of a second appeal—Order passed in second appellate jurisdiction and not original jurisdiction —Leave to appeal necessary where the order was passed by single Judge.*

An order refusing to set aside the abatement of a second appeal does not amount to a "judgment" within the meaning of section 10 of the Letters Patent and therefore no appeal lies therefrom.

Further, if the order had amounted to a "judgment" then leave to appeal, obtained from the single Judge who passed the order, would have been necessary for an appeal to lie under section 10 of the Letters Patent, inasmuch as the order was passed in the exercise of second appeal jurisdiction and not of original jurisdiction. When a second appeal comes before a Judge of the High Court the jurisdiction which he exercises is a jurisdiction of second appeal and that jurisdiction covers all the orders which he may make in the matter and the course of that appeal.

Mr. *B. Mukerji*, for the appellant.

*Appeal No. Nil of 1938, under section 10 of the Letters Patent.

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The appeal was heard *ex parte*.

BENNET, A.C.J., and VERMA, J.:—This is a Letters Patent appeal brought by one Lakshmi Narain against what is styled the order of a learned single Judge. The order in question is one refusing to set aside the abatement of a second appeal. The learned single Judge has not declared that the case is a fit one for Letters Patent appeal under section 10 of the Letters Patent of this High Court. The question therefore arises whether such declaration of a learned Judge is or is not necessary. For the appellant learned counsel contended two points. (1) that the permission was not necessary and (2) that it had already been held by the learned Application Judge that no permission was necessary. Now in the case of a Letters Patent appeal it is for the Letters Patent Bench to decide whether notice should issue or not and this appeal is before us for this purpose. When the application was filed the office noted "Leave to appeal in Letters Patent has neither been granted nor refused". On this the learned Application Judge made an order: "This Letters Patent appeal is directed against an order passed by a learned Judge of this Court refusing to set aside the abatement of appeal. Under these circumstances no permission of the learned Judge to file the Letters Patent appeal was necessary. Office to proceed. The question whether the order can be made the subject of a Letters Patent appeal is for the Letters Patent appeal Bench to decide." We understand that this order was not a judicial order deciding the point, because, as already observed, the learned Application Judge had no such jurisdiction, nor in our opinion did he purport to exercise such jurisdiction because his order does not in any way decide judicially that the appeal lies. It merely directs the office to proceed and the office proceeded by preparing an order, which was signed by the Registrar, to lay before the Letters Patent appeal Bench. The point is for this Bench to decide.

Now as regards the merits of this question as to whether the permission of the learned single Judge who passed the order was necessary or not, learned counsel has argued that although the matter was a second appeal and came before the learned Judge is second appellate jurisdiction, the order of the learned Judge was not passed in second appellate jurisdiction because it was not an order deciding the second appeal on the merits. Learned counsel suggested that it might be considered an order passed in original jurisdiction. Now the Letters Patent in section 9 refer to the original jurisdiction and state that in such original jurisdiction this Court may withdraw any suit from a subordinate court and try it. Then follows section 10 which is now in question. Later we find section 13, referring again to original civil jurisdiction, and section 14 dealing with appellate jurisdiction. Section 15 deals with criminal jurisdiction and section 25 with testamentary and intestate jurisdiction and section 26 with matrimonial jurisdiction. Now the word "jurisdiction" in the Letters Patent appears to cover the exercise of all the powers of the Court in a particular jurisdiction in which the case comes before it. The Letters Patent do not contemplate that a case which comes before the Court in one kind of jurisdiction can be supplemented by the exercise by the Court of any other kind of jurisdiction. It is difficult to see how such a theory can be upheld and learned counsel admits that he has no ruling in support of the theory. It appears to us that when a second appeal comes before a Judge of this Court, if it is within his jurisdiction, the jurisdiction which he exercises is a jurisdiction of second appeal. That jurisdiction covers all the orders which he may make in the course of the second appeal from its commencement to its termination. An application was made to set aside the abatement and he refused to grant that application and held that the appeal had abated. Learned counsel referred to *Sadiq Ali* v. *Anwar Ali* (1),

(1) (1922) I.L.R. 45 All. 66.

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in which it was held in the year 1922 that an appeal would lie under section 10 of the Letters Patent from the order of a single Judge rejecting an application to set aside the abatement of an appeal and it was held there that the word "judgment" in section 10 would cover such an order. That may be so, but since that ruling in 1922 the Letters Patent were amended in 1929 and the Letters Patent now require that a judgment "in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court" must have the declaration by the Judge that the case is a fit one for appeal. There does not seem to be any escape from the position that if the order passed in second appeal by the learned single Judge is a "judgment" within the meaning of section 10 of the Letters Patent, then permission of the learned single Judge is necessary for a Letters Patent appeal.

There are a number of rulings of this High Court subsequent to *Sadiq Ali* v. *Anwar Ali* (1) in 1922, and in each of these it was held that no Letters Patent appeal lay as there was no "judgment": *Khuni Lal* v. *Narain Das Gopal Das* (2), which was a case of an order of transfer of a suit from one court to another; *Shahzadi Begam* v. *Alakh Nath* (3), which was the case of dismissal of an application under section 5 of the Limitation Act and refusal to extend time to file an appeal; this was a Full Bench ruling and in it the ruling of *Sadiq Ali* v. *Anwar Ali* is discussed and it is pointed out that the case of *Tuljaram Row* v. *Alagappa Chettiar* (4), on which the Allahabad Bench had relied, was distinguishable. It may therefore be taken that *Sadiq Ali* v. *Anwar Ali* (1) is no longer good law. Another case is *Beni Madho Rao* v. *Shri Ram Chandraji* (5), which was a case of an order refusing substitution of the applicant in an appeal.

(1) (1922) I.L.R. 45 All. 66.
(2) [1935] A.L.J. 968.
(3) (1935) I.L.R. 57 All. 983.
(4) (1910) I.L.R. 35 Mad. 1.
(5) [1936] A.L.J. 1381.

Two rulings prior to 1922 may be noted, where it was held that no Letters Patent appeal lay: *Banno Bibi* v. *Mehdi Husain* (1), where there was an order refusing application for leave to appeal *in forma pauperis; Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (2), where the order was one directing amendment of a decree passed in appeal. On page 228 EDGE, C.J., stated: "In my opinion the judgment referred to in section 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". On page 232: "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.*" The other four Judges agreed with the learned CHIEF JUSTICE. The passages quoted are a complete answer to the contention for the applicant before us that the order refusing to set aside the abatement was not passed in the exercise of second appeal jurisdiction.

We may also refer to an unreported decision of the 12th of March, 1935, on the Letters Patent appeal of *Balmukand Misr* v. *Shanker Deo Misr,* by SULAIMAN, C.J., and BENNET, J. A learned single Judge had dismissed Second Appeal No. 739 of 1932, same parties, for default of appearance, and refused to restore the appeal. No permission was granted for Letters Patent appeal. The Bench held: "It seems to us that the order passed by the learned Judge was made in the exercise of his appellate jurisdiction and was certainly not made in the exercise of any original jurisdiction. Without leave, therefore, no Letters Patent appeal lies in a case which has come up in appeal before the High Court."

(1) (1889) I.L.R. 11 All. 375. (2) (1892) I.L.R. 14 All. 226.

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We hold that the order of the learned single Judge did not amount to a "judgment" within the meaning of section 10 of the Letters Patent, and therefore no appeal lies. And further, if the order did amount to a "judgment", then the permission of the learned single Judge would have been necessary for an appeal to lie. We dismiss this appeal.

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

1938 *September*, 16

SRI BEHARIJI (DEFENDANT) *v.* MANMOHAN DAS (PLAINTIFF) AND JANKI PRASAD AND OTHERS (DEFENDANTS)*

Transfer of Property Act (IV of 1882), section 92—Subrogation —Equitable claim—Whether equitable right of subrogation, besides the statutory right—Bengal, Agra and Assam Civil Courts Act (XII of 1887), section 37(2)—Transfer of Property Act, section 8—Extent of interest passed on transfer—Transfer of trust property by trustee as his own property, he having repudiated the trust—Whether transfer can take effect as if by trustee as such—Co-trustees must all join to make a valid transfer—Contract Act (IX of 1872), section 69—Person interested in the payment of money due by another—Idol—Juristic person under a disability.

A Hindu widow, acting in accordance with the authority of her husband, built in 1895 a temple in which she installed an idol, "Sri Behariji", and for this purpose borrowed Rs.3,000 on a mortgage of the property now in suit. This mortgage was paid off by a fresh mortgage for Rs.4,000 in favour of another idol "Sri Thakurji" executed in 1907. In 1907 she executed a will dedicating all her property to Sri Behariji and appointing three trustees, of whom *J* was one; this will was, in a subsequent litigation in 1932, found by the High Court to be in accordance with authority from the husband and therefore valid. She died in 1908, and *J* and the others acted as trustees for several years. In 1919, however, *J* formed the opinion that the will of the lady was void and that after her death his father had become the owner of the property as the next reversioner; and so he repudiated the trust and set himself up as the owner. About that time the two other trustees had ceased to act or had died. Sri Thakurji, the mortgagee of

*First Appeal No. 8 of 1935, from a decree of Brij Behari Lal, Civil Judge of Allahabad, dated the 18th of August, 1934.

1907, sued on his mortgage in 1919, and in execution of the decree obtained by him the property now in suit was advertised to be sold on the 9th of December, 1926. On the 4th of December, 1926, *J* and the other members of his family borrowed Rs.14,500 from the plaintiff, upon a mortgage of the property, and with this money the decree of Sri Thakurji was paid off. In this mortgage the mortgagors described themselves as owners by inheritance of the property, and there was no mention of Sri Behariji having any rights therein. In the suit brought by the plaintiff on this mortgage it was held that the property belonged to Sri Behariji and not to the mortgagors, and then the questions arose (1) whether the mortgage could be effective by reason of the fact that *J* was capable as trustee of making the mortgage, and (2) whether the plaintiff could claim to be subrogated to the position of the prior mortgagee Sri Thakurji, whose decree was paid off with the money advanced by the plaintiff: *Held* (1) that *J* having already repudiated his position as trustee and taken up the position that he was the owner of the property, he neither purported to represent nor did represent Sri Behariji in the transaction of mortgage, which therefore could not affect Sri Behariji; and (2) that the plaintiff did not come within the third paragraph of section 92 of the Transfer of Property Act as he did not advance any money to Sri Behariji, the mortgagor of the prior mortgage, and was therefore not entitled to subrogation, and that he could not claim any equitable right of subrogation apart from the statutory right given by section 92.

Where a person has authority to make a transfer in one capacity, but in making the transfer he has no intention to act in that capacity but repudiates it and transfers in another capacity to which he is not entitled, the transfer is not valid to any extent.

Where there are several co-trustees all must join in executing a valid transfer of the trust property.

The amended section 92 of the Transfer of Property Act is a comprehensive section fully providing for rights of subrogation. As there is this statutory provision on the subject of subrogation, the courts are not entitled to extend that provision on grounds of equity. There is no equitable right of subrogation, over and above the statutory right.

Section 37(2) of the Bengal, Agra and Assam Civil Courts Act, which states that equity is to be applied in cases not provided for by any other law for the time being in force, makes it clear that where the statute law deals with a subject and