LETTERS PATENT.

1932.

November, 28, 29.

Before Courtney Terrell, C. J., and Khaja Mohamad Noor, J.

LALA BANWARI LAL

v.

SHEIKH SHUKRULLAH*

Letters Patent of the Patna High Court—clause 10—*order refusing to exercise jurisdiction under section* 151 *of the Code of Civil Procedure,* 1908 (*Act V of* 1908), *whether is appealable.*

A decision of a single judge refusing to exercise jurisdiction under section 151, Code of Civil Procedure, 1908, and to recall his order is not appealable under clause 10 of the Letters Patent.

Brajagopal Ray Burman v. *Amar Chandra Bhattacharjee*(1) and *Kailash Chandra Samadar* v. *Rebati Mohan Ray Chowdhry*(2), followed.

Per KHAJA MOHAMAD NOOR, J.—Where a judge, rightly or wrongly, after hearing all the parties and taking into consideration all that can be said one way or the other, adopts a particular course and passes a particular order and later on one of the parties comes and asks that judge to recall the order either under his power of review or under his inherent power and that judge merely refuses to take any steps in the matter, such an order is not a "judgment" within the meaning of clause 10 of the Letters Patent.

The word "judgment" as used in clause 10 of the Letters Patent is incapable of any exhaustive definition to cover all cases which may come up before the court of appeal; but in each case the court has to make up its mind whether the particular order in question is a "judgment" or not, having regard to the nature of the order.

Budhu Lal v. *Chattu Gope*(3), referred to.

Appeal by the defendants.

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* Letters Patent Appeal no. 43 of 1932, from a decision of the Hon'ble Mr. Justice A. W. E. Wort, dated the 24th February, 1932.

(1) (1928) I. L. R. 56 Cal. 135.

(2) (1917) 21 Cal. W. N. 652.

(3) (1916) I. L. R. 44 Cal. 804.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C. J.

P. R. Das and *A. K. Mitra*, for the appellants.

Sir Sultan Ahmad (with him *K. Husnain*, *S. A. Khan* and *H. R. Kazimi*), for the respondents.

COURTNEY TERRELL, C. J.—This is an appeal from a decision of Mr. Justice Wort in Miscellaneous Judicial Case no. 144 of 1931 which arose from somewhat unusual circumstances. The plaintiffs sued the defendants for dissolution of partnership. The partnership was formed for the purpose of carrying on a sugar factory. They also joined with their claim for dissolution of partnership a claim for damages for breach of the fundamental terms of the contract of partnership, the fundamental term, of which it was said there was a breach, being to carry on the factory concerned in a particular way. The merits of that claim we are not concerned with. The learned Subordinate Judge before whom the suit was tried passed a partnership decree decreeing partnership accounts and dissolution of the partnership and also decreed damages against the defendants for the tort or breach of contract, as the matter may be considered, alleged by the plaintiffs. He then proceeded to take evidence concerning the damages which the plaintiffs had suffered and he inquired into the allegation of damage as suffered up to the date of the suit and drew up his accounts upon that basis and for the period up to the date of the suit in so far as the question of damages was concerned. A little later the plaintiffs applied to the Subordinate Judge for a further decree against the defendants in the matter of damages or it may be that they asked for the continuation of the account as to damages from the date of the suit up to the date of the dissolution of partnership. I do not propose to offer any opinion as to which was the proper way to look at that claim. The Subordinate Judge proceeded, however, to deal with the damages alleged to have been suffered by the plaintiffs

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from the date of the suit continuing for a further period of about a year so as to carry the account of the damages up to the date of the dissolution of the partnership and he came to the conclusion that the plaintiffs in respect of that further period had suffered damages to the extent of Rs. 42,000 and odd.

The defendants objected to this course and they said that the learned Subordinate Judge having originally given a decree for damages was now functus officio and, as they said, had no power to carry the order further and make what they said was a supplementary decree for further damages incurred beyond the date of the suit. The Subordinate Judge heard the objection and decided against the contention of the defendants who thereupon came to the High Court in revision and the learned Judge of this Court dismissed that application summarily. Therefore, on the 1st October, 1931, the learned Subordinate Judge delivered judgment in the matter before him of this further inquiry and he awarded damages to the extent of the amount I have stated together with costs of that further inquiry amounting to about Rs. 2,000 and he directed that the further sum of Rs. 42,000 by way of damages was to be shown on the credit side of the account.

The next material stage in the matter was that on an application to this Court for a transfer of the case it directed that the matter should be called up to this court and continued as an original suit and it came before Mr. Justice Wort. The defendants then applied to this Court in revision of the order of the learned Subordinate Judge and that matter of the application for revision was ultimately placed by my order before Mr. Justice Wort for the reason that he was already seised of the case as called up from the lower court and it would be more convenient that he should deal with the matter. He heard the application in revision and rejected it and held nevertheless that in his opinion the Subordinate Judge had no jurisdiction to pass a supplementary judgment but he held

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that having regard to the original decision of the Subordinate Judge it had been open to the defendants to get that decision altered by way of appeal and he had no right to deal with it by way of revision.

A little later the defendants then took a somewhat curious course which has given rise to this appeal. They applied to Mr. Justice Wort on the 23rd February, 1932, that is to say, about four months or so after the original decision of the Subordinate Judge, to recall the order of the Subordinate Judge under section 151 of the Civil Procedure Code and they put their case in this way:—They said that inasmuch as the case had been transferred to Mr. Justice Wort and inasmuch as it was transferred as a pending case, Mr. Justice Wort was in the same position as the learned Subordinate Judge himself and represented him in all his capacities and powers and, therefore, they asked him in fact to re-hear the matter on the ground that the original decision of the Subordinate Judge had been, according to their contention, come to without jurisdiction and that he had no business to have passed the order which he passed for what they called a supplementary decree for damages. Mr. Justice Wort in dealing with this application repeated that in his opinion the Subordinate Judge who was his predecessor in office, as one might call him, had no jurisdiction to have passed the supplementary decree but the learned judge nevertheless declined to exercise his discretion under section 151 and recall the order.

It is unnecessary for the purposes of this decision to examine the question as to whether the learned judge was right on the merits of the case. The only point for our decision is whether any appeal lies under the Letters Patent against the decision of Mr. Justice Wort refusing to exercise jurisdiction under section 151 of the Civil Procedure Code. A few observations may be made as to some of the jurisdictions used by this Court in which it is clear that no appeal lies. First, a judge of this Court exercising revisional power is clearly not subject to revision by a Bench of this

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Court. Secondly, an application for review, if resulting in the grant of the order for review, may be made the subject of an appeal but it is very clear, and nobody disputes it and it arises from the Code itself, that a decision by a judge of this Court refusing to review his own order is not appealable. In both the case of a revision and in the case of a review the right to a revision or the right to a review depends upon the possibility on the part of the applicant of bringing to the notice of the Court some error in law in the case of a revision or, in the case of a review, the discovery of some new facts or any other new circumstance. But in the case of this particular application under section 151 of the Code it was not suggested on behalf of the applicants that the learned Judge should do more than consider the very matters which had been before him, or, rather to be strictly accurate, before the Subordinate Judge whom he then represented, and decide those matters over again. A fortiori one would have thought that if refusal to exercise the discretion to review was not appealable the refusal to exercise powers under section 151 would not be appealable. But the matter is put by Mr. Das on behalf of the appellants in this way:—He says that we are not concerned with the rights of appeal under the Code, that we are not embarrassed by the provisions relating to revisions and reviews; he claims to be entitled to fall back upon section 10 of the Letters Patent and to say that this decision of Mr. Justice Wort refusing to exercise his discretion under section 151 is a judgment within the meaning of the Letters Patent and further affects his rights as a litigant and, therefore, is properly the subject-matter of appeal. He has not been able, as he frankly conceded, to point to any case in which the Court had interfered with a refusal to exercise powers under section 151. He agrees that it the original order had in fact been passed by the learned Subordinate Judge whom Mr. Justice Wort subsequently represented there would have been no appeal because the Civil Procedure Code which would

have governed the matter in those circumstances provides no appeal and, as I say, he falls back entirely upon the word " judgment " in the Letters Patent. In my opinion, that argument is not sound and the proper analogy between the decision of Mr. Justice Wort and his predecessor, the Subordinate Judge, is illustrated by the decision in the case of *Kailash Chandra Samadar* v. *Rebati Mohan Ray*(1) where it was held that a decision by a single Judge who had originally been a member of a Bench, the other member of whom had ceased to be a Judge, represented the two Judges when an application was made to him for review of the decision of those two Judges. It was also held that under section 15 of the Letters Patent of the Calcutta High Court (corresponding to section 10 of the Letters Patent of this Court) no appeal lay under the Letters Patent from the decision of that Judge notwithstanding that he was physically a single Judge. The meaning of the term " judgment " has been exhaustively dealt with by Rankin, C. J. in the case of *Brajagopal Ray Burman* v. *Amar Chandra Bhattacharjee*(2). At page 144 he makes the matter perfectly clear notwithstanding the correct technical use of the word " judgment " as used in England and as defined by the Privy Council and with that decision I agree. The mere fact that a question of right is decided is not in itself conclusive. This was an exercise of a discretion by the learned Judge and whatever the merits of his decision the discretion exercised cannot be attacked by way of appeal and that is abundantly clear from the fact that he was merely asked to set aside an order which had been made for precisely the same reasons as were considered and rejected when the original order was made. To allow an appeal in a matter of this sort would be highly dangerous. It would allow any litigant who had a decision against him to go to the court and ask for a recall of the

(1) (1917) 21 Cal. W. N. 652.
(2) (1928) I. L. R. 56 Cal. 135.

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judgment and, if the decision were against him on that application, to carry the matter by way of Letters Patent to an appeal or indeed to raise any other appeal which he might consider allowable in the circumstances. In my opinion, this appeal is not admissible and fails in limine and I would dismiss it with costs. Hearing fee ten gold mohurs.

KHAJA MOHAMAD NOOR J.—I entirely agree. In my opinion the word "judgment" as used in clause 10 of the Letters Patent of this High Court is incapable of any exhaustive definition, a definition to cover all cases which may come up before the Court of appeal. In the words of Sanderson, C. J. in the case of *Budhu Lal* v. *Chattu Gope*(1), whenever this point is taken the Court has to make up its mind whether the particular order in question is a judgment within the meaning of clause 15 of the Letters Patent of the Calcutta High Court (corresponding to clause 10 of our Letters Patent) having regard to the nature of the order. I am clearly of opinion that taking into consideration the circumstances under which it was passed the particular order passed by Mr. Justice Wort is not appealable. The appellants cannot be in a better position than if they had asked Mr. Justice Wort to recall an order passed by himself. A Judge has rightly or wrongly after hearing all the parties and taking into consideration all that can be said one way or the other adopted a particular course and passed a particular order. Whether that order itself is or is not appealable and if appealable at what stage are quite different matters. But if later on one of the parties comes and asks that Judge to recall the order either under his power of review or under his inherent power and that Judge merely refuses to take any step in the matter, such an order is not a " judgment " within clause 10 of the Letters Patent. In this particular case the appellants are in a somewhat worse position. The order of Mr. Justice Wort refusing to take action under section 151 was in effect based upon his judgment

(1) (1916) I. L. R. 44 Cal. 804.

in exercise of the revisional powers of the court passed a few days earlier. In effect the appellants' inviting us to hear an appeal against the order of Mr. Justice Wort or, to be more correct, against his refusal to pass any order under section 151 is an invitation to hear an appeal against his order passed in revision. That in my opinion is not tenable. I agree with my Lord the Chief Justice that the appeal should be dismissed with costs.

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Appeal dismissed in limine.

APPELLATE CIVIL.

1932.

Nov., 28. Dec., 8.

Before Fazl Ali and James, JJ.

KALI PRASAD SINGH

v.

MUKUTDHARI PRASAD SINGH.*

Local Self-Government Act, 1885 (*Beng. Act III of* 1885), *as amended by Bihar and Orissa Act* 1 *of* 1923—*District Board Electoral Rules framed under the Act—rules* 29 *and* 68—*Returning Officer, summary rejection of nomination paper by—suit for a declaration that the order was illegal —Civil Court, jurisdiction of, whether ousted—Specific Relief Act,* 1877 (*Act I of* 1877), *section* 42—*District Magistrate, how far empowered to hear election petitions.*

Rule 68 of the District Board Electoral Rules framed by the Local Government under the Local Self-Government Act, 1885, as amended by Bihar and Orissa Act 1 of 1923, provides :—

"All disputes arising under these rules in regard to any matter other than a matter the decision of which by any other authority is declared by these rules to be final, shall be decided by the District Magistrate whose decision shall be final."

Held, (*i*) that the provision in rule 68 is only a precautionary measure to see that some authority is provided by the

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* Second Appeal no. 1366 of 1931, from a decision of Rai Bahadur A. N. Chattarji, District Judge of Gaya, dated the 26th July, 1931, confirming a decision of Babu B. K. Sarkar, Munsif of Aurangabad, dated the 3rd February, 1931.