

(2011) 07 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : CMP No. 408 of 2009 LPA No. 57 of 2008 CMP No. 158 of 2011

Asif Khan

APPELLANT

Vs

Sardar Amanullah Khan

RESPONDENT

Date of Decision : 26-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A

Citation : (2011) 07 J&K CK 0025

Hon'ble Judges : F. M. Ibrahim Kalifulla, Acting C.J.; Muzaffar Hussain Attar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. When the above appeal was taken up for hearing as to admission on 23.05.2008, a preliminary objection was raised as to the maintainability of the appeal. Subsequently on 25.09.2008 when the counsel appearing for the respondent made a statement that in view of the decision of Hon'ble Supreme Court reported in AIR 2004 SC 5125, P. S. Sathappan vs. Andhra Bank Ltd, he does not question the maintainability of the appeal, the appeal was directed to be listed after three weeks. However, subsequently on 11.11.2009 the very same learned counsel who appeared for the respondent on 25.09.2008 joined issue with regard to the maintainability of the appeal and wanted to raise the issue once again. It was pointed out that on 25.09.2008 the counsel did not press the issue of maintainability and an order was also passed to that effect. The counsel, however, wanted to lay a motion. It is in the above stated background the present CMP 408/2009 came to be filed on behalf of the respondent for dismissing the appeal on the ground of maintainability.

2. To appreciate the issue raised in this application, it is necessary to state a few facts relating to the main appeal.

3. The appellant is the defendant in the suit in File no. 23/M. The respondent in the appeal filed the suit for permanent injunction and also sought for

interlocutory injunction pending suit. The interlocutory application came to be dismissed by the trial Court by order dated 19.07.2006. The

respondent took it up on appeal in appeal no. 23/2006 before the Principal District Judge Srinagar on 21.07.2006. The present appellant was on

caveat before the appellate Court. The counsel who appeared for the appellant made a statement before the Court that no construction could be

raised on the spot till the next date of hearing fixed by the Court i.e. 24.07.2006. According to the respondents, the assurance made before the

Court was not adhered to and consequently an application under Order 39 Rule 2-A of the CPC was filed in which the present appellant was

found to have committed disobedience of the undertaking made before the Court. Consequently he was directed to pull down the structure made

by him. The learned District Judge also directed attachment and civil imprisonment of the appellant but instead of resorting to the said course

directly, the learned District Judge, by taking a lenient view, asked the appellant to pull down the disputed structure. Against the order passed

under Order 39 Rule 2-A CPC dated 28.07.2007, the appellant preferred CIMA no. 176/2007 which was dismissed by the learned Single Judge

on 18.02.2008. Subsequently he filed review no. 3/2008 in CIMA no. 176/2007 before the learned Single Judge which was also dismissed by the

learned Single Judge by order dated 16.05.2008. As against the above two orders the present appeal, in LPA no. 57/2008, has been filed.

4. In this appeal challenge has been made to both the orders dated 18.02.2008 passed in CIMA no. 176/2007 as well as the order dated

16.05.2008 passed in Review petition no. 3/2008.

5. The respondent, by filing the present CMP no. 408/2009 contended that while the Letters Patent Appeal as against the order dated 18.02.2008

may be maintainable, since the said order got merged with the order dated 16.05.2008 passed in review petition no. 3/2008 passed by the learned

Single Judge, the appeal is not maintainable.

6. While refuting the stand of the applicant in CMP no. 408/2009, the appellant

would contend that by virtue of the order dated 25.09.2008, wherein the counsel conceded about the maintainability of the appeal based on the decision of the Hon'ble Supreme Court reported in AIR 2004 SC 5125, P. S. Sathappan vs. Andhra Bank, without getting the said order dated 25.09.2008 reviewed in the manner known to law, the applicant, in CMP no. 408/2009, cannot be permitted to raise the objection contrary to the order dated 25.09.2008.

7. On behalf of the applicant in the CMP it was contended that since the main order in CIMA no. 176/2007 was passed on 18.02.2008, the appeal should have been filed on or before 18.04.2008, therefore, on the ground of limitation also the appeal cannot be entertained as against the said order dated 18.02.2008. As far as the maintainability of the appeal as against the order dated 16.05.2008 is concerned, it was contended that by virtue of Order 47 Rule 7 of the Code of Civil Procedure, there being specific prohibition for filing an appeal, the same is not maintainable by virtue of the specific provisions contained in Section 100-A of the CPC.

8. Having regard to the above stand of the respective parties, the issues which arise for consideration in this application in CMP no. 408/2009 in LPA no. 57/2008, are as under:-

a) Whether the Letters Patent Appeal is maintainable at all in the light of Section 100-A of the CPC as was introduced and brought in the Statute

Book on 20.03.2009?

b) Whether the Letters Patent Appeal is maintainable in the light of the provisions contained in Order 47 Rule 7 of the CPC?

c) Whether the Letters Patent Appeal as against the order dated 18.02.2008 is barred by limitation?

d) Whether the present objection raised in CMP no. 408/2009 can be entertained in the light of the order dated 25.09.2008 passed by the

consent expressed on behalf of the applicant in CMP no. 408/2009 by the learned counsel and without seeking for review of the said order dated

25.09.2008?

e) Whether the application in CMP no. 158/2011, seeking for condonation of delay in filing the appeal against order dated 18.02.2008 merits

acceptance?

9. We heard Mr. Z. A. Shah, learned senior counsel appearing on behalf of the applicant in CMP no. 408/2009 and Mr. R. A. Jan, learned

counsel for the respondent in the said CMP and the appellant in the main appeal.

10. Mr. Shah, learned senior counsel in his submissions, by relying upon the Division Bench decision of this Court reported in 2010 (I) S.L.J 367,

Union of India v. Ranjeet Kour and Ors, contended that the issue is directly covered by the said decision and, therefore, the appeal is not

maintainable. Learned counsel then referred to Section 6 of the General Clauses Act, 1977 as well as Section 32 of the Civil Laws (Amendment)

Act, 2009, Act No. VI of 2009 and contended that when Section 32 does not expressly refer to Section 100-A, the amended Section 100-A

would relate back to the appointed date, namely, that the said substituted provision should be deemed to have been in the Statute Book from the

date Section 100-A was introduced into the Statute Book, namely, 15.08.1983 in which event the appeal was not maintainable. The learned

counsel also placed reliance upon the decision reported as Government of India and Others Vs. Indian Tobacco Association, , in support of his

submissions relating to substitution of the provision. Learned senior counsel also placed reliance upon the decision reported in AIR 2009 SCW

668, Sachida Nand Lal vs. State of Bihar and Mahadeolal Jalan Vs. Hardeodas Iswardas, in support of his submissions.

11. As against the above submissions, Mr. R. A. Jan, learned counsel appearing for the appellant in the LPA, at the very outset contended that in

the light of the order dated 25.09.2008, which order came to be passed based on the concession expressed by the learned counsel for the

applicant in CMP no. 408/2009, he cannot be permitted to re-open the said issue without seeking for review of the said order dated 25.09.2008

by filing this application. Learned counsel then contended that as the right of appeal available to the appellant was based on Clause 12 of the

Letters Patent by virtue of Section 4 of CPC, irrespective of the provisions contained in Order 47 Rule 7 CPC as well as Section 100-A CPC, the

appeal is maintainable. Learned counsel relied upon Sir Shadi Lal and Sons, Shamli Vs. Commissioner of Income Tax, Kanpur, and Emp.,

MGMT of Ramkanali Colliery of M/s. BCCL Vs. Workmen by Secy. Rasht. Colliery Mazdoor Sangh and Another, , in support of his

submissions.

12. To appreciate the contentions of the respective counsels and to decide the issues raised herein, the interpretation of amended Section 100-A

CPC, which was brought into the CPC by the Civil Laws (Amendment) Act, 2009, the application of Clause 6 of the General Clauses Act vis-à-vis

vis Section 32 of the Amendment Act 2009, the implication of Order 47 Rule 7 CPC read along with Section 4 of the CPC, falls for consideration.

13. When we refer to the facts involved herein, the CIMA no. 176/2007 was preferred by the appellant challenging the order dated 28.07.2007

by which the appellant was found guilty of the disobedience of the order of the lower appellate Court by invoking Order 39 Rule 2-A CPC. The

said order though was passed in appeal proceedings, was as a matter of fact passed in the first instance on having noticed violation of an

undertaking given by the appellant by which he undertook not to effect any construction till 24.07.2006. Therefore, CIMA no. 176/2007 was in

the nature of first appeal against the order passed by the lower Court. Therefore, when a challenge is made against the order dated 18.02.2008

passed in CIMA no. 176/2007, the appeal, which was filed prior to 20.03.2009 when Section 100-A of the CPC only prohibited Letters Patent

Appeal from a appellate decree or order can be held to be not maintainable. The other relevant point for consideration would be when the

appellant chose to file a review of the order dated 18.02.2008 before the learned Single Judge, which came to be dismissed subsequently by order

dated 16.05.2008, having regard to the specific prohibition contained in Order 47 Rule 7 CPC, can the appellant be permitted to maintain the

present appeal under Clause 12 of the Letters Patent.

14. Keeping the above legal and factual matrix in mind, when we examine the issues raised in these proceedings, in the foremost we wish to deal

with the Division Bench decision relied upon by learned counsel for the applicant in CMP no. 408/2009 reported in 2010 (1) S.L.J 367. The

learned counsel relied upon the proposition of law stated in paragraph 7 of the said judgment, 'when the Legislature substitutes a provision by

another, it is settled that the intendment thereof is to bring in the substituted provision from the day one.' By relying upon the said set of expressions

made by the Division Bench, the learned senior counsel would contend that when

Section 100-A came to be substituted by the Civil Laws

(Amendment) Act, 2009, which came into force on 20.03.2009, the substituted Section 100-A should be deemed to have come into effect from

the original date of introduction of Section 100-A, namely, 15.08.1983 and consequently the appeal preferred, notwithstanding the provision

contained in the Letters Patent, would not be maintainable.

15. Though in the first blush such a contention of the learned senior counsel may appear to be sound but on a deeper scrutiny of the reported

decision of the Division Bench as well as the law laid down by the Hon'ble Supreme Court in the subsequent decisions, it is difficult to accept the

submission of the learned counsel. It must be stated at the very outset that the Division Bench dealt with a case which arose under the Motor

Vehicles Act, 1988 as against the award passed by the Tribunal. The appeal was preferred by the claimant which was heard by the learned Single

Judge of this Court and as against the order of the learned Single Judge Letters Patent Appeal came to be filed in which an objection was raised as

regards its maintainability based on the amended Section 100-A which came into force on 20.03.2009. It will have to be stated that since the said

proceedings arose out of an award of the Motor Accident Claims Tribunal, it is not known how any objection based on Section 100-A of the

CPC could have been entertained at all in the said appeal preferred under Clause 12 of the Letters Patent. Therefore, in our considered view

whatever stated by the Division Bench in the said decision, can only be construed as an obiter and may not be binding. In any event ultimately in

paragraph no. 7 the Division Bench, by relying upon the decision of the Hon'ble Supreme Court reported in Kamla Devi Vs. Khushal Kanwar and

Another, , declared that Section 100-A of the Central Code has no retrospective effect so as to bring within its fold even appeals preferred prior

to commencement of this Act though ultimately the Letters Patent Appeal was held to be not entertainable. Since the said decision did not relate to

a proceedings arising under the CPC and the Division Bench having specifically declared, based on the decision of the Hon'ble Supreme Court,

that amended Section 100-A had no retrospective effect, the said decision does not in any way affect our conclusion which we propose to make in

this application. Once we steer clear of the said position and examine the issues

raised, the learned senior counsel appearing for the applicant in the application itself fairly accepted the position that in the light of the decision of the Hon'ble Supreme Court reported in AIR 2004 SC 5125, the appeal was maintainable.

16. Therefore, so far as the Letters Patent Appeal as against the order dated 18.02.2008 is concerned, the maintainability of the same cannot be called in question except in so far as it related to the limitation point of view. Since the appellant has filed the application for condoning the delay, the said issue can be dealt with while dealing with the said application since the appeal is otherwise maintainable against the order dated 18.02.2008.

17. The next submission of the learned senior counsel for the applicant was that the appellant having chosen to seek for review of the order dated 18.02.2008 which came to be rejected by the learned Single Judge by order dated 16.05.2008, the original order passed in the appeal, namely, CIMA no. 176/2007 having got merged with the subsequent order dated 16.05.2008, the same would only be governed by Order 47 Rule 7 CPC and there being a specific prohibition incorporated in the said Rule, the Letters Patent Appeal cannot be maintained.

18. Under Order 47 Rule 7 (1) of the CPC it is specifically provided that an order of the Court rejecting an application shall not be appealable while an order granting an application may be objected to at once in an appeal or in an appeal from the decree or order finally passed or made in the suit. A bare reading of the said sub-clause did prohibit an appeal against an order of the Court rejecting application for review filed under Order 47 Rule 7 (1). To rebut the said contention learned counsel for the appellant Mr. R. A. Jan placed reliance upon Section 4 of the CPC, which contains a saving clause. Section 4(1) reads as under:-
In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(Emphasis added)

19. Therefore, reading Section 4(1) CPC along with Order 47 Rule 7 (1) CPC it will have to be stated that since there is no specific provision to the contrary contained in Order 47 Rule 7(1), providing for exclusion of either limiting or otherwise affecting the right of the appellant as provided under Clause 12 of the Letters Patent, Section 4 will apply in all fours and thereby saving the right of the appellant to work out his remedy as provided under Clause 12 of the Letters Patent. To put it differently, when Section 4 is examined in depth it saves the right of a person to work out a remedy provided under any special or local law now in force and in the absence of any specific provision contrary to such a remedy provided under Clause 12 of the Letters Patent, which, in the case on hand can be examined under Order 47 Rule 7 (1), which does not specifically limit or otherwise affect such an appeal remedy provided under Clause 12 of the Letters Patent as against the order of learned Single Judge of this Court by way of an LPA, it can be safely held that in terms of Section 4 CPC in the light of the availability of an appeal remedy under Clause 12 of the Letters Patent would still be available to the appellant as against an order of rejection of a review filed under Order 47 Rule 7 (1) irrespective of a specific prohibition of further appeal as stipulated under Order 47 Rule 7(1) CPC. Therefore, we have no hesitation to hold that applying Order 47 Rule 7(1) read along with Section 4 of the CPC it can be held that the appellant is always entitled to invoke Clause 12 of the Letters Patent.

20. This leaves us to the other question as to whether by virtue of Section 100-A, as was brought into the Statute Book by the Civil Laws (Amendment) Act, 2009, which came into effect from 20.03.2009 will have retrospective effect in order to hold that the Letters Patent Appeal of the appellant cannot be maintained.

21. It is not in dispute that the present appeal came to be filed by the appellant on 21.05.2008 on which date the amended Section 100-A was not brought into the Statute Book. Prior to this amendment, Section 100-A prohibited an appeal against an order of the learned Single Judge passed in an appeal from an application from an appellate decree or order notwithstanding anything contained in Letters Patent of any High Court. Since the order of the learned Single Judge passed in CIMA no. 176/2007 was not in an appeal against the appellate decree or order, the appeal filed on

21.05.2008 based on Section 100-A of the CPC, as it stood as on that date, was very much maintainable. In this context it will be appropriate to

rely upon a decision of the Hon'ble Supreme Court reported in (2006)13 SCC 295, Kamla Devi vs. Kushal Kanwar and anr. The Hon'ble

Supreme Court dealt with the very same amendment of Section 100-A of the CPC not related to the State of Jammu and Kashmir. The said

Section 100-A, which was in pari materia with the present amended Section 100-A under the Civil Laws (Amendment) Act, 2009, came to be

introduced by Act 22 of 2002 with effect from 01.07.2002. The then existing Section 100-A in the CPC was inserted by Section 38 of Act 104

of 1976. In the above referred to decision a submission was made to the effect that the amended Section 100-A would not only bar filing of an

appeal against the order of the learned Single Judge passed in an appeal preferred against an original order or decree or appellate order or decree

but would get attracted to a pending appeal also. Dealing with the said question the Hon'ble Supreme Court has laid stress on the issue in un-

controverted terms in paragraph no. 20, which reads as under:

Keeping in view the principles of law as enunciated in the aforementioned decisions of this Court, it is evident that a letters patent appeal, which

was filed prior to coming into force of the 2002 Act, would be maintainable.

22. As the present Section 100-A is introduced in the CPC applicable to the State of Jammu and Kashmir under the Civil Laws (Amendment)

Act, 2009, which came into force on 20.03.2009, and is in pari materia with the amended Section 100-A in the CPC which was dealt with by the

Hon'ble Supreme Court in every respect and applying the said dictum of the Hon'ble Supreme Court itself it will have to be held that the appeal

preferred by the appellant on 21.05.2008 based on Section 100-A, as it stood as on that date, was very much maintainable.

23. In this context the reliance placed upon by Mr. Rajan, learned counsel for the appellant on the decision reported in Emp., MGMT of

Ramkanali Colliery of M/s. BCCL Vs. Workmen by Secy. Rasht. Colliery Mazdoor Sangh and Another, also supports the contention. One other

decision relied upon by learned counsel for the appellant, Bhagat Ram Sharma Vs. Union of India (UOI) and Others, also makes the legal position

clear. That was a case where a Regulation, namely, Regulation 8(3), which was

substituted in the Punjab State Public Service Commission

(Condition of Service) (First Amendment) Regulations, 1972. The contention was that the said substituted Regulation must be read along with

Regulation 1(2) and should be deemed to have come into force on the appointed date, namely, 01.11.1956 and that based on such an

interpretation it should be held that the appellant therein was entitled to pension as a retired Member of the PSC from 02.01.1959 which was the

date of his superannuation and not 10.08.1972 the date when the amendment came into effect.

24. Dealing with the said contention the Hon'ble Supreme Court, by referring to one other clause, namely. Clause 5 which was also similarly

substituted in a new Regulation 6(1) dealing with the salary and allowances payable to the Chairman and other members of the Public Service

Commission and while substituting the said new regulation it was specifically stated as under:-

Notwithstanding anything contained in the Regulations, clause (i) of the proviso to sub-regulation shall be deemed to have come into effect from

1.11.1956.

25. By making a specific reference to such a stipulation provided for another substituted clause, the Hon'ble Supreme Court held in paragraph nos.

18 and 19 as under:

18. Amendment is in fact a wider term and it includes abrogation or deletion of a provision in an existing statute. If the amendment of an existing

law is small, the Act professes to amend; if it is extensive, it repeals a law and re-enacts it. An amendment of substantive law is not retrospective

unless expressly laid down or by necessary implication inferred.

19. For the sake of completeness, we wish to add that the mere use of the word substitution does not imply that Regn. 8(3) must relate back to

November 1, 1956, the appointed date.' (Emphasis added)

26. Going by the above proposition of law laid down by the Hon'ble Supreme Court in regard to the retrospectivity of an amendment, it will have

to be held that in the absence of any such specific stipulation, while introducing Section 100-A by way of an amendment in the Civil Laws

(Amendment) Act, 2009, stipulating that such amended Section 100-A would relate back to the day when the original Section 100-A came to be

introduced, there is no scope to hold that it had retrospective application and that on that score the appeal preferred by the appellant cannot be entertained.

27. One other argument made by Mr. Z. A. Shah, learned senior counsel appearing for the applicant was based on Clause 6 of the General

Clauses Act and Section 32 of the Civil Laws (Amendment) Act, 2009 by which the present Section 100-A of the COPC came to be introduced

in the CPC of Jammu and Kashmir State. Section 6 of the General Clauses Act is to the following effect:-

6. Effect of repeal. Where this Act, or any Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be

made, then, unless a different intention appears, the repeal shall not

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment

as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or

punishment may be imposed as if the repealing Act had not been passed.

28. Section 32 of the Civil Laws (Amendment) Act, 2009, falling under Chapter IV related to repeal on savings. In Section 32, sub-rule (1) and

(2) are as under:-' 32. Repeal and Savings:- (1) Any provision inserted in the principal Act by the High Court before the commencement of this

Act shall, except in so far as such provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or repeal under sub-section (1) has taken effect, and without prejudice to

the generality of the provisions of section 6 of the General Clauses Act, Samvat 1977:-

a) the provisions of section 26 of the principal Act and of Order IV of the First Schedule, as amended by sections 2 and 14 of this Act, shall not

apply to or affect any suit pending immediately before the commencement of sections 2 and 14, and every such suit shall be tried as if sections 2

and 14 had not come into force:

b) the provisions of section 27 of the principal Act, as amended by section 3 of this Act, shall not apply to or affect any suit pending immediately

before the commencement of section 3 and every such suit shall be tried as if section 3 had not come into force:

c) the provisions of section 58 of the principal Act, as amended by section 5 of this Act, shall not apply to or effect any person detained in the civil

prison in execution of a decree before the commencement of section 5:

d) the provisions of section 60 of the principal Act, as amended by section 6 of this Act, shall not exempt salary from attachment to the extent

mentioned in clause (i) of the first proviso to sub-section

(I) of section 60 before the commencement of section 6;

e) section 89 and rules I A, IB and IC of Order X of the First Schedule, as inserted in the principal Act by sections 7 and 20 of this Act, shall not

affect any suit in which issues have been settled before the commencement of section 7, and every such suit shall be dealt with as if sections 7 and

20 had not come into force;

f) the provisions of section 96 of the principal Act, as amended by section 9 of this Act, shall not apply to or affect any appeal from original decree

which had been admitted before the commencement of section 9, and every admitted appeal shall be dealt with as if section 9 had not come into

force;

g) the provisions of section 102 of the principal Act, as amended by section 11 of this Act, shall not apply to or affect any appeal which had been

admitted before the commencement of section 11, and every such appeal shall be disposed of as if section 5 had not come into force;

h) the provision of section 115 of the principal Act, as amended by section 12 of this Act, shall not apply to or affect any proceeding for revision

which had been finally disposed of;

i) the provisions of rules 5, 15, 17 and 18 of Order VI of the First Schedule as

omitted or, as the case may be, inserted or substituted by section

16 of this Act shall not apply to in respect of any pleading filed before the commencement of section 16;

j) the provisions of rules 9, 11, 14 and 18 of Order VII of the First Schedule, as amended or, as the case may be, substituted or omitted by

section 17 of this Act, shall not apply to in respect of any proceedings pending before the commencement of section 17;

k) the provisions of rules 1, 1A, 8, 9 and 10 of Order VIII of the First Schedule, as substituted or inserted by section 18 of this Act, shall not

apply to a written statement filed and presented before the court immediately before the commencement of section 18;

l) the provisions of rules 2 and 5 of Order IX of the First Schedule, as amended by section 19 of the Act, shall not apply in respect of summons

issued before the commencement of section 19;

m) the provisions of rules 2 and 15 of Order XI of the First Schedule, as amended by section 21 of this Act, shall not apply to or affect any order

passed by the court or any application submitted for inspection to the court before the commencement of section 21 of this Act;

n) the provisions of rules 2 and 4 of Order XII of the First Schedule, as amended or omitted, as the case may be, by section 22 of this Act, shall

not affect any notice given by the party or any order made by the court before the commencement of section 22 of this Act;

o) the provisions of rules 1 and 2 of Order XIII of the First Schedule, as substituted by section 23 of this Act, shall not affect the documents

produced by the parties or ordered by the court to be produced before the commencement of section 23 of this Act;

p) the provisions of rules 4 and 5 of Order XIV of the First Schedule, as amended by section 24 of this Act, shall not affect any order made by the

court adjourning the framing of the issues and amending and striking out issues before the commencement of section 24 of this Act;

q) the provisions of rules 1 and 2 of Order XVI of the First Schedule, as amended by section 25 of this Act, shall not affect any application made

for summoning of witnesses and time granted to a party to deposit amount for summoning witnesses made by the court before the commencement

of section 25;

r) the provisions of rule 1 of Order XVII of the First Schedule, as amended by section 26 of this Act, shall not affect any adjournment granted by

the court and any cost occasioned by the adjournment granted by the court before the commencement of section 26 and the number of

adjournments granted earlier shall not be counted for such purpose;

s) the provisions of rules 1, 6A and 6B of Order XX of the First Schedule, as amended or substituted by section 28 of this Act, shall not affect any

application for obtaining copy of decree for filing of appeal made by a party and any appeal filed before the commencement of section 28 of this

Act and every application made and every appeal filed before the commencement of section 28 shall be dealt with as if section 28 had not come

into force;

t) the provisions of rules 1, 9, 11, 12, 13, 15, 18, 19 and 22 of Order XLI of the First Schedule, as amended, substituted or omitted, as the case

may be, by section 31 of this Act shall not affect any appeal filed before the commencement of section 31, and every appeal pending before the

commencement of section 31 shall be disposed of as if section 31 of this Act had not come into force.

29. The contention of the learned senior counsel appearing for the applicant was that Clause 6 of the General Clauses Act though provide that

effect of repeal would not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, since the

said clause 6 in its opening words makes a qualified statement that such saving clause would be applicable unless a different intention appears and

Section 32 while in respect of various other amended provisions specifically stipulated as to what extent such amendment would have

consequential effect on the repealed provisions there being no reference to Section 100-A in that Section 32, it will have to be held that the then

existing Section 100-A stood completely erased as from the date of its original inception, namely, 15.08.1983 by substituting the present Section

100-A and that therefore to any appeals preferred based on the then existing Section 100-A, the same would be governed only by the amended

Section 100-A. Here again, though the argument looks very appealing, we are not able to accept the submissions as put forth by the learned senior

counsel. Though we have all the appreciation for the ingenuity of the learned

senior counsel for putting forth such a submission, the same cannot be countenanced since even applying those set of expressions contained in Clause 6, namely, ' unless a different intention appears' it will have to be held that since in Section 32 of the Civil Laws (Amendment) Act, 2009 no different intention with respect to Section 100-A having been stated, the general consequence of a repeal as set out in clause 6 alone will apply. In fact in Section 32 (2) of the amended Act of 2009 it is specifically provided that the various limitations set out in sub-clause (a) to (t) of Section 32(2) would apply notwithstanding the coming into force or repeal as provided under sub-section (1) of Section 32 which would be without prejudice to the generality of the provisions contained in Section 6 of the General Clauses Act. Therefore, the limits set out in various sub clauses contained in sub section (2) of Section 32 would be without prejudice to what is contained in Section 6 of the General Clauses Act. Therefore, reading Section 6 of the General Clauses Act along with Section 32 of the Amendment Act of 2009 to the extent different intention having been set out therein, namely with reference to those provisions contained in Sub-clauses (a) to (t) of Sub-Section (2) of Section 32, in respect of all other provisions of the Amendment Act, what is set out in Section 6 alone would apply. In our considered opinion that would be the harmonious way of reading the said provisions and thereby not creating any conflict between the two provisions. When the law makers have consciously used the expression 'unless a different intention appear in Section 6 of the General Clauses Act' and 'without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, Samvat, 1977', it should be the endeavor of the Court to apply the provision that would justify the cause and intendment rather than defeating the purpose.

30. In our considered view that would be the harmonious way of construing Section 6 of the General Clauses Act read along with Section 32 of the Civil Laws (Amendment) Act, 2009. Therefore, the said submission of the learned senior counsel is also of no assistance to defeat the claims of the appellant for entertaining the appeal.

31. Though it is a well settled principle that there can be no estoppel against the Statutory provisions and applying the said principle the present stand of the applicant in CMP no. 408/2009, where the applicant, in spite of the

earlier concession made on 25.09.2008, which persuaded this

Court to hold that the appeal was maintainable, can be said to be a point of law which needed deliberation.

32. We are, therefore, left with only other question as to whether the appeal, insofar as it is preferred against the order dated 18.02.2008 would

be hit by the law of limitation and the application, seeking to condone the delay in filing the appeal, should be rejected on that score.

33. It is not in dispute that the appellant while preferring the appeal made it clear in the preamble as well as in the body of the grounds of appeal

that the challenge is to the order dated 18.02.2008 passed in CIMA no. 176/2007 as well as against the order dated 16.05.2008 passed in

review petition no. 3/2008. A composite appeal filed by the appellant cannot be rejected on a technical ground that two separate appeals were not

filed. At best the appellant can be directed to pay separate court fee when he seeks to challenge the order dated 18.02.2008 and the one dated

16.05.2008.

34. Since the appellant filed a review before the learned Single Judge and was waiting for the out come of the said review petition, which came to

be dismissed on 16.05.2008 and the appeal came to be filed on 21.05.2008, the reason set out in the application of the appellant seeking for

condonation of delay in filing the appeal cannot be held to be unjustified or not genuine. Therefore, when there are sufficient reasons adduced on

behalf of the appellant for not preferring the appeal within the stipulated time limit against the order dated 18.02.2008 and as we are convinced of

those reasons, the said delay deserves to be condoned.

35. We, therefore, hold that:-

a) Section 100-A substituted by Section 10 of the Civil Law Amendment Act, 2009 dated 20.03.2009 is prospective in nature and will not affect

the continuation of letters patent appeals filed before the said date.

b) The Letters Patent Appeal preferred by the appellant is maintainable in the light of the than existing Section 100-A as it stood on the date of

filing of the appeal, namely, 21.05.2008.

c) By virtue of Section 4 CPC the prohibition for filing further appeal against the order dated 16.05.2008, rejecting the review, as stipulated under

Order 47 Rule 7(1) of the CPC, cannot stand in the way of invoking Clause 12 of the Letters Patent.

d) Section 6 of the General Clauses Act as well as Section 32 of the Civil Laws (Amendment) Act, 2009 does not, in any way, take away the right

of the appellant to prefer an appeal under Clause 12 of the Letters Patent.

e) As we are convinced of the reasons which prevented the appellant from filing the appeal as against the order dated 18.02.2008 within the

statutory time limit, the condonation delay petition stands allowed and the appeal is admitted.

36. Having regard to our conclusions, the application, in CMP no. 408/2009 stands rejected. CMP no. 158/2011 stands allowed.

37. Appeal shall be listed in due course.

38. Interim directions dated 23.05.2008 shall continue.