

(1946) 05 CAL CK 0015
In the Calcutta High Court

India Electric Works Ltd.

APPELLANT

Vs

Registrar of Trade Marks

RESPONDENT

Date of Decision : 28-05-1946

Acts Referred:

Government of India Act, 1915 — Section 108
Trade Marks Act, 1940 — Section 14

Citation : AIR 1947 Cal 49

Hon'ble Judges : Gentle, J;Das, J

Bench : Full Bench

Judgement

This Judgment has been overruled by : National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), AIR 1953 SC 357 : (1953) 4 SCR 1028

Gentle, J.—The India Electric Works Ltd., applied u/s 14, Trade Marks Act, 1940 to the Registrar of Trade Marks for registration of the word "India" as their trade mark of an electric fan. The Registrar refused the application on 26-9-1944. Pursuant to Section 76(1) of the Act the company presented an appeal to this Court against the Registrar's refusal. It was heard by McNair J. and by whom it was dismissed on 8-1-1945. The company now prefers this appeal against the learned Judge's dismissal. The Registrar of Trade Marks is the respondent. In form and substance it is an appeal from a single Judge to a Division Bench of this Court which, for convenience, I will call an inter-court appeal. Mr. S.B. Sinha, on behalf of the Registrar, raised a preliminary objection to the competency of the appeal on the grounds that an appeal to the High Court u/s 76(1) against the Registrar's refusal to register a trademark is final, and no further appeal, therefore, lies and, in any event, there is no right of appeal to a Division Bench from the decision given in an appeal u/s 76(1) by a single Judge of this Court. The right of appeal has been described as a "creature of statute" and, as observed by Bramwell C.J., as he then was, in *Sandback Charity Trustees v. North Staffordshire Ry. Co.* (1878) 3 Q.B.D. 1 (4). "An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be

given by express enactment."

2. The right of appeal from one Judge of this Court to a Bench is under Clause 15 of its Letters Patent which, so far as material, provides that:

...an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the Judgment...of one Judge of the said High Court...pursuant to Section 108, Government of India Act....

3. The remaining part of the clause relates to an appeal from the judgment on appeal (usually called a second appeal) of a single Judge of the Court from a decree or order made in exercise of appellate jurisdiction by a Court subordinate to the High Court. It is common ground that the latter part of the clause has no application in the present case.

4. Mr. N.C. Chatterjee, for the company, contended that in disposing of the appeal, the learned Judge exercised either the Court's Ordinary Original Civil Jurisdiction or its Appellate Civil Jurisdiction, in either of which events an appeal lies from his decision to a Division Bench of this Court under Clause 15; it was further contended that this Court is given "jurisdiction to deal with matters relating to registration of the company's trade mark and all the incidents of its jurisdiction, including the right to appeal from the decision, arise with respect to the registration and the present appeal is such an incident of the Court's jurisdiction; for these reasons the present appeal is, therefore, competent.

5. In order to see how the appeal before McNair J., and this appeal arose it is necessary to refer to the relevant provisions of the Trade Marks Act, 1940 and to the rules thereunder made by this Court. The provisions of the Act are:

Section 76(1). Save as otherwise expressly provided in this Act, an appeal shall lie, within the period prescribed by the Central Government, from any decision of the Registrar under this Act or the rules made thereunder to the High Court having jurisdiction;

Provided that if any suit or other proceeding, concerning the trade mark in question is pending before a High Court or a District Court, the appeal shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated.

(3) Subject to the provisions of this Act and of rules made thereunder, the provisions of the CPC 1908, shall apply to appeals before a High Court under this Act.

Section 77-A High Court may make rules consistent with this Act as to the conduct and procedure of all proceedings under this Act before it.

6. In exercise of the powers given by Section 77 this Court made Rules 72-81, Chap, XXXVHI of the Original Side Rules. The material rules are:

72. In these rules-

"The Act" means the Trade Marks Act, 1940, as amended from time to time.

73. All original proceedings under the Act including appeals u/s 76 of the Act shall be marked as proceedings under the Trade Marks Act, 1940, as amended from time to time. The procedure of the High Court in relation to Commercial Suits shall (unless by the Act or these Rules otherwise expressly provided) apply thereto.

74(a). The Judge in charge of the Commercial List or such other Judge as the Chief Justice may from time to time appoint shall hear and dispose of all proceedings under the Act including appeals u/s 76 of the Act.

(b) Appeals from the decisions of the Judge shall be heard by the Division Bench appointed to hear appeals from the Original Side.

75. The Rules in Chap. XXXI of the High Court Rules shall apply to appeals to the Division Bench.

76(c). Appeals from any decision of the Registrar or Deputy Registrar of Trade Marks u/s 76(1) of the Act shall be brought by petition presented to the Court. A copy of the petition shall be served by the appellant upon the Registrar of Trade Marks.

7. Reference to Rules 76 (a), (b) and (d) and 77 to 81 are not material to the present consideration since they relate to proceedings in, and applications to, this Court under Sections 10, 37, 38, 46 and 69 of the Act and to proceedings for infringement of trade marks which do not come before the Court by way of appeal from the Registrar.

8. Chapter XXXI, Original Side Rules, deals with appeals to a Division Bench from the judgments of first instance on the Original Side of this Court; since Rule 75, makes the rules in. that Chapter applicable to appeals in Trade Mark proceedings, it would seem that Rules 73, 74(b) and 75 contemplate that those appeals involve the exercise of the Court's Ordinary Original Civil Jurisdiction. Although Sub-section (3), Section 76 of the Act makes the provision of the CPC applicable to appeals to the High Court under Sub-section (1), there is no provision in the Code by which an appeal can be preferred from one Judge to a Division Bench of a High Court. Mr. Chatterjee did not place reliance upon any provision of the Code in support of his contention that the present appeal is competent.

9. In the first place, it is convenient to consider whether McNair J., exercised the Court's Ordinary Original Civil Jurisdiction when he heard and disposed of the appeal against the Registrar's dismissal of the application for registration of the company's trade mark. Mr. Sinha conceded that, if such jurisdiction was exercised Clause 15 is applicable and the present appeal lies. Mr. Chatterjee's argument was put in this way : Rule 74(a) directs that the Judge in charge of the Commercial list shall hear and dispose of appeals u/s 70(1) of the Act; such Judge exercises the Court's Ordinary Original Civil Jurisdiction in disposing of cases in that list; the appeal was heard by McNair J., as the Judge in charge of

that list; therefore, he must have exercised the Ordinary Original Civil Jurisdiction when he disposed of the appeal. Further, Rule 74(b) expressly confers a right of appeal to a Division Bench of this Court against the decision of the Judge disposing of Trade Mark appeals.

10. Whilst, in the majority of the matters which are dealt with by the Commercial List Judge, the Court's Ordinary Original Civil Jurisdiction is exercised, nevertheless, from that circumstance, it does not follow he exercises such jurisdiction when disposing of some special matter which is assigned to him. The words of the rule, that the Judge in charge of the Commercial list shall hear and dispose of all proceedings under the Trade Marks Act including appeals u/s 76, is a direction that, as a persona designata he is the Judge before whom those matters ordinarily will be placed. The rule does not differentiate between proceedings under various sections of the Act, which are initiated in the Court, and appeals from the Registrar before whom the proceedings leading to an appeal are commenced by an application u/s 14. By Rule 74(a) not only the Commercial List Judge but any other Judge so appointed for that purpose by the Chief Justice shall hear and dispose of all proceedings under the Act, including appeals u/s 76(1). Any other Judge of the Court, e.g., a Judge sitting on the Appellate Side of the Court, could be appointed to hear a Trade Mark Appeal, that is to say a Judge who does not exercise the Ordinary Original Civil Jurisdiction of the Court. If such Judge were appointed, and he disposed of a trade mark appeal, the same argument could not apply to him, as Mr. Chatterjee puts forward with regard to the Commercial List Judge, regarding the exercise of the Court's Ordinary Original Civil Jurisdiction. The question of the exercise or the non-exercise of that jurisdiction cannot depend upon the circumstance or accident of it coming before a particular Judge of the Court. The Allahabad High Court is not vested with Ordinary Original Civil Jurisdiction yet it has jurisdiction to deal with Trade Mark Appeals; in their disposal, whether by a single Judge or a Division Bench, no question could arise that Ordinary Original Civil Jurisdiction would be exercised; it cannot have been the intention of the Legislature that one High Court would dispose of an appeal u/s 76(1), Trade Marks Act by exercising its Ordinary Original Civil Jurisdiction whereas another High Court would do so by exercising its appellate jurisdiction. It must have been the intention that the disposal would be under the same jurisdiction in each High Court. The right given by Section 76(1) is a right of appeal from the decision of the Registrar before whom the proceedings leading to the appeal are initiated. The Court does not get seisin of the matter of registration until an appeal is preferred to it. In order to dispose of the appeal the Court must exercise its appellate jurisdiction (the nature of which will be later discussed) and does not exercise its Ordinary Original Civil Jurisdiction in that respect.

11. The right conferred by Section 76(1) is a right of appeal but it is left to the High Court to prescribe, by rules made u/s 77, the procedure for disposal of the appeal. There is nothing in the Act which prevents a rule being made that an appeal to the High Court shall be disposed of by a Division Bench. In my view a

rule to that effect would be consistent with the Act. If there had been such a rule in place of Rule 74(a) (in so far as it relates to the hearing of appeals) no question could arise that the Ordinary Original Civil Jurisdiction of the Court is exercised in disposal of an appeal. The provision in the rule that the Commercial List Judge shall hear and dispose of appeals is no more than an allocation to him as *persona designata* and the circumstance that such Judge, in dealing with other matters, exercises the Court's Ordinary Original Civil Jurisdiction is no indication that that jurisdiction is exercised when the Commercial List Judge hears and disposes of a Trade Marks Appeal by virtue of the right of appeal given by Section 76(1) and the procedure for its disposal prescribed by Rule 74(a). No decided authority was cited in which the question has arisen that this Court exercises its Ordinary Original Civil Jurisdiction when disposing of an appeal preferred under the provisions of a statute or of any other appeal. In my opinion the Ordinary Original Civil Jurisdiction of the Court is not exercised in the disposal of an appeal and u/s 76(1), Trade Marks Act.

12. I turn now to the argument that Rule 74(b) confers a right of appeal from the decision, in a Trade Mark Appeal, by a single Judge. Section 76(1) gives the right of appeal to the High Court. Many proceedings under other sections of the Act are initiated in the High Court, e.g., pursuant to Sections 10, 37, 38, 46 and 69; Rule 74(a) brackets those proceedings with appeals u/s 76(1), as also, it would seem, does Rule 74(b). It may be that in disposing of the proceedings initiated in the High Court its Ordinary Original Civil Jurisdiction is exercised (upon which I express no opinion) and, if that be the case, an appeal lies from, a single Judge to a Division Bench in respect of such proceedings. The Court's rule making power u/s 77 is subject to the rules being consistent with the Act; Section 76(1) of the Act confers one right of appeal and not a right of second appeal. The rules made under the Act cannot give more than is given by the Act itself, Unless there is such right under the ordinary appellate jurisdiction of the Court, pursuant to Clause 15 of the Charter (which question is later discussed), no such right exists and is not conferred by Rule 74(b).

13. The argument that? the Court is given jurisdiction to deal with the company's trade mark registration and, consequently, all the incidents of its jurisdiction arise, including the right to appeal from its decision, is, I think, connected with and dependent upon the questions arising under the further contention that an appeal lies from McNair J.'s decision in the exercise of the ordinary appellate jurisdiction of this Court. Such appeal is an incident of the Court's appellate jurisdiction only if such appeal lies. Reference is now required to the material provisions of the Letters Patent, dated 28-12-1865. The relevant part of Clause 15 has previously been stated and repetition is unnecessary. Other material provisions are:

Clause 16 - The High Court shall be a Court of appeal from the civil Courts of Bengal and from all other Courts subject to its superintendence and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said

High Court by virtue of any laws" or regulations now in force.

Clause 37 - It shall be lawful for the said High Court to make rules for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court.

Clause 44 - The provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council.

14. When the question arises of the Court's jurisdiction and powers, it has become the practice to refer to the Charter as the document or authority by which jurisdiction and powers were conferred. But, although the jurisdiction, powers and authority of the High Courts in India are specified in the Letters Patent of each Court, the jurisdiction and powers and the authority to exercise jurisdiction and powers have been conferred upon the High Courts by enactments of Parliament. The High Courts of the three Presidencies in India, including this High Court, were established by the High Courts Act, 1861 (24 and 25 Vict. cap. 104). So far as material, that statute enacts that:

Section 1 - It shall be lawful for Her Majesty, by Letters Patent...to erect and establish a High Court of Judicature at Fort William in Bengal...and the High Court to be established under such Letters Patent...shall be deemed to be established from and after the publication of such Letters Patent....

Section 9 - Each of the High Courts to be established under this Act shall have and exercise all such, civil...jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct....

15. The 1861 Statute was repealed by the Government of India (Consolidating) Act, 1915 (5 & 6 Geo. V. cap. 61), part ix of which took the place of the repealed Statute, the material provisions were:

Section 106(1) - The several High Courts...have jurisdiction Original and Appellate...and all such powers and authority...and power to make rules for regulating the practice of the Court as are vested in them by Letters Patent all...and such jurisdictions, powers and authority as are vested in those Courts respectively at the commencement of this Act.

Section 108(1) - Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the High Court of the original and appellate jurisdiction vested in the Court.

16. The 1915 Statute was repealed by the Government of India Act, 1935 (26 Geo. V. C2), Part IX of which replaced Part IX of the repealed Statute. The material provisions of the later Statute are contained in Section 223 and are the following:

Section 223 - Subject to...the provisions of any Act of the appropriate legislature...the jurisdiction of...any existing High Court and the respective powers of the Judges thereof...including power to make rules of Court...shall be the same as immediately before the commencement of Part III of this Act.

17. This section substantially embraces the powers of Sections 106(1) and 108(1) of the 1915 Statute. Letters Patent, pursuant to the 1881 Statute, were first granted in 1862; they were revoked in 1865 and Were replaced by the present Letters Patent. This was done pursuant to Section 17 of the 1861 Statute and. Section 1 of 28 and 29 Victoria cap. 15. No point arises with regard to this and for all intents and purposes the 1865 Letters Patent is the Charter granted under the 1861 Statute.

18. The effect of the provisions of the several Acts of Parliament and the Charter can now be considered. The 1861 Statute made it lawful to erect and establish this High Court which should be deemed to be established after publication of its Letters Patent. The Statute, and not the Letters Patent, conferred upon the Court jurisdiction, powers and authority specified in the Letters Patent, and authorised the Court to exercise that jurisdiction, powers and authority. When the 1861 Statute was repealed, the authorisation given by it to the Court ceased to have effect although the Letters Patent remained. New jurisdiction, power and authority were, however, re-conferred by Section 106(1) of the 1915 Statute without which the Court would not have continued to function. Whilst the phraseology of that section is declaratory in form, nevertheless its provisions were a conferment upon the Court. The position was repeated when the 1915 Statute was repealed by the 1935 Statute; the Court now exercises its jurisdiction and powers by virtue of the latter Statute. That Court's ordinary jurisdiction and power may have been increased by the 1935 Statute so as to include jurisdiction and power conferred by Acts passed between the years 1915 and 1935 and subsequent thereto, but the right of appeal from the judgment of one Judge of the Court to a Division Bench is dependent upon Clause 15 as it now provides. In light of the provisions of that clause close investigation into any enlarged or increased ordinary jurisdiction and power since 1915 is unnecessary.

19. An appeal under Clause 15 from the judgment of a single Judge to a Division Bench lies only when the judgment is pursuant to Section 108, Government of India Act, 1915, which section empowered the Court to make rules for the exercise of the appellate jurisdiction vested in the Court. The jurisdiction and power to make rules were vested in all High Courts by Section 106(1) of the 1915 Statute "as are vested in them by Letters Patent and all such jurisdictions powers and authority as are vested in those Courts respectively at the commencement of this Act." The appellate jurisdiction vested in this High Court by the Letters Patent is specified in Clause 16, by which it is a Court of appeal from all civil Courts in Bengal and from other Courts subject to its superintendence and shall exercise its appellate jurisdiction, in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations "now

in force." Clause 15 of the revoked Letters Patent of 1861 corresponds to Clause 16 of the present Charter. Clause 15 included the provision,

or shall become subject to appeal to the said High Court by virtue of such laws and regulations relating to Civil Procedure as shall be hereafter made by the Governor-General in Council,

in addition to the words "laws or regulations now in force." That provision is omitted from Clause 16 of the later Charter which, so far as material, has only the words "laws or regulations now in force." Those words must relate to laws or regulations in force at the date of the Charter (28-12-1865) and do not relate to subsequent laws or regulations. It must follow that the appellate jurisdiction specified in Clause 16 is confined to jurisdiction to hear appeals from the civil Courts mentioned in the clause and appeals under Acts passed and regulations in force up to the year 1865. In *Secretary of State v. Hindusthan Co-operative Insurance Society Ltd.* ("31) 18 AIR 1913 P.C. 149 (153) it was observed by their Lordships at p. 268 of the report that,

To come within the purview of Clauses 16 and 39, Letters Patent, it must be a decree of a Court subject to the superintendence of the High Court....

The Registrar of Trade Marks is not a Court subject to this Court's superintendence and his refusal to register the company's mark "India" is not a decree of such Court.

20. The jurisdiction vested by Section 106(1) of the 1915 Statute was, (a) the jurisdiction conferred by the Letters Patent and (b) the jurisdiction otherwise conferred, at the date of the commencement of the Statute. The jurisdiction so vested, therefore, included jurisdiction to hear an appeal under an Act passed after the date of the 1865 Letters Patent and which was in force before the commencement of the Statute. To the same extent and similar in its effect Section 106(1) also vested rule making power upon the Court. The jurisdiction and rule making power thus vested did not include jurisdiction and power with respect to an Act passed after the commencement of the Statute.

21. The authority, given by Section 108(1) of the 1915 Statute, to make rules for the exercise by one or more Judges of the Court's appellate jurisdiction is limited to the jurisdiction then vested in the Court, that is to say, the jurisdiction conferred by Section 106(1). Such rules, therefore, cannot relate to jurisdiction conferred by an Act passed after the commencement of the 1915 Statute nor to an appeal heard by the Court pursuant to such an Act since the jurisdiction to hear such appeal is conferred by the particular Act giving the right to such appeal and was not conferred upon or vested in the Court by Section 106(1). It is significant that Section 77, Trade Marks Act, expressly confers rule making power on the Court with respect to proceedings under that Act. The power and authority under Sections 106(1) and 108(1) of the 1915 Statute cannot be exercised with regard to an Act passed after the commencement of the Statute. Rules 72 to 81 of chap. 38 are expressed to be rules under the Trade Marks Act.

22. The jurisdiction and rule-making power conferred by Section 223, Government of India Act, 1935 is expressly to be the same as immediately before the commencement of Part III of that Statute, namely, 1-4-1937. The ordinary appellate jurisdiction and rule-making power thereby conferred included jurisdiction and power conferred by an Act passed after the 1915 Statute but which is not included in Section 106(1) of that Statute. The words in Section 223 "subject to the provision of any Act of the appropriate Legislature" may have the effect of including in the jurisdiction and power, thereby conferred, appellate jurisdiction and power given by an Act passed after the commencement of part III of the 1935 Statute. Assuming, that to be the case nevertheless rules made under an Act passed after 1915 (the Trade Marks Act was passed in 1940) and even if they are rules within Section 223, those rules are not rules within Section 106(1) and Section 108(1) of the 1915 Statute.

23. The right of appeal from the judgment of one Judge to a Division Bench is controlled by Clause 15 of the Charter; there is such right, only when the judgment is pursuant to Section 108 of the 1915 Statute; the clause does not give a right of appeal against a judgment pursuant to Section 223 of the 1935 Statute. The clause was amended in 1919 when the words "Section 108, Government of India Act" were inserted. Whilst the 1915 Statute was repealed by the 1935 Statute the repeal did not amend Clause 15, and did not operate so as to substitute in the clause Section 223 of the later Statute for Section 108 of the earlier one. Although the 1915 Statute has been repealed the provisions of its Section 108 are still applicable to the clause since an appeal under Clause 15 lies to a Bench from a single Judge only when the judgment is pursuant to Section 108. For a judgment to be pursuant to Section 108, it must be given by virtue of a rule coming within the section. If a single Judge exercises the Court's appellate jurisdiction under such a rule, his judgment is pursuant to the section but if the rule which enables him to hear an appeal and, it follows, to give judgment, is not a rule within the section but is a rule made under rule-making power not conferred by Section 106(1) but conferred by some Act, then the judgment is not pursuant to Section 108. An appeal under Clause 15 does not lie when the judgment is not pursuant to Section 108.

24. The Trade Marks Act was passed in 1940, after the commencement of the 1935 Statute, and the rules made u/s 77 are not rules (under Section 108. The hearing of an appeal u/s 76(1) is pursuant to rules made u/s 77, Trade Marks Act, and is not a disposal in accordance with a rule made u/s 108 of the 1915 Statute and a judgment in such appeal is not a judgment pursuant to Section 108. Since it is not such a judgment it follows that there is no right of appeal from a single Judge to a Division Bench with respect to a Trade Marks Act appeal.

25. In support for his contention that the present appeal lies as one of the incidents of Court's appellate jurisdiction, Mr. Chatterjee referred to the observations of Lord Parker in [National Telephone Co. Ltd. v. Post Master General (No. 2) (1913) 1913 A.V. 546 (562)] in which, at p. 562, he said:

where by a Statute matters are referred to the determination of a Court of record with no further provision the necessary implication is, I think, that the Court will determine the matters as a Court. Its jurisdiction is enlarged, but all the incidents of the jurisdiction, including the right of appeal from its decision, remain the same.

26. There is an observation to the same effect by Viscount Haldane L.C. at p. 552 of the report. Some decisions by the Judicial Committee were also cited by Mr. Chatterjee and to which now I propose to refer - In AIR 1936 93 (Privy Council) a tribunal was constituted by Section 34, Sikh Gurdwaras Act, 1925, to determine whether an institution is a Sikh Gurdwara within the meaning of Section 16 of the Act and also questions as to the amount of compensation for loss of office -and claims to property in respect of which the tribunal's powers were not limited by any provision as to value; the decision of the tribunal was described as a decree or order; and a provision was made for an appeal from the tribunal being heard by a Division Bench of the High Court. Having regard to the character, variety and importance of the questions dealt with by a tribunal and the terms in which the right of appeal to the High Court was provided by the Act, their Lordships were of opinion that the provision of the CPC with reference to appeals to His Majesty applied to decrees of the High Court made under the Act. In AIR 1936 93 (Privy Council) the High Court heard an appeal under a particular Act and the question was whether the decision of the High Court was final or whether an appeal lay therefrom to His Majesty in Council as an incident of the High Court's appellate jurisdiction. That question does not arise here and there is nothing in the judgment relating to the question whether an inter Court appeal lies from a decision by a single Judge in the exercise of appellate jurisdiction given by an Indian Act to a Bench of the Court. Reference was made in AIR 1936 93 (Privy Council) to *Secretary of State v. Chelikani Rama Rao* ("16) 3 AIR 1916 P.C. 21 (23) where the Board held that an appeal lay to the High Court from a decision of a District Judge by whom claims to land were heard pursuant to Section 10(iii), Madras Forest Act, 1882. At p. 198 of the report it was observed:

The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seised of a dispute of that character, it would require, in the opinion of the Board, a specified limitation to exclude the ordinary incidents of litigation.

27. The ordinary incident in that case was the right of appeal from one tribunal to a higher one, namely from a District Judge to the High Court, with respect to a claim to land, which claim is recognised by the Civil law and is not dependent for its existence upon an Act. The last case is AIR 1934 81 (Privy Council) there the Provincial Insolvency Act, 1920, provided that the decision of a District Judge should be final, but that in a limited class of case there should be a right of appeal to the High Court; the question arose whether, following upon such appeal, a certificate to appeal to His Majesty in Council could be given; after referring to ("16) 3 AIR 1916 P.C. 21 (23) it was laid down by the Board at p.

161,

when such a right of appeal is given to one of the ordinary Courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Code of Civil Procedure,

There also the question was whether an appeal lay from the High Court and not whether it lies to or within the High Court; and as previously mentioned, there is no provision in the Code for an appeal of the nature of the present one. I am unable to find any support for the competency of the present appeal from those three decisions of the Judicial Committee.

28. Mr. Sinha, for the Registrar, contended that the Trade Marks Act is a special Act dealing with the special matter of the registration of a trade mark, which is not a right under the civil law, and the appeal to the High Court, conferred by the Act, is also a special right and no appeal lies from the disposal by a single Judge, or at all of such appeal. Reference was made to *Rangoon Botatouing Coy. Ltd. v. Collector of Rangoon* ("13) 40 Cal. 21 (27) and *Special Officer Salsette Building Sites v. Dorabhai Bezoni Motivalla* ("13) 20 I.C. 763 (764) (P.C.)? in which it was held that no appeal lay to the Judicial Committee from a decision of the High Court on appeal u/s 54, Land Acquisition Act, 1894, (prior to its subsequent amendment). The Rangoon case ("13) 40 Cal. 21 (27) was discussed by their Lordships of the Privy Council in ("16) 3 AIR 1916 P.C. 21 (23) and AIR 1936 93 (Privy Council) where it was pointed out that the proceedings in the Rangoon case ("13) 20 I.C. 763 (764) (P.C.) were, from beginning to end, ostensibly and actually, arbitration proceedings and in View of the nature of the question to be tried and the provisions of the particular Act, it was held that there was no right to carry an award made in an arbitration as to the value of land further than to the Courts specifically set up by the Act for the determination of that value. Mr. Sinha also relied upon AIR 1936 93 (Privy Council) as supporting the proposition that when an Act confers a special right and specifies a particular tribunal or officer by which that right is to be adjudicated and also confers a right of appeal to the High Court from the tribunal's or officer's decision, no appeal lies against the High Court's decision on appeal. That was the argument in AIR 1936 93 (Privy Council) but, whilst the Board held in that case the right was not a special right and that an appeal lay to His Majesty in Council, there was no finding that, had it been a special right, no appeal would lie. Reference was also made to *Nur Mahomed v. S.M. Solaiman* ("44) 49 C.W.N. 10 (17) a decision by a Division Bench of this Court under Sections 46 and 47, Calcutta Municipal Act, 1923. By Section 46 if there is any dispute whether a person is qualified to be a Councillor or if the validity of an election is questioned upon the grounds therein specified, any person can apply to the High Court with respect to those matters; by Section 47, in any proceeding instituted u/s 46 the High Court can declare the election of a Councillor void. Mitter J., at p. 17, expressed the opinion that Section 46 conferred a new right on a body of a person and a special jurisdiction on the Court; apart from the Act those persons would not have had the right to

challenge the validity of an election which right included elections in a ward outside the territory of the Court's Ordinary Original Civil Jurisdiction and the, learned Judge held that no appeal lay from the decision of a single Judge by whom proceedings u/s 46 had been disposed.

29. I have referred to Mr. Sinha's contentions that no appeal at all lies from the decision on appeal by a single Judge in an appeal under the Trade Marks Act since considerable time was devoted to them during the argument but, in my view, for the purpose of disposal of the present appeal no pronouncement with regard to those contentions is required. I desire to reserve consideration as to whether a judgment in appeal u/s 76(1), Trade Marks Act by a single Judge or by a Division Bench is final or whether an appeal lies from such judgment. Nothing which I have said is to be deemed to be an expression of an opinion upon those matters nor upon the question whether the Court exercises its Ordinary Original Civil Jurisdiction with respect to proceedings, e.g., under Sections 10, 38, 39, 46 and 69 which are initiated in this High Court pursuant to the provisions of that Act.

30. The conclusions to which I have arrived are that : McNair J. did not exercise the Ordinary Original Civil Jurisdiction of this Court when he disposed of the appeal from the refusal by the Registrar of Trade Marks to register the company's mark; the Trade Marks Act is not an amendment within Clause 44, Letters Patent; the learned Judge's decision is not a judgment within Clause 15, Letters Patent; and there is no right of appeal from his decision to a Division Bench of this Court. In my opinion, for the reason given, the preliminary objection should prevail and this appeal be dismissed with costs, certificate for two counsel. I desire to add that consideration should be given to the rules made by this Court u/s 77, Trade Marks Act and, in doing so, the question of an appeal u/s 76(1) being heard by Division Bench might be contemplated.

Das, J.

31. I agree with the decision arrived at by my learned brother but as the matter is one of first impression in relation to the Trade Marks Act I desire to give my reasons in support of the same conclusion. The India Electric Works Ltd. (hereinafter referred to as the company) made an application before the Registrar of Trade Marks for the registration of the word "India" as their trade mark in respect of electric fans and regulators manufactured and sold by them for a considerable number of years. The application was made u/s 14, Trade Marks Act, 1940, the material portion of which is as follows:

14(1) Any person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it shall apply in writing to the Registrar in the prescribed manner, and subject to the provisions of this Act, the Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think fit.

(2) In the case of a refusal or conditional acceptance the Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving thereat.

32. Section 70 of that Act regulates the procedure before the Registrar. The material part of that section is as follows:

70. In all proceedings under this Act before the Registrar-

(a) the Registrar shall have all the powers of a civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of documents and issuing commissions for the examination of witnesses;

(b) evidence shall be given by affidavit, provided that the Registrar may, if he thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit.

33. Evidence was adduced before the Registrar by affidavits. After considering the evidence so adduced the Registrar refused the application and stated in writing the grounds of his decision and the materials used by him in arriving thereat. Being aggrieved by the decision of the Registrar the company preferred an appeal to this High Court u/s 76, of the Act which, amongst other things, provides:

76. (1) Save as otherwise expressly provided this Act, an appeal shall lie, within the period prescribed by the Central Government, from any decision of the Registrar or the Bombay Registrar under this Act or the rules made thereunder to the High Court having jurisdiction:

provided that if any suit or other proceeding concerning the trade mark in question is pending before a High Court or a District Court, the appeal shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated;

(3) Subject to the provisions of this Act and of rules made thereunder, the provisions of the Code of Civil Procedure, 1908, shall apply to appeals before a High Court under this Act.

34. It is not quite intelligible as to what is precisely meant by the expression "High Court having jurisdiction" in Section 76(1) quoted above. There is no indication in the Act as to the conditions the fulfilment of which constitutes any particular High Court as "the High Court having jurisdiction" or as to the particular jurisdiction of the High Court which is contemplated. All that I find is that "High Court" is defined in Section 2(d) as meaning a High Court as defined in Section 219, Government of India Act, 1935.

35. Section 77 of the Act authorises the High Court to make rules consistent with the Act as to the conduct and procedure of all proceedings under the Act before it. In exercise of this rule making power this High Court has framed certain rules

which have been incorporated in Part 10 of chap. 38, Original Side Rules as Rules 72 to 81. The relevant rules are in following terms:

73. All original proceedings under the Act including appeals u/s 76 of the Act shall be marked as proceedings under the Trade Marks Act, 1940, as amended from time to time. The procedure of the High Court in relation to the Commercial Suits shall (unless by the Act or these rules otherwise expressly provided) apply thereto.

74. (a) The Judge in charge of the Commercial List or such other Judge as the Chief Justice may from time to time appoint, shall hear and dispose of all proceedings under the Act including appeals u/s 76 of the Act.

(b) Appeals from the decisions of the Judge shall be heard by the Division Bench appointed to hear appeals from the Original Side.

75. The rules in Chap. 31, High Court Rules" shall apply to appeals to the Division Bench.

76. (c) Appeals from any decision of the Registrar or Deputy Registrar of Trade Marks u/s 76(1) of the Act shall be brought by petition presented to the Court. A copy of the petition shall be served by the appellant upon the Registrar of Trade Marks.

36. I find from the Indian Trade Marks Act that some proceedings under the Act may be initiated in the first instance in the High Court, e.g., under Sections 37(1) and 46, and some proceedings may be brought before the High Court on appeal from the Registrar e.g., u/s 76. It will be noticed, however, that all proceedings, original as well as by appeal, brought before the High Court under the Act have been dealt with by the same set of rules and have been assigned to the Judge in charge of the Commercial List for hearing and disposal, a circumstance which has given rise to considerable argument before us. Pursuant to the above rules framed by this High Court u/s 77 of the Act, the appeal preferred by the company came up for disposal before McNair J. who was the Judge in charge of the Commercial List at the time. McNair J., on 29-3-1945, upheld the decision of the Registrar and dismissed the appeal. Hence the present appeal. Mr. S.B. Sinha, appearing for the Registrar has taken a preliminary point as to the maintainability of this appeal, not because the Registrar does not wish us to decide the matter on its merits but because he desires this important question of procedure to be settled also. I consider that learned Counsel has quite properly raised this question, for, if the decision of the Court on the question be in favour of the Registrar, it will save him from considerable harassment and loss of time in future.

37. It is well settled that the right of appeal is the creation of Statute. As observed by Bramwell L.J. in (1878) 3 Q.B.D. 1 (4) at p. 4:

An appeal does not exist in the nature of things : a right to appeal from any decision of any tribunal must be given by express enactment.

38. The onus is undoubtedly and always on the appellant, when the competency of any appeal is questioned, to satisfy the Court that his appeal lies under some Statute or its equivalent. Before proceeding further, I desire to emphasise that the only question which has been raised and which calls for a decision is whether this particular appeal is maintainable. In other words, we have only to decide whether this appeal, which is one from a judgment of a single Judge of the High Court, lies before us as a Division Bench of the High Court. In this appeal we are not concerned with a larger question as to whether any appeal lies from the decision of McNair J. to any higher or other Court and I express no opinion on that question in this judgment.

39. Section 76, Trade Marks Act, 1940 provides only for an appeal from the decision of the Registrar to the High Court having jurisdiction. The Act goes no further and is silent as to any further appeal from the decision of the High Court. Therefore it is clear that there is no right of further appeal expressly given by the Act itself. Section 77 of that Act authorises the High Court to make rules consistent with the Act as to the conduct and procedure of all proceedings under the Act before it. I have already quoted the relevant rules. Mr. Chatterjee, appearing for the company, strongly relies on those rules as statutory sanction for the present appeal. The fact that different kinds of proceedings have been dealt with by the same set of rules in general terms and language used therein has undoubtedly encouraged Mr. Chatterjee to seek to found his claim to a right of appeal on them. After considering the arguments adduced on both sides, I have come to the conclusion that these rules cannot be construed as sanctioning the competency of the present appeal and for the following reasons:

(1) Section 77 authorises the High Court to make rules consistent with the Act as to the conduct and procedure of all proceedings under the Act before it. An appeal u/s 76 is a proceeding before the High Court under the Act and u/s 77 the High Court undoubtedly has power to make rules as to the conduct and procedure of such appeal. As soon as the appeal is disposed of, one way or another, the proceedings under the Act come to an end. The rules cannot go further and authorise further proceedings by way of further appeal which are not contemplated or sanctioned by the Act itself and which, therefore, will not be proceedings under the Act. If they do they will certainly go beyond the Act and cannot strictly be said to be consistent with the Act.

(2) Rule 74(a) only constitutes a Bench of the High Court which will hear and dispose of all proceedings under the Act including an appeal u/s 76. The constitution of a Bench cannot and does not affect or alter the nature or incident of the proceedings. Rule 74(b) does not create any new right of appeal at all. I agree with Mr. Sinha that Rule 74(b) only indicates the particular Court which will hear appeals from the decision of the Judge where an appeal lies and that R. 75 lays down rules regulating appeal to the Division Bench where the appeal lies. To create a new right of appeal more clear and express words are, in my opinion, necessary.

40. In my opinion, this appeal cannot be founded on the Rules made by the High Court u/s 77, Indian Trade Marks Act. It is unfortunate that the High Court has purported to make provision for the conduct and procedure of all proceedings under the Act before it including appeals u/s 76 of the Act by the same set of rules and put all proceedings under the Act before it on the same footing. It would have been much better and more logical if the proceedings under the Act which are in the nature of original proceedings to be initiated in the first instance in the High Court and the proceedings which come to the High Court by way of an appeal u/s 76 from the decision of the Registrar on an application u/s 14 to be initiated in the first instance before the Registrar had been dealt with separately.

41. The next question is whether an appeal lies under the Code of Civil Procedure. A perusal of the relevant provisions of the Code will make it clear, as observed by Sir Lawrence Jenkins C.J. in *Debendra Nath v. Bibudhendra* ("16) AIR 1916 Cal. 973 that the Code makes no provision for an appeal within the High Court from the judgment of a single Judge of the High Court. Indeed, Mr. Chatterjee does not claim any right of appeal under the Code.

42. The Indian Trade Marks Act, 1940, the Rules made thereunder by the High Court and the CPC being of no assistance Mr. Chatterjee falls back on a certain general principle enunciated in judicial decisions of the highest authority. Mr. Chatterjee formulates his submission thus : A right of appeal to an established Court given by Statute, such as has been given by Section 76, Trade Marks Act, carries with it the right of further appeals which are allowed by the ordinary and usual procedure of that Court. The argument is that when, by Statute, a matter is left to the determination of an established Court then that Court will necessarily determine the matter as a Court and the judgments, decrees and orders passed by that Court in determining the matter must be governed by the ordinary rules of procedure of that Court including the rules regulating the right of appeal therefrom. Reliance is placed, in support of this contention, on the decision of the House of Lords in (1913) 1913 A.V. 546 (562) Viscount Haldane L.C. at p. 552 expressed the following opinion:

When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents" of the procedure are to attach, and also that any general right of appeal from its decisions likewise attaches.

43. After referring to Section 1, Telegraph (Arbitration) Act 1909 and comparing it with Section 9, Railway and Canal Traffic Act, 1873 Lord Atkinson at p. 555 observed as follows:

My Lords, if the matter stood there I think it would be clear that this section only added another item to the several matters which the Commissioners have already power as a Court of law to determine just as they determine as a Court of Law matters arising u/s 9 of the Act of 1873. It is not in substance, in my view, at all a question of giving a right of appeal by implication. It is simply the

question of extending the jurisdiction of an existing Court of Law, with all its incidents including a right of appeal, to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of Law.

To the like effect are the observations of Lord Parker at p. 562:

Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think that the Court will determine the matters, as a Court. Its jurisdiction, is enlarged, but all the incidents of such jurisdiction, including the right of appeal from the decision, remain the same.

44. The same principle was applied by the Judicial Committee in AIR 1934 81 (Privy Council) following their earlier decision in ("16) 3 AIR 1916 P.C. 21 (23), where it was held that when a right of appeal is given to one of the ordinary Courts of the country, the procedures, orders and decrees of that Court will be governed by the ordinary rules of the Code of Civil Procedure. The principle has recently been re-affirmed by Sir George Rankin in delivering the judgment of the Board in AIR 1936 93 (Privy Council) . There can be no doubt or dispute as to the soundness of the principle mentioned above or the authority of the tribunals which laid it down. Accepting this principle, as I must, I have yet to enquire and find out what are the ordinary rules of this High Court regulating appeals within the High Court, that is to say-regulating appeals from the judgment of a Single Judge of the High Court to the High Court and then to see if the judgment of McNair J. is such as may come within and be governed by those rules. I have already shown that the Indian Trade Marks Act and the Rules made by the High Court thereunder and the CPC do not support the maintainability of the present appeal. What are the other provisions of law which regulate inter High Court appeals? This leads me to an enquiry into the jurisdictions, powers and authority of this High Court, relating to appeals, under the appropriate Statutes and Charters which established and. have continued this High Court. It is well known that the Indian High Courts Act, 1861 (24 and 25 Vic c 104) commonly known as the Charter Act empowered Her Majesty by Letters Patent to establish High Courts at Calcutta, Bombay and Madras. Section 9 of that Statute provided as follows:

Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; and, save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have

and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

45. Under this section the jurisdiction, powers and authority of the High Court to be established were to be such as Her Majesty by Letters Patent might direct and prescribe and, subject thereto and to the legislative authority of the Governor-General in Council, were to include all the jurisdictions, powers and authority of the Supreme Court and the two Sudder Courts abolished by that Statute. The jurisdiction, powers and authority of the Supreme Court comprised, amongst other things, the jurisdiction, powers and authority of the Court of King's Bench and of the Court of Chancery in England (See Clauses 4, 18, 19 and 21 of the Charter of the Supreme Court at Calcutta dated 26-3-1774). These jurisdictions, powers and authority this High Court inherited from the Supreme Court by virtue of the concluding sentence of Section 9 of the Charter Act. These were, however, subject to the legislative authority of the Governor-General in Council. It is well known that some of these jurisdictions, powers and authority (e.g., as to the prerogative writs of Habeas Corpus and Mandamus) have been taken away by Indian Legislative enactments. In exercise of the power so given by the Charter Act, Her Majesty issued Letters Patent in 1862 establishing this High Court and prescribing its several jurisdictions, powers and authority. These Letters Patent were replaced by Letters Patent of 1865 which, with certain amendments, continue up to the present time. Under the combined operation of the Charter Act and the Letters Patent the jurisdictions, powers and authority of this High Court were as follows : (a) Those prescribed in the Letters Patent, (b) Those inherited from the Supreme Court.

46. These jurisdictions, powers and authority were, however, subject to the legislative authority in India as mentioned in Section 9, Charter Act and also, as will be seen hereafter, in the Letters Patent and subsequent Statutes of Parliament. The portion of Clause 15, Letters Patent which is material for my present purpose was originally worded as follows:

And we do further ordain, that an appeal shall lie to the said High Court of Judicature at Port William in Bengal from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court or of one Judge of any Division Court, pursuant to Section 13 of the said recited Act, and....

47. Confining myself to the above extract I find that in order to be appealable thereunder a judgment of a Single Judge had to be "pursuant to Section 13 of the said recited Act." Section 13 of the Charter Act which is referred to in Clause 15 as "the recited Act" was as follows:

Subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges, or by Division

Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

48. In order to find out the original and appellate jurisdiction of this High Court for the exercise of which by one or more Judges the High Court was empowered to make rules I have to fall back upon Section 9, Charter Act and the Letters Patent. u/s 13 the High Court could make rules providing for the exercise, by one or more Judges of only that original and appellate jurisdiction vested in it by the Charter Act and the Letters Patent. This rule-making power was, again, subject to any laws and regulations which might be made by the Governor. General in Council. Clause 36, Letters Patent as it then stood declared that any function which was thereby directed to be performed by the said High Court in exercise of its original or appellate jurisdiction might be performed by any Judge or any Division Court thereof appointed or constituted for such purpose under the provisions of Section 13 of the aforesaid Act meaning the Charter Act. Section 14, Charter Act empowered the Chief-Justice to determine what Judges should sit alone and what Judges should constitute the several Division Courts. The effect of Clause 15, Letters Patent as it stood in 1865 read with Clause 36 and Section 13, Charter Act, therefore, was that in-order to be appealable under part I of that clause quoted above a judgment of a single Judge had to be (i) a judgment passed in exercise of the original and appellate jurisdiction vested in the High Court by Section 9, Charter Act and the different clauses of the Letters Patent subject to the legislative powers of the Governor-General in Council; and (ii) a judgment of one Judge sitting singly under Clause 36 in pursuance of rules made by the High Court u/s 13 of the Charter and exercising jurisdiction assigned by those rules to a single Judge.

49. The Charter Act was repealed and replaced by the Government of India Act 1915 (hereinafter referred to as the 1915 Act). Part IX of the 1915 Act dealt with the Indian High Courts. Sections 9, 13 and 14, Charter Act were replaced by and in substance reproduced in Sections 106(1) and 108 of the 1915 Act which enacted as follows:

Section 106 (1): The several High Courts are Courts of Eeeord and have such jurisdiction, Original and Appellate including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice including power to appoint clerks and other ministerial officers of the Court and power to make rules for regulating the practice of the Court, as are vested in them by Letters Patent, and subject to the provisions of any such Letters Patent, all such jurisdictions, powers and authority as are vested in those Courts respectively at the commencement of this Act.

Section 108 (1) : Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges of the High Court, of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court, whether with or without the Chief Justice, are to constitute the several Division Courts.

50. The position at the commencement of the 1915 Act was, therefore, that u/s 106(1) this High Court had such jurisdictions, powers and authority as (i) it got under the Letters Patent; (ii) it inherited from the Supreme Court, in so far as they had not been taken away by Indian Legislative enactments; (iii) it derived from Indian Legislative enactments upto that date. It was with regard to these jurisdictions, original and appellate, that the High Court was empowered by Section 108 to make rules. Clause 15, Letters Patent was not, however, amended at that time with the result that the reference to Section 13, Charter Act remained in that clause as before although the Charter Act itself was repealed. The construction of clause 15, Letters Patent in such circumstances must proceed on the principle laid down by the Judicial Committee in ("31) 18 AIR 1913 P.C. 149 (153) where Sir George Lowndes in delivering the judgment of the Board observed at p. 267 as follows:

In this country it is accepted that where a statute is incorporated by reference into a second Statute the repeal of the first Statute does not affect the second; see the oases collected in Craies on Statute Law, 3rd Edn., pp. 349, 350...; despite the death of the parent Act its offspring survives in the incorporating Act. Though no such saving clause appears in General Clauses Act, their Lordships think that the principle involved is as applicable in India as it is in this country.

51. On this principle of construction, the position, at the commencement of the 1915 Act, as regards the appealability of a judgment of a single Judge of the High Court to the High Court was that such judgment had yet to be "pursuant to Section 13 of the said recited Act" which meant and implied that the two conditions of appealability I have mentioned had to be fulfilled. The same result will follow if I apply another rule of construction namely that when a Statute is repealed and re-enacted the reference to a section of the repealed Act is to be read as a reference to the section in the new Act which reproduces it. Clause 15, Letters Patent, was amended in 1919 and twice thereafter in 1928. The amended Clause 15 as it stands now and so far as it is material for our present purpose is as follows:

15. And we do further ordain that an appeal shall lie to the said High Court...from the judgment (not being a judgment passed 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 and not being...) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made on or after the first day of February one thousand nine hundred and

twenty nine in the exercise of the 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, where the Judge who passed the judgment declares that the case is a fit one for appeal....

52. Clause 36 was also amended by deleting the reference to Section 13, Charter Act and inserting a reference to Section 108 of the 1915 Act. In 1919 a new Clause 44 was inserted in the place of the old Clause 44 and the effect of this new clause is to make the provisions of the Letters Patent subject to the legislative powers of appropriate authority in India. The amended Clause 15 read with Section 108 has laid down an additional condition of appealability by requiring a certificate of the Judge in the case of a judgment passed in second appeal. There are thus three conditions which have to be fulfilled before an appeal will lie, under the amended Clause 15, from a judgment of one Judge of the High Court to the High Court, namely, (1) the judgment has to be passed in exercise of the original or appellate jurisdiction vested in this Court by Section 106(1) which preserves all such jurisdictions as had been conferred on it by Section 9, Charter Act and by Letters Patent subject to the Indian Legislative enactments; (2) the judgment has to be passed by one Judge sitting singly under Clause 36 in pursuance of rules made by the High Court u/s 108 of the 1915 Act and exercising jurisdiction assigned by those rules to a single Judge; (3) in the case of the judgment of one Judge sitting in second appeal under rules made as aforesaid the Judge certifies the case to be a fit one for appeal.

53. The 1915 Act was in its turn repealed by the Government of India Act, 1935 (which I shall hereafter refer to as the 1935 Act). Part IX of the 1915 Act has been replaced by Part IX chap. II of the 1935 Act which now deals with High Courts in British India. Section 223 of the 1935 Act is as follows:

223. Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division Courts, shall be the same as immediately before the commencement of Part III of this Act.

54. It will be seen that the jurisdiction of the existing High Courts and the law to be administered therein and the powers of the Judges including their rule-making powers have been preserved intact and are the same as immediately before the commencing of Part III of the 1935 Act, that is to say on 1-4-1937. The jurisdictions, powers and authority which this High Court had at the commencement of the 1935 Act were : (a) Those conferred on it by the Letters Patent, (b) Those it inherited from the Supreme Court u/s 9, Charter Act, in so far as they had not been taken away by Indian Legislative enactments, (c) Those

given to it by the Indian Legislative enactments upto 1-4-1937.

55. No corresponding amendment has, however, been made in Clause 15 and 36, Letters Patent and the references to Section 108 of the 1915 Act still remain in those clauses, although the 1915 Act itself has been repealed, just as the references of Section 13, Charter Act remained in those clauses even after the repeal of the Charter Act. The same principle of construction referred to above must, therefore, be adopted and the appealability under Clause 15 of a judgment of a single Judge must yet be "pursuant to Section 108, Government of India Act", that is to say passed in exercise of the original and appellate jurisdiction vested in it at the date of commencement of the 1915 Act and passed by one Judge sitting singly under Clause 36 in pursuance of the provisions of the rules made u/s 108. The third condition also remains. It follows, therefore, that in order to be appealable such a judgment must still satisfy the three conditions I have formulated above. Even if the reference to Section 108 of the 1915 Act is to be read as a reference to Section 223, the three conditions of appealability will remain, subject to this difference only that the first condition will include jurisdictions vested in the High Court by Indian Legislative enactments upto 1st April 1937.

56. The first condition of appealability, as I have said, is that the judgment must be passed in exercise of the original and appellate jurisdictions vested in this Court at the commencement of the 1915 Act or at the commencement of the 1935 Act. I may for my present purpose leave out of consideration the jurisdiction, powers and authority this High Court inherited from the Supreme Court and what it has derived from particular Indian Legislative enactments as not being material and confine myself to the provisions of the Letters Patent. A cursory glance through the Letters Patent of 1865 will show that various original jurisdictions were conferred on this High Court by the different clauses of the Letters Patent e.g., Ordinary Original Civil Jurisdiction (Clause 11 & 12) Extra-Ordinary Original Civil Jurisdiction (Clause 13) Infancy and Lunacy Jurisdiction (Clause 17) Insolvency Jurisdiction (Clause 18) Ordinary Original Criminal Jurisdiction (Clause 22) Admiralty Jurisdiction (Clause 32) Testamentary and Intestate Jurisdiction (Clause 34) and Matrimonial Jurisdiction (Clause 35). Some of these original jurisdictions (e.g. Ordinary Original Civil Jurisdiction) have very narrow territorial limits while most of the other original jurisdictions extend throughout the Presidency. A judgment of a single Judge of the High Court sitting singly under Clause 36 pursuant to Section 108 and passed in exercise of any of these original jurisdictions will be appealable under Clause 15, Letters Patent.

57. As regards Appellate Jurisdiction, it is not necessary for my present purpose to refer to the Criminal Appellate Jurisdiction, for Clause 15 is not concerned with it. The Civil Appellate Jurisdiction of this Court was first prescribed by Clause 15, Letters Patent of 1862. By that clause it was ordained that "the High Court shall be a Court of Appeal from the civil Courts in the provinces from which there is now an appeal to the Court of Sudder Dewany Adawalat." The appellate

jurisdiction of this Court is now prescribed by Clause 16, Letters Patent of 1865 in the following words:

And we do further ordain, that the said High Court of Judicature at Fort William in Bengal shall be a Court of appeal from the civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

58. The expression "Civil Courts" referred to in Clause 15, Letters Patent of 1862 meant, and the same expression in Clause 16 of the present Letters Patent means the civil Courts constituted under the regulations from which appeals lay to the Sadar Dewany Adawalat. After the repeal of those Regulations, civil Courts were constituted under the Bengal Civil Courts Act, 1871. The last mentioned Act was repealed but the Courts constituted thereby were continued by the Bengal, Agra and Assam Civil Courts Act, 1887, which is still in force. Therefore "civil Courts" referred to in Clause 16 mean and comprise the established civil Courts now referred to in Section 3, Bengal, Agra and Assam Civil Courts Act, 1887, u/s 15, Charter Act, 1861, which was replaced by Section 107 of the 1915 Act, which in its turn has been replaced by Section 224 of the 1935 Act, each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction. The last part of Clause 16 authorises this High Court to "exercise appellate jurisdiction in such cases as are subject to appeal to this High Court by virtue of any laws or regulations now in force." The "laws and regulations now in force" which give an appeal to the High Court are presumably those made between 1862 and 1865 for before 1862 there was no High Court and therefore laws and regulations made before 1862 could not contemplate giving a right of appeal to the High Court which did not exist. On an analysis of Clause 16, it, therefore, follows that under that clause the Civil Appellate Jurisdiction of this High Court extends : (a) over civil Courts of the Bengal Division of the Presidency now constituted or continued under the Bengal, Agra and Assam Civil Courts Act, 1887; (b) over all other Courts subject to its superintendence u/s 224 of the 1935 Act; and (c) in respect of such cases as were subject to appeal to the High Court by virtue of any laws or regulations in force at the date of the Letters Patent of 1865.

59. A brief comparison of the wording of Clause 16 of our Letters Patent with the corresponding provisions of Letters Patent of some of the other High Courts is instructive. Thus the Letters Patent dated 9-2-1916, which established the Patna High Court by Clause 11 provides as follows:

And we do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort

William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

60. The concluding words "or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India" make the civil appellate jurisdiction of the Patna High Court in respect of cases subject to appeal to that High Court flexible and elastic and bring those other cases subsequently declared to be subject to appeal to the High Court within its appellate jurisdiction under Clause 11 itself. There are like provisions in Clause 11, Letters Patent dated 21-3-1919, of the Lahore High Court, in Clause 14, Letters Patent dated 11-11-1922, of the Rangoon High Court and in Clause 11, Letters Patent dated 2-1-1935, of the Nagpur High Court. Those words are not in Clause 16 of our Letters Patent and consequently the civil appellate jurisdiction of this High Court under Clause 16 is rigidly fixed and is exercisable only over Courts and only in respect of cases mentioned therein. This inflexibility is, however, to a great extent modified by preserving the powers of Indian legislative authority in Section 9, High Courts Act, in the amended Clause 44, Letters Patent and in Section 223 of the 1935 Act, but the difference still re-mains-and it is an important and vital one-that cases subsequently declared by any Indian enactment to be subject to appeal to this Court do not strictly speaking come within its appellate jurisdiction under Clause 16, although this High Court exercises appellate jurisdiction over them.

61. To summarise, the authority of this High Court to entertain an appeal from the judgment of one Judge of the High Court is to be found in Clause 15, Letters Patent. To be appealable under Clause 15, the judgment must be "pursuant to Section 108, Government of India Act", that is to say, it has to fulfil the three conditions mentioned above. In each case of an inter High Court appeal it has first to be seen whether the judgment in question was passed in exercise of the original and appellate jurisdiction vested in the High Court. The original and appellate jurisdiction vested in the High Court, first by Section 9, Charter Act, 1861, then by Section 106 of the 1915 Act and now by Section 223, Government of India Act, are to be found mainly in the Letters Patent of 1865. Powers of the appropriate legislative authority in India were preserved by Section 9, High Courts Act, then by Section 106 of the 1915 Act and then by the newel 44, Letters Patent, which was inserted therein in 1919 and now also by Section 223 of the 1935 Act. Legislative enactments of appropriate Indian authority may enlarge or abridge the jurisdictions, powers and authority of this High Court. The first condition of appealability is that the judgment must be passed by one Judge in exercise of any of these jurisdictions. If the first condition is fulfilled, namely that the judgment under appeal be found to have been passed by one Judge in exercise of original or appellate jurisdiction vested in the High Court by the statute which provided for its establishment or by the statute which continues its existence and by the Letters Patent or by subsequent Indian enactments or appropriate legislative authority, it has to be seen whether it fulfils the second

condition of appealability. In other words, it has to be seen whether the judgment was passed "pursuant to Section 108, Government of India Act." To fulfil this condition, a judgment must be shown to have been passed by the Judge sitting singly under Clause 36 in pursuance of rules made u/s 108 to dispose of matters assigned to a single Judge by those rules. A judgment of one Judge of the High Court or one Judge of any Division Court passed otherwise than "pursuant to Section 108, Government of India Act" that is to say, passed by a single Judge not sitting singly under Clause 36 in pursuance of rules made u/s 108 but sitting singly under any rule framed by the High Court under any other rule-making power or in exercise of jurisdiction assigned to him, not by rules made by the High Court u/s 108 but, by rules framed by the High Court under other statutory authority will not be appealable under clause 15. The third condition of appealability requiring a certificate from the Judge was introduced by an amendment of Clause 15 in 1919. That condition also remains but applies only to judgments of one Judge sitting in what is known as second appeals. It is quite clear that McNair J. was not sitting in second appeal and consequently I do not discuss this third condition of appealability in any greater detail.

62. Having formulated and discussed the three conditions of appealability of a judgment of one Judge under Clause 15,¹ now proceed to examine whether the judgment of McNair J. fulfils the first two conditions mentioned above, the third condition, as I have said, being not applicable. The judgment of McNair J. was passed on an appeal which came to this High Court u/s 76, Trade Marks Act, 1940. There can be no doubt that that Act, having been passed by a competent legislative authority in India, can under the 1935 Act and Clause a, Letters Patent, confer jurisdiction on the High Court to hear and determine such matter. It is clear, therefore, that in entertaining, hearing and disposing of the appeal McNair J. was exercising jurisdiction vested in the High Court by the Trade Marks Act passed by a competent legislative authority in India.

63. Section 13, Charter Act, which was and Section 108 of the 1915 Act, which is now referred to in Clause 15, Letters Patent only recognised and recognises, for the purposes of making rules, only one division of the jurisdictions of this Court namely its original jurisdiction and its appellate jurisdiction and no other division : see per Jenkins C.J. in *Shew Prosad v. Ram Chunder* ("14) 1 AIR 1914 Cal. 388 (2) at p. 332. A good deal of argument has, therefore, been advanced before us as to whether in entertaining and disposing of the appeal, McNair J., was exercising original or appellate jurisdiction. Mr. Chatterjee maintains that in entertaining, hearing and disposing of the appeal u/s 76, Trade Marks Act, McNair J., was exercising the original jurisdiction of this Court. He strongly relies on the rules framed by this Court u/s 77 of that Act. Those rules have been incorporated in chap. 38, Original Side Rules. By those rules all proceedings under the Act have been assigned to the Judge in charge of the Commercial list. This allocation, according to Mr. Chatterjee, shows unmistakably that a proceeding u/s 76 although called an appeal is in reality an original proceeding involving the exercise of ordinary original civil jurisdiction. I am unable to accept

this contention. The proceedings which under the Act may be initiated in the High Court in the first instance may be regarded as original proceedings and the allocation thereof to a Judge on the Original Side may be appropriate. The disposal of those matters may involve the exercise of the original civil jurisdiction. Whether those proceedings will come within what is strictly the ordinary original civil jurisdiction of this Court which has very strict territorial limits is a matter on which I am not called upon to and I do not-express any opinion in this case. I am, however, satisfied that the proceeding brought to the High Court u/s 76 is precisely, and nothing more or less than what the section calls it, namely an appeal. When one tribunal is given power to revise, alter or modify the decision of another tribunal the tribunal to which such power is given is, in common parlance and according to ordinary notions, regarded as one exercising appellate jurisdiction which includes a revisional jurisdiction. The circumstance that the conduct and procedure of the appeal is regulated by rules which have been incorporated into the rules of the Original Side, in my opinion, makes no difference in the nature of the proceedings. Applications by way of revision u/s 115, Civil P.C., in respect of a judgment of the Calcutta Small Causes Court have always been by rules of the Original Side, assigned to and are dealt with by a Judge sitting on the Original Side; yet in ("14) 1 AIR 1914 Cal. 388 (2) Jenkins C.J., held, that the Judge dealing with those applications exercised the appellate jurisdiction of this Court which included the revisional jurisdiction. Further Section 76 of the Act provides for an appeal to the High Court having jurisdiction. Allahabad High Court which is a High Court as defined by Section 2 (d) of the Act has no original jurisdiction at all. It cannot for a moment be assumed that Section 76 has, in respect of the same or similar subject-matter, created different kinds of jurisdiction for different High Courts e.g. Original Jurisdiction for the Calcutta High Court and other High Courts having original jurisdiction but an appellate jurisdiction for the Allahabad High Court. If to avoid this anomaly it be held that in dealing with appeal u/s 76 Allahabad High Court also exercises original jurisdiction then it must logically be held that Section 76, by a side wind as it were, created an original jurisdiction for the Allahabad High Court which prior thereto did not possess it under its Letters Patent. That is an astounding proposition which cannot for a moment be countenanced. In truth and in substance all the High Courts dealing with an appeal u/s 76 exercise an appellate jurisdiction. It follows, therefore, that in disposing of the appeal McNair J. was not exercising original jurisdiction. That being so, the question whether he was exercising original jurisdiction under the Letters Patent or a special original jurisdiction under the Act does not call for a decision.

64. On the footing, then, that in dealing with an appeal u/s 76 this High Court exercises an appellate jurisdiction the question arises whether this appellate jurisdiction is the same as prescribed in Clause 16 of our Letters Patent, or it is a new appellate jurisdiction conferred on this Court by the Trade Marks Act. The Registrar has been constituted as a "tribunal" as defined by that Act. He has not been constituted as an ordinary civil Court, as civil Courts constituted by the

Bengal, Agra and Assam Civil Courts Act, 1887. He has not all the powers of a civil Court although Section 70 of the Act gives him only some of the powers of the civil Courts. He has not been made generally subject to the superintendence of the High Court by any provision of the Act. The incidents and powers attached to the Registrar as a tribunal fall far short of those which were attached to the tribunal in the AIR 1936 93 (Privy Council) and to which Sir George Rankin particularly and pointedly referred. Having regard to the plain language of Clause 16, and in the absence therein of like words which appear in the concluding portions of the corresponding clauses of the Letters Patent of the other High Courts to which I have already referred, and which make their appellate jurisdiction flexible and elastic it is impossible to hold that Section 76, Trade Marks Act, has merely extended the appellate jurisdiction of this Court under Clause 16 by the addition of a new subject-matter of appeal so as to attract the general principle enunciated in (1913) 1913 A.V. 546 (562) and confirmed by the Judicial Committee in the cases I have already mentioned. The provisions of Clause 16 cannot, by reason of the express language used therein, apply to or cover an appeal from the decision of a tribunal which is neither a civil Court nor a Court subject to the superintendence of this Court nor can such an appeal be included in the category of such cases "as are subject to appeal to the said High Court by virtue of any laws or regulations now in force." The truth is that the Trade Marks Act has created new rights, e.g., a right to get a trade mark registered and has given certain new advantages consequent upon such registration. It has created new tribunals for its own purposes and it has conferred a new appellate jurisdiction on this Court. It has authorised this Court to make rules regulating the conduct and procedure of the proceedings under the Act before it. This Court has framed separate set of rules accordingly. This very fact makes it impossible to attract the ordinary rules of procedure regarding appeals in this Court and indicates that an appeal u/s 76 of the Act involves the exercise of a new appellate jurisdiction regulated by new rules. These circumstances, therefore, clearly negative the applicability of the principle enunciated in (1913) 1913 A.V. 546 (562) and applied by the Judicial Committee in the several cases I have mentioned. In my opinion the appeal u/s 76 cannot possibly come within Clause 16. A judgment passed on such an appeal is not a judgment passed in exercise of the appellate jurisdiction vested in this Court by Clause 16.

65. As soon as this conclusion is reached Mr. Sinha at once urges that the further conclusion also becomes irresistible that such a judgment, i.e., a judgment not passed in exercise of appellate jurisdiction under Clause 16 cannot be appealable under Clause 15 at all. Mr. Sinha strongly relies on the following observations of the Judicial Committee in AIR 1931 149 (Privy Council) .

Their Lordships also think it right to point out that, even if the award of the Tribunal were deemed to be a decree, that would not of itself be sufficient to give a right of appeal to His Majesty in Council. To come within the purview of Clauses 16 and 39, Letters Patent, it must be a decree of a Court subject to the

superintendence of the High Court, and it is at least doubtful whether the Tribunal is such a Court. In *Hari v. Secretary of State for India* ('03) 27 Bom. 424 (445) above referred to, Sir Lawrence Jenkins held, for what seem to their Lordships to be very cogent reasons, that the Bombay Tribunal was not a Court but a body free from the control and superintendence of the High Court.

66. Founding himself upon the above observations Mr. Sinha argues that a judgment to be appealable under Clause 15 must be a judgment passed in exercise of appellate jurisdiction under Clause 16 and a judgment passed in exercise of appellate jurisdiction vested in the Court under any other provision of law is altogether outside Clause 15. According to Mr. Sinha in order to come within the purview of Clause 15, the judgment must be one passed in exercise of the appellate jurisdiction vested in this Court under Clause 16, just as in order to come within the purview of Clause 39 the judgment must be a judgment of a Court subject to the superintendence of this Court as required by Clause 16. Although the above observations of the Judicial Committee relied on by Mr. Sinha were in a way obiter, as their Lordships did not base their decision on them and did not come to any decision on that aspect of the case, yet if the analogy of the relationship between Clauses 16 and 39 could be applied to that between Clauses 15 and 16 I should feel myself bound to proceed upon the basis of those observations, as they are entitled to my highest respect. I am of opinion, however, that Clause 15 does not stand in the same position in relation to Clause 16 as does Clause 39. Clause 39, amongst other things, allows an appeal from any final judgment of the High Court "made on appeal." Clause 39 by its terms makes no reference to any extraneous provision of law pursuant to which such judgment has to be "made on appeal." According to the general rule of construction, I can only look to the other clauses of the Letters Patent to ascertain under which provision a judgment may be made on appeal. Looking at the different clauses I find that a judgment (other than one in a criminal matter or in an appeal from a judgment exercising original jurisdiction) can only be "made on appeal" in exercise of appellate jurisdiction under Clause 16. The conclusion therefore, becomes irresistible that apart from the excepted case mentioned above, Clauses 16 and 39 go together as regards judgments made on appeal. The observations of their Lordships which I have quoted above proceed on that basis, namely that in order to be appealable under Clause 39 a judgment must also come, except as aforesaid, under Clause 16 and in order to come within the purview of both the clauses the judgment must be of a Court subject to the superintendence of the High Court as required by Clause 16. This, I apprehend is the true meaning of those observations of their Lordships. The position, however, appears to me to be very much different when I come to examine the terms of Clause 15. That clause requires that the judgment of one Judge, to be appealable thereunder, must be "pursuant to Section 108, Government of India Act." Therefore, Clause 15 itself indicates, by reference to Section 108, what judgments are within its purview. Section 108 of the 1915 Act, I have already pointed out, refers to original and appellate jurisdiction vested in

the Court. I have also shown, by reference to Section 9, High Courts Act, Section 106 of the 1915 Act and Section 223 of the 1935 Act that original and appellate jurisdictions, apart, from those inherited from the Supreme Court, are vested in this Court not only by the Letters Patent but also by Indian enactments. If, therefore, a judgment is passed by one Judge in exercise of original or appellate jurisdiction vested in this Court either under the Letters-Patent or under an Indian Act, it satisfies the first condition of appealability I have mentioned. In this respect Clause 15 seems to be wider than Clause 39. In view of this difference between Clause 15 and Clause 39 the observations of the Judicial Committee do not appear to me to be decisive in the case now before me, and indeed are of no assistance and I cannot throw out this appeal as being wholly outside the purview of Clause 15 of the Letters Patent in all its requirements. I am inclined to hold for reasons stated above, that the judgment of McNair J., although it was passed not in exercise of any original jurisdiction or of appellate jurisdiction under Clause 16 but in exercise of appellate jurisdiction vested in this Court by Section 76, Trade Marks Act, fulfils the first condition of appealability required by Clause 15, which is-that the judgment to be appealable thereunder must be one passed in exercise of original or appellate jurisdiction vested in the High Court.

67. Having held that the judgment of McNair J., satisfied the first condition, I have yet to see whether it fulfils the second condition, which, as I have said, requires that, to be appealable under Clause 15, the judgment must be passed by a single Judge in exercise of jurisdiction, original or appellate, assigned to a single Judge by rules made by the High Court u/s 108 of the 1915 Act. Prior to the constitution of the High Court there were in Bengal two parallel systems of judicature. There was the Supreme Court which was established by Charter dated 26-3-1774 issued pursuant to what is commonly known as the Regulating Act, 1773. The Supreme Court had several jurisdictions, civil, criminal, admiralty and ecclesiastical, vested in it by the said Act and the Charter. It had no appellate jurisdiction and indeed no connection with the Sudder Dewany Adawlat and Saddar Nizamut Adawlat which exercised respectively civil and criminal appellate jurisdictions-over the Company's Courts in the moffussil. These two sets of Courts originally derived their authority from different sources, the Supreme Court from the Crown, the Saddar Courts from the East India Company.

68. As regards the Supreme Court Clause 38 of its Charter of 1774 empowered the said Court:

to frame such rules of practice, make such standing orders, for the administration of justice, and the due exercise of the civil, criminal, admiralty and ecclesiastical jurisdiction thereby created and to do all such other things as shall be found necessary thereunto.

69. The rules, however, had to be approved by the King with the advice of the Privy Council. The Act of Settlement of 1781 by Section 19 made it lawful for the Supreme Court to frame processes and make rules and orders in suits, civil or

criminal against the natives of Bengal, Behar and Orissa consistent with their religion and manners. Section 21 of the Act of Settlement continued the powers of Governor-General and Council to determine appeals and references from the country and provincial Courts and made them a Court of record and Section 23 empowered the Governor-General and Council to frame regulations for the provincial Courts and councils subject to the approval of the King in Council. The High Courts Act, 1861 authorised Her Majesty to establish High Courts at Calcutta, Madras and Bombay and by Section 8 provided for the abolition, upon the establishment of the High Courts, of the Supreme Court and the Sadar Courts. Section 11 of that Act, however, continued all Acts of Parliament, orders in Council and Charters and Acts of Indian Legislature then in force, so far as they might be consistent with the provisions of that Act. and the Letters Patent to be issued and subject to the legislative powers in relation to those matters of the Governor-General of India in Council and Section 12 provided for the continuation of the proceedings pending in the abolished Courts as if they were instituted in the High Court but under and according to the practice of the abolished Courts respectively. Section 13, I have already mentioned, authorised that subject to any laws or regulations of the Governor-General in Council the High Court might, by its own rules, provide for the exercise, by one or more Judges or by Division Courts, of the Original and Appellate Jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice. Section 14 authorised the Chief Justice to determine what Judges should sit alone or in Division Courts. Section 15 conferred power of superintendence on the High Court over all Courts which may be subject to its appellate jurisdiction and to make and issue general rules of practice for the subordinate Courts. The Letters Patent of 1865, by Clause 10 empowers the High Court to make rules for admission of Advocates &c, and by Clause 37 empowers the High Court to make rules and orders for regulating all proceedings in civil cases brought before the said High Court consistent with the provisions of the Code of Civil Procedure, 1859. Section 122, Civil P.C., 1908 gives powers to the High Courts and the Chief Court of Oudh to make rules regulating their own procedure and the procedure of the civil Courts subject to their superintendence and to annul, alter or add to the rules in Schedule 1 and Section 129 gives power to the Chartered High Courts to make rules regulating their own procedure in the exercise of their original civil jurisdiction. The 1915 Act reproduces in Section 107 the rulemaking power given to the High Court by Section 15, Charter Act for Courts subject to its superintendence and in Section 108 the provisions of Sections 13 and 14, Charter Act. Section 223 of the 1935 Act preserves all the powers of the Judges including their power to make rules, and Section 224 replaces Section 107 of the 1915 Act. Besides these rule-making powers, different Indian Statutes have given rule-making powers to the High Court e.g., Specific Belief Act, Transfer of Property Act, Guardian & Wards Act, Arbitration Act and other Acts. These are the several sources from which this High Court derives its rule-making powers.

70. It will be noticed that although the High Court derives its rule-making powers under different enactments, Clause 15, Letters Patent, refers only to a particular section namely Section 108 of the 1915 Act and a judgment, to be appealable under Clause 15, has to be one "pursuant to Section 108". Clause 36, Letters Patent, declares amongst other things, that any function which is thereby directed to be performed by the High Court in exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose "in pursuance of Section 108, Government of India Act, 1915." Therefore when a Judge sits singly under Clause 36 in pursuance of a rule made u/s 108 and in exercise of jurisdiction assigned to a single Judge by such rule passes a judgment, not being of the kinds expressly excepted, such judgment becomes appealable under Clause 15. If a Judge sits singly under any rule made by the High Court in pursuance of any other rule-making power derived from any other source such Judge does not sit singly under Clause 36 in pursuance of Section 108 and a judgment passed by the Judge so sitting singly does not satisfy the requirements of Clause 15, for such judgment is not passed "pursuant to Section 108." I am not unmindful of the far-reaching consequence of this conclusion but logically I see no way out of this position in view of the wordings of Clause 15.

71. Turning to the rules regulating the proceedings before the High Court in its appellate jurisdiction, I find that after the constitution of the High Court the Judges by a rule dated 1-1-1865 ordered that

all rules which at the time of the abolition of the Sudar Court were in force in that Court shall extend, as far as they are applicable, and as nearly as may be, to all proceedings of appellate jurisdiction in the High Court, not being cases of appeal from the ordinary civil jurisdiction of that Court except so far as such rules are contrary to Act 24 & 25 Vic. C 104, or to the Letters Patent, or as the same may have been, or shall hereafter be, altered or modified by this Court.

72. Many of the old rules became in course of time obsolete while others were superseded by rules issued by the High Court under the powers vested in it by the Charter Act, 24 & 25 Vic. C 104, by the Letters Patent and by the Code of Civil Procedure, (see the Preface to the first edition of the Appellate Side Rules by C.M.W. Brett published in 1891). As regards some of the rules of procedure e. g., those set out in Part n of the Appellate Side Rules it may be difficult to trace their origin, namely whether they were made u/s 13 of the High Courts Act (corresponding to Section 108 of the 1915 Act) or Clause 37 of the Letters Patent or the Code of Civil Procedure. There can be no doubt, however, that the rules regulating the constitution of benches and the distribution of judicial business contained in Chaps. 2 and 3 of Part I of the Appellate Side Rules must have been made by the High Court in exercise of the rule-making power conferred on it by Section 13 of the High Courts Act which was continued by Section 108 of the 1915 Act and has been preserved by Section 223 of 1935 Act.

73. In dealing with the company's appeal u/s 76, Trade Marks Act, 1940 McNair

J. was not sitting singly under Clause 36, Letters Patent in pursuance of any rule made u/s 108 and was not exercising jurisdiction assigned to a single Judge under rules framed by the High Court u/s 108 of the 1915 Act. The appeal came up before him pursuant to the rules made by the High Court u/s 77, Trade Marks Act. The judgment passed by him on that appeal cannot, therefore, be said to be a judgment "pursuant to Section 108, Government of India Act" within the meaning of Clause 15, Letters Patent. In this view of the matter, although the judgment of McNair J., was passed in exercise of jurisdiction vested in the High Court and satisfies the first condition I have mentioned, it does not fulfil the second condition and, therefore, does not come within the purview of Clause 15 and no right of appeal against the same can be claimed under that clause. McNair J., not having passed the judgment sitting in second appeal the third condition of appealability does not apply.

74. An argument was advanced before us on the principles enunciated in *Dhirendra Kumar Majumdar v. A. Latiff* ("41) 45 C.W.N. 181 (183), ("44) 49 C.W.N. 10 (17). Those cases were concerned with the question whether the Calcutta Municipal Act, which extends beyond the limits of the Ordinary Original Civil Jurisdiction of the High Court, enlarged its original jurisdiction or conferred a special jurisdiction on the High Court. In the view I have taken of the nature of the jurisdiction conferred on this Court by Section 76, Trade Marks Act and of the meaning and effect of Clause 15, Letters Patent I consider it unnecessary to discuss the principles laid down in the election cases for the purposes of the present appeal. I prefer to base my decision on a plain reading and construction of Clause 15 read with Section 108 of the 1915 Act to founding it on particular principles deducible from different cases as to which there may be difference of opinion. For reasons stated above, I agree with my learned brother that this appeal is incompetent and should be dismissed on the preliminary ground.