

Ajanta Pharma Limited Vs. the Controller General of Patents and Others

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Court : Intellectual Property Appellate Board IPAB

Decided On : Aug-12-2008

Judge : Hon'Ble Shri Z.S.Negi, Chairman & Honâ€™Ble Shri S.Chandrasekaran, Technical Member

Appeal No. : M.P.No.26/2008 IN TA/7/2007/PT/DEL (FAO 136/2007 & CM 5192/2007 HIGH COURT OF DELHI)

Appellant : Ajanta Pharma Limited

Respondent : The Controller General of Patents and Others

Judgement :

Honble Shri S.Chandrasekaran, Technical Member :

This Miscellaneous Petition No. 26/2008 has been filed by the petitioner who is the respondent in the main appeal No. TA/7/07/PT/DEL.

2. M/s Ajanta Pharma Limited, being the appellant filed an appeal under section 116 (2) of the Patents Act, 1970 (in short the principal Act) against the order of the respondent No. 2 dated 22.03.2007, in an opposition to the patent application No. 85/DEL/95 by way of third party representation opposition under section 25 (1) of the Patents Act, 1970, [as amended by the Patents (Amendment) Act, 2005 (hereinafter referred as the Act)] before the Honble High Court of Delhi bearing No. FAO 136/2007 and CM 5192/2007. The said appeal is a transferred to this Appellate Board under section 117G of the Patents Act, 1970.

3. An application for patent titled Tetracyclic derivatives, processes for preparation and use was filed on 23.01.1995 by Laboratories Glaxo S.A., of France and the application was assigned to M/s ICOS Corporation of U.S.A., which in turn further assigned the rights to M/s Elli Lilly and Co., Indianapolis, U.S.A. All these assignments and change of applicants have been duly recorded in the Patent Office, Delhi and thus M/s Elli Lilly and Co., is the present applicant on record. This applicant for patent claims the priority of U.K. application No.9401090.7 dated 21.01.1994. The original application for patent, as originally filed, consisted of 16 claims of which 1 to 11 were directed to the compounds of formula I designated within the specification or its isomers per se ; Claims 12 - 14 were directed to the use of the compound, method of treatment comprising administering the claimed compound and pharmaceutical compositions comprising the claimed compound; Claim 15 was directed to an intermediate used in the preparation of the claimed compound ; whereas Claim 16 was an omnibus claims directed to compounds described and exemplified within the specification. Subsequently, the respondent No. 3 voluntarily amended the statement of claims and added few more process claims for the preparation of the compounds claimed in the earlier claims.

4. The appellant filed a pre-grant opposition under section 25 (1) of the Act on 30.01.2006 followed by a revised representation on 30.03.2006 against the voluntarily amended claims which were added later on.

5. The respondent No. 2, after hearing the parties on 30.05.2006, based on the third party intervention opposition under section 25 (1) passed the impugned order on 22.03.2007 allowing the process claims and simultaneously disallowing the product claims. Aggrieved by this impugned order, the respondent No. 3 filed a review petition immediately at the respondents office at Delhi. The appellant also being partly aggrieved by this impugned order of the respondent No. 2 preferred an appeal under section 116 (2) of the principal Act in the Delhi High Court on 03.04.2007 as the said appeal provision was in force when the impugned order was issued on 22.03.2007. The same was numbered as FAO 136/2007 and CM 5192/2007. The appeal having been scrutinized by the Registry of the Honble High Court of Delhi, directions were given on 17.04.2007 to the appellant to file an affidavit to the effect that the Appellate Board has not yet been constituted for the

patent appeals. Consequently, the appellant filed an affidavit in the Delhi High Court mentioning about the formation of the Appellate Board for patent appeals and also the notification dated 03.04.2007 of the Central Government regarding the transfer of appeals pending before any High Court to the Appellate Board under section 117G of the Act. The Honble High Court was pleased to pass an order for transferring the appeal to this Appellate Board after due consideration of the affidavit and directed the appellant to appear before this Appellate Board on 24.07.2007.

6. The appeal FAO 136 of 2007 transferred from the High Court of Delhi has been renumbered as TA/7/2007/PT/DEL and was posted for the hearing on 16.10.2007 before this Appellate Board. The appellant having not complied with certain formalities raised by the Registry of this Appellate Board, sought time for compliance. The matter was again posted for hearing before the Appellate Board on 4.12.2007. The respondent only sought clarification about the review petition filed by them before the Controller of Patents, as to whether he is free to pass such orders, as are open to him in the said review petition notwithstanding the pendency of this instant appeal before the Appellate Board. It was clarified that the instant appeal is unconnected with the matter under review before the Controller of Patents. The appellant was asked to furnish the paper book comprising of all the pleadings and documents that have been filed by the respective parties before the Controller of Patents together with the evidences that each party may wish to rely and refer during this appeal and make them as a compilation in the form of an appeal paper book. The respondent submitted during the hearing on 14.03.2008, that the Controller of Patents had not passed any orders on the review petition till then. Accordingly the parties to this appeal were directed to file their reply and rejoinder within two months.

7. The matter was posted for hearing on 11.06.2008 as the paper book have been prepared and submitted before the Registry of this Appellate Board. The respondent No. 3 filed a M.P., stating briefly the facts of the case that had taken place till then and then submitted that the present appeal proceedings are not maintainable before this Appellate Board. The respondent No. 3 referred to the section 117-A of the Act and submitted that the Act does not contain any provision

whereby the order passed by the Controller of Patents in a pre-grant opposition under section 25(1) of the Act may be appealed against. The respondent 3 also referred to a recent judgment passed by the Delhi High Court that clarifies the law on the point that appeals filed on or after 02.04.2007 against the Controller's decision under section 25(1) of the Act are not maintainable. Consequently the respondent No. 3 submitted that this appeal is against the order of the Controller of Patents in a pre-grant opposition before this Appellate Board and hence not maintainable. So the respondent No. 3 requested for the dismissal of the present appeal and render justice in the matter. The learned counsel for the respondent No. 3 relied on the following cases, in support of his arguments.

Sumitomo corporation v. CDC financial services(Mauritius) Ltd. (2008) 4 Supreme Court Cases 91;

ii. Kamal Kumar Dutta and another v. Ruby General Hospital Ltd., and others (2006) 7 Supreme Court Cases 613;

iii. Rahul Sharad Awasthi v. Ratnakar Triambak Pandit 2004(4) CTC 241 of the Bombay High Court;

iv. Alala Sundaram v. The Commissioner H.R. and C.E Administration department of the Madras High Court 2007(4) CTC 169.

8. The learned counsel for the appellant argued that subsequent to the filing of the appeal in the Honble Delhi High Court, notifications of the Government of India dated 2.4.2007 and 3.4.2007 came to the knowledge of the appellant. The appellant brought to the notice of the Honble Delhi High Court the above development on the 17.04.2007. The Honble Delhi High Court was pleased to direct the appellant to state the same on an affidavit, which the appellant had complied with. The Honble Delhi High Court was pleased to pass an order for transferring the appeal to the Appellate Board after due consideration of the affidavit and directed the appellant to appear before the said Appellate Board on 24.07.2007, treating this appeal as a pending appeal under section 117G of the Act.

9. The learned counsel for the appellant submitted that the Honble Delhi High Court, after hearing the appellant on the basis of the affidavit and the aforesaid notifications of the Government of India, considered appropriate to treat the appeal as pending appeal as of 02.04.2007 and subsequently the Honble High Court was pleased to direct the transfer of the appeal to the Honble Appellate Board at Chennai. The learned counsel also submitted that the order passed by the Honble Delhi High Court was still valid and subsisting so long as the order is recalled or set aside by an appellate court having competent jurisdiction. The learned counsel for the appellant submitted that the respondent No. 3 did not choose to prefer any appeal or a review of the order dated 01.05.2007 of the Honble Delhi High Court but on the contrary, he participated in the proceedings before the Appellate Board on various dates.

10. The learned counsel for the appellant argued that the respondent No. 3 filed their reply to this appeal and did not raise any objections with regard to maintainability at that point. The counsel also stated that the respondents ought to have raised such objections at the threshold but not later and in fact they had accepted the order of the Honble Delhi High Court and participated in the appeal proceedings and in the preparation of paper book but never filed any recalling application or an appeal for setting aside the order of the Honble Delhi High Court. The learned counsel for the appellant argued that the judgement relied upon, deals with the different facts and circumstances wherein maintainability of an appeal filed in 2006 was challenged. Finally, the learned counsel for the appellant submitted that the instant petition filed by the respondent No. 3 may be dismissed and the matter may be referred to the Honble High Court at Delhi for appropriate adjudication on maintainability of the appeal.

11. We have heard the arguments of the learned counsel for the respondent and the appellant. At the outset it may be noted that the appeal in respect of the pre-grant opposition under section 25(1) of the patent application No.85/DEL/95 was filed on 03.04.07 at the Delhi High Court. In this case, the proceedings in respect of a pre-grant opposition by way of opposition due to third party intervention against the said application was filed on 24.01.06 under section 25(1) of the Act. By then the Patents (Amendment) Act, 2005 had come into force amending the

Patents Act, 1970 with effect from 01.01.2005. Section 25(1) under Chapter V of the Patents Act, 1970 deals with the opposition to the grant of patent. It is also to be noted that section 47 of the Patents (Amendment) Act, 2002 states that for Chapter XIX of the principal Act, the following chapter shall be substituted, namely,

Chapter XIX - Appeals to the Appellate Board

Section 47 of the Patents (Amendment) Act, 2002 substituted the earlier section 116 of the original Act as section 117A which deals with the appeals to the Appellate Board. Section 117A (2) provides that all appeals under section 25 shall lie to the Appellate Board but this section 47 of the Patents (Amendment) Act, 2002 has not been brought into force till 02.04.2007. In view of this all appeals against the decisions passed by Controller of Patents pertaining to the opposition under section 25 were only appellable before the High Court as per the provisions under sub-section (2) of section 116 of the original Act because there should be a remedy for the aggrieved party in an opposition proceedings. It is to be noted that the Patents Act, 1970 as amended from time to time and as was in force as on 20.05.03 had to be considered, for in opposition to the grant of patent and the legal position for that opposition proceedings taking place under section 25, was only one set of right given to opponents for opposition to grant of patent i.e., before the final patent is granted and the appeal for the aggrieved party against the order passed by the Controller would be available before the High Court under section 116 (2) of the principal Act for the reason that section 47 of the Patents (Amendment) Act, 2002, has not been brought into force though they continue to remain in the statute books. This section 47 of the Patents (Amendment) Act, 2002 was brought into force by a notification by the Government of India dated 02.04.2007. But it is a settled law that a right of appeal is a vested right and the aggrieved party in any proceedings can not be remediless. Therefore, the availability of a remedy to an aggrieved person has to be determined with respect to the legislative provisions in force on the date when the aggrieved person alleges that a wrong has been committed and his appeal has to be heard to grant a remedy to him. It is also a clear fact that appellant is aggrieved when the impugned order has been passed on 22.03.2007, the appellant has got a right to go for appeal before the Honble High Court as per the provisions available under

section 116 of the principal Act. But by the time the Registry of the Honble High Court has scrutinized the appeal and numbered the appeal, the notification of the Government of India bringing into force of section 47 of the Patents (Amendment) Act, 2002 w.e.f. 02.04.07 had come. It is a fact that the Honble High Court of Delhi has jurisdiction to receive an appeal and consider on the date of the impugned order and while doing so, the Honble High Court of Delhi had asked the appellant to file an affidavit to the effect that the Appellate Board has not been constituted for the patent appeals. The appellant having come to know about the formation of the Patent Bench on that particular date had immediately pointed out the provisions which have come into force, to the knowledge of the Honble High Court. Immediately the Honble High Court of Delhi had heard the submissions of the appellant, considered and passed an order transferring the appeal to the Appellate Board at Chennai directing the appellant to appear before the Appellate Board. Now all the provisions of the Patents (Amendment) Act, 2002 have come into force. It is an appeal against an order of the Controller under section 25(1), which was pending before the Honble High Court of Delhi, but stood transferred based on the order dated 01.05.2007. The appeal was re-numbered and the Registry of the Appellate Board has no jurisdiction or power to question the maintainability, when it has already been scrutinised and stood transferred from the Honble High Court, but to place it before the Appellate Board to decide the same.

12. But as seen and referred to by the respondent/petitioner in M.P. in the Delhi High Court case Span Diagnostic Vs. Assistant Controller of Patents and Designs, wherein Justice Pradeep Nandrajog had decided that, it is settled law that when enacting a statute the legislature can delegate the power to the executive to bring into effect and notify the date on which the legislative provision would come into force. It is also settled law that the right of appeal is a substantive and a vested right and cannot be taken away by implication. . rights and remedies go hand in hand and thus it is imperative that where substantive rights are proposed to be amended with simultaneous amendments relating to the remedy, both should be notified together lest there is a hiatus in the changed substantive right vis--vis the changed appellate remedy. Accordingly it is to be understood clearly, that when the executive would have simultaneously brought into force these changes in the rights and remedies, such problem as seen now regarding maintainability of this

transferred appeal or this petition now filed by the respondent/petitioner would never have arisen, rather it would have been smooth for the judicial forum to apply the law and decide the matter. When the matter comes at the transition stage like this, the appeal has been numbered and then transferred to the Appellate Board, in which case, the Registry of this Appellate Board does not have any jurisdiction to check the scrutiny already done by the Registry at the Honble Delhi High Court and hence it was listed before the Bench to decide the maintainability issue of this appeal as it falls under section 25 (1) now, in view of all the sections of the Patents Act having been declared by the Central Government to have come into force with effect from 02.04.2007, vide notification No.12/15/2006-IPR-III dated 02.04.2007. It is before us now to decide, firstly, whether this appeal is maintainable or not? The day when the impugned order was passed, i.e., 22.03.2007, under section 25(1) of the Act, the pre-grant opposition by way of third party intervention was existing and also the second or an alternative provision to the same opponent to once again come under the post-grant opposition under section 25(2) of the Act. Only difference was the appellate forum which remained earlier the High Court, prior to 02.04.2007 and thereafter the appellate authority was the Appellate Board and not the High Court. But the legislature has made a diversion or deviation in the appeal process for the aggrieved party that, only the orders and decisions under section 25(2), in the post-grant opposition is appealable before the Appellate authority, viz., Intellectual Property Appellate Board and not the orders and decisions issued under section 25(1) of the Act. However, there is always the provision of appeal under article 226 of the Constitution, by way of writ petition to the Honble High Court. That apart, the normal legal appeal channel is closed and the executive decisions at the Controllers level under the section 25(1) of the Act is not appealable before this Appellate Board as per section 117A (2) of the Act i.e., the order of the Controller is not appealable before the Appellate Board, but only before the High Court as per the provisions available under the Constitution. But the situation is different when the matter has been transferred from the Honble High Court as a transferred appeal duly numbered and scrutinized, passing an order directing the appellant to appear before the Appellate Board. The cases referred to by the respondent/petitioner have been perused but the matter is different, as pointed out by the appellant. But the respondent/petitioner pointed out

that the appellant does not have the right to appeal, in view of the fact and provision and cited cases, that the appellants right to appeal is taken away by the subsequent notification of the Central Government. For this the respondent/petitioner had relied on cited cases, viz., (ii) to (iv) referred to in para 7 above. In those cases, it has been discussed and decided by the Honble High Courts as to whether the judgement or order of the single Judge is appealable before the Division Bench of the same High Court. In a way this order of the Controller of Patents is like an order from a first or a trial Court and this is a first appeal by the appellant. But it is to be noted that the appellant has made an appeal to the Honble High Court of Delhi, which has now been transferred to this Appellate Board because of the notification by the Central Government. Hence the situation now is different and the matter in question is not like that of an appeal to Division Bench from the order or decision from the Single Judge. But the respondent/petitioner, referring to Apex Courts Judgement in Kamal Kumar Dutta and another Vs Ruby General Hospital Ltd., and others argued that the appeal is a vested right, but that right can be taken away by a subsequent enactment either expressly or by necessary intendment. As pointed out in the matter, that section 100-A of CPC has taken away the power of appeal to a Division Bench from the order of a Single Judge in High Court, the respondent/petitioners counsel submitted that the appeal facility has been taken away for the aggrieved party against order of the Controller under section 25(1) of the Act and hence this appeal is not maintainable. This may seem to be okay, when the appellant has come straight to the Appellate Board for an appeal, but in this case the appellant has made an appeal to the Honble High Court of Delhi under section 116(2) of the principal Act, when the said provision was available and remained in force. It may be relevant to mention here, that prior to this notification by the Central Government, the appellant had the only option of going on appeal under section 116(2) of the principal Act, against the order of the Controller given under section 25, though it was an opposition proceeding prior to the grant of patent by way of third party intervention under section 25(1) of the Act. Till the sections 60 to 63 came into force and given effect to, by way of this notification of the Government of India, the section 116(2) of the principal Act was operative and in force; The section 116(2) reads as under: -

116 (2) Save as otherwise expressly provided in sub-section (1), an appeal shall lie to a High Court from any decision, order or direction of the Controller under any of the following provisions, that is to say,

section 15, section 16, section 17, section 18, section 19, section 20, section 25, section 27, section 28, section 51, section 54, section 57, section 60, section 61, section 63, sub-section (3) of section 69, section 78, section 84, section 86, section 88 (3), section 89, section 93, section 96 and section 97.

Therefore, any party aggrieved under section 25(1) also would have the option to go for appeal to the Honble High Court under the above section 116(2) of the principal Act, until these sections 60 to 63 have been brought into force on 02.04.2007. But after this date of notification, similar situation like the one, what is created due to the amendment of the section 100-A of CPC, would arise, making the situation clearer that no appeal shall lie from the decision of the Controller under section 25(1) excepting an appeal by way of writ, which is under the constitutional provision. Therefore, these references to the reported cases, by the respondent/petitioner mentioned above, cannot be of any help to them.

13. At this juncture, there arise a few questions before us.

(i) Whether this appeal made by the appellant though transferred from the Honble High court of Delhi, to be considered for the maintainability aspect or not?

(ii) Whether the appeal made in the Honble High Court has any support of law to exist or to be treated as pending appeal before the High Court and now to be considered as transferred appeal on or after the date viz., 02.04.2007 when all the sections 60 to 63 have been brought into force by the notification by the Central Government.

14. When an Act or regulation states that it comes into force on a particular day or on a day fixed by proclamation or otherwise, it comes into force at the beginning of that day. Substitute of an old provision by a new provision was the real issue in a recent case that went up to the Apex Court. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary

implication made to have retrospective operation.

On retrospectivity, Dickson J., held in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at p. 279, that,

First retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

At page 282, in the same judgment, he observed with respect to vested rights:

Second interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction.

Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, [1933] S.C.R.629, at p.638, Williams J held that the presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions.

In *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, Duff C.J. wrote at p. 638:

A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all

events, that intention is plainly manifested by unavoidable inference.

The High Court of Australia in *Maxwell v. Murphy* (1957), 96 C.L.R. 261, considered the question of retrospectivity. Under s. 5 of the Compensation to Relatives Act, 1897 (N.S.W.), an action had to be commenced within twelve months of the death of the deceased. The Act was amended as from December 16, 1953 by replacing the words "twelve months" by the words "six years". On November 30, 1954, an action was commenced by the plaintiff in respect of the death of her husband which had occurred on March 19, 1951. It was held that the amendment did not operate to revive the plaintiff's right to maintain an action which had been barred from March 19, 1952.

As against retrospectivity, there is a presumption that Acts are not to be read as being retrospective. Normal laid down and apparent blanket rule is that an enactment does not have retrospective effect.

But that presumption has different strengths in different contexts. It is strongest in relation to legislation that imposes obligations or penalties, or takes away acquired rights. In the case of beneficial social legislation, a court may be much more inclined to find that the legislation operates retrospectively as well as prospectively. Among the matters taken into account will be the words of the legislation in question, its purpose, its context, and the injustice or otherwise of finding retrospectivity. The much-quoted maxim that procedural Acts are more likely to be interpreted retrospectively than substantive ones is at best only a guideline; the effect of statutes upon previously acquired rights is more important than any label which may be attached to them.

As regards the consequences of an interpretation the courts are naturally unwilling to arrive at an interpretation which has unreasonable or inconvenient results. As Danckwerts LJ said: "An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available.

As to the scope of a savings clause in an enactment, Sabyasachi Mukharji, J. (as his Lordship then was), in *CIT v. Shah Sadiq and Sons*[15] ruled: (SCC p. 524, para 15) held,

"... the 'savings' provision in the repealing statute is not exhaustive of the rights which are saved or which survive the repeal of the statute under which such rights had accrued. In other words, whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(c) of the General Clauses Act, 1897."

In *Bansidhar v. State of Rajasthan*[16] also, M.N. Venkatachaliah, J. (as he then was) for a Constitution Bench observed that "a saving provision in a repealing statute is not exhaustive of the rights and obligations so saved or the rights that survive the repeal".

15. Referring to few more Supreme Court decisions, regarding substitution word in an amendment notification as in *Government of India Vs. Indian Tobacco Association*, decided by the Apex Court, the facts, being, the introduction of the Duty Entitlement Pass Book (DEPB) scheme announced on 1.4.1997, under the Exim Policy 1997-2002 for export promotion scheme envisages grant of DEPB Credit Entitlement to an exporter at the time of export at an ad-valorem rate notified by Director General of Foreign Trade, in relation to FOB value of the export product. A notification was issued on 7-4-1997, announcing details about the scheme mentioning the names of eligible seaports and airports, and also "inland container depots (ICDs) at Bangalore, Coimbatore, Delhi, Gauhati, Kanpur, Pimpri (Pune), Pitampur (Indore), Moradabad, Ludhiana and Hyderabad." Indian Tobacco Association (ITA) was unhappy that Guntur was not included in the list of ICDs, and so approached the Government for remedy. The Government came, with an amendment to the notification on 27-11-1997 thus showing: "(b) for the words 'Ludhiana and Hyderabad', the words 'Ludhiana, Hyderabad, Nagpur, Agra, Faridabad, Jaipur, Guntur and Varanasi' shall be substituted." Thus, the list in the previous paragraph extended to six more ICDs, including Guntur. ITA felt that the November notification was clarificatory in nature, and so it would also cover the period from April 7 to November 27. But the Central Government rejected this line of reasoning. On 23-8-2001, they wrote a letter to ITA, saying: "Exports of tobacco

made during the period 1-4-1997 to 26-11-1997, cannot qualify for DEPB Scheme because it would mean granting retrospective effect to the said customs Notification which is not permitted in law." Aggrieved ITA approached the Andhra Pradesh High Court, which noted that Guntur was introduced by way of substitution. "The word substitution would connote that the Government intended to give benefit to the imports and exports from Guntur and if really the Government wanted to introduce and give benefit to the imports and exports from Guntur from 27-11- 1997, they could have issued a separate notification which would operate as prospective in nature," ruled the court. ITA was happy that the November notification was held to be "only by way of substitution", conferring "retrospective benefit to the exports and imports from Guntur". The Government was aggrieved by High Court's verdict, and so appealed to Apex Court. There, Additional Solicitor General, appearing on behalf of the Government, submitted that the two notifications in question providing for exemption from payment of additional Customs duty must be strictly construed and cited the Mahaan Dairies case to state that a subordinate legislation containing exemption from payment of duty would only have prospective operation. Justices Mr .S. B. Sinha and Mr. A. R. Lakshmanan of the Supreme Court heard the case and observed, "An exemption notification, it is trite, must be construed having regard to the object and purport which the same seeks to achieve. It is also well-settled that an expression used in a statute should be given its ordinary meaning unless it leads to an anomalous or absurd situation." From the Mahaan Dairies precedent, the Court cited a paragraph that read: "It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available, then by stretching the words of the Notification or by adding words to the Notification benefit cannot be conferred." "The word `substitute' ordinarily would mean `to put (one) in place of another'; or `to replace'," said the Apex court, and referred to the definition in Black's Law Dictionary - that substitute means `to put in the place of another person or thing' or `to exchange' and also referred to Definition in Collins English Dictionary which came in handy, though a bit more technical, because it defined the word to mean `to serve or cause to serve in place of another person or thing'; `to replace (an atom or group in a molecule) with (another atom or group)'; or `a person or thing

that serves in place of another, such as a player in a game who takes the place of an injured colleague'.

Similarly, in the *Tata Iron and Steel Co Ltd vs State of Jharkhand*, the court had said that eligibility clause in relation to exemption notification must be given a strict meaning. The amendment did not take away any substantive right, nor impose any penal consequence, but only sought to remove an obvious mistake, reasoned the court. "When a person is held to be eligible to obtain the benefits of an exemption notification, the same should be liberally construed," noted the judgment, and added: "It is not in dispute that 'Guntur' was one of the inland container depots. It is also not in dispute that such duty exemption had all along been granted for export from 'Guntur'." Instead, "the Union of India while making a subordinate legislation had advisedly used the word 'substitution' in place of the word 'addition'," pointed out the apex court. This shows that the object and purport of the subsequent notification was to grant the same benefit which had been granted through the April 1997 notification to those exporting from seaports or ICDs specified in the November communiqu, ruled the court, concluding that the amended notification was "only intended to rectify a mistake" and, so it would have "retrospective effect and retroactive operation".

16. When referring to the *Ramkanali Colliery* case, the court had taken the view, that "If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression 'substituted' is used." Such deletion has the effect of repealing the existing provision and also introducing a new provision, the court had explained. In *Zile Singh vs State of Haryana*, the court held that the substitution of one text for the other pre-existing text is one of the known and well-recognized practices employed in legislative drafting. "Substitution has to be distinguished from 'supersession' or a mere repeal of an existing provision."

"In the *Koteswar* case a three-Judge Bench of Apex Court emphasized the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps:

i) the old rule is made to cease to exist and,

ii) the new rule is brought into existence in its place.

Normally, it is seen that the courts do take 'the doctrine of fairness' as a relevant factor when construing a statute. Similarly the Apex Court had taken the view that the statute need not be given retrospective effect by express words but the intent and object of the legislature in relation thereto can be culled out from the background facts, upholding the decision of the High Court.

Whereas in *Mahabir Vegetable Oils Pvt. Ltd. and Anr. Vs. State of Haryana and Ors.*, the Apex Court while considering the retrospective operation of the subordinate legislation held that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act. Hence it was held by the Apex Court that the rights of the appellant could not be taken away with retrospective effect as a retrospective effect to an amendment by way of a delegated legislation could be given only after coming into force of a particular provision in the Act and not prior thereto.

17. To clearly ascertain the correct legal position it has become imperative to examine relevant provisions and decided cases, dealing with the ambit and scope of repeal and reenactment of a statute and also the General Clauses Act 1897. Looking into point of Presumption against retrospectivity the General Clauses Act has a presumption against retrospectivity clearly embodied in section 5. This means that it is very clear that any statute will not be retrospective in its operation unless the statute clearly mentions it. Many provisions of the Income-tax Act are mentioned as having retrospective operation and only those provisions will have a retrospective operation and all other provisions will have only a prospective operation. Similarly amendments are also not retrospective in operation unless the special statute specifically mentions it.

In *M/s M.S. Shivananda v. Karnataka State Road Transport Corporation and Ors.* (1980) 1 SCC 149 the judgment given also leads to the same conclusion that after repeal of the Act whether it applies or not depends on the intention of the legislature which is reflected by the language used in the subsequent Act passed by the legislature. The Apex Court had observed that if, the right created by the statute is of an enduring character and had vested in the person, and then that

right cannot be taken away because the statute by which it was created has been repealed. When the specific or the special statute does not mention or speak about the retrospectivity, for a better and clearer interpretation we shall have to look in to the provisions of the General Clauses Act, 1897.

Since the General Clauses Act, 1897 is largely based on the English Interpretation Act, 1889, it would be appropriate to first look at the similar provision in the English Act and other relevant cases which would throw some light on issues involved in the present case to be decided. According to the law of England, as it stood before Interpretation Act of 1889, the effect of repealing a statute was to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, or prescribed and concluded while it was an existing law. In *Kay vs. Goodwin* reported in 1830 English Reports (Volume 130) at page 1403, Chief Justice Tindal held that the effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law. In England, to obviate such a situation a practice was developed to insert a saving clause in the repealing statute with a view to preserve rights and liabilities that had already accrued or incurred under the repealed enactment. When it was found to be cumbersome to insert a saving clause in every statute, to dispense with the necessity of having to insert a saving clause on each occasion, Section 38(2) was incorporated in the Interpretation Act of 1889. Section 6 of the General Clauses Act, 1897 is found to be predominantly based on the same lines as Section 38(2) of the Interpretation Act of 1889 of England. In order to see the similarity between the Indian and English Law on this subject, it would be appropriate to set out Section 6 of the General Clauses Act, 1897.

"6. Effect of repeal.- Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not --

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of such right, privilege, obligation, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

A Seven Judge Bench of the Apex Court by majority laid down in *Keshavan Madhava Menon vs. The State of Bombay*, (1951) SCR 228, that the Court was concerned with the legality of the prosecution of the appellant for contravention of the Indian Press (Emergency Powers) Act, 1931. The offence had been committed before the Constitution came into force and a prosecution launched earlier was pending after January 26, 1950. The enactment which created the offence was held to be void under Article 19(1)(a) read with Article 13 as being inconsistent with one of the Fundamental rights guaranteed by Part III of the Constitution. In the circumstances, the point that was debated before the Apex Court was whether the prosecution could be continued after the enactment became void and the Court by a majority judgment held that the Constitution was prospective in its operation and that Art. 13(1) would not affect the validity of these proceedings commenced under pre-Constitution laws which were valid up to the date of the Constitution coming into force, for to hold that the validity of these proceedings were affected would in effect be treating the Constitution as retrospective. Therefore, the Apex Court considered that there was no legal objection to the continuance of the prosecution.

A Constitution Bench of the Apex Court in *State of Punjab vs. Mohar Singh* (1955) 1 SCR 893 held that the claim of the respondent Mohar Singh, as an evacuee under the East Punjab Refugees (Registration of Land Claims) Act, 1948 to be false and also an offence under the Act. At the trial, on his confession, the respondent was convicted and sentenced to imprisonment. On suo motu revision, the District Magistrate found the sentence to be inadequate and referred the case to the High Court. The High Court found that since the ordinance was repealed, he could not be convicted under Section 7 of the Act. The Apex Court, on appeal, reversed the decision and upheld the conviction applying Section 6 of the General Clauses Act.

18. The principle has been laid down by the Apex Court, making a clear ruling that whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject one would undoubtedly have to look to the provisions of the new Act, but only for the purposes of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. Therefore, Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section.

In the case of *Brihan Maharashtra Sugar Syndicate vs. Janardan* AIR 1960 SC 794, it was held that "Section 6 of the General Clauses Act provides that where an Act is repealed, then, unless a different intention appears, the repeal shall not affect any right or liability acquired or incurred under the repealed enactment or any legal proceeding in respect of such right or liability and the legal proceeding may be continued as if the repealing Act had not been passed.

In *M.A. Tulloch's* case the Apex Court aptly observed that every later enactment which supersedes an earlier one or puts an end to an earlier state of the law is presumed to intend the continuance of rights accrued and liabilities incurred under

the superseded enactment unless there were sufficient indications - express or implied - in the later enactment designed to completely obliterate the earlier state of the law.

19. It is clear to say that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words. Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded, would there be any incongruence in attributing to the later legislation the same intent which Section 6 of the General Clauses Act presumes has to be seen, where the word 'repeal' is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and an implied provision. It is only the form that differs in the two cases and there is no difference in intention or in substance.

In view of the above interpretation what follows is absolutely clear that unless a different intention appears in the repealing Act, any legal proceeding can be instituted and continued in respect of any matter pending under the repealed Act as if that Act was in force at the time of repeal. In other words, whenever there is a repeal of an enactment the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears in the repealing statute.

In case the repeal is followed by fresh legislation on the same subject the appropriate judicial forum has to look to the provisions of the new Act for the purpose of determining whether they indicate a different intention. The question is not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. The application of this principle is not limited to cases where a particular form of words is used to indicate that the earlier law has been repealed. As the Apex Court has said, it is both logical as well as in accordance with the principle, upon which the rule as to implied repeal rests, to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would

attract the incident of saving found in Section 6. In the case of *Munshilal Beniram Jain Glass Works vs. S. P. Singh* (1971) II S.C.J. July- December p. 307, the Apex Court held that, Section 6 would apply to a case of repeal even if there is a simultaneous enactment unless a contrary intention appears from the new enactment.

In *Qudrat Ullah vs. Municipal Board, Bareilly*, (1974) 1 SCC 202, the Apex Court held that the general principle is that an enactment which is repealed is to be treated, except as to transactions passed and closed, as if it had never existed. However, the operation of this principle is subject to any savings which may be made, expressly or by implication, by the repealing enactment. If a contrary intention appears from the repealing Statute, then that prevails.

A three-Judge Bench of the Apex Court in *India Tobacco Co. Ltd. vs. CTO*, (1975) 3 SCC 512, held that repeal is not a matter of mere form but is of substance, depending on the intention of the legislature. If the intention indicated either expressly or by necessary implication in the subsequent statute, was to abrogate or wipe off the former enactment wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal. Broadly speaking, the principal object of a repealing and amending Act is to 'excise dead matter, prune off superfluities and reject clearly inconsistent enactments.

20. Therefore it is very clear, that, when there is a repeal and simultaneous reenactment, Section 6 of the General Clauses Act would apply to such a case unless contrary intention has been gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. When the repeal is followed by a fresh legislation on the same subject, provisions of the new Act will have to be looked into, only for the purpose of determining whether the new Act indicates different intention. The object of repeal and reenactment is to obliterate the Repealed Act and to get rid of certain obsolete matters.

In *Commissioner of Income Tax vs. Shah Sadiq and Sons* AIR 1987 SC 1217, the Apex Court observed that, a right which had accrued and had become vested, continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act, 1897.

In *M/s Gurcharan Singh Baldev Singh v. Yashwant Singh and Ors.* (1992) 1 SCC 428, the Apex Court observed that, the objective of Section 6(c) of the General Clauses Act, 1897 is to ensure protection of any right or privilege acquired under the repealed Act. The only exception to it is legislative intention to the contrary. That is, the repealing Act may expressly provide or it may impliedly provide against continuance of such right, obligation or liability.

In *Gajraj Singh and Others vs. State Transport Appellate Tribunal and Others* (1997) 1 SCC 650, a permit under Section 47(3) of the Motor Vehicles Act, 1939 was granted to the appellant for a period of 3 years. The Motor Vehicles Act, 1988 came into force with effect from 1.7.1989. The question arose whether the renewal of the permit of the appellant granted under the repealed Act is a permit under the Act and its operation was saved by Section 217(2)(a) read with sub-section (4) thereof. Therefore, the second renewal granted under Section 81 was valid in law. There was no need for the appellant to obtain a fresh permit under the Act as the renewal is a continuation of the original permit which is a vested right. The effect of saving provisions in Section 217(2) (a) is to allow all the permits granted under the Repealed Act to continue after renewal under the Act. Section 217(2) (a) and sub-section (4), thus, obviate the need to obtain fresh permit under the Act and, therefore, it would be unnecessary. According to the appellant, the Act is not intended to lay down that after the Act came into force, all the holders of stage carriage permits granted under the Repealed Act would be required to obtain fresh permits under the Act. Section 6 of the General Clauses Act, 1897 read with Sections 217(2) (a) and (4) saves operation of all those permits which were alive when the Act came into force. Consequently, renewals granted under Section 81 were valid. In *Gajraj Singh's* case (*supra*), the Apex Court observed that the proceedings under the Repealed Act would be continued and concluded under the

Act as if the Act was not enacted.

21. Number of authors have commented on the 'Doctrine of Repeal'. Craies in his book on Statute Law stated that in English acts passed after 1889 certain savings are implied by statute in all cases of express repeal, unless a contrary intention appears in the repealing Act. The author has stated in his book that it had been usual before 1889 to insert provisions to the effect above stated, in all statutes by which express repeals were effected. The result of this enactment is to make into a general rule what had been common statutory form, and to substitute a general statutory presumption as to the effect of an express repeal for the canons of construction hitherto adopted.

In Halsbury's Laws of England, Fourth Edition the word 'repeal' has been defined as under :-

"To repeal an Act is to cause it to cease to be a part of the corpus juris or body of law. To repeal an enactment contained in an Act is to cause it to cease to be in law a part of the Act containing it. The general principle is that, except as to transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed. However, the operation of the principle is subject to any savings made, expressly or by implication, by the repealing enactment, and in most cases it is subject also to the general statutory provisions as to the effects of repeal."

When an Act is repealed then it is treated as revoked or abrogated, and removed from what is popularly known as the Statute Book. The provisions of English Interpretation Act and General Clauses Act, 1897 are *pari materia* as far as Section 38 of English Act and Section 6 of the Indian Act are concerned. According to Halsbury's Laws of England (*supra*), where any Act after 1889 repealed and re-enacted, with or without modification, a previous enactment, then, unless the contrary intention appears, any reference in any other enactment to the enactment so repealed must be construed as a reference to the provision reenacted.

Crawford in his book on Interpretation of Law stated that an express repeal will operate to abrogate an existing law, unless there is some indication to the contrary, such as a saving clause. Even existing rights and pending litigations, both civil and criminal, may be affected although it is not an uncommon practice to use the saving clause in order to preserve existing rights and to exempt pending litigation.

In the said book it is further stated that often the legislature instead of simply amending a pre-existing statute, will repeal the old statute in its entirety and by the same enactment reenact all or certain portions of the pre-existing law. Of course, the problem created by this sort of legislative action involves mainly the effect of the repeal upon rights and liabilities which accrued under the original statute. Are those rights and liabilities destroyed or preserved? One has to evaluate! The authorities are divided as to the effect of simultaneous repeals and reenactments. Some adhere to the view that the rights and liabilities accruing under the repealed act are destroyed, since the statute from which they sprung has actually terminated, even though for only a very short period of time. Others, they seem to be in the majority, refuse to accept this view of the situation, and consequently maintain that all rights and liabilities which have accrued under the original statute are preserved and may be enforced, since the reenactment neutralizes the repeal, thereby continuing the law in force without interruption.

Francis Bennion in his book on Statutory Interpretation (2nd Edn.) says that where an English Act passed after 1878, repeals and reenacts the enactment (with or without modification) then, unless the contrary intention appears, anything done, or having effect as if done, under the enactment repealed, insofar as it could have been done under the provision reenacted, has the effect as if done under that provision.

G. P. Singh in his book on 'Principles of Statutory Interpretation', 2006 Edition enumerated the effect of clauses (c) to (e) of Section 6 of the General Clauses Act is to prevent the obliteration of a statute in spite of its repeal to keep intact rights acquired or accrued and liabilities incurred during its operation and permit continuance or institution of any legal proceedings or recourse to any remedy

which may have been available before the repeal for enforcement of such rights and liabilities.

Sutherland in his book on Statutory Construction (3rd Edn.) Vol. I by Horack stated under common law principles of construction and interpretation all rights, liabilities, penalties, forfeitures and offences which are of purely statutory derivation and unknown to the common law are effaced by the repeal of the statute which granted them, irrespective of their accrual. Likewise, where a common law principle is abrogated, its effective existence is destroyed both as to past actions and to pending proceedings. However, a right of a common law nature which is further embodied in statutory terms exists as an enforceable right exclusive of the statute declaratory of it, and therefore the right is not expunged by the repeal of the statute. Since the effect of a repeal is to obliterate the statute and to destroy its effective operation in future, or to suspend the operation of the common law, when it is a common law principle which is abrogated, any proceedings which have not culminated in a final judgment prior to the repeal are abated at the consummation of the repeal. When, however, the repeal does not contemplate either a substantive common law or statutory right, but merely the procedure prescribed to secure the enforcement of the right, the right itself is not annulled but remains in existence enforced by applying the new procedure.

22. At this juncture, we ought to consider whether the appeal proceedings constitute as a continuation proceeding of the earlier adjudication proceedings. It is a well settled law that the appeal proceeding is a continuation of the adjudication, and that this view is supported by the Honble Supreme Courts decision in *Hasmat Rai Vs. Raghunath Prasad* (1981) 3 SCC 103).

Before the Securities Appellate Tribunal, Mumbai in an Appeal No.87/2002 between Rukmani Metals and Gaseous Ltd. (Appellant) Vs. Chairman, Securities and Exchange Board of India (Respondent) , it was decided that it is a well settled principle that the appeal proceeding is a continuation of the adjudication, and the proceedings in progress in an appeal filed against the order passed by the Adjudicating Officer will be considered as the continuation proceeding.

The Income Tax Appellate Tribunal, relying on judicial precedent has also observed that proceedings pending before the Income Tax Appellate Tribunal should be regarded as continuation of assessment proceedings which takes place before the ITO. In the Case No. Appeal (Civil) 5838 of 2006 Kamla Devi Vs. Khushal Kanwar and Anr., a division bench consisting of S.B. Sinha and Markandey Katju, S.B. SINHA, J. observed that A right of appeal under the Code is statutory. Such right of appeal is also conferred under the Letters Patent of the High Court or the statutes creating the High Court.

An appeal, as is well known, is the right of entering a superior court invoking its aid and interposition to redress an error of the Court below. The central idea behind filing of an appeal revolves round the right as contra-distinguished from the procedure laid down therefor.

The Apex Court in Messrs. Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and Others [AIR 1953 SC 221], opined : The above decisions quite firmly establish and our decisions in Janardan Reddy v. The State and in Ganpat Rai v. Agarwal Chamber of Commerce Ltd., uphold the principle that a right of appeal is not merely a matter of procedure. It is matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior court. In the language of Jenkins C.J. in Nana v. Shaikh (supra) to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication."

In Shiv Shakti Co-op. Housing Society, Nagpur v. M/s Swaraj Developers and Others [AIR 2003 SC 2434], the Apex Court held : Right of appeal is statutory. Right of appeal inheres in no one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, appeal requires so. As was observed

in *The State of Kerala v. K.M. Charia Abdulla and Co.*, the distinction between right appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four-Judges Bench in *Hari Shankar and Ors. v. Rao Girdhari Lal Chowdhury* that the distinction between the appeal and a revision is a real one. A right of appeal carries with it a right of re-hearing on law as well as fact, unless the statute conferring the right of appeal limits the re-hearing in some way, as has been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law."

A question in relation to maintainability of a Letters Patent Appeal under the Indian Succession Act came up for consideration before the Apex Court in *Subal Paul v. Malina Paul and Another* [(2003) 10 SCC 361], wherein then Apex Court opined : It is not disputed that Section 299 of the Act expressly provides for an appeal to the High Court. The right of appeal, therefore, is not conferred under Section 104 of the Code of Civil Procedure. The words "save as expressly provided by any other Act" were inserted in the said provisions in 1908 having regard to difference of opinions rendered in the judgments of various High Courts as regards the applicability of letters patent. The High Courts of Calcutta, Madras and Bombay following the decisions of the Privy Council in *Hurrish Chunder Chowdhry v. Kalisunderi Devi* [(1883) 9 Cal. 482 : 10 I.A. 4] held that Section 588 of the Code of Civil Procedure, as it then stood, did not take away the jurisdiction of Clause 15 of the Letters Patent whereas the Allahabad High Court in *Bannu Bibi v. Mehdi Husain* [(1889) 11 All. 375] held to the contrary. The said words were, therefore, added in the 1908 Act to give effect to the Calcutta, Madras and Bombay High Courts' decisions."

It was further held : If a right of appeal is provided for under the Act, the limitation thereof must also be provided therein. A right of appeal which is provided under

the Letters Patent cannot be said to be restricted. Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred. It is now well-settled that the appellate jurisdiction of a superior court is not taken as excluded simply because subordinate court exercises its special jurisdiction. In G.P. Singh's 'Principles of Statutory Interpretation', it is stated:" The appellate and revisional jurisdiction of superior courts is not taken as excluded simply because the subordinate court exercises a special jurisdiction. The reason is that when a special Act on matters governed by that Act confers a jurisdiction to an established court, as distinguished from a persona designata, without any words of limitation then, the ordinary incident of procedure of that court including any general right of appeal or revision against its decision is attracted."

But an exception to the aforementioned rule is on matters where the special Act sets out in a self-contained Code the applicability of the general law procedure would be impliedly excluded. [See *Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasinghji Solanki and Ors*]."

In *Municipal Corporation of Brihanmumbai and Another v. State Bank of India* [(1999) 1 SCC 123], the Apex Court held: "This section has been introduced to minimize the delay in the finality of a decision. Prior to the enactment of the above provision, under the letters patent, an appeal against the decision of a Single Judge in a second appeal was in certain cases, held competent, though under Section 100 of the Code of Civil Procedure, there was some inhibition against interference with the findings of fact. The right of taking recourse to such an appeal has now been taken away by Section 100-A of the Code of Civil Procedure."

In *P.S. Sathappan (Dead) by L.Rs. v. Andhra Bank Ltd. and Others* [(2004) 11 SCC 672], a Constitution Bench of the Apex Court, albeit in reference to Section 104 of the Code, held : "It is thus to be seen that when the Legislature wanted to exclude a Letters Patent Appeal it specifically did so. The words used in Section 100A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the Legislature knew that in the absence of such words a Letters Patent Appeal would not be barred. The Legislature was

aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 C.P.C. Thus now a specific exclusion was provided. After 2002, Section 100A reads as follows:

"100A. No further appeal in certain cases.-Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

To be noted that here again the Legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100A no Letters Patent Appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100A nor Section 104(2) barred a Letters Patent Appeal."It was furthermore observed : We may notice that when a first appeal or second appeal was disposed of by a Single Judge, a Letters Patent Appeal had been held to be maintainable there from only because there existed no bar in relation thereto. Such a bar has now been created by reason of Section 100-A of the Code. No appeal would, therefore, be maintainable when there exists a statutory bar. When the Parliament enacts a law it is presumed to know the existence of other statutes. Thus, in a given case, bar created for preferring an appeal expressly cannot be circumscribed by making a claim by finding out a source thereof in another statute."

In *Kamal Kumar Dutta and Another v. Ruby General Hospital Ltd. and Ors.*, [2006 (7) SCALE 668], it was observed: "So far as the general proposition of law is concerned that the appeal is a vested right there is no quarrel with the proposition but it is clarified that such right can be taken away by a subsequent enactment either expressly or by necessary intendment. The Parliament while amending Section 100A of the Code of Civil Procedure, by amending Act 22 of 2002 with effect from 1.7.2002, took away the Letters Patent power of the High Court in the matter of appeal against an order of learned single Judge to the Division Bench" . it is evident that a letters patent appeal, which was filed prior to coming into force

of the 2002 Act would be maintainable. Our attention has, furthermore, been drawn to the two decisions of this Court in *Bento De Souza Egipsy (Dead) by LRs. v. Yvette Alvares Colaco and Others* [(2004) 13 SCC 438] and *Sanjay Z. Rane and Others v. Saibai S. Dubaxi (Dead) Through LRs.* [(2004) 13 SCC 439], wherein this Court opined that Section 100A of the Code has no retrospective effect.

In an Appeal Case No. CIC/WB/A/2006/00274 of Ms. Vishaish Uppal Vs Shri Kamal Dayani, CPIO. PMO dated 31/5/06 before Central Information Commission under the Right to Information Act, 2005 - Section 19 the facts and decision are: Chief Information Commissioner held that a decision by an appellate authority after issue of a notice and after a full hearing, in presence of both the parties, replaces the judgment of the lower court/ authority. The decision of the appellate authority is on merit and as such, it can vary, modify or substitute its own decision in place of the decision of the inferior authority. In appropriate cases, it can quash or set-aside the decision of the inferior authority and can pass its own decision, which may be altogether different from that of the original decision. An Appellate Authority may re-examine the matter and take fresh evidence, if required, or if considered necessary.

When we look into the actual definition of Appeal, which is defined in the Oxford Dictionary as the transference of a case from an inferior to a higher Court or tribunal in the hope of reversing or modifying the decision of the former. In the Law Dictionary by Bouvier an appeal is defined as the removal of a case from a Court of inferior jurisdiction to one of superior jurisdiction for the purpose of obtaining a review and re-trial. In the Law Dictionary by Sweet, the term appeal is defined as a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court or Court of Appeal. It is a settled law that an appeal proceeding is a continuation of the original proceeding.

23. In the instant case, in the law, during amendment process, there is a simultaneous repeal and the reenactment by substitution, but the certain provisions have been framed to come into force on such date as the Central Government may, by notification in the Official Gazettee, appoint; and different

dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision. Consequently, rights and liabilities accrued with a few and certain provisions would continue even after it is repealed, but along with certain old provisions which still exist as the newer provisions have not been brought into force. On critical analysis and scrutiny of all relevant cases and opinions of learned authors, the conclusion here becomes inescapable that whenever there is a repeal of an enactment and simultaneous reenactment, the reenactment is to be considered as reaffirmation of the old law and provisions of the repealed Act which are thus reenacted continue in force uninterruptedly unless, the reenacted enactment manifests an intention incompatible with or contrary to the provisions of the repealed Act. Such incompatibility will have to be ascertained from a consideration of the relevant provisions of the reenacted enactment and the mere absence of saving clause is, by itself, not material for consideration of all the relevant provisions of the new enactment. In other words, a clear legislative intention of the reenacted enactment has to be inferred and gathered whether it intended to preserve all the rights and liabilities of a repealed statute intact or modify or to obliterate them altogether. Moreover as contended to by the respondent/petitioners counsel, whether section 100A takes away such a right is a question to be decided. In our opinion, from the above referred decisions, it is clear that right exists and an appeal as is well known and aptly interpreted in the above decisions, is a continuation of the original proceedings. On the touchstone of the principles of law culled out from the judgments of various courts referred to above, and applied to the facts of this case it leads to a definite conclusion that when the impugned order was issued on 22.03.2007, the appellant herein, had the full opportunity and aware that he had the right to go for appeal under section 25 of the Act to the High Court (as Patent Bench of IPAB has not been formed, till then) in the event of dismissal of third party intervention opposition or otherwise he becomes aggrieved in that opposition proceedings. At that point of time, the provisions regarding the pre-grant under section 25(1) and post-grant oppositions under section 25(2) have come into force w.e.f. 01.01.2005, but the appeal provisions were only available under section 116 (2) of the Principal Act. The appellant has initiated this opposition litigation process

to the grant of patent. During these proceedings, when the matter was decided against it, the opponent, who is the appellant here, becomes aggrieved and thus entitled for a right to appeal before the High Court. If this third party intervention opposition (as pre-grant opposition) under section 25(1) has been initiated on or after 02.04.2007 before the Controller of Patents, then the opponent has no right for an appeal as per section 117A (2) which he is aware of when he initiates such an action and he is also aware that he has a right to go for an appeal only in the post grant opposition under section 25(2) of the Act. Citing the decisions and rulings of various courts and quotes from famous authors mentioned here in paras 14 to 22, we are of the opinion, that when the proceedings under 25(1) of the Act have been initiated with the appeal provisions under 116(2) of the principal Act, this appeal shall only be treated as Transferred appeal, thus maintainable, Consequently the M.P. is dismissed. In the facts and circumstances of the case, we direct the parties to bear their own costs.

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