

(1924) 09 MAD CK 0017
In the Madras High Court

(Allamputi) Venkatasubbiah

APPELLANT

Vs

Chutti Venkatasubbamma and Others

RESPONDENT

Date of Decision : 30-09-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 98

Citation : AIR 1925 Mad 1032 : (1925) 21 LW 721

Hon'ble Judges : Venkatasubba Rao, J; Jackson, J

Bench : Full Bench

Judgement

Venkatasubba Rao, J.—My learned brother and myself Were divided in opinion as to the decision in this appeal, I being for allowing the

appeal and my learned brother for dismissing it. The question was argued as to whose judgment should prevail.

2. It has been a uniform and invariable rule of this Court to apply Section 98 of the CPC and to give effect to that judgment which confirms the

decree of the lower Court, when the difference of opinion arises in appeals governed by Section 96 of the Code, The practice has been equally

uniform to give effect under Clause 36 of the Letters Patent to the judgment of the senior Judge, when the Judges of the High Court are divided in

opinion, when hearing appeals under Clause 15 of the Letters Patent.

3. Following this course, it is obvious that the judgment of my learned brother should prevail. But Mr. A. Krishnaswami Aiyar, the learned vakil for

the appellant, has contended that the question has to be reconsidered in view of the observations of their Lordships of the Privy Council in Bhaidas

Shivdas v. Bai Gulab AIR 1921 P.C. 6. I shall first examine the relevant provisions of the Letters Patent and the Civil Procedure Code. Clause 15

of the Letters Patent provides for appeals to the High Court from judgments of a single Judge, or two or more Judges of the High Court. Clause

16 similarly provides for appeals to the High Court from the Civil Courts of the Presidency and all other Courts subject to its superintendence.

Then comes Clause 36 and it enacts:

Any function, which is directed to be performed by the High Court may be performed by any Judge, or by any Division Court, and if such Division

Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point.... If the Judges should

be equally divided then the opinion of the senior Judge shall prevail.

4. So far there can be no doubt that the result is the same whether the appeal is under Clause 15 or under Clause 16; that is to say, if the Judges

are equally divided, the opinion of the senior Judge should prevail. But the provisions of the Letters Patent are, by Clause 44, made subject to the

legislative powers of the Governor-General in Council. Section 96 of the CPC runs thus:

Save where otherwise expressly provided in the body of this Code, or by any other law for the time being in force, an appeal shall lie from every

decree passed by any Court, exercising Original Jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

5. Appeals to the High Court, governed by Clause 15 of the Letters Patent, from decisions of a single Judge, or of two or more Judges, are

excluded from the operation of Section 96 of the Code of Civil Procedure, the reason being that they are otherwise expressly provided for. I

cannot agree with the contention of Mr. Krishnaswami Aiyar that the opening words of Section 96 refer only to the negation of a right of appeal.

His construction that these words mean only "unless a right of appeal is excluded" seems too narrow and must be rejected. They are more

comprehensive, and clearly exclude cases where appeals are provided for by any other enactment. Appeals therefore, under Clause 15 of the

Letters Patent are outside the ambit of Section 96 of the Code of Civil Procedure. The scope of Section 98 is determined by the scope of Section

96. As Section 96 does not govern appeals under Clause 15 of the Letters Patent, but is applicable only to appeals under Clause 16, so is the

scope of Section 98 limited to the latter class of appeals only. As the present

appeal is governed by Section 96, the judgment of my learned brother, confirming, as it does, the decree of the lower Court, ought to prevail. The CPC has varied Clause 36 of the Letters Patent to this extent.

6. Now let me turn to the decision quoted above, *Bhaidas Shivdas v. Bai Gulab* AIR 1921 P.C. 6. The case was originally decided by a Judge of the High Court of Bombay, exercising Ordinary Original Civil Jurisdiction. An appeal from the decision was heard by Scott, C.J., and Heaten, J., who differing in opinion, referred the case under the proviso to Section 98 to the decision of two other Judges of the High Court. The Privy Council held that the course taken was wrong. Their Lordships of the Judicial Committee were dealing with the case of an appeal from the judgment of a single Judge of the High Court of Bombay; and as I have shown Section 96 cannot apply in such a case. But their Lordships do not say that even if an appeal falls within Section 96, the same result follows. But the learned vakil for the appellant contends that the view he presses logically follows from the observations made by their Lordships. I cannot agree. Section 4 of the CPC is referred to in the absence of any specific provision to the contrary. Nothing in the Code shall be deemed to affect any special form of procedure prescribed by any law for the time being in force. There is a special form of procedure, prescribed by the special Clause 36 of the Letters Patent. Is not that special form of procedure affected by a specific provision to the contrary in Section 98? It is true that unless an appeal falls u/s 96, Section 98 cannot apply. Their Lordships' observations, however, were not concerned with Section 96, and their Lordships' observations cannot be read as applying to a case with which they were not dealing. As the Judicial Committee observed, in *Hari BaKhsh v. Babu Lal* AIR 1924 P.C. 126 "to understand and apply a decision of the Board, or of any Court, it is necessary to see what were the facts of the case in which the decision was given and what was the point which had to be decided." I cannot hold that the Privy Council intended to reverse, by this decision, a settled course of uniform and invariable practice.

7. Mr. Krishnaswami Aiyar has argued that Clause 36 of the Letters Patent applies in terms to Chartered High Courts whereas Section 98 of the CPC does not do so but is general in its wording and cannot be deemed to contain "a specific provision to the contrary" as contemplated by

Section 4. I cannot accede to this argument. There may be other Courts than Chartered High Courts, presided over by a Bench of two or more

Judges. But the language of Section 98 is comprehensive enough to take in a Chartered High Court, and Section 117 specially makes the

provisions of the Code, with certain exceptions, applicable to Chartered High Courts. The opinion of my learned smothery therefore, prevails and

the appeal is dismissed with costs.

Jackson, J.

8. I agree.