

(1973) 05 GUJ CK 0005
In the Gujarat High Court

Babulal Vadilal

APPELLANT

Vs

Ambica Iron and Steel Works Re. Rolling

RESPONDENT

Date of Decision : 04-05-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 98(2), 98(2)
Government of India Act, 1950 — Section 108

Citation : (1974) 15 GLR 474

Hon'ble Judges : P.N. Bhagwati, C.J.; P.D. Desai, J.; M.U. Shah, J.; J.M. Sheth, J.; C.V. Rane, J.; B.J. Divan, J.; A.D. Desai, J

Bench : Full Bench

Judgement

P.N. Bhagwati, C.J.—This reference to a Full Bench of seven Judges is necessitated because a question has arisen whether a decision given by a Full Bench of five Judges of the Bombay High Court in *Bhuta v. Lakdu* 21 Bom. L.R. 157 lays down the correct law. The point which has been referred to us for our opinion is, whether the procedure applicable in case of difference of opinion amongst Judges constituting a Division Bench where they are equally divided in opinion in the decision of an appeal from a subordinate Court is governed by Section 98 Sub-section (2) of the Code of Civil Procedure, 1908, or Clause 36 of the Letters Patent. The Full Bench of five Judges has taken the view in *Bhuta v. Lakdu* that in such a case Section 98 Sub-section (2) applies and not Clause 36 and this view taken by five Judges of the Bombay High Court is assailed in the present reference. The reference has been made by J.M. Sheth B.K. Mehta JJ. on a difference of opinion arising between them in a First Appeal preferred from a decree passed by the Third Joint Civil Judge (Senior Division), Ahmedabad. The two learned Judges differed on a question of fact and arrived at contrary conclusions. Mr. Justice J.M. Sheth was of the view that the decree of the trial Court should be confirmed while Mr. Justice B.K. Mehta was inclined to hold that the decree of the trial Court should be reversed-. Now if Section 98 Sub-section (2) were applicable, the result of the difference of opinion between the two learned Judges would be that the decree of the trial Court would have to be

confirmed. But, if on the other hand the procedure applicable were governed by Clause 36 the point of difference between the two learned Judges would have to be heard by one or more of the other Judges of the High Court and decision would follow according to the opinion of the majority of the Judges who have heard the case including those who have first heard it. That might conceivably produce a different result from that reached on an application of Section 98 Sub-section (2). The question, therefore, assumes significance as to what is the proper procedure applicable in a case of this kind. Which of the two rival provisions applies: Section 98 Sub-section (2) or Clause 36?

2. Now on this question a large multitude of authorities was cited before us. The decisions referred on behalf of the parties ranged over a period of about hundred years and represented conflicting opinions held by different High Courts from time to time. It is not possible to discover any logical consistency in these decisions which may be aptly described in the words of Lord Goddard "as a rough sea of contradictory authorities" and we do not think any useful purpose will be served by indulging in the long and rather tedious exercise of examining this welter of decisions. That would unnecessarily encumber the judgment and instead of helping to elucidate the point at issue, serve to confound it by burying it in a mass of authorities. It will be sufficient, in our opinion, if we broadly indicate the categories in which the decisions are capable of being divided and refer only to some of the important decisions, particularly those delivered by the Bombay High Court. But before we proceed to do so, we may first examine the question on principle, unfettered by any decisions of the Bombay High Court or other High Courts and aided only, by such pronouncements of the Privy Council and the Supreme Court as bear directly on the interpretation of the relevant statutory provisions and consider for ourselves what is the proper answer to be given to the question referred to us.

3. We may preface the discussion of this question by a brief history of the relevant legislative provisions which fall for consideration. The first CPC enacted by the Governor-General in Council was Act 8 of 1859. Before this Code of 1859 was enacted, the procedure of the mofussil Courts was governed by Special Acts and Regulations and the Supreme Courts was regulated by their own Rules and Orders and certain Acts such as Act 17 of 1852 and Act 6 of 1854. The Code of 1859 applied to mofussil Courts only and not to the Supreme Courts which were established by a Royal Charter. Vide the Preamble and Section 382 of the Code of 1859. Section 23 of Act 23 of 1861 which amended the Code of 1859 prescribed the procedure to be followed where Judges hearing an appeal in the Sudder Court, that is an appeal from a subordinate "Court, were equally divided in opinion. It provided that if the difference was on a point of law, the Judges should state the point on which they differed and the case would then be re-argued upon that question before one or more of the other Judges and determined according to the opinion; of the majority of the Judges by whom the appeal was heard but if the difference was on a point of fact, the decree of the trial Court should be affirmed. There were at this time in the Presidency of

Bombay two; Courts, namely, the Supreme Court established by Royal Charter and the Court of Sudder Dewany Adawlut and Sudder Foujdary Adawlut. On 6th August 1861 the High Courts Act 1861 was enacted by the British Parliament; Section 1 of this Act empowered Her Majesty, by Letters Patent, to erect and establish High Courts of Judicature at Fort William in Bengal, Madras and Bombay and Section 9 provided that "Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal... 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 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 j in each Presidency shall have and exercise all jurisdiction and every power i and authority whatsoever in any manner vested in any of the Courts in i the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts." The Courts abolished under the Act were those referred to in sac. 8 and so far as the Presidency of Bombay is concerned, they were the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foujdary Adawlut. Her Majesty in exercise of the power conferred u/s 1 issued three Letters Patent in identical terms on 14th May 1862 establishing High Courts of Judicature at Fort William in Bengal, Madras and Bombay. We are concerned only with the High Court of Bombay and we will, therefore, confine our attention to the Letters Patent in regard to the High Court of Bombay. There were two characteristics of the Letters Patent of 1862 which deserve to foe noted. One was the absence of a provision similar to Clause 36 so that the Letters Patent of 1862 did not prescribe what should be the procedure to be followed where there was an equal division of opinion between Judges constituting a Division Bench. The other was the introduction of Clause 37 which enacted that "the proceedings in the High Court in Civil cases shall be regulated by the CPC enacted by the Legislature of India of which Act 23 of 1861 forms a part." The procedure set out in Section 23 of Act 23 of 1861 was thus admittedly applicable in case of difference of opinion amongst Judges hearing an appeal id the High Court. The Letters Patent of 1862 were, however, revoked by Her Majesty by issuing fresh Letters Patent on 28th December 1865 and it is with these Letters Patent of 1865 that we are concerned in the present reference. It would be convenient at this stage to make a brief reference to some of the relevant clauses of the Letters Patent of 1865. Clause 15 confers a right of appeal to the High Court from the judgment of one Judge of the High Court or "one Judge of any Division Court pursuant to Section 108 of the Government of India Act." Clause 16 provides for the exercise of appellate jurisdiction by the High Court over the Courts in the Province and is in the following terms:

And we do further ordain that the said High Court of Judicature at Bombay shall be a Court of Appeal from the Civil Courts of the Presidency of Bombay, 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 Jaws or regulations now in force.

Clause 36 lays down the procedure to be adopted in case the Judges composing a Division Court are divided in opinion as to the decision to be given on any point. It reads:

And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Bombay, in the 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 one hundred and eight of the Government of India Act 1915; 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, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges, should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

We have reproduced here Clause 36 as it stands after its amendment by the Repealing and Amendment Act 18 of 1928. Prior to its amendment, Clause 36 provided that if the Judges are equally divided in opinion, the opinion of the senior Judge shall prevail. That was the form in which Clause 36 stood at the time when it came up for consideration before the Bombay High Court in *Bhuta v. Lakdu* (supra). Clause 44 is the last clause to which we may refer and it is in these terms:

And we do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor General in Legislative Council and also of the Governor-General in Council u/s seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency u/s seventy-two of that Act, and may be in all respects amended and altered thereby.

It may be noted that Clause 37 of the Letters Patent of 1862 was dropped in the Letters Patent of 1865 and instead a new Clause 37 was introduced which empowered the High Court to make Rules and Orders for the purpose of regulating of proceedings in civil cases which may be brought before the High Court. The result was that the Code of 1859 ceased to apply to the High Court though the appellate jurisdiction of the Sudder Court to hear first appeals under laws and regulations then in force particularly Section 72 Clause (4) of Regulation IV of 1827 and to hear Second Appeals u/s 372 of the Code of 1859

become vested in the High Court by virtue of the second part of Section 9 of the High Courts Act 1861 and Clause 16 of the Letters Patent of 1865. Of course, if any provisions of the Code of 1859 were adopted by Rules and Orders made by the High Court under Clause 37 they would apply to the High Court but in the absence of such rules or Orders, the Code of 1859 did not apply to the High Court since the issue of the Letters Patent of 1865. Thereafter if there was a difference of opinion amongst Judges constituting a Division Court, it was liable to be resolved by following the procedure set out in Clause 36 and Section 23 of Act 23 of 1861 had no application.

4. Now, before we proceed further with the narration of the history, we may conveniently at this stage examine the true scope and ambit of Clause 36. It is clear on a plain grammatical construction of the language of Clause 36 that it applies in all cases where a Division Court composed of two or more Judges is performing a function "which is hereby directed to be performed by the High Court... in the exercise of its original or appellate jurisdiction." Clause 36 is couched in language of the widest amplitude and it applies irrespective whether the Division Court is exercising original jurisdiction or appellate jurisdiction, the only condition being that the function performed by the Division Court in exercise of such jurisdiction must be a function directed by the Letters Patent to be performed by the High Court. It was common ground between the parties that Clause 15 confers appellate jurisdiction on the High Court by providing for an intra High Court appeal against a judgment of a single Judge of the High Court and, therefore, when a Division Court is hearing an appeal under Clause 15, it is performing a function which is directed by Clause 15 to be performed by the High Court in exercise of its appellate jurisdiction and consequently, if the Judges constituting the Division Court are equally divided in opinion, the procedure would be governed by Clause 36. But, what would be the position where a Division Court is hearing an appeal from a subordinate Court? Can it be said in such a case that the Division Court is performing a function which is directed by the Letters Patent to be performed by the High Court in the exercise of its appellate jurisdiction? Is the hearing of an appeal from the subordinate Court a function directed to be performed by the High Court by any clause of the Letters Patent? The answer is clear and beyond doubt if we look at Clause 16. That clause provides that the High Court of Bombay shall be a Court of Appeal from the Civil Courts of the Province of Bombay and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the High Court by virtue of any laws or regulations now in force. There was at one time some controversy as to the true meaning and import of the last part of Clause 16 and particularly the words "laws or regulations now in force". Clause 15 of the Letters Patent of 1862 which Clause 16 replaced included a provision to the following effect: "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." These words were

omitted from Clause 16 when the Letters Patent of 1865 were issued and only the words "laws or regulations now in force" were retained. The Calcutta High Court in a decision given in *India Electric Works Ltd. Vs. Registrar of Trade Marks*, inferred from this change that the appellate jurisdiction of the High Court as specified in Clause 16 was confined only to the jurisdiction to hear appeals from the Civil Courts mentioned in that clause and appeals under Acts passed and Regulations in force upto the year 1866 and if any appellate jurisdiction was conferred on the High Court by any subsequent statute, it was not within the appellate jurisdiction contemplated under Clause 16. This view taken by the Calcutta High Court was overruled by the Supreme Court in a case which went from the Bombay High Court. The decision in that case is reported in *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee)*, . Mahajan J., speaking on behalf of the Supreme Court pointed out in this decision, after referring to Clause 44:

That being so the last words of the clause "now in force" on which emphasis was placed in the Calcutta Judgment lose all their importance, and do not materially affect the point. The true intent and purpose of Clause 44 of the Letters Patent was to supplement the provisions of Clause 16 and other Clauses of the Letters Patent. By force of this Clause appellate jurisdiction conferred by fresh legislation on the High Courts stands included within the appellate jurisdiction of the Court conferred by the Letters Patent.... In our opinion the learned Judges were in error in thinking that the appellate jurisdiction possessed by the High Court under the Letters Patent of 1865 was narrower than the jurisdiction it possessed under Cl. 15 of the Letters Patent of 1862. Whatever jurisdiction had been conferred on the High Court by Clause 15 of the Letters Patent of 1861 was incorporated in the letters Patent of 1865 (as amended) and in the same measure and to the same extent by the provisions of Clauses 16 and 44 of that Charter.... We have not been able to appreciate this distinction and it seems to us it is based on some misapprehension as to the true intendment of Clause 44 of the Letters Patent. The purpose and intent of Clause 44 of the Letters Patent was to declare that in addition to the jurisdiction conferred by Clause 16 it would also exercise the appellate jurisdiction which from time to time would be conferred on it by subsequent enactments. (Underlining is ours).

It would, therefore, be seen that Clause 44 is intended to serve the same purpose as the words which found a place in Clause 15 of the Letters Patent of 1862 but which were subsequently omitted when Clause 16 of the Letters Patent of 1865 came to be enacted. This clause includes within the appellate jurisdiction of the High Court conferred by Clause 16 of the Letters Patent such further appellate jurisdiction as may from time to time be conferred on the High Court by subsequent legislation. Whenever, therefore, the High Court exercises appellate jurisdiction whether by virtue of any laws or regulations in force when the Letters Patent of 1865 were issued or by virtue of any subsequent legislation, it does so under Clause 16 read with Clause 44. The High Court in either case exercises appellate jurisdiction conferred under Clause 16 read with Clause 44

and when it does so, it performs a function directed to be performed by it by Clause 16 read with Clause 44 so as to attract the applicability of Clause 36. Clause 36 is, therefore, not confined in its application to appeals under Clause 15 but it also applies in case of appeals from subordinate Courts, for the latter fall within the appellate jurisdiction under Clause 16 read with Clause 44. This conclusion follows inevitably from the observations of the Supreme Court in *N.S. Thread Co. v. James Chadwick Bros.* (supra).

5. We are fortified in this view by the following observations from the judgment of Shadilal, C.J., in *Punjab Akhbarat and Press Co. v. Ogilvie* AIR 1926 Lah 65

the matter were *res Integra*, I would be inclined to adopt the view that the clause of the Letters Patent prescribing the method of procedure in the event of a difference of opinion between two Judges composing a Division Bench governs all appeals heard by the High Court, and that it is immaterial whether they are appeals within the High Court itself or from Courts of inferior jurisdiction. Clause 11 of the Letters Patent, which ordains that the High Court of Judicature at Lahore shall be a Court of appeal from the civil Court of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, expressly recognizes the jurisdiction to hear appeals from subordinate Courts as one of the functions of the High Court; and Clause 26 declares that "any function which is hereby directed to be performed by the High Court of Judicature at Lahore, in the 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 of the Government of India Act, 1915; 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, such point shall be decided according to the opinion of the majority of the Judges, if there is a majority; but, if the Judges be equally divided then the opinion of the senior Judge shall prevail". It would, therefore, appear that the rule prescribed by Clause 26 embraces all decisions given by the High Court in the exercise of any of the functions which the Letters Patent direct the High Court to perform, and the duty of hearing appeals from Subordinate tribunals is one of these functions.

Of course, the learned Chief Justice was constrained to hold, having regard to what he thought was the settled legal position established by a long line of authorities, that Section 98 of the Code of 1908 corresponding to Section 575 of the Code of 1882 superseded Clause 26 of the Letters Patent of the Lahore High Court and difference of opinion in case of appeals from subordinate Courts was therefore governed by Section 98 and not by Clause 26 but so far as the content of Clause 26 standing by itself is concerned, the learned Chief Justice was clearly of the opinion that it embraced not only intra High Court appeals but also appeals from subordinate Courts and that completely supports the view we are taking as to the proper ambit and coverage of Clause 36.

6. We may also point out that there are two decisions, one a decision of the Bombay High Court and the other a decision of the Calcutta High Court, which

lend support to our view. The first is a decision of the Bombay High Court in *Collector of Ahmedabad v. Samaldas Bechardas* 9 Bom 205. There, a difference of opinion arose between Mr. Justice Tucker and Mr. Justice Gibbs in a Second Appeal preferred from a subordinate Court. Clause 36 as it then stood was applied and Mr. Justice Tucker being the Senior Judge, the decree was made in accordance with his view. We do not know whether any rules or orders were made by the High Court under Clause 37 adopting Section 23 of Act 23 of 1861 but in the absence of any such Rules or Orders having been brought to our notice, we must assume that Section 23 of Act 23 of 1861 was not applied to the High Court and Clause 36 was, therefore, the only provision in the field and the Division Bench applied it in case of a Second Appeal from subordinate Court. Clause 36 was regarded by the Division Bench as wide enough to include not only intra-High Court appeals under Clause 15 but also appeals from subordinate Courts.

7. The other decisions to which we must refer in this connection is the decision of a Full Bench of the Calcutta High Court in *Roy Nandipat Mahata v. Alexander Shaw Urquhart* 4 BenLR 181. The question which arose for consideration in this case was as to which provision applied in case of difference of opinion between two Judges hearing an appeal against an order made by a subordinate Judge u/s 257 of the Code of 1859: Section 23 of Act 23 of 1861 or Clause 36? The High Court of Calcutta in exercise of the power conferred under Clause 37 had made rules on 28th December 1865 providing that "all proceedings which shall be brought before the Court... shall be regulated by Act 8 of 1859 and 23 of 1861 and by such other Acts and by such Rules and Orders of the High Court as were in force and regulated the procedure of the said Court at the time of publication of the said Letters Patent, except so far as the same are at variance with the provisions of the said Letter Patent". It was contended that by reason of these Rules, Section 23 of Act 23 of 1861 regulated the procedure on difference of opinion between the two Judges constituting the Division Bench and it excluded the applicability of Clause 36. This contention was however negatived by the Full Bench of the Calcutta High Court on the ground that the provisions of Section 23 of Act 23 of 1861 were at variance with the provisions of Clause 36 and, therefore, they were not attracted and the case was governed by Clause 36. This was a case of an appeal from a subordinate Court and yet Clause 36 was applied to resolve the difference of opinion between Judges hearing the appeal. Clause 36 was not regarded as limited only to intra High Court Appeals under Clause 15. If that had been the case, there would have been no variance between Clause 36 and Section 23 of Act 23 of 1861 so far as appeals from subordinate Courts were concerned and Section 23 of Act 23 of 1861 would have been applied. But, instead, Clause 36 was held applicable and that could only be on the footing that Clause 36 applies not only in case of intra-High Court Appeals under Clause 15 but also in case of appeals from subordinate Courts under the CPC or under any other law for the time being in force.

8. Returning to the narration of the history of legislative provisions, it may be

pointed out that the Code of 1859 was repealed and replaced by the Code of 1877 and within five years, the Code of 1882 was enacted replacing the Code of 1877. The material provisions of the two Codes so far as the present controversy is concerned were identical and it would, therefore, be sufficient to refer to the relevant provisions of the Code of 1882. It may be pointed out straightway that the Code of 1882 did not contain any provision similar to Section 4 Sub-section (1) of the present Code. On the contrary, Section 632 provided, in so many terms, that except as provided in Chapter XLVIII and Section 652, the provisions of the Code of 1882 shall apply to the High Courts. Section 575 prescribed the procedure to be followed in case of difference of opinion amongst Judges hearing an appeal. It provided that in such a case appeal shall be decided in accordance with the opinion of the majority of the Judges but if there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed. This was obvious a procedure different from that set out in Clause 36. Now Section 575 applied to the High Court by reason of the enactment in Section 632 and so also did Clause 36. How to reconcile these two provisions? That was the question which came before the High Courts in several decided cases. We shall refer to a few of these in chronological order.

9. The first decision to which we may refer in this connection is an old decision of a Full Bench of the Bombay High Court in *Appaji Bhivrav v. Shivilal Khubchand* 3 Bom. 204. That was a case of an appeal from a subordinate Court and the two learned Judges hearing the appeal being equally divided in opinion, applied Clause 36 and disposed of the appeal in accordance with the opinion of the senior Judge. There was an appeal against this decision under Clause 15 and the Full Bench hearing the Letters Patent Appeal took the view that Clause 36 was superseded by Section 575 so far as regards cases to which Section 575 was applicable and from a subordinate Court would obviously fall within Section 575, the Full Bench held that Section 575 was applicable and not Clause 36. This decision, therefore, clearly established that so far as appeals from subordinate Courts were concerned, the procedure in case of difference of opinion in such appeals was governed not by Clause 36 but by Section 575.

10. The next decision to which we must refer is also an equally old decision given by a Full Bench of the Calcutta High Court in *Gridhariji Maharaj Tickait v. Purushotwn Gossami* 10 Cal 814. The Full Bench in this case not only approved of the decision in *Appaji Bhivrav v. Shivilal Khubchand* (supra) but extended its ratio to intra-High Court appeals. The Full Bench held that Section 575 was rightly applied by the Division Bench on difference of opinion in an intra High Court appeal. This decision, therefore, went further than *Appaji Bhivrav v. Shivilal Khubchand* (supra) and propounded the view that even in case of an intra High Court appeal, Section 575 applied and Clause 36 being superseded by Section 575, had no application to such a case.

11. Both these decisions came to be considered by a Full Bench of the Allahabad High Court in *Husaini Begam v. The Collector of Muzaffarnagar* 11 All. 176. The

Full Bench approved of the decision in *Appaji Bhivrav v. Shivilal Khubchand* (supra) and *Gridhariji Maharaj Tickait v. Pursushotum Gossami* (supra), and observed that in each of these cases Section 575 was applicable and, therefore, Clause 36 was superseded. Section 575 was thus regarded as applicable in case of intra High Court appeals as well as appeals from subordinate Courts and the applicability of Clause 36 was excluded in case of both these categories of appeals on the ground that Section 575 superseded Clause 36.

12. But in *Lachman Singh v. Ram Lagan Singh* 26 All. 10, a Division Bench of the Allahabad High Court took the view that the procedure in case of difference of opinion in a intra High Court appeal under Clause 10 of the Letters Patent of the Allahabad High Court corresponding to Clause 15 of our Letters Patent was governed by Clause 27 and not by Section 575. So also, in *Roop Laul v. Lakshmi Doss* 29 Madras 1, a similar view was taken. A Division Bench of the Madras High Court held in that case that Section 575 did not apply to intra High Court appeals under Clause 15 and they were therefore, governed by Clause 36. This view was taken on the analogy of the decision of the Judicial Committee of the Privy Council in *Hurriah Chunder Chowdry v. Kali Sundari Debia* 10 Ind. App. 4 where it was held that Section 588 of the Code of 1877 corresponding to Order 43 Rule 1 of the present Code which had the effect of restricting appeals only against certain kinds of orders did not apply to a case where an appeal was sought to be preferred from an order made by a single Judge of the High Court the right of appeal against such an order would be determined by reference to Clause 15 and not Section 588: in other words, an intra High Court appeal would be governed by the provision of the Letters Patent in preference to the Code. This decision of the Privy Council in effect and substance overruled *Sombai v. Ahmadbhai* 9 Bom.. 398 and *Achaya v. Ratnavalu* 9 Mad 253 where a different view was taken.

13. It would thus be seen that under the Code of 1882 the High Courts of Bombay, Calcutta, Madras and Allahabad were all agreed that Section 575 superseded Clause 36 and since appeals from subordinate Courts were covered by Section 575, the procedure in case of difference of opinion in such appeals was governed by Section 575 and not by Clause 36, though, if Section 575 had not been there and Clause 36 had not been superseded by it, the procedure applicable would have been that set out in Clause 36. There was difference of opinion amongst the High Courts only in regard to the procedure applicable in case of intra High Court appeals under the Letters Patent. The Calcutta High Court took the view that even in case of intra High Court appeals, Section 575 applied and Clause 36 was excluded while the Madras and Allahabad High Courts held that the procedure in case of intra High Court appeals was governed by Clause 36 and not by Section 575.

14. This was the state of affairs when the Code of 1882 was repealed and the Code of 1908 was enacted. Section 4 Sub-section (1) of the Code of 1908 provides:

4. (1) In the absence of any specific provision to the contrary, nothing in this

Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

Section 98 which corresponds to Section 575 of the Code of 1882 provides, and here we are setting out the section as it stood prior to its amendment by the Repealing and Amending Act 18 of 1928:

98. (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

Section 117 corresponds to Section 632 of the Code of 1882 and it reads:

117. Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

If these were the only relevant sections there can be no doubt that by reason of Section 117, Section 98 would ordinarily apply in case of difference amongst Judges hearing an appeal from a subordinate Court as did Section 575 by reason of Section 632 of the Code of 1882. But Section 4 Sub-section (1) provides in so many terms that nothing in the Code and since the Code includes Section 98, nothing in Section 98, shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force. We have already discussed the scope and content of Clause 36 and it is apparent from that discussion that Clause 36 is wide enough to include appeals from subordinate Courts as well as intra High Court appeals and, therefore, the procedure for resolving difference of opinion set out in Clause 36 is applicable not only in case of intra High Court appeals but also in case of appeals from subordinate Courts. This procedure is different from that set out in Section 98 and it is clearly, qua Section 98, a special form of procedure prescribed by Clause 36. Now there is no specific provision to the contrary in Section 98 or any other provision of the Code and nothing in Section 98 is, therefore, to be deemed to limit or otherwise affect the special form of procedure prescribed by Clause 36 and consequently notwithstanding Section 98, Clause 36 must operate in its fullness and apply to appeals from subordinate Courts. Section 4 Sub-section (1) saves the special form of procedure prescribed in Clause 36 and provides that it

shall prevail despite conflict with Section 98. It is, therefore, clear as a matter of plain grammatical construction that under the present Code the procedure in case of difference of opinion in appeals from subordinate Courts is governed by Clause 36 and not by Section 98.

15. This would appear to be the undoubted position in principle but let us see what the decided cases say. The first decision to which we must refer in this connection is the decision of the Full Bench of the Bombay High Court in *Bhuta v. Lakdu* (supra) but before we do so, we may make a brief reference to an earlier decision of the Bombay High Court in *Suraj Mai v. Hornfman* 20 Bom. L.R. 185. That was a case of an intra High Court appeal under Clause 15 and the question arose whether on difference of opinion amongst the Judges, Section 98 applied or Clause 36. The Division Bench observed that Clause 36 prescribed a special form of procedure in certain cases where the Judges of a Division Bench differed and this special form of procedure was saved by Section 4 Sub-section (1) and the applicability of Section 98 excluded in cases to which this special form of procedure applied. It was held that Section 129 made it abundantly clear that the intention of the Legislature was that in trial of cases on the Original Side as well as appeals arising in the Original Jurisdiction, nothing should be done which is inconsistent with the Letters Patent and, therefore, the special form of procedure prescribed in Clause 36 applied in case of intra High Court appeals arising from the Original Side and Section 98 had no application in case of such appeals. This decision was no doubt given in the context of intra High Court appeals but the principle on which it was based must apply equally in relation to appeals from subordinate Courts. Clause 36, as we have already pointed out, embraces appeals from subordinate Courts as well as intra High Court appeals and therefore, if the special form of procedure prescribed in Clause 36 is saved for intra High Court appeals, it must be held equally to be saved for appeals from subordinate Courts and Clause 36 must accordingly be held to apply in relation to them and not Section 98.

16. But the Full Bench of the Bombay High Court took a different view in *Bhuta v. Lakdu* (supra). That was a case where the Judges hearing a Second Appeal from the mofussil were equally divided in opinion and the only question which, therefore, really arose for consideration was whether in a Second Appeal from the mofussil the procedure in case of difference of opinion is governed by Section 98 or by Clause 36. The Full Bench, however, did not discuss this question on principle but contended themselves by saying that "The Full Bench in *Appaji Bhivrav v. Shivilal Khubchand*, considered that the provisions of the Letters Patent had been superseded by Section 575 of Act X of 1877 so far as regards cases to which Section 575 was applicable" and "The terms of the reference would be satisfied by an answer in this sense." The Full Bench failed to notice that there was a material difference between the provisions of the Code of 1908 under which the case was required to be decided by them and the provisions of the Code of 1882 under which *Appaji Bhivrav v. Shivilal Khubchand* was decided. The Code of 1888 did not contain a provision similar to Section 4 Sub-section (1) of

the Code of 1908 saving the special form of procedure prescribed by Clause 36 and it was on account of the absence of such provision that the Full Bench held in Appaji Bhivrav v. Shivalal Khubchand that Section 575 read with Section 632 of the Code of 1882 superseded Clause 36 so far as regards cases to which Section 575 was applicable. The ratio of the decision in Appaji Bhivrav v. Shivalal Khubchand could not be applied to a case arising under the Code of 1908 because the Code of 1908 provided in so many terms in Section 4 Sub-section (1) that nothing in Section 98 shall be deemed to limit or otherwise affect the special form of procedure prescribed by Clause 36. This important distinction between the provisions of the two Codes was completely overlooked by the Full Bench in Bhuta v. Lakdu and with great respect to the learned Judges who constituted the Full Bench, they blindly and mechanically followed the decision in Appaji Bhivrav v. Shivalal Khubchand without caring to inquire whether (hat decision could have any application under the Code of 1908. The Full Bench having observed that the question referred to them was concluded by the decision in Appaji Bhivrav v. Shivalal Khubchand proceeded to consider the further question which did not arise directly before them, namely, whether the decision in Appaji Bhivrav v. Shivalal Khubchand could be extended to intra High Court appeals from the Original Side or whether they were governed by the decision in Surajmal v. Horniman. The Full Bench embarked upon a discussion of the question whether Surajmal v. Horniman was rightly decided and held that it was. Scott, C.J., relied on Section 4 Sub-section (1) and held that the generality of the words used in that section "should be held to cover the express provisions of the High Court Letters Patent, Clause 36" and the special form of procedure prescribed in Clause 36 was, therefore, saved and intra High Court appeals under Clause 15 were governed by Clause 36. Now if Section 4 Sub-section (1) could be availed of by the learned Chief Justice for saving the special form of procedure prescribed in Clause 36 in relation to intra-High Court appeals, it is difficult to see how the learned Chief Justice could ignore Section 4 Sub-section (1) when he came to a consideration of the question whether appeals from subordinate Courts were governed by Clause 36. Clause 36 applied to both categories of appeals and if in case of one category of appeals the operation of Clause 36 was saved by Section 4 Sub-section (1), we fail to see how a view could be taken that in case of the other category of appeals Section 4 Sub-section (1) did not save the operation of Clause 36. The same reasoning which the learned Chief Justice applied for the purpose of saving the operation of Clause 36 in relation to intra High Court appeals must apply equally to save the operation of Clause 36 in relation to appeals from subordinate Courts. Hay-ward J., who delivered the other leading judgment also took the same view as Scott C.J. The learned Judge, with great respect, allowed himself to be misguided by the decisions given under the Code of 1882 overlooking that the Legislature had in enacting the Code of 1908 made a fundamental departure from the Code of 1882 by introducing Section 4 Sub-section (1) and the decisions given under the Code of 1882 could not, therefore, be applied while considering a question arising under the Code of 1908. If only the effect of Section 4 Sub-section (1) had been properly

appreciated by the learned Judge, he would have definitely come to a different conclusion. It would, therefore, be seen that *Bhuta v. Lakdu* was not correctly decided by the Full Bench. The Full Bench failed to appreciate the true effect of Section 4 Sub-section (1) and erred in holding that the procedure in case of difference of opinion in appeals from subordinate Courts was governed by Section 98 and not by Clause 36.

17. This fallacy underlying the decision of the Full Bench in *Bhuta v. Lakdu* was exposed by the Judicial Committee of the Privy Council in a decision given only two years later in *Bhaidas Shivdas v. Bai Gulab* 23 Bom. L.R. 623 : 43 Ind.App, 181. That was, of course, a case of an intra High Court appeal under Clause 15 and while dealing with the question as to what procedure to be followed in case of difference of opinion in such an appeal, Lord Buckmaster, after referring to Section 4 Sub-section (1) of the Code of 1908 observed:

There is no specific provision in Section 98, and there is a special form of procedure which was already prescribed. That form of procedure Section 98 does not, in Their Lordships' opinion, affect. The consequence is that the appellant is right in saying that in this instance a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by judgments in Madras, Allahabad, and in Calcutta: see *Roop Laul v. Lakshmi Doss*, *Lachman Singh v. Ram Lagan Singh*, and *Nundeeapat Mehta v. Urguhart*.

These observations were undoubtedly made in the context of intra High Court appeals but the reasoning behind these observations is equally applicable in case of appeals from subordinate Courts because both categories of appeals are embraced by Clause 36. This decision of the Privy Council must, therefore, be held to have overruled *Bhuta v. Lakdu* by necessary implication. Moreover, the Judicial Committee pointed out that the view taken by them in regard to the interaction of Section 98 and Clause 36 was not novel for it was supported inter alia by the judgment of the Calcutta High Court in *Nundeeapat Mahta v. Urghuhart* (supra). The case of *Nundeeapat Mahta v. Urghuhart*, as we have pointed out above, related to an appeal from a subordinate Court and it was held by the Calcutta High Court in that case that the procedure in case of difference of opinion in such an appeal was governed by Clause 36. This decision of the Calcutta High Court was approved by the Judicial Committee and it must, therefore, be held that according to the Judicial Committee it is Clause 36 and not Section 98 which applies in case of an appeal from a subordinate Court. The decision in *Bhuta v. Lakdu* cannot, therefore, be regarded as good law after the decision of the Judicial Committee in *Bhaidas Shivilal v. Bai Gulab*, and it need not deter us from taking a different view.

18. But the matter does not rest here. If at all there was any doubt in regard to this question, it has been completely laid at rest by the introduction of Sub-section (3) in Section 98 by the Repealing and Amendment Act 18 of 1928. That

subsection reads as follows:

98. (3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.

This sub-section makes it clear beyond doubt that nothing in Section 98 shall be deemed to alter or otherwise affect Clause 36. Clause 36 is not to be controlled by Section 98. If there is any area in which Section 98 and Clause 36 operate simultaneously, Clause 36 must prevail and Section 98 must give way. Now we need not repeat that Clause 36 embraces exercise of appellate jurisdiction in both categories of appeals, namely, appeals from subordinate Courts as well as intra High Court appeals under Clause 15. It is, therefore, obvious that, at any rate, since the introduction of Sub-section (3), the procedure in case of difference of opinion in appeals from subordinate Courts must be held to be governed by Clause 36 and not by Section 98. In fact, as we have pointed out above, that was always the law under the Code of 1908 even before the amendment by reason of Section 4 Sub-section (1). Sub-section (3) of Section 98 merely clarified the existing legal position by removing a doubt which was cast upon it by some judicial decisions. That is made clear by the Statement of Objects and Reasons of the Repealing and Amending Act 18 of 1928 where it is stated that the object of introduction of Sub-section (3) in Section 98 is to enact more clearly the provision which was previously implied in sec, 4 of the Code. The respondents relied on the decision of the Allahabad High Court in *Muhammad Ishan v. Muhammad Rustam Ali Khan* 40 All. 292 and urged that it is a recognised rule that where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions must be adhered to. We accept this principle but we do not see "how it has any application here. The law prior to the amendment was never different. The amendment did not seek to alter the law it merely clarified what was always the law under the Code of 1908 and what that law was on a proper interpretation of Section 4 Sub-section (1) has already been discussed by us. But even if the view be taken that prior to the amendment, the law was that appeals from subordinate Courts were governed by Section 98 despite the existence of Section 4 Sub-section (1), Sub-section (3) introduced in Section 98 made it very clear that Clause 36 must operate in its fullness and its applicability to appeals from subordinate Courts should not be excluded by Section 98 and to that extent the pre-existing law must be held to have been altered. The decision in *Bhuta v. Lakdu* (supra) cannot, therefore, in any view of the matter, stand after the introduction of Sub-section (3) in Section 98.

19. We may now turn to the decisions of the other High Courts. The Madras High Court in a Division Bench judgment in *Veeraraghava Reddy v. Subba Reddy* 43 Mad 37 , held that even in case of appeals from subordinate Courts, Clause 36 applies and not Section 98 but this judgment is not of much help because it does not contain any discussion of the question on principle. This question again came

up for consideration before a Division Bench of the Madras High Court in (Allamputi) Venkatasubbiah Vs. Chutti Venkatasubbamma and Others, . The Division Bench held that the previous practice of the Court was to apply Section 98 to appeal from subordinate Courts and the decision in Bhaidas Shivdas v. Bai Gulab was not intended to override the rule of law enshrined in this practice. This decision is plainly incorrect for reasons which we have already discussed. We need not repeat those reasons. The Madras High Court was again called upon to consider this question in Immidisetti Dhanaraju and Others Vs. Motilal Daga and Others, Madras 641 which was a Full Bench decision. The Full Bench relied on Bhaidas Shivdas v. Gulab (supra) and also emphasized Section 98 Sub-section (3) for taking the view that Clause 36 is not controlled by Section 98 and it applies to all appeals, whether from a single Judge of High Court or from subordinate Court. This decision of the Full Bench has been consistently followed in the Madras High Court and it supports the view we are taking.

20. The view taken by the Calcutta High Court on this point varied from time to time. Though there was no specific decision on the point in Suresh Chandra Mukerjee Vs. Shiti Kanta Banerjee and Others, , Page J., observed in that case that Clause 36 applies to all appeals, whether intra High Court or from subordinate Courts. Two different views were expressed in the subsequent case of Becharam Choudhuri and Others Vs. Purna Chandra Chatterji and Others, . There Walmsley, J., took the view that Clause 36 applies not only to intra High Court appeals but also to appeals from subordinate Courts while Suhrawardy J., observed that so far as appeals from subordinate Courts are concerned, they are governed by Section 98, The next decision which followed was that in Prafulla Katnini v. Bhabani Nath AIR 1926 Cal 121. In this case Page, J., who was a party to the judgment in Suresh Chandra v. Shiti Kanta (supra) changed his opinion and held that Bhaidas v. Gulab was confined to appeals under the Letters Patent and did not apply to appeals from subordinate Courts and Walmsley J., also allowed himself to be persuaded to take the same view as Page J., observed in the opening paragraph of his Judgment that this controversy can be satisfactorily set at rest "only by the action of the Legislature now long overdue" and invited the Legislature to solve the doubts and differences by an express enactment. There were in fact no doubts and differences. The effect of Section 4 Sub-section (1) was clear and indubitable, and in our opinion, it saved the full content and operation of Clause 36 notwithstanding Section 98. But even so the Legislature in response to the invitation of Page J., and with a view to leave no scope for doubts or debate, introduced Sub-section (3) in Section 98 by the Repealing and Amendment Act 18 of 1928. Since then the Calcutta High Court has taken the view that the procedure in case of difference of opinion in appeals from subordinate Courts also is governed by Clause 36.

21. So far as the Lahore High Court is concerned, a Division Bench of that Court held in Punjab Akhbarat and Press Co. v. Ogilvie (supra), that appeals under the Code were governed by Section 98 and those under the Letters Patent by Clause 36. Shadilal, C.J., who presided over the Bench pointed out that if the matter

were res Integra, he would have held that Clause 26 of the Letters Patent of the Lahore High Court applied to all appeals heard by the High Court and it was immaterial whether they were appeals within the High Court itself or from Courts of inferior jurisdiction but he felt compelled by authorities to take a different view. We do not think, for reasons which we have already discussed, that the learned Chief Justice should have felt constrained to decide the case contrary to his personal opinion. The personal opinion entertained by the learned Chief Justice was plainly correct. This question again came up for consideration before a Full Bench of the Lahore High Court in *Mt. Sardar Bibi v. Hag Nawaz Khan* AIR 1934 Lah 371 . The Full Bench held relying on *Dhanaraju v. Motilal* (supra) and *Debi Prasad Pandey Vs. Gaudharn Rai and Others*, that "it is now well-settled that with the addition of Sub-section (3) Section 98, Civil Procedure Code, made by the Repealing and Amending Act, 18 of 1928, that section has no application to cases heard by a Division Bench of a Chartered High Court, whether in appeals from decrees of subordinate Courts, or from decrees passed by a Judge of the High Court 011 the original side, and that all cases of difference of opinion among the Judges composing the Division Bench are governed by Clause 26, Letters Patent". This decision completely supports the view we are taking.

22. We have no decision of the Patna High Court prior to the introduction of Sub-section (3) in Section 98--at any rate none was cited before us. The first case where the question of competing claims between Section 98 and Clause 28 of the Letters Patent of the Patna High Court in relation to appeals from subordinate Courts came to be considered by the Patna High Court was that in *Debi Prasad v. Gaudham Rai* (supra). The Division Bench held in that case that the introduction of Sub-section (3) in Section 98 had resolved the controversy and it was clear that Clause 28 applied to all appeals, irrespective whether they were intra High Court appeals or appeals from subordinate Courts. The same view was reiterated by the Patna High Court in *Rajnarain v. Saligram* I.L.R.Pat 332 and *Bokaro and Ramgur Ltd. Vs. State of Bihar*, .

23. It would, therefore, be seen that there is now a consensus amongst most of the High Courts in the country that the procedure in case of difference of opinion in appeals from subordinate Courts is governed by the appropriate clause of the Letters Patent and not by Section 98 and the view we are taking is in accord with the decisions of the other High Courts.

24. The respondents, however, made a valiant attempt to escape this conclusion by putting forward a rather ingenious argument. The respondents contended that Clause 36 was impliedly repealed by Section 575 read with Section 632 of the Codes of 1877 and 1882 in so far as it applied to appeals from subordinate Courts and the repeal of the Code of 1882 by the Code of 1908 did not revive that part of Clause 36 which was impliedly so repealed and, therefore, even after the enactment of the Code of 1908, Clause 36 continued in its truncated form and did not apply in case of appeals from subordinate Courts and the saving provisions enacted in Section 4 and Sub-section (3) of Section 98 were

consequently futile: they merely saved the special procedure prescribed in Clause 36: they could not add to the content of Clause 36 and bring within its scope and ambit something which was not there. Clause 36, therefore, did not apply to appeals from subordinate Courts and they were governed by sec, 98. This contention plausible though it may seem is, in our opinion, not well-founded. It proceeds on the hypothesis that Clause 36 in so far as it applied to appeals from subordinate Courts was impliedly repealed by Section 575 read with Section 632 of the Codes of 1877 and 1882. Of course, if this hypothesis is correct, there can be no doubt that the respondents must succeed. It is a well-settled rule of interpretation now embodied in Section of the General Clauses Act, 1906, that where a Statute repeals a repealing enactment, it shall not be construed as reviving the enactment previously repealed, unless words are added reviving that enactment and this Rule apparently applies to cases of implied repeal as well as repeals by express enactment. It would, therefore, seem that if Section 575 read with Section 632 of the Code of 1882 and we need refer only to the Code of 1882 because the Code of 1877 contained identical provisions in Sections 575 and 632 as the Code of 1882--impliedly repealed Clause 36 to the extent that it applied to appeals from subordinate Courts, the repeal of the Code of 1882 by the Code of 1908 could not have the effect of reviving that part of Clause 36 which was impliedly so repealed because there was no provision in the Code of 1908 to that effect. But we do not think this hypothesis is correct. It is not possible to say that there was implied repeal of any part of Clause 36 by Section 575 read with Section 632 by the Codes of 1877 and 1882. It is true that Section 9 of the Indian High Courts Act, 1861, provides in so many terms that the jurisdiction, power and authority of every High Court established under that Act shall be "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council" and Clause 44 of the Letters Patent declares that the provisions of the Letters Patent are "subject to the Legislative powers of the Governor General in Council" and may thereby be in all respects amended and altered. Clause 36 could, therefore, be validly altered and amended and even repealed by an enactment made by the Governor-General in Council in exercise of the law-making power conferred u/s 22 of the Indian Council Act, 1861. But the question is: whether the Governor-General in Council did so by enacting Sections 575 and 632 of the Codes of 1877 and 1882. Did Section 575 read with Section 632 have the effect of repealing Clause 36 in its application to appeals from subordinate Courts?

25. Now it may be noted that while Clause 36 applies in all cases where the Judges are equally divided in opinion irrespective whether the case arises in the exercise of original jurisdiction or appellate jurisdiction-and here appellate jurisdiction includes revisional jurisdiction Vide *Shanker Ramchandra v. Krishnaji Dattatraya* AIR 1970 S.C.I. Section 575 was on its plain terms restricted in its application to appeals. Section 575, therefore, dealt only with the limited class of cases out of a wider class covered by Clause 36. Since Section 575 was made

applicable to High Courts established under the Indian High Courts Act, 1861 by Section 632, there can be no doubt having regard to Section 9 of the Indian High Courts Act, 1861 and Clause 44 of the Letters Patent that appeals from subordinate Courts which fall within the scope and ambit of Section 575 came to be governed by that section and Clause 36 ceased to apply to them. But that does not mean that Clause 36 was in part impliedly repealed by Section 575. It is indeed difficult to appreciate how Clause 36 could be impliedly repealed in its application to a class of cases. It is true that the Legislature can exercise the power of repeal by implication but it is an equally well-settled principle of law that there is a presumption against implied repeal. That presumption is based on the ground that the intention to repeal, if any had existed, would have been declared in express terms. Of course, this presumption would be rebutted if the provisions of the subsequent statute are so inconsistent with those of the prior statute that the two cannot stand together or "the two statutes together would lead to wholly absurd consequences or... the entire subject matter were taken away by the subsequent statute." It is stated by Crawford on Statutory Construction, page 631, paragraph 311: "There must be what is often called "such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made to stand together." In other words, they must be absolutely repugnant, or irreconcilable. Otherwise, there can be no implied repeal, as we have pointed out in the preceding section, for the intent of the legislature to repeal the old enactment is utterly lacking". But how is it to be determined whether there is absolute repugnancy between the old and the new law so as to justify the inference that the former is impliedly repealed by the latter? The Supreme Court has laid down the following three principles in *Deep Chand Vs. The State of Uttar Pradesh and Others*, Whether there is direct conflict between the two provisions: (2) whether the Legislature intended to lay down an exhaustive Code in respect of the subject matter replacing the old law; and (3) whether the two laws occupy the same field and refer to the same subject matter. It is also necessary to bear in mind, as pointed out by Crawford at page 634 paragraph 312 that "it is essential that the new statute cover the entire subject matter of the old; otherwise there is no indication of the intent of the legislature to abrogate the old law." It is clear on an application of these principles that Clause 36 could not be said to have been impliedly repealed by Section 575 in so far as it applied to appeals from subordinate Courts. Clause 36 and Section 575 were not so absolutely repugnant or irreconcilable that they could not stand together. Section 575 did not cover the entire subject matter of Clause 36 so that if effect was given to Section 575, Clause 36 rendered itself devoid of application and futile. Section 575 and Clause 36 could both operate together, Section 575 in its limited field of appeals from subordinate Courts and Clause 36 in the remaining field. Section 575 did not, therefore, have the effect of repealing Clause 36 or any part of it. The repeal of a statute means as if the repealed statute was never on the Statute Book. It is wiped out from the Statute Book. The effect of Section 575 was certainly not to wipe out any part of Clause 36 from the Statute Book. Clause 36 remained

untouched so far as the Statute Book is concerned. The only thing that happened was that when Sections 575 and 632 were enacted, the operation of Clause 36 became subject to Section 575. Clause 36 remained unrepealed but during the continuance of Section 575 it ceased to operate in the field occupied by Section 575. The ambit of its operation was thus limited without there being repeal of any of its provisions. Vide paragraph 12 of the judgment of Mahajan C.J. in *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, . We may in this connection profitably refer to the decision of the Court of Appeal in England in *Jenkins v. Jones* (1882) 9 Q.B.D. 128 . There, Section 2 of 32 Hen. 8, C. 9 prohibited sale of "any pretended rights or titles". The settled legal position was that all dealings with rights of entry, except by release to the person in possession, were dealings with "pretensed rights and titles", and were, therefore, within the inhibition of Section 2 of 32 Hen. 8, c- 9, Section 6 of 8 9 Vict. c. 106, however, permitted the sale of rights of entry and the question arose whether Section 6 of 8 9 Vict. c. 106 repealed Section 2 of 32 Hen. 8, c.9. Cotton, L.J., speaking on behalf of the Court of Appeal held that the effect of Section 6 of 8 9 Vict. c. 106 was not to repeal Section 2 of 32 Hen.8, c.9 but to restrict its application. This decision bears close analogy to our case and it would thus be seen that there was no implied repeal of any part of Clause 36 by Section 575. Clause 36 was merely over-shadowed by Section 575 to the extent of the field occupied by Section 575. This shadow eclipsed the operation of Clause 36 in so far as appeals from subordinate Courts are concerned. So long as the shadow lasted, the operation of Clause 36 was restricted but as soon as the shadow was removed by the repeal of Section 575, the eclipse having gone, Clause 36 sprang back into full life and once again began to operate in its entire field without any restriction or inhibition. The doctrine of eclipse laid down by the Supreme Court in *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, and *Dipchand v. State of U.P.* (supra) and extended in *Mohammadbhai Khudabux Chhipa and Another Vs. The State of Gujarat and Another*, must apply here with equal force. It is, therefore, clear that Clause 36 began to operate in its fullness and applied to appeals from subordinate Courts as soon as the Code of 1882 containing Sections 575 and 632 was repealed by the Code of 1908. There was no eclipse on the operation of Clause 36 by Section 98 of the Code of 1908 because of Section 4 and in any event even if our view as to the effect of Section 4 is erroneous and there was such eclipse, it was removed by the introduction of Section 98 Sub-section (3). This contention seeking to limit the applicability of Clause 36 and to exclude from it appeals from subordinate Courts must, therefore, fail.

26. That takes us to the last argument advanced on behalf of the respondents. The respondents contended in the alternative that in any event, even if we were inclined to think differently, the view taken by the Full Bench of five Judges in *Bhuta v. Lakdu* (supra) should not be disturbed since it has held the field for over fifty years. The principle of *stare decisis* was invoked by the respondents in support of this contention. We do not think this contention is sound. The principle

of stare decisis has no application here. This principle is stated in the following terms in Halsbury's Laws of England, Third Edition, Vol. 22 P. 802 para 1690:

Apart from any question as to the Courts being of coordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But the supreme appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside the statute and outside the common law, when no title and no contract will be shaken, no persons can complain, and no general course of dealing be altered by the remedy of a mistake.

The same doctrine is thus explained in *Corpus Juris Secundum*, Volume 21, page 302 para. 187:

Under the stare decisis rule, a principle of the law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the Courts, it is not universally applicable.

The *Corpus Juris Secundum*, however, adds a rider that "previous decisions should not be followed to the extent that grievous wrong may result; and accordingly, the courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous. The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the Court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result". It has also been pointed out by *Craies on Statute Law*, (Seventh Edition), at page 156 that the rule of stare decisis does not apply "when the earlier decisions have not been uniform. When that is the case the Court has to determine which current of authority should prevail and construe the statute accordingly. Nor can this rule of construction be applied when the meaning of a statute is plain and free from ambiguity". Lord Loreburn L.C. said in *West Ham Union v. Edmonton Union* (1908) A.C. 1 :

Great importance is to be attached to old authorities on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and that practical injustice is the consequence that must flow from them, I consider it is the duty of the House to overrule them,

Furthermore, this rule is applicable only when transaction relating to property or contractual rights have been completed on the faith of a particular construction put upon a statute by earlier decisions. In *Pate v. Pate* (1915) A.C. 1100, Lord Sumner in declining to follow earlier cases on the construction of a Ceylon Ordinance which had stood for forty-four years said: "This is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb... nor is it in any case sound to misconstrue a statute for fear that in particular instances hardship may result. That is a matter for the legislature, not for the Courts."

26. Now, in the present case, it must be remembered that the CPC is a Central statute having application throughout the country and the rule of stare decisis can, therefore, have application in the construction of Section 98 only if we find that a particular interpretation of the section has prevailed throughout the country without interruption for a long period of time. It is difficult to see how the principle of stare decisis can be applied in the construction of an all India Statute on the basis of a decision of a single State High Court howsoever old the decision may be. On the contrary, it would be a sound principle that as far as possible there should be uniformity in interpretation of an All India statute and if a State High Court finds that a view taken by it in the past is erroneous and contrary view-which is the correct view-has been taken by other State High Courts, it is but proper that the State High Court should be anxious to rectify the error and achieve uniformity in interpretation and the doctrine of stare decisis need not stand in the way of the State High Court in reversing its earlier view. In case of an All India Statute, uniformity in interpretation is a much more desirable objective than perpetuation of an erroneous interpretation by a State High Court on the principle of stare decisis. Here, as is evident from the preceding discussion, the High Courts of Patna, Allahabad, Lahore and Madras have definitely taken the view that the relevant clause of the Letters Patent governs the procedure in case of difference of opinion not only in intra-High Court appeals under the Letters Patent but also in appeals from subordinate Courts. There is now no High Court, other than Bombay and Gujarat High Courts, which has maintained the view that Section 98 applies in case of difference of opinion in appeals from subordinate Courts. The Bombay and Gujarat High Courts stand alone in this view. If that be so, there is no reason why the Gujarat High Court should not fall in line with the other High Courts when it is found that the view taken in *Bhuta v. Lakdu* (supra) is clearly erroneous. Moreover, this is not one of those cases in which transactions relating to property or contractual rights have been completed on the faith of the interpretation placed on Section 98 in *Bhuta v. Lakdu*. Section 98 merely embodies a rule of procedure in case of difference of opinion in an appeal and no titles, transactions or rights are founded on it which would be disturbed or shaken by reversal of the decision in *Bhuta v. Lakdu*. It may also be noted that the decision in *Bhuta v. Lakdu* is plainly wrong. It ignores the scope and content of Clause 36 and the effect of the saving provision in Section 4. In fact it is impossible to take the view that Section 98 supersedes

Clause 36 in so far as appeals from subordinate Courts are concerned if we give proper effect to Section 4. The meaning which emerges from a conjoint reading of Sections 4 and 98 and Clause 36 is plain and unambiguous and it clearly shows that *Bhuta v. Lakdu* (supra) is wrongly decided. The subsequent course of judicial decisions of other High Courts also discloses the weakness in the reasoning on which the decision in *Bhuta v. Lakdu* is based. The fallacy underlying the reasoning in *Bhuta v. Lakdu* is also exposed by the decision of the Supreme Court in *Union of India v. Mohindra Supply Co.* (supra). Now if the decision in *Bhuta v. Lakdu* is plainly incorrect, there is no reason why the error should be allowed to be perpetuated by invoking the doctrine of stare decisis. We may in this connection refer to the following passage from the speech of Lord Gardiner, L.C. in *Button v. Director of Public Prosecutions* (1965) 3 All E.R. 587 where the Lord Chancellor overturned a view of the law as to affray which had prevailed since over a century:

The most powerful argument for the appellant is that afforded by the lapse of over a century since the error crept into the law. During that period one may assume that prosecutions and trials have been based on the hypothesis that only in respect of acts done in a public place can there be a conviction for affray. But no a 1 fetation of the surrounding law has been founded on that hypothesis, nor can it properly be regarded as an intentional development of the law of affray. The only result of it has been that during that period the citizen who has been the victim of affray in a private place has in practice been deprived of the protection of the law. That is not in itself any reason to continue the deprivation. Moreover there is no argument of principle or logic to gild the error. In riot and assault, two kindred offences which legal writers have so often treated in association with affray, there is no requirement that they should be committed in a public place. To distinguish affray in this respect is captious and illogical. There seems therefore no adequate reason to perpetuate the error.

This reasoning must apply equally here where the error is only half a Century old. But quite apart from this consideration, the decision of the Judicial Committee in *Bhaidas v. Gulab* (supra) is inconsistent with *Bhuta v. Lakdu* (supra) and must be regarded as having overruled it and obviously the principle of stare decisis cannot be founded on a decision the reasoning of which is overruled by a subsequent decision of a superior Court. Moreover, there has been a change of the law since *Bhuta v. Lakdu* was decided, namely, Sub-section (3) has been introduced in Section 98 and we have to decide the question before us in the light of Sub-section (3) of Section 98. There has been no decision of the Bombay High Court or Gujarat High Court since the introduction of Sub-section (3) in Section 98 where a view has been taken that Section 98 applies in case of appeals from subordinate Courts. The doctrine of stare decisis cannot, therefore, stand in our way in adopting a view different from that taken in *Bhuta v. Lakdu* (Supra).

27. These were the reasons which weighed with us in answering the question

referred to us for our opinion by saying that the procedure to be adopted by the High Court in case of equal division of opinion between Judges hearing a First Appeal from a decision of a subordinate Court is governed by Clause 36 of the Letters Patent and not by Section 98 the Code of Civil Procedure, 190.