

**(1931) 07 AHC CK 0038**  
**In the Allahabad High Court**

Hafiz Shaikh Fazlur Rahman

APPELLANT

Vs

Haji Abdulla and Others

RESPONDENT

---

**Date of Decision :** 21-07-1931

**Acts Referred:**

**Citation :** (1931) 07 AHC CK 0038

**Final Decision :** Dismissed

---

### **Judgement**

1. A difference of opinion has arisen between the members of this Bench (vide our separate judgments), it has been argued by the learned Advocate for the appellant that this appeal is governed by Clause 27 of the Letters Patent of 1866 and not by Section 98 of the Code of Civil Procedure. Section 98(2) nine as follows:

Where there is no such majority which concurs in a judgment varying or reversing a 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 that 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.

2. This rule is applicable not only first to appeals but also to appeals from the appellate decrees of the Subordinate Courts (vide Section 108 of the Code of Civil Procedure).

3. Where an appeal has been filed to this Court under the Code of Civil Procedure, the procedure regulating the hearing and the disposal of the appeal as laid down in the Code must be followed. The essence of a Code is to be exhaustive and the Code has indicated the course which should be adopted where the difference has arisen between the Judges on a question of fact and the

course where the difference has arisen on a point of law. It is clear then no reference can be made under this section, where the Judges have disagreed on a question of fact as in this case. There is no warrant for the view that in an appeal to this Court under the Code of Civil Procedure, in case of a difference of opinion between two Judges, hearing the appeal, the procedure which should be followed is not the one clearly and specifically indicated in Section 98(2) but the one laid down in Section 27 of the Letters Patent. There is a difference of procedure between the provisions of these two enactments. Under Clause 27, the reference is imperative and obligatory and not discretionary as in Section 98 and under Clause 27 the subject of the reference is wider in scope as it may relate to both questions of fact and of law and is not restricted to points of law only as in Section 98.

4. It has been argued that Section 98(1) and (2) are not applicable to the High Court and reliance has been placed upon sub Section (3) which provides:--"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 was incorporated into the section by the Repealing and Amending Act, XVIII of 1928. It is clear that Section 98 cannot control or over-ride the provisions of Sections 10 and 27 of the Letters Patent, The words of sub Section (3) of Section 98 cannot be construed to mean that Section 98(1) and (2) is superseded by reason of certain provisions of the Letters Patent. We are clearly of opinion that Clause 27 of the Letters Patent and Section 98 of the Code are not incongruous. They do not overlap and are applicable to different sets of circumstances. Where there is an appeal under the Letters Patent and two Judges, hearing the appeal, differ in their opinion, the procedure is governed by Section 27 of the Letters Patent; but where the appeal is under the Civil Procedure Code, the procedure is governed by Section 98. The preponderance of judicial decisions is in support of this view. These cases have been summarised in Sir Dinshaw Mulla's CPC (9th Edition, page 296). We accept the statement of the law set out there and respectfully dissent from the view of the Madras High Court in *Immidiseti Dhanaraju and Others Vs. Motilal Daga and Others*,

5. The result is that we must give effect to the rule in affirmance of the decree of the lower Appellate Court.

6. We dismiss this appeal with costs.