

(1998) 06 CAL CK 0012

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction, G.A. No. 586 of 1998, A.P.O. No. 671 of 1994, C.S. No. 755 of 1985 in item No. 1, G.A. No. 237 of 1997, A.P.O. No. 94 of 1996, W.P. No. 475 of 1996 in item No. 2 and G.A. No. 743 of 1998, A.P.O.T. No. 61 of 1998, E.O.S. No. 3

Ratanlal Nahata

APPELLANT

Vs

Nandita Bose
 CESC Ltd. Vs Shankar Rubber Industries
 Indian Seamless Financial Services Ltd. Vs Damodar Chakraborti

RESPONDENT

Date of Decision : 30-06-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 47 Rule 1, Order 47 Rule 5, Order 47 Rule 6, Order 47 Rule 7
Constitution of India, 1950 — Article 215, 225, 226, 266, 269
Government of India (Amendment) Act, 1935 — Section 223, 256
Government of India Act, 1915 — Section 106(1), 108, 108(2)
High Courts Act, 1861 — Section 106(1), 108(1), 624, 627, 98(3)
Industrial Disputes Act, 1947 — Section 25F, 33, 33(2)(b), 33(A)
Interpretation Act, 1889 — Section 32

Citation : AIR 1999 Cal 29 : (1998) 3 CALLT 348 : (1999) 2 RCR(Civil) 328

Hon'ble Judges : Probha Shankar Mishra, C.J.; Shyamal Kumar Sen, J.; Satyabrata Sinha, J.; Nure Alam Chowdhury, J.; Barin Ghosh, J

Bench : Full Bench

Advocate : Mr. P.K. Das. Mr. P.K. Dutt, Mr. R. Bachawat, Mr. D. Ghosh, Mr. M.K. Singh, Mr. A.K. Panjam. Mr. K.R. Das, Mr. Arijit Banerjee and Mr. Debduitta Dutta, for the Appellant; Mr. Ranjan Deb, Mr. S.K. Kapoor, Mr. Ashish Chakraborty, Mr. Bhaskar P. Gupta, Dr. Charkraborty, Mr. R.N. Jhunhunwalla, Ms. Indira Banerjee, Mr. Debraj Mukherjee, Mr. P.K. Sinha and Mr. Pratap Chatterjee, for the Respondent

Judgement

P.S. Mishra, C.J.—I have the privilege to go through the separate but concurring judgments of S.K. Sen, J and S.B. Sinha, J.

2. It is indisputable that procedural laws are meant to advance justice and the same must apply to Order 47 rule 5 of the Code of Civil Procedure. A superior

court apart from its power u/s 229 read with section 4 of the CPC coupled with its power under Letters Patent as a matter of general policy may frame its procedural rules. This court has framed Original Side Rules as well as Appellate Side Rules of Procedure for civil cases as well as for petition under Art. 226 of the Constitution of India. In High Court of Judicature for Rajasthan Vs. Ramesh Chand Paliwal and Another, the Supreme Court has set at rest any controversy as respects power of the Chief Justice to constitute a bench of two or more Judges to decide a case or any question of law formulated by a bench hearing a case. It is pointed out by the Supreme Court that the Chief Justice enjoys special status not only under Constitution but also under Rules of Court made in exercise of the power conferred by Article 225 of the Constitution. The Chief Justice can alone determine jurisdiction of various Judges of the court. He alone can assign work to a Judge sitting alone and to the Judges sitting in the Division Bench or to Judges sitting in the Full Bench. He alone has the jurisdiction to decide which case will be heard by two or more Judges. The conferment of this power exclusively on the Chief Justice is necessary so that various courts comprising of the Judges sitting alone or in Division Bench etc. work in a co-ordinated manner and the jurisdiction of one court is not overlapped by other court. If the Judges were free to choose their Jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the court would collapse and the judicial functioning of the court would cease by generation of internal strife on account of hankering for a particular Jurisdiction or a particular case. The nucleus for proper functioning of the court is the "self and "judicial" discipline of Judges which is sought to be achieved by Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sitting.

As master of the roster, thus, the Chief Justice is expected to know the implication of a review and reference or any other matter of significance including proper hearing of a case by a Judge or more than one Judges of the court constituting a Bench. In exceptional cases when there is a chance of injustice to a litigant notwithstanding the procedure under Order 47 rule 5 of the CPC the review application can be placed before a Judge or a Bench of more than one Judge as constituted by the Chief Justice but it would be in conformity with the procedure and judicial discipline that-

1. Order 47 rule 5 of the CPC although ipso facto has no application in relation to a writ proceeding or a proceeding on the original side of this court as well as in proceeding that arises on the appellate side, the procedure in principle in Order 47 rule 5 should be followed; and
2. in a case where merely one of the learned Judges attached to the Bench is available, he may issue rule but the matter on merit must be heard by a Division Bench of two Judges or such number of Judges as the Hon"ble the Chief Justice may constitute; and
3. it would be proper, even though the Chief Justice may have unfettered

jurisdiction in the matter of constitution of Benches including for a review application that the Judge who is still attached to the court and was a party to the Judgement under review is associated with the Bench of two or such number of Judges as the Hon"ble the Chief Justice may constitute. The reference is answered accordingly.

N.A. Chowdhury, J.

3. I agree.

B. Ghosh, J.

4. I agree.

S.K. Sen, J.

5. I have the privilege of going through elaborate judgment of my learned brother S.B.Sinha, J wherein the scope of reference before us has been fully discussed and questions involved have been discussed at length including that of source of power of Chartered High Court and also of the Chief Justice vis-a-vis the scope of Order 47 rule 5. My learned brother S.B.Sinha, J. has also referred to series of decisions and as such I refrain from repeating the same. I have also got the opportunity to consider the judgment rendered by Hon"ble Chief Justice. I, however, deal with the questions in the manner stated hereinafter.

6. It is not in dispute that the Chartered High Court has power to make rules regulating its own procedure irrespective of the provision that may have been made in the Civil Procedure Code. Such rules have accordingly been framed from time to time by the Full Court under the powers granted by the Letters Patent. It is quite true that such rules will have an overriding effect irrespective of the provision contained in the Civil Procedure Code. Accordingly, question of applying Order 47 rule 5 so far as the Chartered High Court is concerned, will be subject to the rules framed by the High Court under Letters Patent. Our High Court both in its appellate and original jurisdiction have framed rules so far as the review is concerned. Chapter X of the Appellate Side Rules provide for applications for review of judgment. The procedure to be followed in an application for review of the judgment have been enumerated in the said chapter.

7. It appears that under rule 4 of the said rules, application for review of judgment has to be presented to the Stamp Reporter who will certify that the review application is in proper form and it is within the period of limitation.

8. Rules 5 and 6 have already been quoted by my learned brother. It appears that rule 5 provides inter alia that within 7 days of the return of the Stamp Reporter, the said application has to be presented by way of motion in open court to the division bench of whose judgment review is sought; or if the Judges of the division bench may not sitting together, to the senior of such Judges. Rule 6 contemplates a situation where there is no scope for hearing by an application in the manner as provided under Order 47 rule 5 of the CPC and in such

circumstances the matter has to be referred to the Chief Justice and the Chief Justice shall provide for hearing of the application.

9. In my view, therefore, although the High Court has overriding power to frame rules irrespective of the provisions contained in the Civil Procedure Code, our Appellate Side Rules have clearly recognised Order 47 rule 5 and only in a situation when Order 47 rule 5 cannot be given effect to, the Chief Justice will exercise his supreme authority.

10. There cannot be any dispute that the Chief Justice has exclusive power of determination and to fix which matters will be taken by particular Judge concerned. In fact, there is no dispute with regard to the power of the Chief Justice to allocate the business in terms of sections 13 and 15 of the 1861 Act and section 108 of the Government of India Act and the fact that the same has been retained all through even after coming into force of the Constitution of India. In fact, it is for the Chief Justice to determine from time to time which Judge in each case shall sit alone and which Judges of the court whether or without the Chief Justice shall constitute the several Division Courts as aforesaid.

11. It appears to me that the Appellate Side Rules have also taken into consideration, the fact that as and when the procedure relating to review as contemplated under Order 47 rule 5 cannot be given effect to, it should be left to the Chief Justice to constitute a bench for the purpose of hearing of such matters and that the same clearly presupposes that the said rules have contemplated that as far as practicable Order 47 rule 5 should be applied. These rules however are rules applicable to civil proceedings and not to writ jurisdiction. So far as the procedure in Original Side is concerned, in exercise of powers under Letters Patent, rules have also been framed which appear under Chapter XXXI of the Original Side Rules.

12. Rule 34 of Chapter XXXI provides for memorandum of review and rule 36 provides for filing of such memorandum and motion. Rule 36 provides for presentation of such review of any decree or order within the time prescribed by law to the Registrar who shall file the same where it appears to satisfy the requirements of the Code and all these rules; and the parties seeking review shall, as soon as possible, move before the Judge who passed the decree or order for a rule calling on the other side to show-cause why the application should not be granted and the suit set down for hearing.

13. It appears that rule 37 of Chapter XXXI provides that where the Judge who passed the decree or order sought to be reviewed has left the High Court. Rule 37 provides the procedure when the Judge is absent. The said rule makes it clear that the Judge who passed the decree or order sought to be reviewed has left the High Court or is absent on leave for more than 3 months, the application for review may be made to any other Judge on the original side.

14. It appears therefore to me that in terms of the said rules the parties seeking review shall move before the Judge who passed the decree or order for a rule. It

is therefore, necessary that when such Judge is available, the application for review is to be moved before such Judge who passed the decree or order. The rules therefore contemplate a situation where as far as practicable and possible Order 47 rule 5 should be followed where, however, it is not possible due to non-availability of the concerned Judge the Original Side Rule provides that this may be placed before any Judge.

15. In my view, therefore as far as possible Order 47 rule 5 has to be applied and as and when the same is not possible to apply for any reason whatsoever or because of peculiar contingencies in a given case the Chief Justice will constitute a Bench as he may feel proper. It therefore appears that our High Court has taken into consideration such situation when it may not be possible to apply Order 47 rule 5 and accordingly the rules have been framed considering such circumstances. There cannot be any dispute that a single Judge can refer a matter to Chief Justice for a reference to division bench or a division bench may refer a case to Chief Justice for constitution of a larger bench in terms of our rules.

16. It is beyond doubt that the Chief Justice has the absolute authority to constitute Bench and to make determination for the purpose of hearing matters by Judges. It is well settled, however that a review by its very nature contemplates reconsideration of the same subject by the same Judge or Judges while an appeal is reheard by another Tribunal. Section 114 of the CPC creates a right to make an application for review under certain conditions and Order 47 provides for mode, manner and circumstances under which review petition can be made, heard and determined. No doubt procedure is meant to advance justice and as such cannot be treated as mandatory. Procedure, however, should be followed as far as possible keeping in view the cause of justice.

17. In (1922) ILR 3 LAH 127 (Privy Council) it was held under Order 47. rule 5 the same Judges must sit and if one of the Judges of the Original Bench is absent the other Judge should sit alone.

18. In Jagal Chandra Acharji & another v. Syama Charan Bhattacharjee & Ors. reported in AIR 1919 Cal 1033. a special bench of this court consisting of Hon'ble Chief Justice and two other puisne Judges, it was held that during the absence of leave of one of the two Judges of a High Court constituting a division bench, the other Judge has no jurisdiction to hear an application for review of its decree unless the former Judge has ceased to be a member of the court or is precluded by absence or other cause, for a period of six months next after the application, from considering the decree to which the application refers. The judgment of a single Judge thus disposing of an application for review without jurisdiction is subject to appeal under clause 15 of the Letters Patent.

19. In the aforesaid decision what happened is as follows :

Holmwood J. sitting with Chapman. J. heard these second appeals under Order 41, rule 11. CPC and dismissed them. After that Chapman J. took a month's

leave immediately before the long vacation, and while he was away applications were made to Holmwood, J, for a review of the judgments which had been delivered by him and Chapman, J. Holmwood, J. heard the applications for review and dismissed them. The parties did not object to the hearing of the matter by. Holmwood.J, and raised no question on jurisdiction although consent cannot confer jurisdiction. In the aforesaid decision reliance was placed on Kailash Chandra Sammaddar v. Revati Mohan Ray which was decided by a division bench comprising Woodroffe, J. and Mookherjee, J. In the said decision Teunon, J. sitting with Smither, J. who was then acting as a Judge of the High Court had dealt with a second appeal. Then after Smither, J. left the court that is after his officiating period had come to an end and he ceased to be a member of the court, an application was made to Teunon, J for a review of the judgment delivered by him and Smither, J and he dealt with that application and then an appeal was filed against the decision of Teunon, J. u/s 15 Letters Patent. That appeal came on for hearing before Woodroffe. J and Mookherjee, J who came to the conclusion that no appeal lay. They referred to the Code and amongst other reasons they referred to the fact that if they had heard the appeal from Teunon. J, they would in effect be hearing an appeal from a decision of two Judges, because after Smither. J. had ceased to be a member of the court, Teunon, J. represented the court which had been constituted by the two Judges and therefore to hear an appeal from Tunon, J. would be to hear an appeal from the two Judges which of course, they could not.

20. The special bench considered the said Judgment and was of view that "if I may say so I entirely agree with the judgment of Woodroffe, J. and Mookherjee. J. but that judgment does not cover the present case because Chapman, J. did not cease to be a member of this court, nor was he in the words of the rule". "The provisions of Order 47 rule 5 has therefore been recognised by special bench of this court as early as in 1990.

21. The Full Bench of the Rangoon High Court comprising of 5 Judges also considered the same question in the case of AIR 1927 20 (Rangoon) . In the aforesaid decision full bench of the Rangoon High Court followed the principles decided by our court in the case of Aitbhoy Churn Mohunt v. Shamont Lochun Mohunt reported in ILR 16 Cal 788. In the aforesaid decision the full bench held "Where a case is decided by a Bench of two Judges and an application for review of that decision is made when one of the two Judges is on leave, the review application should be heard only by the other Judge, and if he grants the application he is to forward the papers to be laid before the Chief Justice for the appointment of a Bench of hear the review."

22. It is now necessary to consider the decision of the Special Bench in the case of Aubhoy Churn Mohunt v. Shamont Lochun Mohunt reported in ILR 16 Cal 788.

23. In the said decision the case was originally a second appeal to this court which was heard by this court consisting of Mr. Justice Wilson and Mr. Justice Beverley. The second appeal was decided on the 1st June, 1888, and it was

decided in favour of the defendant; and the plaintiff, being dissatisfied with that decision, was desirous of having it reviewed, and accordingly on the 24th July 1888, an application for review bearing the proper stamp was filed with the Deputy Registrar of this court. Section 623 of the CPC provides that such an application shall come before the Judge or Judges who were parties to the original decree. Those Judges, as I said just now, were Mr. Justice Wilson and Mr. Justice Beverley. Various reasons prevented them from sitting together until the month of March 1889 and on the 6th of that month, the matter was presented before those learned Judges, and upon its being so presented they issued a rule calling upon the other side to show cause why the application should not be granted. The practice is, that such applications should be presented in this way, and if the Judges, before whom the application is made, think there is anything in it, they grant a rule calling upon the other side to show cause against it; and the whole of these proceedings, the granting a rule and the argument of the rule when it is returned, are treated within the meaning of Chapter XLVII of the CPC as being an entire application.

24. Since on the returnable day Mr. Justice Wilson was not available, the rule was heard Mr. Justice Beverley. The point was taken that the procedure was wrong and either the matter stood over until Justice Wilson returned or else that an application ought to have been made to the Chief Justice to appoint another Judge to sit with Mr. Justice Beverley to form the bench to hear it. Construing section 627 of the CPC which corresponds to Order 41 rule 5 it was held that "no other Judge or Judges of the court, excepting the Judge or Judges who was or were parties to the original Judgment, shall hear the application for review if the Judge or Judges or any one of them is still attached to the court, so that it seems to me that although the Chief Justice of this court has in general the duty cast upon him of appointing the Judges who are to constitute particular Benches for particular business, in these cases the constitution of the Bench is taken out of his hands, and is provided for by the Code, for the Code says that these applications shall be heard by the Judge or Judges remaining attached to the court by whom the original decree was given."

25. Petheram, C.J. speaking for the special bench observed as follows:--

"As I said just now, at the time this rule was returned Mr. Justice Wilson had gone away on furlough and another gentleman had been appointed to perform his duties, and consequently, he had ceased to have any Jurisdiction as a Judge of this court for the time. He was not at the time attached to the court, and consequently, Mr. Justice Beverley was the only one of the Judges who heard the appeal who remained attached to the court, and was. In my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice Beverley was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails."

26. It was further held on the question of appealability from the said order

making the order absolute that the same did not decide the rights of the parties in any sense. All it decided was that in his opinion the trial of the appeal had been unsatisfactory, and it would be in the interests of justice that it should be re-heard, it decides nothing more. The rights of the parties are still at large.

27. It may be noted in the said decision that by order of Mr. Justice Beverley, making this rule absolute, refer the matter to the Hon"ble Chief Justice for constituting a bench for hearing the matter on merit.

28. The Full Bench of Lahore High Court in fact accepted the same principle. It therefore appears that there will be no difficulty when one Judge is not available, the Judge who is available may hear out the matter for purpose of issuing rule and even make the rule absolute and thereby no harm will be caused since nothing is decided on merit. After the rule is made absolute, the matter will be referred to the Hon"ble Chief Justice the Chief Justice will constitute a bench as he may feel proper.

29. In this connection, the principles in contempt jurisdiction may also be taken note of.

30. Rule 15 and Rule 17 of the Contempt Rules of our court are set out hereinbelow:--

" 15. All petitions in connection with a civil contempt grounded on wilful disobedience to a judgment, decree, direction, order or other process of a court or wilful breach of an undertaking given to a court shall be heard by the Judge or Judges who passed the judgment or the decree or gave the direction or the order or issued the writ or other process or before whom the undertaking was given."

"17. Rules, issued by any court on its own motion shall be dealt with by that particular court provided that such rules u/s 15 of the Act shall be heard and determined by such bench of Judges as the Chief Justice may appoint."

31. Rule 18 however provides that notwithstanding anything contained in rules 15-17 Chief Justice may assign a rule for hearing before another Judge or the bench, if required, in the said circumstances of the case or if the Judge or the bench reports or report to the Chief Justice for so doing under such provision has been made in the review rules of our court.

32. In this connection judgment and decision in the case of High Court of Judicature at Allahabad through its Registrar Vs. Raj Kishore and others, . may be taken note of. In the aforesaid decision while dealing with the inherent power of the High Court to determine the question about its own jurisdiction and also to punish for contempt summarily and also the power of the Chief Justice to constitute a Bench for the purpose. The Supreme Court in paragraph 16 of the said judgment at page 24 of the said report observed as follows:--

"It is also to be kept in view that while exercising original jurisdiction under Contempt of Courts Act, 1971 in connection with civil contempt of its own orders

the High Court is not exercising any review jurisdiction wherein statutorily the proceedings may have to be placed for decision of the same Judge or Judges if they are available. Contempt jurisdiction is in independent jurisdiction of original nature whether emanating from Contempt of Courts Act or under Article 215 of the Constitution of India. How such original jurisdiction can be exercised is a matter which can legitimately be governed by the relevant rules framed by the High Court on its administrative side by exercising its rule-making power u/s 23 of the Act or under its general rule-making power flowing from the relevant provisions of the constitutional scheme as seen earlier. Consequently it cannot be said that the impugned rule is violative of Article 215 of the Constitution of India as held by the judgment under appeal.

33. The Supreme Court therefore made distinction between the exercise of power under contempt jurisdiction and the review jurisdiction and held any review jurisdiction wherein statutorily the proceedings may have to be placed for decision of the same Judge or Judges if they are available.

34. Considering the principles laid down in all the aforesaid decisions, it appears to me to be proper that in terms of our rules read with CPC matters relating to review should be heard by the Judges if they are available and in the event one of the Judge does not remain attached to this court, the matter may be heard for the purpose of issuing rule by one of the Judges who is available and the said Judge will hear the rule also and in the event he makes the rule absolute and is of the view that the matter should be re-heard, he will place the matter before the Hon'ble Chief Justice for constitution of a bench. In other words question of review is permissible, should be heard and decided by the Judge who is available but the matter thereafter should be referred to the Chief Justice for constitution of division bench in the event the Judge concerned finds the order reviewable. It is however, expected unless there is a special reason, the Judge issued the rule should be made a party to the Division Bench. It may not be out of place to mention that so far as the writ application is concerned, there is no scope for application under Order 47, rule 5 as explained in details in the Judgment of my learned brother S.B.Sinha, J. However, the principle and procedure analogous thereto may be applied.

S.B. Sinha, J.

35. The reference to this bench has been made by two of us. Hon'ble the Chief Justice and Hon'ble Mr. Justice Barin Ghosh by an order dated 30.4.1998 for determination of the following questions:--

1. Whether an application for review of a judgment/order of a division bench can be heard by the learned Judge, who was a party to the earlier proceeding alone when the other Judge is not available or by a division bench?
2. In the event such an application is required to be heard by a division bench whether the Judge who is available and heard the earlier matter shall be necessarily there.

3. Whether Order 47 rule 5 of the CPC is mandatory and there is no discretion in a civil proceeding except for the hearing of in Review Application by the learned Judge who was a party to the earlier proceeding and who is available.

4. Whether notwithstanding the common source of right of appeal being clause 15 of the Letters Patent of the Court, Order 47, rule 1 CPC shall not inhibit the court's jurisdiction to hear any review application by a division bench even though one of the Judges constituting the bench is not available and/or by a bench other than the bench which had earlier passed the judgment which is sought to be reviewed.

The reference of the division bench in each of the case arose in the following circumstances:--

1. G.A.No.586/98 [Ratanlal Nahata v. Nandita Bose]. When the matter was placed before one of us (S.B.Sinha, J.), it was observed:

"A review application has been filed for reviewing the judgment and order dated 18.7.96 passed by a division bench of this court. Although in terms of Order 47, rule 5, this bench can hear the review application sitting singly but in view of the order passed in Appeal No. 94 of 1996 (C.E.S.C Limited & Ors. v. Shankar Rubber Industries & Ors.), I am of the opinion that the matter should be heard by a Division Bench of this court to review the application.

Let the records be placed before the Hon"ble the Chief Justice for assignment of the matter before an appropriate division bench. The applicant may, however, in the mean time serve a copy of the review application upon the other side.

Registrar, Original Side and all parties concerned are to act on a signed copy of the minutes of this order on the usual undertaking."

2. G.A.NO. 743 of 1998 (Indian Seamless Finance Service Ltd. v. Damodar Chakraborty) arises out of a Judgment and order passed in the original side of this court. An appeal from the said decree was placed for hearing before division bench as at the time when the review application was presented one of the Hon"ble Judges retired.

The record was placed before two of us (S.K.Sen and N.A. Chowdhury, JJ.) and on 6.4.98 the division bench passed the following order:--

"This is an application for review. One of the learned Judges who was a party to the earlier proceeding can hear.

Mr. Chatterjee, learned advocate appearing for the respondents submits that this review application is not maintainable.

In this view of the matter we are not inclined to take up the matter. We are not going into the merits of this case."

3. Appeal No. 94/96 with Writ Petition No. 475/96 (C.E.S.C.Limited v. Shankar Rubber Industries), arose out of an interlocutory order. However, keeping in view

the urgency of the matter the learned counsel appearing on behalf of the parties prayed that the writ petition itself be heard by a division bench, whereafter the entire Writ Petition was disposed of by a division bench. When the review application was filed by the writ petitioner, one of the Hon'ble Judges hearing the Writ Petition had retired. By an order dated 8.4.97 one of us (S.B.Sinha. J) keeping in view the provision of Order 47 rule 5, Appendix 4 of the Appellate Side Rules, rules 48 and 53 of the writ rules framed by this court under Article 225 of the Constitution of India and Chapter XXXI rules 34 and 36 of the Original Side Rules expressed a doubt as to whether a power of review in a writ proceeding being not circumscribed by the procedures laid down under Order 47 rule 1 read with Order 47 rule 5 of the CPC and being governed by the Letters Patent of this court, the matter should be heard by a division bench comprising of two Judges.

36. In the said order reference was made to Manoharlal Verma Vs. State of Madhya Pradesh and Others, . J.N.Surty v. T.S. Chettyar Firm reported in AIR 1927 Rangoon 20 and 1989 (9) ATC page 617 at page 680 and keeping in view the fact that one of the matters had been placed by the Chief Justice before a division bench it was observed:--

"As the question posed in this application is not free from doubt, in my opinion, the matter should be placed before Hon'ble the Chief Justice for constituting an appropriate bench so that the question of Jurisdiction may not be taken up at a latter stage. The question of law raised in this application may also be considered by a division bench or a large bench as the Hon'ble the Chief Justice may seem fit and proper so that the law may be settled once for all so far as this court is concerned."

37. Two extreme views have been taken before us by the learned counsel for the parties but we must note that Mr. Panja appearing in A.P.O No.94/ 96 (C.E.S.C. Ltd. v. Shankar Rubber industries) and Mr. P.K. Das appearing in A.P.O No. 671 of 1994 (Rafonlal Nahata v. Nandtta Bose) although at the initial stage took the view that the provisions of Order 47 rule 5 of the CPC is mandatory in nature and the said rule applies to a writ proceeding also changed their stand before this bench and, inter alia, submitted that the power of the Chief Justice to allocate business is not inhibited Order 47 rule 5 of the CPC and in any event, the said Rule will have no application in a writ proceeding.

38. However, Mr. Ranjan Deb, appearing on behalf of the plaintiff in O.S. 755 of 1985 and Mr. Arjit Banerjee, appearing on behalf of the appellant in APOT No. 61/98 submitted that Order 47 rule 5 is mandatory in nature and in any event the Privy Council and this court having held that the principles laid down in Order 47 rule 5 should be followed, the same has developed into a law and thus, the said practice should not be deviated from by this court.

39. In order to resolve the controversy as noticed hereinbefore. It is necessary to trace the history of creation of this court. This High Court was created under High

Courts Act. 1861. the relevant provisions whereof are as follows:--

"Para-13. Subject to any laws or regulations which may be made by the Governor-General in Council, the High Courts established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by division courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such court, in such manner as may appear to such court to be convenient for the due administration of Justice."

"Para -14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the court, whether with or without the Chief Justice, shall constitute the several division courts as aforesaid."

40. The said Act was repealed and replaced by the Government of India Act, 1915. The power of this court and in particular the power of the Chief Justice as envisaged under sections 13 and 14 were reiterated in section 108 of the Government of India Act. 1915 which reads thus:--

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

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

41. Such provisions were retained in Government of India Act. 1935 in section 223 thereof which reads thus:--

"Subject to the provisions of this part of this Act, to the provisions of any order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act. the jurisdiction of and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of Justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the Government of Part III of this Act."

42. Upon coming into force of the Constitution of India, the power of the High Court to frame rules, the jurisdiction of and the law administered in. any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the court, including any power to make rules of the court and to regulate the sittings of the court and of members thereof sitting alone or in division bench were retained as was immediately prevailing before the commencement of Constitution by reason of Article 225 of the Constitution of

India,

43. This court was constituted in terms of the Letters Patent, the relevant provisions whereof are Clauses 15, 36 and 37 read thus:--

"15. Appeal from the courts of original jurisdiction to the High Court in its appellate jurisdiction.--And we do further ordain, that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a Judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any division court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act made on or after the first day of February one thousand nine hundred and twentynine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of judges of the said High Court or of such Division Court shall be to us. Our heirs or successors in Our or Their Privy Council as hereinafter provided."

36. Single Judges and Division Court.--And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, 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.

37. Regulation of proceedings.--And we do further ordain, that it shall be lawful for the said High Court of Judicature at Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty. Testamentary, Intestate, and Matrimonial jurisdictions respectively: Provided always that the said High Court shall be

guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India."

Pursuant to the powers conferred upon this Court's Rules both on the Appellate Side and on the Original Side were framed. For the purpose of the present case Chapter X Rules 5 and 6 of the Appellate Side Rule and Chapter XXXI Rules 34 and 36 of the Original Side Rule are relevant which read thus:--

Chapter-X of the Appellate Side Rules:

"R.5. Within seven days of the return of the application by the Stamp Reporter, the applicant, either in person or by an advocate, shall present the application by way of motion in open court to the division bench of whose judgment a review is sought; or. If the Judges of such Division Bench be not sitting together, to the senior of such Judges who may be then attached to the court and present.

6. If an application for review of a judgment cannot be heard in the manner provided in Order XLVII, rule 5. Civil Procedure Code, such application shall be presented by the applicant or his advocate with the certificate of the Stamp Reporter, as required by rule 4. to the Chief Justice, who shall provide for the hearing of the application.

Chapter XXXI of the Original Side Rules:

34. Form of memorandum of review.--Rules 2 and 3 shall, so far as applicable, apply, mutatis mutandis to applications for review. But an application resting on an alleged error in a judgment or other matter necessitating reference to the judgment shall be accompanied by a copy of such judgment, where a Judgment has been recorded.

36. Filing of such memorandum and motion.--Any person desiring a review of any decree or order shall, within the time prescribed by law, present his memorandum of review, properly stamped, to the Registrar, who shall file the same, where it appears to satisfy the requirements of the Code and of these rules; and the parties seeking review shall, as soon as possible, move before the Judge who passed the decree or order for a rule calling on the other side to show cause why the application should not be granted and the suit set down for re-hearing."

44. Thus, neither in the Letters Patent of this court, nor in the Rules of Appellate Side or the Original Side of this court, there exists any provision of the nature of Order 47 rule 5 of the Code of Civil Procedure.

45. In the instant case this court is concerned with the rules framed on the original side of this court as the concerned Suits and the Writ Petitions were filed under the said jurisdiction.

46. Section 4(1) of the CPC provides that in the absence of any specific provision to the contrary nothing in the 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.

47. The CPC thus saves the special provision or special procedure laid down under any other statute. It has not been disputed nor can it be disputed that the rules framed by Letters Patent of this court as also the rules framed by this court are special statute and thus where a matter is to be decided in terms of the procedure laid down under the rules or the Letters Patent vis-a-vis the Code of Civil Procedure, the former shall prevail. The CPC itself has empowered the High Court to make rules in terms of section 122 subject to the provisions contained in section 123 therein. However, such rules in terms of section 126 of the CPC shall be subject to the previous approval of the Government or the State.

48. Section 128 further specified the matter for which rules may provide. However, section 129 of the Code of Civil Procedure, reads thus:

"129. Power of High Courts to make rules as to their original civil procedure.-- Notwithstanding anything in this Code, any High Court, not being the court of a Judicial Commissioner, may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

49. A Charter High Court, therefore, is entitled to make rules to regulate its own procedure in the exercise of its original civil jurisdiction which need not be consistent with the provisions of the Code but must be consistent with the Letters Patent, establishing the High Court. As the position of law in this regard is well settled it is not necessary to refer to a large number of decisions. Reference, however, may be made to *In Re: Ram Dayal De*, and AIR 1985 Delhi 163. While enacting rules High Court keeping in view the express provision or practice and procedure is also entitled to make a provision for correcting its own orders passed during the course of original trial.

50. Section 129 of the Code of Civil Procedure, although confers a wider power on the High Court, however, puts an embargo to its rule making power in so far as the same is circumscribed by the provisions of the Letters Patent referred to in the section, there cannot be any doubt, may legitimately be read as the Original Letters Patent of this court which was in force at the time of passing of the Code.

51. There cannot, therefore, be any doubt whatsoever that so far as practice and procedure of the Original Side of this court is concerned, the provision of the Letters Patent coupled with section 108 of the Government of India Act, 1918 shall prevail over the provisions of the CPC (in case there exists any Inconsistency).

52. So far as practice and procedure to be followed in the writ jurisdiction of this court is concerned the rules have been framed by this court in exercise of its power under Article 225 of the Constitution of India. Rules 48 and 53 which are relevant for the purpose of this case, read thus:--

"48. Appeals from orders in this Jurisdiction shall be made in the same manner as appeals from orders in the Original Side and appeals from orders in the Appellate Side according as they arise out of "Original Side" and "Appellate Side" applications and all rules applicable thereto in the Rules of the Original and Appellate Side, respectively, shall apply thereto mutatis mutandis:

Provided that unless the court otherwise directs no prayer for any interim order shall be entertained unless a copy of an application for such an interim order has been served upon a party, who has lodged a caveat in the form and manner as may be prescribed, and given an opportunity of being heard.

53. Save and except as provided by these rules and subject thereto, the procedure provided in the CPC (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings for issue of a writ."

53. In this background the court has to consider the power of review of this court. Review is of two types: (a) Procedural and (b) substantive. Every court or Tribunal has an inherent right of procedural review. See *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, .

54. But in absence of any express power conferred by a statute a court or a Tribunal cannot exercise its jurisdiction of substantive review. In view of the aforementioned legal position the Parliament had to enact section 114 of the CPC which reads thus:--

"S. 114. Subject as aforesaid, any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this court, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a court of small causes, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

55. However, Article 226 of the Constitution of India having conferred a plenary power upon the High Court to exercise its jurisdiction thereunder, a power of review is Implied in the said provision itself. This has been so held by the apex court in *Shivdeo Singh and Ors. v. State of Punjab & Ors.* reported in AIR 1963 SC 1909 in the following terms:-

"The other contention of M. Gopal Singh pertains to the second order of Khosla, J., which in effect, reviews his prior order. Learned counsel contends that Article

226 of the Constitution does not confer any power on the High Court to review its own order and, therefore the second order of Khosla, J., was without jurisdiction. It is sufficient to say that there is no thing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it."

56. In the aforementioned backdrop, the applicability of Order 47 rule 5 of the CPC in a writ proceeding has to be considered. There cannot be by denial whatsoever that the power of the Chief Justice to allocate the business in terms of sections 13 and 14 of 1861 Act and section 108 of the Government of India Act having been preserved all through even after coming into force of the Constitution of India particularly in view of the fact that clause 15 of the Letters Patent refers to section 108 of Government of India Act, 1915 is absolute. There cannot further be any doubt whatsoever that all subsequent statutes or enactments amending or modifying or reforming the order u/s 108 preserves the original power of the Chief Justice. Thus whether Order 47 rule 5 of the CPC takes away such jurisdiction of the Chief Justice is the basic question involved in these references. Order 47 rule 5 of the CPC reads thus:--

"Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the court shall hear the same."

57. The answer to the aforementioned question must be rendered in negative in view of the clear language used in sub-section (2) of section 108 of the Act of 1915 read with clauses 36 and 37 of the Letters Patent of this court. The words "each case" contained in sub-section (2) of section 108 bring within its fold an application for review under Order 47 rule 5 as well. Order 47 rule 5 must, therefore, be read harmoniously with the aforementioned provisions.

58. If such an Interpretation is not given, the same would not only give rise to absurdity or anomaly if a strict literal interpretation is given to Order 47 rule 5 but also would border on unconstitutionality. At this juncture we may examine some of the case laws relating to the subject.

59. In National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), a bench of 3 Judges of the apex court held that despite non-existence of any provision of appeal in the Trade Marks Act, a right of appeal is available to a litigant under clause 15 of the Letters Patent. Expressing its disagreement with the view of this court in Indian Electric Works v. Registrar of Trade Marks reported in AIR 1947 Cal 49, it was held:--

"It is thus difficult to accept the argument that the power vested in the High

Court under sub-section (1) of section 108 was a limited one, and could only be exercised in respect to such jurisdiction as the High Court possessed on the date when the Act of 1915 came into force. The words of the sub-section "Vested in the court" cannot be read as meaning "now vested in the court". It is a well known rule of construction that when a power is conferred by a statute that power may be exercised from time to time when occasion arises unless a contrary intention appears. This rule has been given statutory recognition in section 32, Interpretation Act. The purpose of the reference to section 108 in clause 15 of the Letters Patent was to incorporate that power in the charter of the court itself, and not to make it moribund at that stage and make it rigid and inflexible. We are therefore of the opinion that section 108 of the Government of India Act 1915 conferred power on the High Court which that court could exercise from time to time with reference to its Jurisdiction whether existing at the coming into force of the Government of India Act 1915 or whether conferred on it by any subsequent legislation."

60. There cannot also be any doubt whatsoever that the Chief Justice has an inherent power to allocate cases to the Judges.

61. In *Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar*, , the apex court referring to the various provision of the Calcutta High Court Rules Appellate Side, held:--

The Chief Justice must have the inherent power to constitute a larger Bench in special circumstances. And in the exercise thereof he can surely constitute a larger bench in a case of importance where the division bench hearing it considers that a question of the correctness or otherwise of earlier division bench decisions of the same court will fall for consideration in the case."

62. The same view was reiterated by the apex court in *State of Maharashtra Vs. Narayan Shamrao Puranik and Others*, , in the following words:--

"In contrast, the power to appoint the sittings of the Judges and Division Courts of the High Court for a new State at places other than the place of the principal seat, is in the unquestioned domain of the Chief Justice, the only condition being that he must act with the approval of the Governor."

63. Suffice it to say that the said principles has also been stated in Allahabad High Court in *State Vs. Devi Dayal*, .

64. A division bench of this court in *Sohan Lal Baid Vs. State of West Bengal and others*, in which one of us (S.K.Sen, J. was a member) upon tracing the history of this court as also the decisions observed:--

"The foregoing review of the constitutional and statutory provisions and the case law on the subject leaves no room for doubt or debate the once the Chief Justice has determined what Judges of the Court are to sit alone or to constitute the several division courts and has allocated the judicial business of the court amongst them, the power and Jurisdiction to take cognizance of the respective

classes or categories of cases presented in a formal way for their decision, according to such determination, is acquired. To put it negatively, the power and jurisdiction to take cognizance of and to hear specified categories or classes of cases and to adjudicate and exercise any Judicial power in respect of them is derived only from the determination made by the Chief Justice in exercise of his constitutional, statutory and inherent powers and from no other source and no cases which is not covered by such determination can be entertained, dealt with or decided by the Judges sitting singly or in Division Courts till such determination remains operative. Till any determination made by the Chief Justice lasts, no Judge who sits singly can sit in a division bench nor can a division bench be split up and one or both of the Judges constituting such bench sit singly or constitute a division bench with another Judge and take up any other kind of judicial business. Even cases which are required to be heard only by a particular single Judge or division bench, such as part-heard matters, review cases etc.. cannot be heard, unless the Judge concerned is sitting singly or the same division bench has assembled and has been taking up judicial business under the extant determination. Such reconstitution of benches can take place only if the Chief Justice specially determines accordingly."

65. The aforementioned views has been reiterated by the apex court recently in some decisions.

66. In *Inder Mani and Others Vs. Matheshwari Prasad and Others*, . It has been held:--

"The Registrar"s affidavit discloses a somewhat alarming situation. It is the prerogative of the Chief Justice to constitute benches of his High Court and to allocate work to such benches. Judicial discipline requires that the puisne Judges of the High Court comply with directions given in this regard by their Chief Justice. In fact it is their duty to do so. Individual puisne Judges cannot pick and choose the matters they will hear or decide nor can they decide whether to sit singly or in a division bench. When the Chief Justice had constituted a division bench of Justice V.N. Khare and the learned Judge, it was incumbent upon the learned Judge to sit in a division bench with Justice V.N. Khare and dispose of the work assigned to this division bench. It was most improper on his part to disregard the administrative directions given by the Chief Justice of the High Court and to sit singly to take up matters that he thought he should take up. Even if he was originally shown as sitting singly on 22.12.1995, when the bench was reconstituted and he was so informed, he was required to sit in a division bench on that day and was bound to carry out this direction. If there was any difficulty, it was his duty to go to the Chief Justice and explain the situation so that the Chief Justice could then give appropriate directions in that connection. But he could not have, on his own, disregarded the directions given by the Chief Justice and chosen to sit singly. We deprecate this behaviour which totally undermines judicial discipline and proper functioning of the High Court."

67. Yet recently in *State of Rajasthan Vs. Prakash Chand and Others*, . the court

approving the decisions of Allahabad High Court in State Vs. Devi Dayal, . Sohan Lal Baid Vs. State of West Bengal and others, and Inder Mani and Others Vs. Matheshwari Prasad and Others, and upon discussing the subject at great details held:--

"(1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals.

(2) That the Chief Justice is the master of the roster. He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted.

(3) That the puisne Judges can only do that work as is allotted to them by the Chief Justice or under his directions.

(4) That till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a division bench and no division bench can be split up by the Judges constituting the bench themselves and one or both the Judges constituting such bench sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.

(5) That the Chief Justice can take cognizance of an application laid before him under Rule 55 (supra) and refer a case to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case.

(6) That the puisne Judges cannot "pick and choose" any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.

(7) That no Judge or Judges can give directions to the Registry for listing any case before him or them which runs counter to the directions given by the Chief Justice."

68. In High Court of Judicature for Rajasthan Vs. Ramesh Chand Paliwal and Another, . It has been held:--

"The status, functions and duties of the Chief Justice qua other Judges of the High Court was considered by a full bench of the Allahabad High Court of which one of us (S. Saghir Ahmad, J.) was a member, in Son/ay Kumar Srivastava v. Acting Chief Justice, (1996) Allahabad Weekly Cases 644, in which it was, inter alia, observed as under:--

"The Chief Justice may constitute a bench of two or more Judges to decide a case or any question of law formulated by a bench hearing a case. In the latter even the decision of such bench on the question so formulated shall be returned to the bench hearing the case and that bench shall follow that decision on such question and dispose of the case after deciding the remaining question, if any, arising therein."

It was further observed:--

"Under Rule 6 of Chapter V of the Rules of Court, it can well be brought to the notice of the Chief Justice through an application or even otherwise that there was a case which is required to be heard by a larger bench on account of an important question of law being involved in the case or because of the conflicting decisions on the point in issue in that case. If the Chief Justice takes cognizance of an application laid before him under Rule 6 of Chapter V of the Rules of Court and constitutes a bench of two or more Judges to decide the case, he cannot be said to have acted in violation of any statutory provisions."

69. The full bench also observed:---

"In view of the above, it is clear that the Chief Justice enjoys a special status not only under Constitution but also under Rules of Court, 1952 made in exercise of powers conferred by Article 225 of the Constitution, The Chief Justice alone can determine jurisdiction of various Judges of the court. He alone can assign work to a Judge sitting alone and to the Judges sitting in division bench or to Judges sitting in full bench. He alone has the jurisdiction to decide which case will be heard by a Judge sitting alone or which case will be heard by two or more Judges. The conferment of this power exclusively of the Chief Justice is necessary so that various courts comprising of the Judges sitting alone or in Division bench etc.. work in a co-ordinated manner and the jurisdiction of one court is not overlapped by other court. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear decide, the machinery of the court would collapse and the judicial functioning of the court would cease by generation of internal strife on account of hankering for a particular jurisdiction of a particular case. The nucleus for proper functioning of the court is the "self and "judicial" discipline of Judges which is sought to be achieved by Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sittings."

70. In view of the aforementioned authoritative pronouncement there cannot, thus, be any doubt whatsoever that the Chief Justice being "the master of the roster" can form any bench either single or division in respect of any matter which would include the review petitioner.

71. Coming now to the applicability of Code of Civil Procedure. In a proceeding under Article 226 of the Constitution of India we may at the very threshold take note of the fact that section 141 of the CPC as amended in 1976 excluded the applicability of said provision in a proceeding under Article 226 of the Constitution of India. It may be true that by reason of rule 53 of the Writ Rules framed by this court, the procedures provided in the CPC in regard to suits as far as it can be made practicable may be followed in all proceeding for issue of a writ. The said rule, however, is subject to the rules framed by this court, viz. Original Side Rules and Appellate Side Rules as would appear from rule 48 itself. The Appellate Side Rules and the Original Side Rules make provision as regard procedure to be followed in review petition.

72. The CPC per force, therefore, is not applicable in a proceeding u/s 226 of the Constitution of India but only the procedural aspects thereof mutatis mutandis apply. Furthermore rules 48 and 53 the writ rules must be read in the light of section 4(1) of the CPC which protects powers under Letters Patent, section 108 of Government of India Act, 1915, section 223 of Government of India Act, 1935 and Article 225 of the Constitution of India, thus read, we have no doubt in our mind that Order 47 and rule 5 ipso facto cannot be made applicable by telescoping the same in the writ proceedings through Rule 53 of the writ rules. The extensive power of the Chief Justice to allocate business of the court as noticed hereinbefore by no means can be curtailed or whittled down in terms of Order 47 Rule 5 so far as the proceedings before High Court is concerned. We intend to make it clear that Order 47 rule 5 will have application in cases where CPC alone applies i.e. before the subordinate courts and other Tribunals.

73. Apart from the reasons noticed hereinbefore, we reiterate that Order 47 rule 5 having been framed in terms of section 114 of the CPC which provision itself being not applicable in relation to a writ proceeding, the procedures laid down in terms whereof v/ouId not ipso facto apply inasmuch whereas a civil court trying a suit (not the High Court trying in exercise of its original jurisdiction) is bound by the provision of Order 47 rule 5 of the Code of Civil Procedure, the High Court while exercising its writ jurisdiction is not, as the power of review is taken recourse to by the High Court in exercise of its inherent jurisdiction.

74. Power under Article 226 of Constitution of India is exercised by the High Court in its equity jurisdiction and thus, as it has to do equity to the parties and to do complete justice to them, its power of review is not and cannot be limited only in terms of section 114 or Order 47 rule 1 of the Code of Civil Procedure. By parity of the reasoning Order 47 rule 5 ipso facto would not be attracted in a writ proceeding.

75. The reason as to why the provisions of CPC are not applicable in a writ proceedings has been explained by the apex court in Puran Singh and others Vs. State of Punjab and others, , N.P.Singh, J. speaking for the division bench held that the provisions of Code of Civil Procedures were not applicable even before coming into force of 1976 Amendment Act in view of the decision of the apex court in Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others, and held:--

"If because of the explanation, proceeding under Article 226 of the Constitution has been excluded, there is no question of making applicable the procedure of Code as far as it can be made applicable to such proceeding. The procedures prescribed in respect of suit in the Code if are made applicable to the writ proceedings then in many cases it may frustrate the exercise of extraordinary powers by the High Court under Articles 226 and 227 of the Constitution."

76. In that case also in terms of rule 32 of the writ rules framed by the Punjab and Haryana High Court the provision of Code of Civil Procedure, 1908 was to

apply mutatis mutandis as far as they are not inconsistent with the said rules.

77. The said decision of the apex court has been followed by a full bench of the Andhra Pradesh High Court in Hon''ble Secretary and Correspondent, Badruka College of Commerce and Arts (Day), Hyderabad Vs. State of Andhra Pradesh and others, . (of which one of us. P.S.Mishra. C.J. was a member). The Andhra Pradesh High Court also framed rules similar to rule 53 of writ rules of this court being rule 24 which provided that all other rules relating to matters coming before the Original Side and Appellate Side of the High Court and the provisions of the Code of Civil Procedure, 1908 will apply to the writ petitions and the writ appeals in so far as they are not inconsistent with these rules.

78. The full bench held that rule 24 cannot be taken by any state of imagination to substitute section 141 of the Code even after amending Act of 1976. The apex court referred to various decisions where similar arguments had been rejected and noticed that in Puran Singh (supra), the apex court had observed:

"The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious."

The Full Bench held:--

"Therefore, we conclude that notwithstanding. Rule 24. the provisions of the Code cannot be made applicable to any extent to any of the proceedings under Article 226 of the Constitution and the High Court in dealing with such matters should be left to adopt its own procedure for granting relief to persons concerned and by adopting a procedure which can be held not only reasonable but also expeditious."

79. Prior thereto another full bench of the Andhra Pradesh High Court had the occasion to deal with the very question raised before us.

80. In A. Srinath and others Vs. The Andhra Pradesh State Road Transport Corporation and others, . the Hon''ble Chief Justice speaking for the full bench not only traced the history of creation of the court but also referred to the provisions of the Letters Patent of the Madras High Court which are part materia with the provisions of Letters Patent of this court and upon taking note of the relevant provision of Government of India Act. Constitution of India and various decisions wherein it was held, that Letters Patent is not controlled by the CPC opined:--

"One of us (P.S. Mishra, C.J.), sitting in the Full Bench of the Madras High Court in Mayavaram Financial Corporation Limited, Maylladuturat v. The Registrar of Chits, Pondteheny (1991)2 Mad LW 80 had the occasion to deal with a similar question and noticed one of the earliest cases in which section 623 CPC, 1882 and Clause 15 of the Letters Patent of the Calcutta Court were examined is in Aubhoy Churn Mohunt v. Shamont Lochun Mohunt, (1889) ILR 16 Cal 788. The view expressed in the Calcutta judgment is so relevant that we are tempted to

extract the observation in the said Judgment in the Judgment of the full bench of the Madras High Court in Mayavaram Financial Corporation Limited. Mayiladuturat v. The Registrar of Chits, Pondteherly (1991)2 Mad LW 80 (supra), which is as follows:--

"It seems to me that under the spirit of the section referred to, I and I alone, am bound to bear this rule. The section is apparently intended to refer to a High Court which is specially excepted from the rule laid down in section 624, section 627 imposes a very reasonable and proper restriction, and that restriction is this, that when the Judges, or any one of them who made the decree can hear the application, within six months after its presentation they or he. and they or he only, shall hear it."

81. The Calcutta High Court reiterated the above in a subsequent judgment in Moksud Mahi v. Secretary of State (1911)9 ind Cas 532, a full bench of the Madras High Court was faced with an objection that an order of reference to a full bench made by the Travancore Cochin High Court before the State Reorganisation Act after transfer of the case to Madras High Court as a result of the reorganisation was required to be heard by a Full Bench. A learned single Judge of the court, after taking notice of the various authorities on the subject, held that the procedure of the court in the matter of reference to a full bench was not governed by any statutory provisions, but by prevailing practice and it was not permissible to any litigant to claim as a matter of right, in the absence of a statutory provision, to have his case decided by any particular Judge or Judges of the court. After taking notice of the Scheme of the Letters Patent and other relevant provisions and the fact that there is an essential distinction between a substantive right of appeal and the procedure prescribed for disposing of that appeal, it is observed by the Full Bench of the Madras High Court in Mayavaram Financial Corporation limited v. The Registrar of Chits, Pondicherry (1991)2 Mad LW 80 (supra) that, "The same thing can undoubtedly be said with respect to the right to make a review application and the procedure for disposing of the same."

The Hon^{ble} the Chief Justice observed:--

"If the CPC applies perforce, a review petition has to be heard by a Judge or Judges or any of them who had passed the decree or made the order, a review of which is applied for, and no other Judge or Judges of the court shall hear the same. If, however, it is applied as a rule of convenience or constructively as respects exercise of the Letters Patent power, the court has to make its own rules, CPC is applied only constructively.

82. The full bench of the Andhra Pradesh High Court considering the fact that the power of review is in a court and not in a particular Judge observed:--

That is why it is said that a review of a Bench order (as provided in r 6 of Or 47 of the Code) has to be allowed only in a case of a majority opinion in favour of the review and in the case of a bench of equal strength, in the event of equal

division, the application for review must be rejected. This rule of prudence has been followed more as a practice than as a command of the legislature in almost every court in India and constructively applied to the writ proceeding as well. But it will still not be open to any party to insist that his case must be heard by the Judge or Judges, who had passed the decree or made the order. There may be cases where after passing the decree or making the order, one or all of the Judges constituting the bench may feel embarrassed in hearing the review petition. They may in such a situation, order for the case being placed before some other Judge. They need not for this purpose make an open pronouncement except indicating their disinclination to hear the matter to the Hon'ble the Chief Justice. What would be done in such a case if the Hon'ble the Chief Justice did not exercise his inherent power to constitute a new Bench to hear the review petition. There may be many other circumstances and situations in which the Hon'ble the Chief Justice exercising his inherent power to constitute a new Bench to hear the review petition. There may be many other circumstances and situations in which the Hon'ble the Chief Justice exercising his inherent power, may not think it desirable to place the review petition before the Bench, which passed the decree or made the order. As this is a rule of procedure and not a substantive right, it is not for the litigant to suggest who should hear the review petition. A prudent exercise of discretion by the Hon'ble the Chief Justice in this matter, and since this power has been held to inhere and vest with the Hon'ble the Chief Justice, in our view, by itself is a sufficient safeguard to ensure its prudential exercise, should be more than enough for the parties to accept the constitution of the Bench or allotment of the case to a Judge or Judges for the hearing of the review petition."

83. The findings were thus, summed up:--

(1) CPC does not apply to a writ proceeding under Article 226 of the Constitution of India, Courts, however, sometimes constructively apply certain basic principles enshrined therein to the writ proceedings, on ground of public policy or dictates of reason or necessity whenever it is found to be essential for the effective administration of justice.

(2) A writ appeal is the continuation of the writ petition. Merely because it is an appeal under the Letters Patent of the court, it does not change its character from being a writ proceeding to an ordinary civil proceeding.

(3) The Hon'ble the Chief Justice has the inherent power to allocate the judicial business of the High Court including who of the Judges should sit alone and who should constitute the bench of two or more Judges. No litigant shall, upon such constitution of a bench or allotment of a case to a particular Judge of the court will have a right to question the jurisdiction of the Judges or the Judges hearing the case. No person can claim as a matter of right that this petition be heard by a single Judge or a division bench or a particular single Judge or a particular division bench. No Judge or a bench of Judges will assume jurisdiction unless the case is allotted to him or them under the orders of the Hon'ble the Chief Justice.

(4) A Judge or the Judges constitution the Bench will not decide whether to entertain a review petition or not unless the same is placed before him or them under the orders of the Hon''ble the Chief Justice.

(5) Unless it is on account of exceptional circumstances or to meet an extraordinary situation the Hon''ble the Chief Justice decides to allot the work to some other Judge or Judges, as the case may be, we consider it to be prudent as well as desirable that the Judge or Judges who passed the judgment/decreed or made the order sought to be renewed, hear the review petition and in the case of the Judgment, decree or order of a Bench the Judge or the Judges who are available are associated as members of the bench."

84 The matter also came up for consideration although in a bit different context. In *Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel and others*, . In that case the question of applicability of section 98 of the CPC arose vis-a-vis the rules framed by the High Court as also the Letters Patent and Order 47 rule 6 of the Code of Civil Procedure. The question was framed by the apex court in the following manner:--

"When in review proceedings arising out of the decision of the division bench of two learned Judges of the High Court rendered in a writ petition under Article 226 of the Constitution of India which is in the nature of original proceedings, the two learned Judges deciding the review petition differ on questions of fact or law, whether a reference to a third learned Judge is required to be made for disposal of the review petition as per the majority opinion of the three learned Judges or whether on difference of opinion between them on these questions, the petition is required to be dismissed under Order 47 rule 6 Code of Civil Procedure, 1908 ("CPC" for short), keeping the order sought to be reviewed untouched."

85. The apex court laid down the law as regard the scope and purport of the review petition in the following manner:--

"Therefore, the short question is whether the decision rendered by the division bench of the High Court in Special Civil Application No. 770 of 1995 allowing it as a public interest litigation petition in exercise of original jurisdiction of the High Court under Article 226 of the Constitution of India would not tend colour of the very same original jurisdiction to review proceedings arising out of that very judgment? it has to be kept in view, that review petitions are not by way of appeals before the superior court but they are by way of requests to the same court which decided the matter, for persuading it to recall or reconsider its own decision on grounds which are legally permissible for reviewing such orders. As laid down by Order 47 rule 5 CPC as far as possible the same two learned Judges or more Judges who decided the original proceedings have to hear the review petition arising from their own judgment. Thus in substance a review amounts to reconsideration of its own decisions by the very same court. When the court sits to review its own order, it obviously is not sitting in appeal over its judgment but is seeking to have a fresh look at its own Judgment of course within the limits of

review powers, but still invoking for that limited purpose the very same Jurisdiction which it exercised earlier. It is axiomatic that if a division bench of two learned Judges deciding the appeal had exercised appellate powers and when its decision is sought to be reviewed it can be said to be required to reconsider its own decision within the limits of review jurisdiction but still in exercise of the same appellate jurisdiction which it earlier exercised. Similarly when a decision rendered in exercise of original jurisdiction by a bench of two learned Judges is sought to be reviewed, the learned Judges exercising review jurisdiction subject to the limitation inhering in such an exercise, can be said to be called upon to reconsider their decision earlier rendered in exercise of the very same original jurisdiction. In that review jurisdiction takes colour from the nature of the jurisdiction exercised by the court at the time when the main judgment, sought to be reviewed, was rendered. Review jurisdiction, therefore, cannot be said to be some independent jurisdiction sought to be exercised by the court dehors the nature of the jurisdiction exercised by it when the judgment sought to be reviewed was rendered by it. As the decision sought to be reviewed in the present proceedings was rendered by the division bench in exercise of its original Jurisdiction the review proceedings emanating from the very same Judgment would partake the character of the very same exercise of original jurisdiction. It remained in the domain of original Jurisdiction which could be said to have been invoked by the appellant when it requested the court to review its earlier decision rendered in exercise of original jurisdiction.

(Underlining is mine for emphasis).

86. Upon consideration of the provisions of sections 122 and 129 of the Code of Civil Procedure, Clause 37 of the Letters Patent which is in part materia with Clause 37 of the Letters Patent of this court and rule 186 of the Rules.

87. It was held that Rule 186 of the Gujarat Rules which related to the procedure in case of difference of opinion between Judges is of general nature cannot get attracted so far as Article 226 is concerned. But they shall apply in a case which comes u/s 98(3) and in-relation to the decision of the division bench of the High Courts dealing with petition under Articles 226 and 228 of the Constitution. The apex court held that despite Order 47 rule 6 of the Code of Civil Procedure, in view of the Letters Patent of the Bombay High Court in a case of difference of opinion between two Judges hearing a review application the matter has to be referred to a third Hon'ble Judge.,

88. The said principles were reiterated in a recent decision of the apex court in S.G.P. Committee Vs. M.P. Dass Chela (Dead) by LRS., in the following term:--

"As per that sub-section, nothing in section 98 shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court. Admittedly the High Court of Punjab has Letters Patent. Clause 26 of the Letters Patent provides that in the event of difference of opinion between two Judges as to the decision to be given on any point it shall be heard upon that point by one or

more of the otehr Judges and the case must be decided on the basis of the majority opinion."

89. This aspect of the matter has also been considered by a division bench of this court in which one of us (S.B.Sinha.J) was a member in *Sri Pintu Acharyya v. The State of West Bengal & Ors.* reported in 1997(2) Cal Law Journal 428. wherein it was held:--

The power of review is exercised by this court under Article 226 of the Constitution of india. A writ court or for that matter any appeal court deciding an appeal from a decision in exercise of its jurisdiction under Article 226 of the Constitution of India and not under Order 47 rule 1 of the Code of Civil Procedure. In terms of section 141 of the Code of Civil Procedure, the provisions of CPC have no application in relation to a proceedings under Article 226 of the Constitution of india. It is true that in terms of rule 53 of the writ rules, the Code of Civil Procedures are applicable but as rules can be framed only in respect of the procedural matters, the legal-right of a person cannot thereby be taken away. In this view of the matter we are unable to hold that Order 47 rule 1 of the CPC ipsojacto will have any applicaton in a proceeding under Article 226 of the Constitution of india. This court cannot loose sight of the fact that the writ court is not only a court of law but also a court of equity, in exercise of its power of review, thus not only it can review its order when there exists an error apparent on the face of the record but also in exercise of its inherent jurisdiction and in the interest of justice."

90. We respectfully agree with the aforementioned views. We may, however, further point out that there may be an inherent danger in holding that Order 47 rule 5 perforce applies to the proceedings in a High Court whether exercising its jurisdiction under Article 226 or trying a suit or hearing appeal therefrom. There may be a case where a matter has been heard by a special bench and a final judgement has been rendered in which one or more members had held a minority view. Even in a case of temporary absence of Hon''ble Judges holding majority view, a review application can be filed before the Hon''ble Judges holding minority view and the entire judgment may be reversed.

91. There may also be a situation where a strict literal interpretation of Order 47 rule 5 of the CPC would nullify the object and purport of the review application in case of matter of urgent nature as owing to temporary absence of a Judge the matter cannot be placed at all causing irretrievable injury to the petitioners.

92. The reasonings aforementioned as regard applicability of Order 47 Rule 5 in a writ proceeding, shall also necessarily apply in a civil proceeding. As indicated hereinbefore, both the appeals arose out of the suits filed in the Original Side of this court. The suits and consequently the appeals threagainst were thus, disposed of upon following the rules framed on the original side framed by this court laying down the procedures therefor. The court is, therefore, bound to follow the said rules and review application must also, necessarily be disposed of

in terms of rules made in Chapter XXXI of the Original Side Rules read with the provisions of the Letters Patent of this court.

93. In Chapter XXXI of Original Side Rules no provision exists like Order 47 rule 5 of the Code of Civil Procedure. Keeping in view the provisions of the Government of India Acts and the Rules framed by this court, thus, Order 47 rule 5 perforce will have no application in relation to the said appeals.

94. We are further of the view that in any view of the matter a learned Judge can always in terms of the Original Side Rules while hearing a review application may refer the matter to a division bench and in that view of the matter, the power of learned Judge to refer the matter to the Chief Justice for being heard by a division bench or a larger bench cannot be curtailed by Order 47 rule 5 of the Code of Civil Procedure.

95. However as regard the question as to whether Order 47 rule 5 of CPC is mandatory or discretionary even in a civil proceeding. There is a great deal of divergent views. In *Bhera and Others Vs. Board of Revenue and Others*, , it agreed with the opinion of a Full Bench of Travancore-Cochin High Court in *Narayanan v. Roman* reported in AIR 1953 Trav-Co. 306. which in turn disagreed with its earlier view with another full bench in *Sirkar v. Valayudhan Ponnai* reported in AIR 1953 Trav-Co. 1 and held that the limitation of six months wailing provided that Order 47 rule 5 .was not mandatory.

96. In *Behra* (supra) the Rajasthan High Court held:--

"It is easy to imagine that acceptance of an interpretation given by the Board of Revenue is likely to lead to strange results and anomalies. The review application of an applicant, however, good in law. will be lost if official exigencies force a certain member of the Board of Revenue to leave that Office whereas another applicant, similarly situated may not suffer from such a handicap. Procedural law is not erratic but is an instrument for the attainment of justice and if the language can reasonably bear an interpretation of its uniform application, which in our opinion Order 47 rule 5. Civil P.C. does then such an interpretation alone can be given to it rather than an interpretation which tends to strange results and anomalies. A legal battle is ordinarily a conflict of interest and the procedural law is the accepted path on which would travel the process of settlement. This path has for its foundation principles of natural justice, sound reason and good conscience. Any interpretation which detracts from the certainty of the path or makes it freakish, anomalous or uncertain has to be avoided because it will lend unpredictability to the process."

97. However, in *Maji Mohan Kanwar and Others Vs. The State of Rajasthan and Another*, , a Division Bench of the Rajasthan High Court while stating that there are 3 stages of review application, it is only the court which passed the decree or order is entitled to review. The said decision was rendered without taking into consideration the provision of the Letters Patent and the Government of India Act and the Constitution of India and thus, must be held to have been rendered per

incurium.

98. In *State of Rajasthan v. Gopal Singh*, 1994 Supp. (2) SCC 404 keeping in view Rule 64 of the Rajasthan High Court Rules, 1952 the apex court held that the proper procedure which would require to be followed was to lay the application before the learned Chief Justice and "without following the said procedure a power of review exercised by a single bench and reversing in the earlier order which would ordinarily go to a division bench was not in accordance with law.

99. In *Pitambar Mallik and Another Vs. Ramchandra Prasad and Others*, , the Chief Justice's power to place a review application before any other Judge has been upheld.

100. In *Manoharlal Verma Vs. State of Madhya Pradesh and Others*, referring to Rule 4 of M.P. High Court Rules, the division bench held that on retirement of one of the Judges review has to be heard by two Judges specially when the Chief Justice has directed and constituted a bench.

101. Although a large number of decisions have been cited before us to show that Order 47 rule 5 of the CPC is mandatory in nature. "we need not consider all the decisions but take into consideration only such decisions upon which strong reliance has been placed by Mr. Deb and Mr. Banerjee.

102. In *Chhajju Ram v. Neki and Ors.* reported in AIR 1992 PC 112: 26 CWN 697: Law Reports 49: Indian Appeals 144. a bench of seven Judges of the judicial committee was concerned with a question as to what is meant by a sufficient reason under Order 47 rule 1 of the Code of Civil Procedure. While deciding the said question, however, a passing observation was made that provision of Order 47 rule 5 should be followed which was in the nature of obiter dictum as the said question was taken into consideration only for the purpose of the larger considerations and not independently. Neither any argument was advanced as to whether Order 47 rule 5 of the CPC was mandatory nor any precedent was cited. The learned Judges did not advert to themselves the question as to whether the said provisions are mandatory or not.

103. In *Maharajah Moheshur Singh v. The Bengal Government* reported in 1859 (7) Moor Indian Appeal 283, the Judicial committee held:--

"We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only ex necessitate. We do say that in all practicable cases the same Judge ought to review; and that for the attainment of that object, expedition in presenting a petition for the review is indispensable. and the only practicable course for attaining that end by accelerating the hearing of the review before accident or unexpected events shall have removed the original Judge. Looking at all these

circumstances, we should naturally expect to meet in the Regulation upon this subject such provisions as would prevent the evils necessarily incidental to delay and procrastination."

104. Thus, even in that case the judicial committee has held that necessitate the provision of Order 47 rule 5 may not strictly be adhered to and thus the same cannot be said to be absolute or mandatory in nature.

105. In both the aforementioned cases the judicial committee was considering appeals from Chief Court of Punjab and or Commissioners of Revenue respectively who did not have the same power as that of the High Court and thus, neither they were governed by the Letters Patent nor were governed by the rules framed in terms of section 129 of the CPC read with section 4(1) thereof.

106. In Jagai Chandra Acharji and Anr. v. Syama Charan Bhattacharjee and Ors. reported in AIR 1919 Cal. 1033. this court was concerned with absolutely a different question. In that case a division bench had dismissed an application under Order 41 rule 11 of the Code of Civil Procedure. One of the Hon^{ble} Judges went on leave but another Hon^{ble} Judge reviewed the Judgement in contravention of Order 47 rule 5 of the Code of Civil Procedure. Despite a contrary judgment of the division bench in Meghrqj v. Bijoy Gobind Nural reported in 1875(1) Cal 197 as also another view expressed in Nusserooddeen Khan v. Indurnarain Chowdhury reported in 5 Weekly Report 93, it was held that an appeal would be maintainable. It is thus, evident that the question posed in that case was also different. Furthermore, in that case even the provision of Order 47 rule 7 which poses an inherent danger in the event of allowing the review application by a single Judge was not brought to its notice. The said decision is, therefore, also not applicable in the facts of the present case.

107. In Abbhoy Churu Mohunt v. Samant Lochurt Mohunt reported in ILR 16 Cal 788. the court was considering an appeal against an order admitting a review application and directing the papers to be laid before the Chief Justice for appointment of a bench to hear the review. The division bench upon taking into consideration the fact of the matter held:--

"As I said Just now, at the time this rule was returned Mr. Justice Wilson had gone away on furlough and another gentleman had been appointed to perform his duties, and, consequently, he had ceased to have any jurisdiction as a Judge of this court for the time. He was not at the time attached to the court, and, consequently, Mr. Justice Beverley was the only one of the Judges who heard the appeal who remained attached to the court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice Beverley was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails."

108. Even in that case as noticed hereinbefore upon making the rules absolute, it was held that if there should be re-trial the matter should be referred to a

division bench for a decision on merit.

109. In AIR 1927 20 (Rangoon) , however, an observation was made that the matter should be placed before a division bench for hearing on merit if the attached Judge sitting single is of the view that the matter requires re-hearing.

110. Apart from the fact that the factors which have been taken into consideration by us had not been taken into consideration in the aforementioned cases, the question which now arises as to whether we are precluded from considering the matter afresh. The answer to the said question, to our opinion, must also be rendered in negative.

111. Order 47 rule 5 occurs in the 1st Schedule appended to the Code of Civil Procedure. Normally it has to be considered to be a procedural matter. A superior court apart from its power u/s 129 read with section 4 of the CPC coupled with its power under Letters Patent as a matter of general policy may frame its own procedural particularly when the same is required in the interest of justice. Can we in a public interest litigation refuse to entertain an oral prayer or refuse to entertain an application which does not conform with the rule? The position which clearly emerges, by reason of the decision of the apex court, is that in a given case the writ court or the High Court exercising its inherent Jurisdiction can waive any of such procedural rules. The rules of procedure are not in themselves an end, rather they mean to achieve goal of Justice in other words, they have been framed with a view to achieve justice and not to frustrate the path way of Justice. Any construction which puts obstruction to the course of promotion of justice and prevention of miscarriage thereof must be discouraged and the court in all such situations must adopt a pragmatic approach while construing a procedural provision. Thus, the approach of the court should be not to interpret the rules in a rigid matter.

112. In *Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh*, it has been emphasised that the procedure is hand-maid to justice. In case the submission of the learned counsel for the petitioners are accepted, it shall not only defect the object and purpose of imparting Justice but also in a given case may prove to be oppressive. It would also take away the jurisdiction of Hon"ble the Chief Justice as a "Master of the Roster." in any event the power given to the High Court under Article 225 of the Constitution of India is very comprehensive. The provisions of Article 225 of the Constitution have to be read conjointly with Article 226 thereof. In the matter of interpretation of the constitutional provisions I am reminded what His Lordship Oliver Wendell Holmes said in an American Supreme Court case in *Campers v. United States* 233 US 604(619) which is as follows:--

"But the provisions of the Constitutions are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil, their significance is vital, not formal, it is to be gathered not simply by taking the words and a dictionary but by considering their origin and line of their growth.

113. The law is a part of human conduct which are only instruments for serving the needs of society. The purpose is to reconcile injustice with justice and to suppress the former when it clashes with the latter. Law has to be interpreted keeping in view the constitutional goal which would sub-serve the society as a whole.

114. Order 47 rule 5, it is true, ex facie seems to be imperative in nature, A procedural law may be imperative but it should be construed in such a fashion so that it does not result in any absurdity.

115. In *Shreenath and Another Vs. Rajesh and Others*, . It was held:--

"In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding the justice is to be adopted. The procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed."

116. Order 47 rule 5 also seeks to curtail the right of the Chief Justice and/or a learned single Judge who, is otherwise entitled to in a given situation to refer a matter to a division bench in terms of the Original Side Rules as also Appellate Side Rules. Such a power of the Chief Justice or the learned Judge to refer a matter to the division bench cannot be curtailed.

117. In *Sachida Nand Singh and Another Vs. State of Bihar and Another*, , it has been held that the word "shall" is not always decisive to hold that a particular statute is directory or mandatory. The same view has also been taken in *State of Andhra Pradesh and another Vs. Dr. Rahimuddin Kamal*, .

118. Mr. Deb, the learned counsel has placed strong reliance upon a decision of the House of Lords in *The Public Prosecutor v. Oie Hee Koi* reported in 1968 Appeal Cases 829 wherein it was held:--

"The direction not to proceed with the trial which is to be given in the case of a protected prisoner of war is mandatory that is to say imperative in character. It seems that enactments regulating the procedure to be followed in courts are usually imperative and not merely directory. See Maxwell on interpretation of Statutes, 11th ed. (p. 367). The direction is one which is given to the court of trial itself, that is to say to the court of first instance. It does not purport to be an ouster of Jurisdiction but is a direction not to proceed until etc."

119. In that case the court was concerned with the right of a prisoner. However, in that case the court or tribunal whose Jurisdiction was laid down by Act was under a statutory duty not to make certain type of order, and in that situation it was held that the duty is mandatory. It is now well settled that even a discretion coupled with the duty would be mandatory in nature.

120. Francis Bennion in his *Statutory interpretation*. Third Edn. at page 30 while considering the tests as to whether a provision is mandatory or directory

observed:--

"S.10(1) This section applies where-

(a) a person (the person affected) may be affected by a thing done under an enactment, and

(b) the legal effectiveness of that thing is subject to the performance by the same or any other person (the person bound) of some statutory requirement (the relevant requirement), and

(c) the relevant requirement is not complied with, and

(d) the intended consequence of the failure to comply is not stated in the legislation.

(2) in ascertaining, in a case where this section applies, the effect of the failure to comply with the relevant requirement, it is necessary to determine whether the requirement was intended by the legislature to be mandatory or merely directory. For this purpose it may be relevant to consider whether the person affected and the person bound are the same, and whether the thing done under the enactment is beneficial or adverse to the person affected."

It is true that the apex court in Lachmi Narain and Others Vs. Union of India (UOI) and Others, , held:--

"Section 6(2), as it stood immediately before the impugned notification, requires the State Government to give by Notification in the Official Gazette "not less than 3 months" notice" of its intention to add to or omit from or otherwise amend the Second Schedule. The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory (Crawford, The Construction of Statutes, pp. 523-524). Here the language of sub-section (2) of section 6 is emphatically prohibitive, it commands the Government in unambiguous negative terms that the period of the requisite notice must not be less than three months."

121. The apex court in that case, however, was considering the provisions of section 6(2} of Bengal Finance (Sales Tax) Act, 194J and the Notification issued thereunder, and as such the said construction was made in favour of the assessee and against the revenue. However, it may be noted that even the apex court does not lay down any law in strict term, that in all such situations the statute has to be held as mandatory. As otherwise the word "rarely" would not

have been used. There may, therefore, be certain cases where despite such terminologies, the statute may be held to be directory.

122. Instead of encumbering this judgment with various decisions it would be profitable to reproduce a passage from Principles of Statutory interpretation by Justice G.R.Singh. 51st Edn., p. 240 which is in the following terms:--

"But the principle is not without exception section 256 of the Government of India Act, 1935, was construed by the Federal Court as directory though worded in the negative form. Directions relating to solemnization of marriages though using negative words have been construed as directory in cases where the enactments in question did not provide for the consequence that the marriage in breach of those directions shall be invalid. Considerations of general inconvenience, which would have resulted in holding these enactments mandatory, appear to have outweighed the effect of the negative words in reaching the conclusion that they were in their true meaning merely directory. An interesting example, where negative words have been held to be directory, is furnished in the construction of section 25F of the Industrial Disputes Act, 1947, where compliance of clause (c) has been held to be directory, although compliance of clauses (a) and (b) which are connected by the same negative words is understood as mandatory. Another example can be found in the Proviso to section 33(2)(b) of the same Act which is worded in a negative form and is prima facie imperative. But the Supreme Court after examining the language of sections 33 and 33A has held that a dismissal order passed without obtaining the permission as required by the proviso is not void and it may not be annulled if on merits the dismissal is well founded. These cases illustrate that the rule, that negative words are usually mandatory, is like any other rule subordinate to the context, and the object intended to be achieved by the particular requirement."

123. In *Smt. Mono Mohini Choudhury Vs. Nityananda Saha Choudhury*, this court was dealing with a situation where non-compliance of the provision of section 10C of the Bengal Court of Wards Act rendered the sale void and in that situation it was held to be mandatory.

124. In *Banarsi Dass Vs. Brig. Maharaja Sukhjit Singh and Another*, the apex court merely held that the manner prescribed by law for exercising the jurisdiction and conferring the power for that purpose should be exercised in the same manner. In that case the apex court was considering the power of the court u/s 100 of the Code of Civil Procedure. The apex court, however, itself held:--

"No doubt procedure is meant to advance justice but when law prescribes as to how jurisdiction is to be exercised that way. For a second appeal to be maintainable, it has to satisfy the parameters as laid in section 41 of the Punjab Courts Act or section 100 of the Code as the case may be. In this view of the matter, we consider it unnecessary to refer to any of the decisions cited at the Bar to contend when the High Court will interfere in the second appeal and when it will stay its hands."

125. In *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, was again dealing with a case where the statute conferred an express power governing the rights of the parties and in that situation it was held that a power inconsistent with that expressly given cannot be implied. The said decision has, therefore, also no application to the fact of the mailer.

126. It is not a case where the statutory body exercises its statutory function only in the event, such statutory functionary is bound to exercise its jurisdiction within the four corners of the statute but in that case where the court has to exercise its power, being entitled to lay down its own procedure, it cannot be said that the procedure laid down must be held to be mandatory so as to stretch the same to the extent that thereby it may render injustice.

127. For the self-same reason, the decisions of the Privy Council in AIR 1936 253 (Privy Council) and *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, cannot be said to be applicable as in the former case; the question was as regard the right of an accused in the later case; the apex court was concerned with a surrender by a tenant in terms of the provision of Bombay Tenancy & Agricultural Lands Rules.

128. On the other hand, in *Ganesh Prasad Sah Kesari and Another Vs. Lakshmi Narayan Gupta*, while interpreting section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 where consequences of striking off the defence was provided for on the tenant's failure to deposit the rent within the prescribed period the apex court held that the word "shall" used in the aforementioned provision is directory in nature.

129. In *Crawford on "Statutory Construction"*, the law is stated in the following terms:--

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other."

130. This aspect of the matter has also been considered in *Owners and Parties interested in Owners and Parties interested in M.V. "ValiPero" Vs. Fernando Lopez and Others*, wherein the apex court while interpreting the provision of a rule of this High Court relating to obtaining of a signature of a witness observed:--

"Procedure is meant to subserve and not rule the cause of justice. Where the outcome and fairness of the procedure adopted is not doubted and the essentials of the prescribed procedure have been followed, there is no reason to discard the result simply because certain details which have not prejudicially affected the result have been inadvertently omitted in a particular case, in our view, this

appears to be the pragmatic approach which needs to be adopted while construing a purely procedural provision. Otherwise, rules of procedure will become the mistress instead of remaining the handmaid of Justice contrary to the role attributed to it in our legal system."

It was further held:--

"If the word "shall" used in this expression is construed as mandatory, non-compliance of which nullifies the deposition, drastic consequence of miscarriage of justice would ensue even where omission of the witness' signature is by inadvertence and correctness of the deposition as well as its authenticity is undisputed. On the other hand, if the word "shall" used in the expression is treated as directory, the court will have power to prevent miscarriage of Justice where the omission does not cause any prejudice and the defect is only technical. The object of the provision being merely to obtain acceptance of the witness to the correctness of the deposition, that object would be advanced by taking this view and thereby empowering the court to avoid the drastic consequence of nullifying the deposition where the correctness and authenticity is undisputed. In a case where the correctness has been disputed, it would be permissible for the court to examine the effect of omission of the witness signature and to reject the deposition only if it does not accept the correctness and authenticity thereof on the available material."

131. We may also usefully quote Articles 266, 269 and 271 from Crawford's Statutory Construction which are in the following terms:--

"Art. 266. As a general rule, a statute which regulates the manner in which public officials shall exercise the power vested in them, will be construed as directory rather than mandatory, especially where such regulation rests on uniformity, order and convenience, and neither public nor private rights will be injured or impaired thereby. If the statute is negative in form, or if nothing is stated regarding the consequences or effect of non-compliance, the indication is all the stronger that it should not be considered mandatory.

Art. 269. As a general rule, a statute which specifies a time for the performance of an official duty will be construed as directory so far as the time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure-Art. 271. Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles.

Most, if not all of these devices find their justification in considerations of justice. It is a well known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and human considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law."

132. Mr. Deb has referred to a large number of decisions, viz.. Sm. Radharani Das Vs. Sisir Kumar and Others, ; Air Carrying Corporation Vs. Shibendra Nath Bhattacharya, ; Kishan Chand Vs. Ram Babu, : Jagadindra Kumar and Others Vs. Revenue Commr., , State of Bombay Vs. Chhaganlal Gangaram Lavar, ; Santu and anr. v. Sohan Lal & Ors. reported in AIR 1951 Pepsu 33 and Hotha Sitarama Sastry being minor by mother and Guardian Hotha Kameshwaramma Vs. The State of Andhra Pradesh, for the proposition that the decisions of the Privy Council are binding on this court unless the Supreme Court speaks differently. There cannot be any doubt whatsoever that Article 372 read with Article 374(2) of the Constitution of India are of wide amplitude. What, therefore, is binding on the High Court is the law laid down by the Privy Council. The ratio of decision is the reason. The law laid down by Privy Council is to be found out from its ratio. An obiter dicta, as well known, is not a ratio decidendi.

133. In Dias on Jurisprudence, Fifth Edn., at page 143 it is stated:--

"Pronouncements of law, which are not part of the ratio decidendi. are classed as obiter dicta and are not authoritative. Ratio and dicta tend to shade into each other. The former have law-quality and are binding on lower courts; dicta too. have law-quality but are not binding at all. Vis-a-vis a higher court even the ratio decidendi of a lower court decision has only persuasive force like that of a dictum. It has been pointed out that some dicta are so authoritative that the distinction between ratio and dictum is reduced to vanishing point. Dicta, which have no force, are propositions stated by way of illustration or on hypothetical facts. Greater difficulties attend rulings of law which are subsequently relegated to the status of dicta by interpretation. The distinction in such cases between ratio and dictum is but a device employed by subsequent courts for the adoption or rejection of doctrine expressed in previous cases according to the inclination of the Judges. An example would be the treatment of Lord Atkin's "neighbour" proposition in subsequent cases."

134. In Salmond on Jurisprudence. 12th Edn., page 29. It is stated:--

"One of the essential features of the doctrine of precedent in the common law is that rules of law are developed in the very process of application. This means that they are created by Judges and not by teachers and other academic lawyers, however, learned they may be. It also means that they are created by Judges only when acting as Judges, i.e.. when deciding cases and not for example when giving lectures or other addresses; statements made by Judges in their extra-judicial capacity, like other extra-judicial opinions, are without binding authority. For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides.

In the course of this judgment, however, a Judge may let fall various observations not precisely relevant to the issue before him. He may for instance illustrate his general reasoning by reference to hypothetical situations and the law which he considers to apply to them. Here of course, since the issue is not

one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual decision. Or again, having decided the case on one point, the Judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we are not given the Judge's final decision ?ji a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way, obiter dicta, are without binding authority, but are nonetheless important: not only do they help to rationalise the law but they serve to suggest solutions to problems not yet decided by the courts. Indeed dicta of the House of Lords or of judges who were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than the rationes of lesser Judges."

135. An obiter may have persuasive value or coming from a renowned Judge, it may command respect but it would not be the law within the meaning of Article 372 read with Article 374(2) of the Constitution of India.

Similarly in a Textbook of Jurisprudence by G.W.Paton, 4th Edn. at page 210 the learned author states:--

"Ratio decidendi, literally, would refer to the "reason of decision" or to the "reason for deciding" but the use of the term to refer to the binding part of a case requires some attention to the actual terminology used in arguments about case law authority, for there has been much confusion. To begin with, ratio decidendi is almost always used in contra-distinction ? to obiter dictum. An obiter dictum, of course, is always something said by a Judge. It is frequently easier to show that something said in a judgment is obiter and has no binding authority. Clearly something said by a judge about the law in his Judgment, which is not part of the course of reasoning leading to the decision of some question or issue presented to him for resolution, has no binding authority however persuasive it may be. and it will be described as an obiter dictum,"

136. However, in the instant case apart from the fact that we have shown hereinbefore that the decisions of the Privy Council are merely obiters. We have also noticed that there are decisions to the contrary. It is now a well known proposition of law that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is further well known that a decision is not a precedent on a point which was not argued. See Goodyear India Ltd., Gidore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, and Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut, .

137. The ratio of Privy Council is binding on a High Court as a precedent. In terms of Article 372 of the Constitution of India. It has been noticed hereinbefore that the Supreme Court has decided the law in a different manner and thus, those Privy Council's decisions are no longer binding on this court.

138. In any event, the law laid down by the Privy Council merely operates as a binding precedent. In *Assambook Exports Ltd. and Another Vs. Export Credit Guarantee Corpn. of India Ltd. and Others*, , one of us (S.B. Sinha. J.) noticed:--

"In the *The Regional Manager and Another Vs. Pawan Kumar Dubey*, , the Supreme Court while considering the case of reservation observed:--

"It is the rule deducible from the application of law to the facts and circumstances of a case which continues its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts."

In *Krishena Kumar and Others Vs. Union of India and others*, . It was held:--

The doctrine, of precedent, that is being bound by a previous decision is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required". This was what Lord Selborne said in *Calendontan Railway Co. v. Walker's Trustees* (1882(2)AC 259] and Lords Halsbury in *Quinn v. Leathern* (1901 AC 495). Sir Frederick Pollock has also said: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principle accepted and applied as necessary grounds of the decision".

In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premises consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premises consisting of the material facts of the case under immediate consideration. If it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th Edn. Vol. 26. para 573).

The concrete decision alone is binding between the parties to it but it is abstract ratio decidendi as ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell with difficulty a ratio decidendi in order to be bound by it. and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."

139. Reference in this connection may also be made to *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, . It is not also correct to contend

that the court has to follow the practice of this court bindly. During passage of time the situation has changed/The change in the situation in the conduct of business of the High Court has also been taken note of the Supreme Court in the latest decision. The interpretation of law can never be rigid. It has to be purposive. The law has to develop. It shall not be allowed to stink by confining it as still water.

Justice Cardozo said:--

The law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new: but the transition is never an easy process."

140. From only "justice" the courts have now begun to think in terms of "social justice", "socio-economic justice" and "distributive justice". The end of the law is seen to be, not only vindication of legal equality, but also provision of equality in fact with regard to more and more of elements that make life meaningful in the contemporary community. It no longer plays a regulatory role but also a constructive one.

Albert Camus stated:--

"The wheel turns, history changes". Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic poles: without stability the law becomes not a chart of conduct, but a game of chance: with only stability the law is as the still waters in which there are only stagnation and death."

141. Application of a statute may be varied from time to time. Difficulties may arise in the application of a statute by a court in different situation and context.

Reed Dickerson in the interpretation and Application of Statutes at page 255 refers to such a case and noticed:--

The doctrinal problem that the Court of Appeals faced was this: How could the selfsame statute, which had remained unchanged since 1831, have meant one thing in 1939 and another in 1941? The answer is that it could not. If by "meaning" we mean true meaning. On the other hand, it could, if by "meaning", we mean legal meaning, the same statute can have different legal meanings on different dates. Taking as our standard the assumed correctness of the 1941 interpretation (which was not in issue), we can say that in 1939 the legal meaning of the Act, which is ordinarily what counts in court, differed from its true meaning. When in 1941 the Supreme Court made the assumedly correct interpretation, it declared a meaning that, if correct, must have been the statute's meaning from the date of enactment. By that same determination it also made the true meaning, for the first time, the legal meaning. In short, the basic relevant juridical fact was that in 1941 the legal meaning of "near" had changed.

This analysis would ordinarily liberate the court from the false dilemma of having to choose between staying with a wrong legal meaning and declaring a new

correct legal meaning that is necessarily effective from the date of enactment. Because only a newly declared rule of law, which now coincided with true meaning, was directly involved, the court had discretion to make the new rule effective at what it considered the appropriate time. Thus, it is arguable that the court in *Colpoys* was free to apply the new rule only *pros pec lively*, if that seemed to be the most appropriate action."

142. Furthermore, if a rigid and strict literal interpretation is given to Order 47 rule 5 of the Code of Civil Procedure, the same may border on unconstitutionality. If two views are possible the court will uphold such view which will preserve the constitutionality and for the said purpose, the provision of a statute can also be read up or read down.

143. However, we agree with the suggestion of Mr. Panja that with a view to remove all uncertain;lies, the Full Court may take appropriate steps for amending the High Court Rules.

144. Before parting with this case, however, we may place on record that we have come across an order dated 26th November 1993 passed by the Supreme Court of India in Civil Appeal No. 7597/93 (M/s, K.Saroja Nakshatri v. Sadasukh Kabra & Co. & Ors.) wherein the apex court directed hearing of review application by a single Judge keeping in view the fact that the othr Judge forming the Division Bench has become non-attached.

145. It appears that the apex court has passed the said order on the premises that according to the Rules of the Calcutta High Court if one of the Judges retired, the review application is heard by a single Judge who is still on the bench. Such an observation was made on concession of the counsel of the parties. However, we have noticed hereinbefore that there does not eixist any such review. Furthermore, as indicated hereinbefore, all the apoinls raised before this bench were not argued nor canvassed before the apex court. Such an order on a wrong concession cannot, in our considered opinion, be a binding precedent.

In view of our foregoing discussions we hold-

1. Order 47 rule 5 of the CPC although ipso facto has no application in relation to a writ proceeding or a proceeding on the Original Side or the Appellate Side of this court, the principles laid down therein may be applied.
2. in a case where merely one of the learned Judges attached to the Bench is available he may issue the rule but the matter on merit must be heard by a division bench of two Judges or such number of Judges as the Hon''ble the Chief Justice may constitute.
3. The Hon''ble the Chief Justice has an unfettered jurisdiction in the matter of constitution of benches in all matters including a review application.
4. As a matter of propriety, a Judge who is still attached to the court should be made a parry to hear the review application unless exceptional situation arises

which may in the opinion of the Hon''ble the Chief Justice would be subversive to imparting justice to a litigation keeping in view the principle that justice is not only to be done but manifestly seem to be done,

146. These references are answered accordingly. The records may now be placed before the Hon''ble the Chief Justice for placing the matter before appropriate bench on the administrative side.

147. Answered accordingly