supposed powers of *de facto* guardians in the most recent case of *Imambandi* v. *Mutsaddi* supports, it seems to me, the view that no such rule of representation could be pleaded under Mahomedan law in aid of an invalid sale by the Court. This case would appear not yet to have been reported. It was only decided on the 28th February, 1918, by the Privy Council(2).

This appeal ought, therefore, in my opinion, to be allowed. The cross-objections of respondent No. 1 ought to be dismissed with costs. The appeal of respondent No. 2 ought to be dismissed with costs. Possession by partition of the particular house in dispute with mesne profits and costs ought to be allowed against respondent No. 4.

Decree reversed.

J. G. R.

(2) Since reported (1918) L. R. 45 I. A. 73.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt, Chief Justice, Mr. Justice Heaton, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Hayward.

BHUTA VALAD JAYATSING (ORIGINAL PLAINTIFF-APPLICANT), APPELLANT *v.* LAKADU DHANSING AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1918. *September* 28.

Civil Procedure Code (Act V of 1908), section 98—Second Appeal from the mofussil—Difference of opinion—Procedure—Letters Patent, 1865, clause 36.

In second appeals from the mofussil on the Appellate Side of the High Court where Judges differ the procedure is governed by section 98 of the Civil Procedure Code, 1908, and not by clause 36 of the Letters Patent, 1865.

* Second Appeal No. 22 of 1917.

1918.

BHUTA v. LAKADU DHANSING.

SECOND appeal against the decision of C. C. Dutt, Assistant Judge of Khandesh, confirming the decree passed by J. H. Betigiri, First Class Subordinate Judge at Dhulia.

A difference of opinion on a question of law having arisen between Beaman and Heaton JJ. their Lordships set down the following point of law for the decision of one or more Judges under section 98 of the Civil Procedure Code, 1908: "Whether a plaintiff who has obtained a decree in his favour in the trial Court and gone into possession under it, and has been put out of possession under the decree of the first Court of appeal reversing the trial Court's decree (no claim for restitution having at this stage been preferred against him by the defendant) and who has succeeded in the Court of second appeal which has restored the judgment of the trial Court, can claim any benefit under section 144 in respect of the time he was dispossessed between the decrees of the first and second appeal Courts?"

Subsequently a doubt being raised whether the provisions of section 98 of the Civil Procedure Code, 1908, should govern the case or the opinion of the Senior Judge should prevail under the clause 36 of the Letters Patent, 1865, the case was sent back to the same Bench and their Lordships after hearing the pleaders on the question of procedure to be followed, referred the following question to the Full Bench on the 21st June, 1918; "Whether in second appeals from the mofussil on the Appellate Side of this High Court where Judges differ the procedure is governed by section 98 of the Civil Procedure Code or clause 36 of the Letters Patent."

The referring judgments were as follows :—

BEAMAN, J.:—We think that the point we are considering, being one of frequent recurrence and great importance, had better be settled once for all by a Full

Bench. As far back as 1879 the same point was decided by a Full Bench of this High Court. The decision there was that the procedure with which we are concerned was to be governed by the Civil Procedure Code and not by the Letters Patent. At that time the Civil Procedure Code contained no section corresponding with section 4 of the present Code, and on that ground it might reasonably be contended that the decision of the Full Bench has become obsolete. On the other hand in the recent case of *Surajmal* v. *Horniman*[1], I find no reference whatever to the Full Bench's decision in *Appaji Bhivrav* v. *Shivlal Khubchand*[2], and my learned brother who was a party to that judgment cannot say that the case was cited. Again in the opening part of the learned Chief Justice's judgment I find him laying considerable stress on the fact that there was no long established practice in appeals from the Original Side of the High Court supporting the view that they are governed by the Civil Procedure Code and not by the Letters Patent. There can be no doubt that rightly or wrongly there is a very long and well-established practice, dating from the decision of 1879 of the Full Bench and I believe practically uniform and invariable up to the present day, by which second appeals from the mofussil are in this respect governed by the Civil Procedure Code and not by the Letters Patent. While I am not throwing any doubt on the correctness of the decision in *Surajmal's case*,[1] and speaking for myself I can find no flaw in the reasoning, it is quite possible that on fuller argument other considerations might be adduced peculiar to second appeals from the mofussil which would dispose this Court to uphold the old and invariable practice. If we were to decide in accordance with the earlier Full Bench decision today, it seems to me quite probable that another Bench might prefer to follow the decision in *Surajmal's case*[1] and decide differently tomorrow.

(1) (1917) 20 Bom.L. R. 185. (2) (1879) 3 Bom. 204.

1918.

BHUTA v. LAKADU DHANSING.

I, therefore, think that it is eminently desirable that these doubts should be finally laid to rest by a decision of the Full Bench and the question we refer to it is:

Whether in second appeals from the mofussil on the Appellate Side of this High Court where the Judges differ the procedure is governed by section 98 of the Civil Procedure Code or clause 36 of the Letters Patent.

HEATON, J.:—I should be very glad if we could arrive at a definite decision now instead of referring the point to a Full Bench, but unfortunately it seems to me to be practically impossible for us to do this. The decision in *Surajmal's case*,[1] to which I was a party, is expressly limited to appeals from the Original Side of this Court. There is a certain amount of argument in favour of making a distinction between Original Side appeals and mofussil appeals. When we turn to the decision in *Appaji Bhivrav* v. *Shivlal Khubchand*[2] which is a decision of a Full Bench of this Court, we find that nearly forty years ago it was definitely laid down that in the case of mofussil appeals, where there is a difference of opinion, the procedure to be followed should be that prescribed by the Civil Procedure Code and not that prescribed by the Letters Patent. It is undoubtedly difficult for us to override this decision of the Full Bench even though it appears that in the new Code there is a provision which did not appear in the old Code and which may support a view contrary to that taken by the Full Bench in 1879. It is, I think, more correct, more consonant with the dignity of the Court, seeing that there is what appears to us to be good reason for doubting whether the decision of the Full Bench of 1879 is now in accordance with the law, that we should refer the point to another Full Bench.

(1) (1917) 20 Bom. L. R. 185.

(2) (1879) 3 Bom. 204.

The reference was heard by a Full Bench, consisting of Scott, C. J. and Heaton, Macleod, Shah and Hayward JJ., on the 29th July, 1918.

W. B. Pradhan, for the appellant:—I submit that section 98 of the Civil Procedure Code, 1908, governs second appeals from mofussil and in cases of difference on a point of law between two Judges in the High Court the matter will have to be referred to a third Judge.

I submit *first*, the appellate jurisdiction of the High Court over mofussil Courts is the appellate jurisdiction of the Sadar Diwani Adalat which was subject to and governed by Acts of Indian Legislature. *Secondly*, although the Indian Legislature has generally no power to affect any Statute passed by the Parliament, there is a reservation in the High Courts Act, 1861, sections 9 and 13 empowering the Indian Legislature to pass any law or regulation for the exercise of the original and appellate jurisdiction vested in the High Court. *Thirdly*, under powers reserved under clause 44 of the Letters Patent the Indian Legislature by passing section 98, Civil Procedure Code, 1908, has superseded the provisions of clause 36 of the Letters Patent.

The provisions of clause 36 only apply to those appeals which come under clause 15 of the Letters Patent. At any rate they do not govern appeals from the mofussil. *Lastly*, the provisions of section 4, Civil Procedure Code, 1908, are not new and the special jurisdiction which they speak of is not the special jurisdiction which is conferred by the Letters Patent.

As to points (1) and (2): Jurisdiction of the High Court is the jurisdiction of the Sadar Diwani Adalat: see Regulation II of 1827, section 5. Under this section Sadar Diwani Adalat used to exercise appellate jurisdiction over mofussil Courts. Sections 9 and 10

1918.

BHUTA v. LAKADU DHANSING.

of the Regulation showed the manner in which the appeals were heard. They also provided that the decision was to be settled by the majority and if there was equality of votes the senior Judge should have the casting vote.

Next came the High Courts Act, 1861 (24 & 25 Vic. c. 104). By section 8 of the Act, the old Sadar Diwani Adalat was abolished. By sections 9 and 13 the jurisdiction of the Sadar Diwani Adalat was maintained and it was declared to be subject to Indian Legislature. By sections 10 and 15 revisional powers exercised by the Sadar Diwani Adalat were also maintained and made subject to the provisions made by the Indian Legislature.

As there is nothing in the Letters Patent of 1862 which directs otherwise, the powers of the Indian Legislature to control the proceedings are kept intact.

The Amended Letters Patent of 1865 came next in order. It repeats section 9 of the Indian High Courts Act, 1861. It becomes quite clear that the jurisdiction which the Indian High Courts are exercising is the jurisdiction of the old Sadar Diwani Adalat and is subject to the Indian Legislature. Under clause 44 of the Amended Letters Patent the powers of the Indian Legislature are preserved.

Under the Indian Councils Act (24 & 25 Vic. c. 67), section 22 the powers of the Indian Government are limited and any enactment passed by them affecting the Statute law is *ultra vires*; but since there is reservation as to jurisdiction any enactment passed by Indian Legislature relating to it is perfectly valid: see *Queen* v. *Meares*[1]. In this last mentioned case it was held that though originally the Supreme Court

[1] (1874) 14 Ben. L. R. 106 at p. 110.

alone had jurisdiction over European British subjects, the Indian Legislature could extend the jurisdiction to mofussil Courts in spite of the Indian High Courts Act, 1861, and the Letters Patent. The same question arose in *The Queen* v. *Burah*[1]. There the Indian Legislature took some territories out of the jurisdiction of the High Courts and made them over to the Commissioner. It was held that the Indian Legislature could do so.

In *Thornton* v. *Thornton*[2] a question arose whether the Indian Legislature could extend the matrimonial jurisdiction. It was held that it could do so: see *Achaya* v. *Ratnavelu*[3]; *In re Rajagopal*[4]; *Queen-Empress* v. *Dada Ana*[5]; *In re James Currie*[6] and *Banno Bibi* v. *Mehdi Husain*[7].

It is in the exercise of these powers that are reserved that the Bombay Civil Courts Act, and the Civil Procedure Code are passed. Section 98 of the present Civil Procedure Code was first enacted as section 332 in the Code of 1859. That section, however, made no provision for reference on difference of opinion between the Judges. By Act XXIII of 1861, section 23, provision was made for difference of opinion and similar provision was made in the Code of 1877, section 575.

[SCOTT C. J.:—Section 575 did not in terms apply to the High Court.]

Section 632 made the provision of the Code applicable to the High Court save as otherwise provided. Section 575 was thus made expressly applicable to the High Court. In the Code of 1882, the same section 575

(1) (1878) L. R. 5 I. A. 178 at p. 188.
(2) (1886) 10 Bom. 422.
(3) (1885) 9 Mad. 253.
(4) (1886) 9 Mad. 447.
(5) (1889) 15 Bom. 452 at p. 473.
(6) (1896) 21 Bom. 405 at pp. 409, 410.
(7) (1889) 11 All. 375.

1918.

BHUTA v. LAKADU DHANSING.

was embodied. In the Code of 1908, section 98 corresponds with section 575 of the Code of 1882 with this difference that only the point of law on which the difference arises can be referred and not the whole case as under the old Codes of 1877 and 1882. I further submit that section 98 appears in Part VII of the Code and the said part is made applicable to second appeals by reason of section 108 of the Code of 1908.

On the *third point*, I submit that under clause 44 of the Letters Patent, the provisions of the Letters Patent are declared subject to the Legislative powers of the Governor-General in Council and in virtue of this power, the Indian Legislature by passing section 98 of the Civil Procedure Code, 1908, have superseded the provisions of clause 36 of the Letters Patent: see *Appaji Bhivrav* v. *Shivlal Khubchand*[1]; *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami*[2] and *Husaini Begam* v. *The Collector of Muzaffarnagar*[3].

[HAYWARD J.:—The Letters Patent are competent to govern appeals from the Original Side of the High Court as well as from mofussil Courts. The Civil Procedure Code governs appeals from mofussil.]

The language of clause 36 of the Letters Patent shows that it governs appeals falling under the Letters Patent under clause 15 only. I would construe the words "any function which is hereby directed to be performed" in clause 36 to apply only to the appellate jurisdiction created by the Letters Patent under clause 15 to hear appeals from one Judge of the same Court by two or more Judges of the same Court, while the scheme of the Indian Legislature is to provide appeals from an inferior Court to

(1) (1879) 3 Bom. 204. (2) (1884) 10 Cal. 814.
(3) (1889) 11 All. 176.

a superior Court: see *Sabhapathi Chetti* v. *Narayanasami Chetti*[1]; *Lachman Singh* v. *Ram Lagan Singh*[2] and *Roop Laul* v. *Lakshmi Doss*[3].

Lastly, the special jurisdiction spoken of in section 4 of the Civil Procedure Code, 1908, is not jurisdiction under the Letters Patent, but certain special jurisdictions under local law such as jurisdiction vested in certain Jagheerdars, Saranjamdars, &c. This section first appeared as section 384 in the Code of 1859 and in the Codes of 1877 and 1882 as section 4, the terms of which are identical with those of section 384 of the Code of 1859. The present section 4 is only an attempt to express briefly the same law. In *Surajmal* v. *Horniman*[4], reference to section 4 was unnecessary, though the final decision is correct. It was an appeal from the decision of a single Judge on the Original Side, which was governed by clause 36 of the Letters Patent.

S. Y. Abhyankar, for respondents Nos. 1 to 3:—I submit that under the provisions of section 23 of the Act XXIII of 1861 when there is a difference of opinion on a point of law the Judges shall state the point on which they differ, and the case shall be re-argued upon that question before one or more of the other Judges, and shall be determined according to the opinion of the majority of the judges of the Sadar Court by whom the appeal is heard; but this provision was not applicable to the Courts established by Royal Charter. Contemporaneously with the said Act, the Indian High Courts Act (24 & 25 Vic. c. 104) was passed, which created the High Courts. Section 9 of that Act confers on the High Court appellate as well as original jurisdiction and section 13 gives power for the exercise of the jurisdiction. Clause 15 of the Letters

(1) (1901) 25 Mad. 555.
(2) (1903) 26 All. 10.
(3) (1905) 29 Mad. 1.
(4) (1917) 20 Bom.L. R. 185 at p. 216.

1918.

BHUTA v. LAKADU DHANSING.

Patent provides for appeals and clause 36 makes provision that the opinion of the senior Judge shall prevail in cases where the Judges are equally divided in opinion. In none of these sections was any distinction made between appellate and original jurisdiction. That it was so is corroborated by a comparison of clause 37 of the Letters Patent of 1862 with the same clause as amended in 1865. Clause 23 of Sir Charles Wood's despatch gives the reasons for this amendment. Therefore, I submit that up to 1877 when the Civil Procedure Code applicable to all Courts was passed the rule was as provided for in clause 36 for both sides. This is corroborated by practice: see *The Collector of Ahmedabad* v. *Samaldas Bechardas*[1] which was a case from the mofussil and in which the opinion of the senior Judge prevailed.

After 1877 and up to 1879 the practice was to allow senior Judge's opinion to prevail. This practice was for the first time upset by a Full Bench in 1879 in *Appaji Bhivrav* v. *Shivlal Khubchand*[2], where it was held that the provisions of the Letters Patent in that respect had been superseded by section 575 of the Code of 1877. Assuming that the decision of the Full Bench was correct at the time it was given, yet after the enactment of the Code of 1908 it is no longer good law because section 4 of the Code does not limit or affect any procedure prescribed under any special or local law or any special jurisdiction. I, therefore, submit that the provisions of the Letters Patent would be saved by the latter section and the opinion of the senior Judge would prevail in spite of the decision in the Full Bench case: see *Surajmal* v. *Horniman*[3].

(1) (1872) 9 Bom. H. C. 205 at p. 212. (2) (1879) 3 Bom. 204.

(3) (1917) 20 Bom. L. R. 185 at p. 216.

I, however, submit that the decision in the Full Bench case is not correct, because the points whether (1) section 575 of the Civil Procedure Code superseded the Letters Patent and (2) whether the Indian Legislature could supersede the Indian High Courts Act, 1861, were neither argued nor considered in that case.

The assumption that there was a supersession of clause 36 of the Letters Patent by section 575 is not tenable: see section 22 of the Indian Councils Act (24 & 25 Vic. c. 67). Thus there being no express supersession, there can be no implied supersession, since the two Acts, viz., the Civil Procedure Code and the Letters Patent, are not inconsistent; the general rule being that a Statute is repealed by implication by the enactment of other Statute if the provisions of the two are wholly incompatible: see Halsbury's Laws of England, Vol. XXVII, section 392, page 197; and *Kutner* v. *Phillips* [1].

The case law also supports the view that there was no supersession of the Letters Patent by the Civil Procedure Code: see *Hurrish Chunder Chowdhry* v. *Kali Sundari Debia* [2]; *Sabhapathi Chetti* v. *Narayanasami Chetti* [3]; *Chappan* v. *Moidin Kutti* [4] and *Toolsee Money Dassee* v. *Sudevi Dassee* [5].

[HAYWARD J.:—Sections 116 and 117, and 122-126 and 128 of the Civil Procedure Code tend to show that corresponding provisions of the Letters Patent were meant to be superseded by the enactment of the Civil Procedure Code.]

[1] [1891] 2 Q. B. 267. at p. 272
[2] (1882) L. R. 10 I. A. 4.
[3] (1901) 25 Mad. 555 at p. 558.
[4] (1898) 22 Mad. 68 at p. 86.
[5] (1899) 26 Cal. 361.

1918.

BHUTA v. LAKADU DHANSING.

These sections deal with the power of the High Court in general without making any distinction between the original and the appellate jurisdiction and it has been held in several cases that the enactment of section 588 of the Code of 1882 which corresponds to section 104 and Order XLIII, Rule 1 of the Code of 1908, had not the effect of taking away the right of appeal given by the Letters Patent. Therefore the aforementioned sections do not have the effect of superseding the Letters Patent.

Section 129 which seems to suggest a distinction between original and appellate jurisdiction does not really have that effect, because if we read sections 122, 128 and 129 with clause 37 of the Amended Letters Patent together, it can be seen that sections 122 and 128 refer to such matters arising whether under the original or the appellate jurisdiction for which Civil Procedure Code ordinarily provides and section 129 refers to the jurisdiction of the High Court, viz., probate, insolvency matrimonial and admiralty jurisdictions.

[HAYWARD J.:—Clause 44 of the Amended Letters Patent in terms says that the Indian Legislature shall have power to make any alterations in the Letters Patent.]

That power to make alterations must be limited by the reservations in sections 9, 11 and 13 of the Indian High Courts Act, 1861.

Pradhan, in reply:—The essence of a Code is to be complete in itself. Civil Procedure Code is a Code and unless and until we find that there is no provision in the Code governing second appeals, we should not have recourse to the Letters Patent. Sections 98, 108, 117 and 128 make a complete provision for hearing of appeals by the High Court. Moreover clause 44 of the

Letters Patent reserves to the Indian Legislature power to modify the provisions of the Letters Patent.

The case of *The Collector of Ahmedabad* v. *Samaldas Bechardas* [1] does not assist the respondent.

The scheme of the new Civil Procedure Code in Part X is to make a distinction between the original and the appellate jurisdiction of the High Court and so far as the latter is concerned, section 98 of the Civil Procedure Code will govern the procedure to be followed on difference arising between the Judges on a point of law. Since the Full Bench decision in 1879, the practice on the appellate side of this Court has uniformly been to refer the case to a third Judge whenever there is a difference in opinion between the two Judges hearing an appeal from mofussil.

C. A. V.

SCOTT, C. J. :—The question referred for consideration by the Full Bench is whether in Second Appeals from the mofussil on the Appellate Side of this High Court where the Judges differ, the procedure is governed by section 98 of the Civil Procedure Code or Clause 36 of the Letters Patent. There can, I think, be no doubt that the procedure must be taken to be governed by section 98 of the Civil Procedure Code, for the question has, as the referring judgment states, been decided by a Full Bench of this Court in 1879, and the practice dated from that decision has been practically uniform and invariable. The decision has also been approved by Full Benches in Calcutta : see *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* [2], and in Allahabad in *Husaini Begam* v. *The Collector of Muzaffarnagar* [3]. The Full Bench in

(1) (1872) 9 Bom. H. C. 205 at p. 212. (2) (1884) 10 Cal. 814.
(3) (1889) 11 All. 176.

1918.

BHUTA v. LAKADU DHANSING.

Appaji Bhivrav v. *Shivlal Khubchand* [1] considered that the provisions of the Letters Patent had been superseded by section 575 of Act X of 1877 so far as regards cases to which section 575 was applicable. The terms of the reference would be satisfied by an answer in this sense.

The question, however, has been argued whether the decision of 1879 in *Appaji Bhivrav* v. *Shivlal Khubchand* [1] should be extended to cases of appeal from judgments on the Original Side of the Court where the Appellate Judges differ, or whether the recent decision in the case of *Surajmal* v. *Horniman* [2] should stand. In my opinion *Surajmal's case* [2] was rightly decided.

The genesis of clause 36 can be gathered from the despatch which accompanied the Original Letters Patent of 1862. When the High Court was constituted by the Original Letters Patent there was no provision to meet the case of Judges being equally divided in opinion upon appeal. Clause 14 gave a right of appeal to the High Court in all cases of original civil jurisdiction from the judgment of one or more Judges of the High Court or of any Division Court, pursuant to section 13 of the High Courts Act, provided that no such appeal should lie to the High Court from any decision made by a majority of the full number of Judges of the High Court but that the right of appeal in such cases should be to Her Majesty in Council. Appeals from Courts in the Provinces were governed by clause 15, which provided that the High Court should exercise appellate jurisdiction in such cases as were subject to appeal to Sadar Diwani Adalat and which should become subject to appeal to the High Court by virtue of such laws or regulations relating to Civil Procedure

[1] (1879) 3 Bom. 204. [2] (1917) 20 Bom. L. R. 216.

as should thereafter be made by the Governor-General-in-Council. The Secretary of State for India, Sir Charles Wood, in his covering despatch of the 14th of May, 1862, paragraph 23, said: "It will appear, from a subsequent clause in the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII of 1861 forms a part. By section 23 of the last-mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance, presided over by single Judges only, contains no provision. To call in a third Judge, and to retry the case, with a view to a judgment from which there may be an appeal to the High Court under clause 14, would be productive of unnecessary delay and expense to the parties: and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro formâ*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose." The subsequent clause in the Letters Patent referred to by him was clause 37. He observes in the Despatch, paragraph 36: "Clause 37 is a very important one, and, there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends

1918.

BHUTA v. LAKADU DHANSING.

to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Courts not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its Common Law, Equity, and Admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment".

The suggestion of the Secretary of State that a rule should be made under section 13 of the Act of Parliament, that is the High Courts Act, 24 & 25 Vic. c. 104, was not given effect to. But in the Amended Letters Patent an express provision was made for the case of Judges differing in opinion by clause 36 which runs as follows :—"And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Bombay in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or any Division Court thereof, appointed or constituted for such purpose, under the provisions of the 13th section of the aforesaid Act of the Twenty-fourth and Twenty-fifth years of Our reign; 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 then the opinion of the Senior Judge shall prevail". Clause 15 of the Amended Letters Patent also referred to the case of difference of opinion among the Judges of the High Court in relation to appeal to the Privy Council providing that an appeal "shall also lie to the said High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division

Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court for the time being; 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".

Clause 36 of the Amended Letters Patent is expressed to apply to cases arising in the performance of any function directed by the Letters Patent to be performed by the High Court in the exercise of its original or appellate jurisdiction and it may be contended that if the latter part of clause 36 has been superseded by section 575 of the Code of 1877 as decided in *Appaji Bhivrav* v. *Shivlal Khubchand* [1], this clause of the Letters Patent must be taken to be no longer in force. There are, however, as it seems to me, cogent reasons for holding that clause 36 is in force without modification in so far as it relates te proceedings on the Original Side of the High Court and appeals from Judges of the High Court.

In the first place, section 129 of the present Civil Procedure Code, corresponding with the 3rd clause of section 652 of the Code, of 1882, provides that "notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, ...may make such rules not inconsistent with the Letters Patent 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." The effect of this provision was to bring the Code into harmony with

[1] (1879) 3 Bom. 204.

1918.

BHUTA v. LAKADU DHANSING.

the Letters Patent and to enable the High Courts to regulate the exercise of their original civil jurisdiction accordingly. Thus the High Court may make rules regulating the procedure in cases falling under the second part of clause 36 of the Letters Patent, but may not make any such rules which would be inconsistent with that clause unless it can be said that the clause has been impliedly repealed. The law as to repeal by implication is thus stated in *Conservators of the Thames* v. *Hall*[1] : " The Court must be satisfied that the two enactments are inconsistent before they can from the language of the later imply a repeal of an express prior enactment," and the rule laid down by Sir Orlando Bridgman (in his judgments, pp. 121, 127, *Lyn* v. *Win*) was quoted that " The law will not allow the exposition to revoke or alter by construction of general words, any particular Statute, where the words may have their proper operation without it." In *Ex parte Warringlon*[2], Lord Justice Turner said : " I take the rule of law to be, that an affirmative Statute is not without express words repealed by a subsequent affirmative Statute, unless the two Statutes cannot stand together."

It has never been held that any part of clause 36 of the Letters Patent has been repealed for it is not mentioned in the Schedule of repeals annexed to the Civil Procedure Code of 1877. The Court in *Appaji Bhivrav* v. *Shivlal Khubchand*[3] thought the clause to some extent had been " superseded " by section 575. It had not been removed from the Statute Book. According to Craies on Statute Law, p. 295, among enactments considered as having ceased to be in force although not expressly and specifically repealed are Statutes which have been

[1] (1868) L. R. 3. C. P. 415 at pp. 419, 421.

[2] (1853) 22 L. J. Bank. Cas. 33 at p. 39.

[3] (1879) 3 Bom. 204.

"superseded," i. e., where a later enactment effects the same purposes as the earlier one by repetition of its terms or otherwise.

Section 4 of the Code may also be referred to in this connection. That section reproduces in general language section 4 of the Code of 1882 which expressly saved the application of the Code to the Central Provinces Civil Courts Act of 1865, the Lower Burma Courts Act of 1875, and the Punjab Courts Act of 1877, and the Oudh Civil Courts Act of 1879, or any law theretofore or hereafter passed under the Indian Councils Act of 1861. Section 4 of the present Code is far more general in its terms than section 4 of the Code of 1882 for it applies to 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, and sub-section (2) is enacted in particular and without prejudice to the generality of the propositions contained in sub-section (1). It is to be noted that the Lower Burma Courts Act of 1875 and the Punjab Courts Act of 1877 contained special provisions for the case of Judges in appeal being equally divided in opinion which were inconsistent with section 575 of the Code of 1882 and section 98 of the present Code, and I am of opinion that the generality of the words used in the present section 4 should be held to cover the express provisions of the High Court Letters Patent, clause 36.

On the other hand, section 117 of the Code states that save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts. In view of the other provisions of the Code (and particularly of section 129 which is in Part X) this section does not present any difficulty to my mind. The Code must be applied so far as may

1918.

BHUTA v. LAKADU DHANSING.

be to the High Court, and the practice following on the decision in *Appaji Bhivrav* v. *Shivlal Khubchand*[1] permits of the application of section 98 to many cases falling within the High Court jurisdiction. In my opinion section 98, like section 104, read with Order XLIII, Rule 1, must be taken to apply to appeals from Courts of inferior jurisdiction to the High Court, and not to appeals from one or more Judges of the High Court.

In *Srí Gridhariji Maharaj Tickait* v. *Puroshotum Gossami*[2] a Full Bench of the Calcutta Court, who were dealing with a case on the Original Side of the Court under the Code of 1882, which at that time did not contain the clause subsequently added to section 652, agreed that the effect of section 575 was to supersede the provision in clause 36 of the Letters Patent that in the event of any disagreement between two Judges of a Division Bench, the judgment of the senior Judge shall prevail; but that, still notwithstanding that section, clause 15 of the Letters Patent remained in full force, because if the appeal under clause 15 of the Charter were taken away, a judgment in the High Court of a Judge in a Division Bench, who agreed with the Court below upon a question of fact, would be absolutely final, and owing to the provisions of section 597 of the Civil Procedure Code no appeal would lie to the Privy Council from such decision. The result arrived appears to me with all respect to involve an unnecessary inconsistency.

The reasoning of the Judges of the Madras High Court in *Sabhapathi Chetti* v. *Narayanasami Chetti*[3], a case arising on the Original Side, is appli-

(1) (1879) 3 Bom. 204. (2) (1884) 10 Cal. 814.
(3) (1901) 25 Mad. 555.

cable to the question now under consideration. The conclusion there arrived at that sections 588 and 591 of the Civil Procedure Code did not interfere with or supersede clause 15 of the Letters Patent had already been come to by a Full Bench of the Madras High Court in *Chappan* v. *Moidin Kutti*,[1] by a Full Bench of the Calcutta High Court in *Toolsee Money Dassee* v. *Sudevi Dassee*[2] and by the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sundari Debia*.[3]

A Full Bench of the Allahabad High Court in *Husaini Begam* v. *The Collector of Muzaffarnagar*[4] was of opinion that clause 27 of the Allahabad Letters Patent, corresponding with clause 36 of the Bombay Letters, was superseded in those cases only to which section 575 of the Code of Civil Procedure properly and without straining language applied. There was, therefore, no absolute supersession of the provisions of the Letters Patent. In *Roop Laul* v. *Lakshmi Doss*[5] the Court held that section 575 of the Civil Procedure Code did not apply in the case of appeals under clause 15 of the Letters Patent from judgments of the High Court in the exercise of its original jurisdiction, and that under clause 36 where the Judges are equally divided in opinion, the judgment of the senior Judge would prevail, basing its conclusion upon the reasoning of the Court in *Sabhapathi Chetti's case*.[6] It appears to me, therefore, both upon the provisions of the Code and the Letters Patent and the reported decisions of this and other High Courts, that the procedure under clause 36 should be followed in case of appeals from the Original Side. It should also be followed in other cases to which section 98 cannot properly and without straining language be applied as

(1) (1898) 22 Mad. 68.
(2) (1899) 26 Cal. 361.
(3) (1882) L. R. 10 I. A. 4.
(4) (1889) 11 All. 176.
(5) (1905) 29 Mad. 1.
(6) (1901) 25 Mad. 555.

1918.

BHUTA v. LAKADU DHANSING.

was decided by the Allahabad High Court in *Husaini Begam* v. *The Collector of Muzaffarnagar*[1] and in the later case of *Lachman Singh* v. *Ram Lagan Singh*.[2]

HEATON J. :—I concur.

MACLEOD, J. :—Clause 15 of the Letters Patent ordains that an appeal shall lie to the High Court from the judgment of one Judge of the High Court or one Judge of any Division Court pursuant to section 13 of the High Courts Act. Section 96 of the Civil Procedure Code enacts that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decision of such Court. And Section 108 enacts that the provisions of Part VII relating to appeals from original decrees shall, so far as may be, apply to appeals from appellate decrees. Section 96 therefore does not deal with appeals under clause 15 of the Letters Patent and therefore, I think, it follows that the provisions of section 98 are not applicable to such appeals, but they may be taken as altering or amending the provisions of clause 36 of the Letters Patent with respect to second appeals on the Appellate Side of the High Court as was decided in *Appaji Bhivrav* v. *Shivlal Khubchand*[3], except that the less accurate expression 'supersede' was used.

SHAH, J. :—I agree with the learned Chief Justice.

HAYWARD, J. :—I think this is a case in which a consideration of the contemporaneous circumstances surrounding the legislation in this somewhat intricate matter is essential for a right appreciation of the intentions of the Legislature

(1) (1889) 11 All. 176.
(2) (1903) 26 All. 10.
(3) (1879) 3 Bom. 204.

The Chief Court of Civil Jurisdiction for the Presidency Town was the Supreme Court and its procedure was governed by the Letters Patent of 1824. It was there provided (proviso to para. 11) that a difference of opinion between the Judges should be decided by the casting vote of the Chief Justice. It was not however a Court of Appeal. The Chief Court of Civil Appeal for the mofussil was the Sadar Diwani Adalat and its procedure was governed by Regulation II of 1827. It was there provided (section 9) that a difference of opinion should be decided by the casting vote of the senior Judge. This was subsequently modified by the provision for affirmation on fact and reference on law to a third Judge in section 332 of the Civil Procedure Code, 1859, as amended by section 23 of Act XXIII of 1861.

The Supreme Court and the Sadar Diwani Adalat were combined to form the present High Court by the Letters Patent of 1862 and this was constituted (clauses 14 and 15) a Court of Appeal both from the Judges exercising the original civil jurisdiction of the High Court and from the Civil Courts of the mofussil subject to the High Court. But no provision was made for a difference of opinion between two or more Judges exercising the original civil jurisdiction of the High Court, though this was provided for in the case of Judges exercising the appellate civil jurisdiction of the High Court by the incorporation (clause 37) of the procedure prescribed by the Civil Procedure Code.

This defect was pointed out in paragraph 23 of the Despatch of the Secretary of State forwarding the Letters Patent of 1862 and it was suggested that a rule should be made for deciding differences of opinion between Judges exercising original civil jurisdiction according to the opinion of the senior Judge. No such rule was however made and the matter remained for

1918.

BHUTA v. LAKADU DHANSING.

disposal by the Amended Letters Patent of 1865. The Court was then constituted (clause 15) a Court of Appeal from one Judge or more differing Judges whether exercising the original or appellate civil jurisdiction of the High Court. It was also constituted (clause 16) a Court of Appeal as before from the Civil Courts of the mofussil subject to the High Court. It was then provided (clause 36) that a difference of opinion between two or more Judges should be decided according to the opinion of the senior Judge whether in the exercise of the original or appellate civil jurisdiction of the High Court. But there was no longer any express incorporation (clause 37) of the procedure prescribed by the Civil Procedure Code.

It appears to me the result was that differences of opinion between two or more Judges had to be decided in all cases according to the opinion of the senior Judge, whether they arose in the exercise of the original civil jurisdiction of the High Court or in the exercise of the appellate civil jurisdiction over other Judges of the High Court or in the exercise of the appellate civil jurisdiction over the Civil Courts of the mofussil subject to the High Court. It does not appear whether the rule was ever acted on in the exercise of the original civil jurisdiction. It would be the appropriate rule to prevent the waste of time and money involved in a retrial but it would hardly be likely to have been often used as original suits have seldom been heard before more than one Judge of the High Court. It does not appear from the remarks in the case of *Surajmal* v. *Horniman*[a], that it was regarded strictly in the exercise of the appellate civil jurisdiction over other Judges of the High Court, but it was

(a) (1917) 20 Bom. L. R. 185 at p. 216.

followed in the case of the *Collector of Ahmedabad* v. *Samaldas Bechardas*[1] decided in 1872 in exercise of the appellate civil jurisdiction over the Civil Courts of the mofussil subject to the High Court. It does not appear to me arguable that the rule would not still apply in the exercise of the original civil jurisdiction because no authority purporting to substitute any other procedure has been produced. But it has been argued that it would no longer apply in the exercise of the appellate civil jurisdiction over either the other Judges of the High Court or the Civil Courts of the mofussil subject to the High Court in view of the recognition of the powers of the Indian Legislature in clause 44 of the Amended Letters Patent of 1865 and in view of the provision for affirmation on fact and for reference on law to a third Judge in case of differences of opinion between Judges of Appeal Courts in section 575 of the Civil Procedure Code of 1877 and the provision in section 632 applying the Code unlike previous Codes to the Chartered High Courts. These provisions have been repeated in sections 575 and 632 of the Civil Procedure Code of 1882 and in sections 98 and 117 of the present Civil Procedure Code of 1908.

It appears to me the rule would, as held in the case of *Surajmal* v. *Horniman*[2], still apply in the exercise of the appellate civil jurisdiction over the other Judges of the High Court. It has already been indicated that this jurisdiction has arisen entirely out of the Letters Patent; while the appellate civil jurisdiction over the Civil Courts of the mofussil subject to the High Court has been derived from the provisions of section 332 of of the Civil Procedure Code of 1859 as amended by section 23 of Act XXIII of 1861. These provisions did

(1) (1872) 9 Bom. H. C. 205 at 212.

(2) (1917) 20 Bom. L. R. 185 at p. 216.

1918.

BHUTA v. LAKADU DHANSING.

not apply to the Chartered High Courts but they were repeated verbatim in sections 540 and 575 of the subsequent Codes of 1877 and 1882 and in sections 96 and 98 of the present Code, which *have* been applied to the Chartered High Courts. It appears to me to follow that the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent; while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the Civil Courts of the mofussil subject to the High Court would be the Civil Procedure Code. This natural presumption would appear strengthened by the express reference to Civil Courts subordinate to the High Court in section 584 of the Codes of 1877 and 1882 and in section 100 of the present Code. This moreover was the view taken in 1882 of the analogous section 588 of the Codes of 1877 and 1882, now section 104 of the present Code, in the case of *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi*[1] where the provisions of section 588 were held (p. 494) not to apply to appeals from one of the Judges to other Judges of the High Court by their Lordships of the Privy Council. It is true that this view was not taken in 1883 in the case of *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami*[2] by the Full Bench of the Calcutta High Court, but it would appear that that Bench was not referred to the decision in the previous year by the Privy Council. It was however accepted in 1898 in the case of *Chappan* v. *Moidin Kutti*[3] by a Full Bench of the Madras High Court and again in 1899 in the case of *Toolsee Money Dassee* v. *Sudevi Dassee*[4] by a subsequent Full Bench of the Calcutta High Court. It was

(1) (1882) 9 Cal. 482 at p. 494.
(2) (1884) 10 Cal. 814.
(3) (1898) 22 Mad. 68 at p. 84.
(4) (1899) 26 Cal. 361.

again followed in 1901 in the case of *Sabhapathi Chetti* v. *Narayanasami Chetti*[1] by a subsequent Bench of the Madras High Court, where it was pointed out (pp. 558 and 559) that appeals were not contemplated from one of the Judges to the other Judges of the High Court but merely from the Civil Courts subordinate to the High Court by the appellate provisions of the Civil Procedure Code as laid down by the Privy Council. This view was again followed in 1903 in the case of *Lachman Singh* v. *Ram Lagan Singh*[2] by a Bench of the Allahabad High Court and again in 1905 in the case of *Roop Laul* v. *Lakshmi Doss*[3] by a third Bench of the Madras High Court. It was finally observed by Jenkins C. J. in 1915 that "the Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the Charter." This was the case of *Debendra Nath Das* v. *Bibudhendra Mansingh*[4]. These observations would not appear to have been brought to the notice of Sanderson C. J. later in the same year in the case of *Mathura Sundari Dasi* v. *Haran Chandra Saha*[5]. There Woodroffe J. relied solely on the Charter, though Mookerjee J. relied both on the Code and the Charter. The Judges differed therefore in the *ratio decidendi* and deprived the decision of the authority that would otherwise have attached to it as the latest decision of the Calcutta High Court. It appears to me therefore upon these considerations and authorities including that of the Privy Council that the civil appellate jurisdiction over Civil Courts subordinate to the High Court was alone in view when the Civil Procedure Codes were, by

(1) (1901) 25 Mad. 555 at pp. 558, 559.

(2) (1903) 26 All. 10.

(3) (1905) 29 Mad. 1.

(4) (1915) 43 Cal. 90 at pp. 93, 94.

(5) (1915) 43 Cal. 857 at pp. 866, 867.

1918.

BHUTA v. LAKADU DHANSING.

section 632 of the Codes of 1877 and 1882 and by section 117 of the present Code, made applicable to the Chartered High Courts by the Indian Legislature.

It was held in this particular matter so long ago as 1879 in the case of *Appaji Bhivrav* v. *Shivlal Khubchand* [1] by a Full Bench of this Court that the appellate civil jurisdiction over the Civil Courts of the mofussil subordinate to the High Court *was* governed by the provisions of the Civil Procedure Code and it would appear that that decision has consistently been followed ever since by this Court. It was so held similarly in the case of *Husaini Begam* v. *The Collector of Muzaffarnagar* [2] by the Allahabad High Court and it would appear to be in accord with the intention as indicated in the other authorities already discussed with which the Civil Procedure Codes were extended to the Chartered High Courts by the Indian Legislature. It has not been argued before us and need not perhaps be here debated in view of nearly forty years unquestioned practice that the extention was in this particular matter *ultra vires* of the Indian Legislature. But it has been pointed out by Markby J. in *In the matter of the petition of Feda Hossein* [3] that special powers, such as those granted by clause 36 of the Letters Patent, would not, though general powers such as those merely repeated by clause 39 of the Letters Patent would be subject to the legislative powers of the Government of India. His view was that the provisions of clause 44 of the Letters Patent merely referred to the powers specially reserved to the Legislative Council of the Government of India by sections 9, 11 and 13 of the High Courts Act, 1861, in derogation of the general limitations of their powers prescribed by the sixth clause of the

(1) (1879) 3 Bom. 204. (2) (1889) 11 All. 176.
(3) (1876) 1 Cal. 431 at pp. 447,449.

proviso to section 22 of the Indian Councils Act, 1861. That view would appear to have been accepted in the subsequent case of *Empress* v. *Burah and Book Singh*[1] by the Full Bench of the Calcutta High Court but not to have been brought to the notice of the learned Judges in the latest case of *Mathura Sundari Dasi* v *Haran Chandra Saha*[2] before the Calcutta High Court. It would appear to me that the views expressed by Markby J. would require further and particular investigation, should further conflict arise between the provisions of the Letters Patent and enactments of the Legislative Council of the Government of India.

J. G. R.

[1] (1877) 3 Cal. 63 at p. 79.

[2] (1915) 43 Cal. 857.

APPELLATE CIVIL.

Before Mr. Justice Shah.

JANA KOM APPA SUTAR (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* RAKHMA, FATHER NARAYAN AMBAJI BADIGAR AND ANOTHER (ORIGINAL PLAINTIFF No. 1 AND DEFENDANT No. 2), RESPONDENTS.*

1918. *September* 24.

Hindu Law—Mitakshara—Succession—Competition between full sister and half-sister—Full sister entitled to priority.

According to the Mitakshara School of Hindu law, a full sister is entitled to succeed in priority to the half-sister.

SECOND appeal from the decision of L. C. Crump, District Judge of Belgaum, confirming the decree passed by C. G. Kharkar, Subordinate Judge at Chikodi.

Suit to recover possession of property.

One Gyanu owned the property in dispute. On his death, the property was claimed by Rakhma (plaintiff), who was his full sister. Her claim was resisted by defendant No. 1, who was half-sister of the deceased.

* Second Appeal No. 17 of 1916.