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that the claim of the plantiff-appellant is made out and that she is entitled to succeed.

The discussion above is more germane to the case of a public temple wherein the idol has been *Shastrically* installed and consecrated and the worship is in accordance with the *Shastras*. There is nothing on the record to show whether the temple in this case falls within this category. If, however, the temple is a private one or idol therein is not one *Shastrically* consecrated, the case in favour of the plaintiff is much stronger and her right cannot be seriously challenged. At this stage, it is desirable to mention one other matter. In the present case the emoluments attached to the office are stated to be the daily and other offerings made to the deity at the worship by the visiting devotees. Both the parties to this case have come up to Court on the common footing that it is this which constitutes the emoluments. Whether and how far such votive offerings can be appropriated by a Pujari for his emoluments if the temple is a public institution, (i.e., not a private family temple) and whether any usage in this behalf is valid is a matter which does not arise before us in this case.

In the result, the appeal must be allowed with costs throughout and the decree of the trial court must be restored.

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April 7

RAO SHIVA BAHADUR SINGH
v.
THE STATE OF VINDHYA PRADESH AND ANOTHER

[MUKHERJEA C.J., S. R. DAS, VIVIAN BOSE, SINHA and IMAM JJ.]

Constitution of India—Art. 145(3)—Construction of—Supreme Court—Whether competent to split up the case for the purpose of hearing and decision.

Held (*Per* MUKHERJEA C.J., DAS, VIVIAN BOSE, and IMAM JJ. SINHA J. *dissenting*) that a Constitution Bench of five or more Judges before which a case happens to be posted in the first instance

is competent to split up the case by deciding the constitutional questions and leaving the rest of the case to be dealt with and disposed of by a Division Bench of less than five Judges on merits in conformity with the opinion of the Constitution Bench.

The splitting up of cases into different stages for hearing and decision is not repugnant to the Constitution or the general principles of procedural law. The underlying principle of the Constitution is clear and all that it insists upon is that all Constitution questions should be heard and decided by a Bench of not less than five Judges. As long as this requirement is fulfilled there can be no constitutional objection to the rest of the case being disposed of by a Division Bench of less than five Judges, so as to save the time of the Constitution Bench of five or more Judges.

There is no general rule of indivisibility of a case for the purpose of its hearing and decision: *vide* proviso to Article 145(3) and Article 228 of the Constitution, s. 24 and Order 18, Rule 15 of the Code of Civil Procedure and ss. 350, 526, 528 and 556 of the Code of Criminal Procedure.

Article 145(3) of the Constitution cannot be so construed as to deprive the Supreme Court of the inherent power of splitting up a case for the purpose of hearing and decision.

Per SINHA J.—The Constitution while laying down clause (3) of Article 145, contemplates the whole matter in controversy arising in a case, which may include substantial questions of law as to the interpretation of the Constitution as also other questions. The main clause (3), excepting cases coming within the purview of the proviso, does not contemplate a splitting up of a case into parts, one part involving substantial questions of law as to the interpretation of the Constitution and another part or parts not involving such questions.

The language of clause (3) of Article 145 does not warrant the hearing of a case piecemeal by different Benches unless it comes within the purview of the proviso. The proviso is meant to cover only a limited class of cases which otherwise would have come within the purview of the main clause (3). But the proviso cannot have a larger effect than is justified by its language, viz., that only a question of that description has to be referred for the opinion of the larger Bench, the case itself remaining on the file of the smaller Bench. The proviso thus makes a clear distinction between a "case" and a "question".

Maulvi Muhammad Abdul Majid v. *Muhammad Abdul Aziz* (L.R. 24 I.A. 22), *Burrowes* v. *High Commission Court* (3 Bulst. 48) and *Hobibar Rahman* v. *Saidannessa Bibi* (I.L.R. 51 Cal. 331), referred to.

ORIGINAL JURISDICTION. Petition No. 40 of 1955:

Under Article 32 of the Constitution for a Writ of *Habeas Corpus*.

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Rao Shiva Bahadur Singh v. The State of Vindhya Pradesh and another

Purshottam Trikumdas, (*K. B. Asthana, Syed Murtaza Fazl Ali* and *Rajinder Narain*, with him) for the petitioner.

M. C. Setalvad, Attorney-General for India and *C. K. Daphtary Solicitor-General for India* (*Porus A. Mehta* and *R. H. Dhebar*, with them) for the respondents.

1955. April 7. The Judgment of Mukherjea C. J., Das, Vivian Bose and Imam JJ. was delivered by Das J. Sinha J. delivered a separate Judgment.

DAS J.—This is a petition for a writ in the nature of a writ of *habeas corpus* calling upon the respondents to show cause why the petitioner, who is now confined in the Central Jail at Rewa, should not be set at liberty. The petitioner's grievance is that he has been deprived of his liberty otherwise than in accordance with procedure established by law. A rule *nisi* having been issued, the respondents have filed an affidavit by way of return to the writ. The question for our decision is whether the return is good and sufficient in law.

The facts leading up to the present petition are few and simple. In the years 1948 and 1949 the petitioner was the Minister of Industries in the Government of Vindhya Pradesh which was at that time an acceding State within the meaning of section 6 of the Government of India Act, 1935 as amended in 1947. On the 11th April, 1949 the petitioner was arrested in Delhi on the allegation that he had accepted illegal gratification in order to show favour to Panna Diamond Mining Syndicate in the matter of the lease of the Diamond Mines at Panna. In December, 1949 the petitioner along with one Mohan Lal, who was the then secretary in the Ministry of Industries, was put up for trial before the Court of Special Judge, Rewa, constituted under the Vindhya Pradesh Criminal Law Amendments (Special Courts) Ordinance No. V of 1949. The charges were under sections 120-B, 161 465 and 466 of the Indian Penal Code as adapted for Vindhya Pradesh by the Indian Penal Code (Application to Vindhya Pradesh) Ordinance No. XLVIII of

1949. By his judgment pronounced on the 26th July 1950 the Special Judge acquitted both the accused. The State preferred an appeal against that acquittal to the Judicial Commissioner of Vindhya Pradesh. By his judgment pronounced on the 10th March 1951 the Judicial Commissioner reversed the order of acquittal, convicted both the accused and sentenced them to different terms of rigorous imprisonment under the different sections in addition to the payment of certain fines. On the application of the petitioner and his co-accused the Judicial Commissioner on the 12th March 1951 issued a certificate to the effect that four points of law raised in the case and formulated by him in his order were fit for the consideration of this Court in appeal under article 134 of the Constitution of India. A petition of appeal was filed in this Court on the strength of this certificate of fitness and it was registered as Criminal Appeal No. 7 of 1951.

As the case involved a substantial question of law as to the interpretation of the Constitution, it was, in April 1953, placed before a Bench of five Judges of this Court as required by article 145(3) of the Constitution. For convenience of reference we shall call a Bench of five or more Judges as the Constitution Bench. The validity of the convictions and sentences was challenged before the Constitution Bench on the ground that there had been infringements of articles 14 and 20 of the Constitution. A further point of law was raised that no appeal lay to the Judicial Commissioner from the acquittal by the Special Judge. By their judgment pronounced on the 22nd May 1953 the Constitution Bench rejected all these objections. The judgment concluded with the following direction: "The appeal is accordingly directed to be posted for consideration whether it is to be heard on merits". This was evidently done in view of the fact that the certificate of fitness granted by the Judicial Commissioner was limited only to four points of law.

The constitutional points having been disposed of, the appeal was placed before a Division Bench of three Judges who on the 20th October 1953 ordered

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the appeal to be heard on the merits. The appeal was accordingly put up for hearing before another Division Bench consisting of three Judges. On the 5th March 1954 this Division Bench allowed the appeal of Mohan Lal and acquitted him but dismissed the appeal of the petitioner with respect to his conviction under sections 161, 465 and 466, Indian Penal Code, as adapted in Vindhya Pradesh, but set aside his conviction on the charge under section 120-B. The sentence of three years' rigorous imprisonment was maintained but the sentence of fine was set aside.

On the 18th March 1954 a petition for review was filed on behalf of the petitioner. It was directed against the judgment of the Constitution Bench pronounced on the 22nd May 1953 repelling the constitutional points as well as against the judgment of the Division Bench dated the 5th March 1954 dismissing the petitioner's appeal on the merits. On objection being taken by the Registry against one application being filed for the review of two judgments one of which had been pronounced much earlier than the period allowed for filing a review application, the petitioner filed a second application for review of the judgment of the Constitution Bench and prayed for condonation of the delay in filing the same. On the 5th April 1954 the application for review was put up for hearing before the same Division Bench which had pronounced the judgment on the merits dated the 5th March 1954. After considering the points of review relating to that judgment the Division Bench on the same day came to the conclusion that no ground had been made out for review of that judgment and accordingly dismissed the petition. An order was drawn up as of that date directing the petitioner who had been previously enlarged on bail to surrender and serve out his sentence.

On the 12th April 1954 another petition was filed on behalf of the petitioner praying that the review matter relating to the judgment of the Constitution Bench delivered on the 22nd May 1953 be placed before a Constitution Bench for final disposal. That review application was put up before a Constitution

Bench which on the 17th May 1954 declined to entertain the same.

In the meantime the petitioner had in the last week of April 1954 surrendered and has since then been confined in the Central Jail at Rewa. The present application has, therefore, been made for a writ of *habeas corpus* on the allegation that the petitioner has been and is being deprived of his liberty otherwise than in accordance with procedure established by law.

In the present petition the petitioner has again urged that the Court of the Judicial Commissioner of Vindhya Pradesh was not the proper forum for entertaining the appeal against the judgment of the Special Judge and consequently the judgment of the Judicial Commissioner setting aside the acquittal of the petitioner convicting and imposing sentence of imprisonment was void and inoperative. Alternatively, it has been urged that, assuming that the Judicial Commissioner had jurisdiction to hear the appeal from the Special Judge and his judgment was in accordance with procedure established by law, the appeal filed by the petitioner in this Court against the judgment of the Judicial Commissioner should have been, under article 145(3) of the Constitution, heard and completely disposed of by the Constitution Bench. As regards the first point as to the incompetency of the Court of the Judicial Commissioner to entertain the appeal from the decision of the Special Judge the same has been fully dealt with by the Constitution Bench and cannot be reagitated. Indeed, learned counsel appearing in support of this petition has not pressed the same. The only point urged before us is the alternative plea mentioned above which depends for its decision on a true construction of article 145.

Article 145 by clause (1) authorises this Court, subject to the provisions of any law made by Parliament and with the approval of the President, to make rules for regulating generally the practice and procedure of the Court, including, amongst others, rules as to the procedure for hearing appeals, as to the entertainment of appeals under sub-clause (c) of clause (1) of article

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134 and as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review. Clauses (2) and (3) of the article are in the terms following:—

"(2) Subject to the provisions of clause (3), rules made under this article may fix the minimum number of Judges who are to sit for any purpose, and may provide for the powers of single Judges and Division Courts.

(3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion".

The contention of the petitioner is that the question whether a particular case involves a substantial question of law as to the interpretation of the Constitution is to be examined at the time when the case first comes before this Court. If at that stage it is found that it is a case involving a substantial question of law as to the interpretation of the Constitution it becomes irrevocably impressed with that character and quality and the minimum number of Judges who are to sit for the purpose of deciding such case must be a Constitution Bench, that is to say, a Bench of at least five Judges. The argument then proceeds to say that once the Constitution Bench takes seisin of the case and starts the hearing that

Bench and that Bench alone must decide the whole of such case, that is to say, decide all questions, constitutional or otherwise, arising in the case. Sri Purshottam Trikumdas who appears in support of this petition has strongly relied on the language used in clause (3) and contends that "the case" cannot be split up and that the clause requires the entire case to be disposed of by the Constitution Bench. He, therefore, urges that the Division Bench had no jurisdiction to take up the case involving substantial questions of law as to the interpretation of the Constitution and consequently the judgment of that Division Bench pronounced on the 5th March, 1954 was illegal and void. According to him, his client's appeal, in the eye of the law, remains undisposed of and as he had been let out on bail until the disposal of his appeal, his detention in jail pursuant to the judgment of the Division Bench, which is a nullity, amounts to deprivation of his personal liberty otherwise than in accordance with procedure established by law and is an infringement of his fundamental right under article 21 of the Constitution. The argument at first sight certainly appears to be plausible but on a deeper consideration of the constitutional provisions bearing on the subject and the general principles regulating the procedural powers of Courts we are unable to accept the same as sound or well-founded.

In this very case the Judicial Commissioner of Vindhya Pradesh had granted a certificate of fitness under article 134(1)(c). Consequently under the proviso to clause (3) of article 145 the appeal might well have been placed before a Division Bench consisting of less than five Judges. In that situation, being satisfied that the appeal involved a substantial question of law as to the interpretation of the Constitution the determination of which was necessary for the disposal of the appeal, that Division Bench could refer the question for the opinion of a Constitution Bench and on receipt of the opinion dispose of the appeal in conformity with such opinion: but to accede to the argument of Sri Purshottam Trikumdas will lead us to hold that while a Division Bench of three

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Judges could split up this very case, had it been posted before it in the first instance, by referring the constitutional questions to a Constitution Bench for its opinion and then, after receipt of that opinion, disposing of the rest of the case on merits in conformity with such opinion, a Constitution Bench of five or more Judges before which the case happened to be posted in the first instance could not split up the case by deciding the constitutional questions and leaving the rest of the case to be dealt with and disposed of by a Division Bench of less than five Judges on merits in conformity with the opinion of the Constitution Bench thus saving the time of the Constitution Bench. Reference may also be made to article 228 which authorises the High Court, if satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case, to withdraw the case and either to dispose of the case itself or determine the said question of law and return the case to the Court from which it has been so withdrawn so as to enable the said Court to proceed to dispose of the case in conformity with the judgment of the High Court. Here again learned counsel's argument leads us to hold that while the High Court can split up a case involving a substantial question of law as to the interpretation of the Constitution a Constitution Bench of this Court cannot do so. Apart from these provisions of the Constitution there are provisions made by procedural statutes which result in a case being partly heard by one Judge and partly by another Judge. To cite only a few instances, reference may be made to section 24 and Order 18, rule 15 of the Code of Civil Procedure and sections 350, 526, 528 and 556 of the Code of Criminal Procedure. The argument of Sri Purshottam Trikumdas, pushed to its logical conclusion, must amount to this that although Courts operating under the ordinary procedural code may split up cases into different stages for the purpose of hearing and decision, a Constitution Bench of this Court cannot do so if a case involving substantial questions of law as to

the interpretation of the Constitution happens to be posted before it in the first instance.

Learned counsel for the petitioner recognises the incongruity that results from his argument but contends that it cannot be helped because the relevant provisions referred to above expressly sanction the splitting up of cases whereas the body of clause (3) of article 145 does not. His argument is that in the cases mentioned above splitting up of cases has to be allowed because the special provisions of the Constitution or other statutes provide for such splitting up in those cases. He contends that the very fact that these provisions had to be made clearly indicates that but for them there could not have been any splitting up of the case. It is said that these provisions are exceptions to the general rule of indivisibility of a case. We are unable to accept this reasoning as correct.

In the first place the proviso to article 145(3), article 228 and the other provisions of the Codes referred to above quite clearly indicate that the splitting up of cases into different stages for hearing and decisions is not repugnant to the Constitution or the general principles of procedural law. The underlying principle of the Constitution is clear and all that it insists upon is that all constitutional questions should be heard and decided by a Bench of not less than five Judges. As long as this requirement is fulfilled there can be no constitutional objection to the rest of the case being disposed of by a Division Bench of less than five Judges, so as to save the time of the Constitution Bench of five or more Judges.

In the next place we are not aware of any such general rule of indivisibility as is being insisted upon by learned counsel. There is nothing in principle which requires that a case must always be decided in its entirety by one Judge or one set of Judges even though such a case may conveniently be dealt with in two or more stages. Indeed, in *Maulvi Muhammad Abdul Majid* v. *Muhammad Abdul Aziz*(1) the Privy Council pointed out that where a Judge had before

(1) L.R. 24 I.A. 22.

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him a case consisting of two parts, a question of title and an incidental question of account depending on title, it did not require any provision of the Civil Procedure Code to authorise him to decide the first question and reserve the second for further investigation and that to treat such a proceeding as beyond the power of the Court and as an error which barred the proceedings reserved for further decisions was a serious miscarriage of justice. Indeed, the Court often exercise its inherent power, if it thinks fit to do so, to decide questions of jurisdiction or limitation or the like as preliminary questions reserving other questions of fact for future investigation. The decision of a case at two or more stages may and often does result in the case not being decided by the same Judge, for the Judge who decided at the first stage may, by reason of death, retirement or transfer, be not available for deciding the case at the later stages. It follows, therefore, that no argument can be founded on any supposed general rule of indivisibility of a case for the purpose of its hearing and decision.

The consideration that there is no such general rule as is relied on by learned counsel and that the splitting up of cases not generally repugnant to law and in particular to the Constitution, leads us to the conclusion that in construing clause (3) of article 145 no quality of indivisibility need be attributed to the words "the case" used therein. A case may, to begin with, involve a substantial question of law as to the interpretation of the Constitution, but it may cease to do so at a later stage, Suppose a case which involves a constitutional question is placed before a Constitution Bench but learned counsel appearing in support of the case intimates to the Bench that he does not press any constitutional point, surely he cannot, in that situation, insist that the time of a Bench of five or more Judges should be spent on the determination of a case which, by his own election, has ceased to involve any constitutional question. Likewise, when the constitutional questions involved in the case are disposed of by a Constitution Bench what

remains of the case cannot properly or appropriately be described as still a "case involving a substantial question of law as to the interpretation of this Constitution". It should be borne in mind that when a case or appeal is properly admitted to this Court all that the parties are entitled to is a decison of this Court and not of any particular Bench. So long as the minimum number of Judges which the Constitution and the rules framed by this Court prescribe are present to hear and decide the questions raised from stage to stage, they represent the Court for the purpose of giving decisions on its behalf and the parties get all that they are entitled to under the law. If a Court is entitled to decide a case in stages, as the Privy Council has held it can, there is no reason why article 145(3) should be so construed as to deprive this Court of that inherent power. It will involve no violation of any principle of natural justice or of any legal principle if we construe clause (3) of article 145 as requiring only that the minimum number of five Judges must sit for the purpose of deciding any case in so far and as long as it involves a substantial question of law as to the interpretation of this Constitution. We find nothing in the language of clause (3) of article 145 which militates against this interpretation of that clause. Indeed, it is on this interpretation that the practice has grown up in this Court for a Constitution Bench to dispose of all constitutional questions and to leave the other subsidiary questions for disposal by a Division Bench of less than five Judges in conformity with the opinon of the Constitution Bench. There is nothing that we find in the body of clause (3) of article 145 which compels us to depart from the famous maxim *cursus curiae est lex curiae* which was laid down by Lord Coke in *Burrowes* v. *High Commission Court*(1) and which was quoted with approval in *Habibar Rahman* v. *Saidannessa Bibi*(2).

For reasons stated above we consider that a good and valid return has been made by the respondents to the rule *nisi* issued to them and this application must be dismissed. We order accordingly.

(1) 3 Bulst. 48, 53. (2) I.L.R. 51 Cal. 331, 335.

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SINHA J.—I regret to have to differ from my learned brethren on the construction of article 145(3) of the Constitution which is the main question in controversy in this case. Clause (3) of article 145 is in these terms:—

"The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five:

Provided that, where the Court hearing an appeal under any of the provisions of this Chapter other than article 132 consists of less than five Judges and in the course of the hearing of the appeal the Court is satisfied that the appeal involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the appeal, such Court shall refer the question for opinion to a Court constituted as required by this clause for the purpose of deciding any case involving such a question and shall on receipt of the opinion dispose of the appeal in conformity with such opinion".

It is noteworthy that the Constitution has not vested this Court with complete power to make rules as to the constitution of Benches for hearing matters coming before this Court in its Original, Appellate or Advisory Jurisdiction. Clause (2) of article 145 has invested this Court with power to make rules fixing the minimum number of Judges who are to sit for any purpose and for defining the powers of single Judges and Division Courts. But this power is expressly made subject to the limitation laid down in clause (3) quoted above; that is to say, where any case involves a substantial question of law as to the interpretation of the Constitution (omitting the words not material for our present purpose) the minimum number of Judges prescribed by the Constitution to decide such a case is five. A case may involve questions of law as to the interpretation of the Constitution, as also other questions. In this case we have to determine whether clause (3) contemplates the whole case or a part of a

case. In my opinion, the Constitution while laying down clause (3) of article 145 contemplates the whole matter in controversy arising in a case which may include substantial questions of law as to the interpretation of the Constitution as also other questions. The main clause (3), excepting cases coming within the purview of the proviso does not contemplate a splitting up of a case into parts, one part involving substantial questions of law as to the interpretation of the Constitution and another part or parts not involving such questions. My reasons for coming to this conclusion are as follows:

Clause (3) itself read along with the proviso makes a distinction between a "case" and a "question" of the nature indicated in the proviso to the clause. The Constitution has clearly indicated that cases coming within the purview of the proviso may be split up so as to admit of the questions of constitutional importance being determined by a Bench of at least five Judges who may be described for the sake of convenience as a "Constitution Bench" in contradistinction to a Division Court consisting of less than five Judges, as is contemplated in the proviso. The main clause (3) requires a case of the description therein set out to be heard and decided by a Constitution Bench, whereas the proviso contemplates that only the question of constitutional importance (using a compendious phrase) has to be decided by a Constitution Bench and the case out of which such a question arises remaining in the seisin of the Division Court before which the case was originally placed for hearing.

The Constitution has placed cases involving substantial questions of law of constitutional importance on a special footing. If the framers of the Constitution had intended that not the whole case but only particular questions of the nature indicated had to be heard by a minimum number of five Judges, they would have used words similar to those used in the proviso making it permissible for the Constitution Bench to give its opinion for the decision of the case by a Division Court in conformity with that opinion.

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A reference to the terms of article 228 of the Constitution would also show that the framers of the Constitution were fully alive to the difference between the decision of the "case itself" and a "question of law" of constitutional importance involved in that case. It has made clear in that article that the High Court shall either decide the whole case including the question of law as to the interpretation of the Constitution which was necessary for the disposal of the case or determine only such a question or questions and return the case to the original court for disposal in conformity with the judgment of the High Court on such question or questions. The Constitution made these specific provisions to emphasize that there is a distinction between determining the case itself and determining a substantial question of law of constitutional importance.

Can it be said that if clause (3) of article 145 had been enacted without the proviso, a case could be heard piecemeal first by a Constitution Bench which would determine only questions of law as to the interpretation of the Constitution, and then the residue of the case being heard and determined by a Division Court? That, in my opinion, would not be in compliance with the imperative provisions of the main clause (3). The framers of the Constitution therefore enacted the proviso in the nature of an exception to the general rule laid down in the main clause (3). It has to be observed that the proviso is limited to appeals only, subject to the further exception that such appeals should not have come up to this Court through the process laid down in article 132 of the Constitution. It is thus clear that not all cases contemplated in the main clause (3) but only appeals of a particular description would come within the qualifying provisions of the proviso.

The word "case" has not been defined but it may be taken as settled law that it is much wider than a "suit" or an "appeal". Hence whereas the proviso would apply to appeals brought up to this court, except those under article 132 of the Constitution, the main cluase (3) would apply to all appeals and all

other matters coming up to this Court in its Original, Appellate and Advisory jurisdictions. In my opinion, there cannot be the least doubt that the main provisions of clause (3) are all-embracing, and contemplate all cases coming up to this Court.

It has not been contended that the present case comes within the purview of the proviso but it has been said that if it is open to a Division Court to refer a question of constitutional importance to a Constitution Bench, why should not a Constitution Bench be competent to refer questions other than those of constitutional importance to a Division Court? The answer is that whereas the former is contemplated by the Constitution in terms, the latter is not. Nor are there any rules to that effect.

But it has been further observed that the splitting up of a case into parts, one involving questions of constitutional importance and the remaining part not involving questions of that kind, is not against the provisions of the Constitution. But, in my opinion, if the Constitution has made a specific provision as to the splitting up of a case into parts, one cognisable by a Court of higher jurisdiction like a Constitution Bench and the rest by a court of lower jurisdiction like a Division Court, the argument is not available that a splitting up of a case apart from those specific provisions is also permissible. In this connection reference was made to certain provisions of the Code of Civil Procedure as also of the Code of Criminal Procedure to show that those Codes do contemplate hearing of the same case in part by different courts, but those are all courts of co-ordinate jurisdiction in which the question of the power of the court itself relatively to the subject-matter of the case is not in question. The court which originally dealt with the case and the court which finally came to hear and determine the matter were each one of them competent to deal with the whole matter or any part of it. That is not the position here. In this case the argument on behalf of the petitioner is that as admittedly his appeal involved substantial questions of law as to the interpretation of the Constitution and as it did not come

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within the purview of the proviso to clause (3) of article 145 of the Constitution, it should have been dealt with throughout by a Constitution Bench. It was suggested in answer to this argument that after the questions of law of Constitutional importance had been dealt with by the Constitution Bench the case ceased to be one involving such questions and therefore could have been heard by a Division Court. But the difficulty in accepting this argument is that once a Constitution Bench was seized of the case, it could not transfer it to another Bench for sharing the decision of that case with it. That Bench should have heard out the whole case and it had not the power to direct, and it did not so direct, that the remaining part of the case should be heard by a Division Court. Once a Constitution Bench is seized of the case, it has to hear the case to its conclusion. There was no process known to the rules framed under the rule-making power of this Court by which a case once it came before a Constitution Bench could get transferred from that Bench to a Division Court either automatically or by orders of any authority. But it has been suggested that it may happen that a Constitution Bench may start the hearing of the case, and before the hearing is concluded one of the Judges is by reason of death or otherwise disabled from hearing out the case and in that event the Chief Justice has the power to constitute another Bench. But that is quite a different matter. In that case the hearing by the previous Bench comes to nothing and the Bench constituted afresh by the Chief Justice has to hear out the whole case afresh.

It has also been suggested on the other side that a "case" may mean a part of a case. In my opinion, that submission is not well founded; because, if that argument were accepted and pushed to its logical conclusion, it may make the provisions of the main clause (3) of article 145 nugatory. Article 132 of the Constitution has been, as indicated above, excepted from the operation of the proviso to clause (3). Suppose an appeal is brought to this Court under article 132 of the Constitution as the case involved substantial

questions of law as to the interpretation of the Constitution. That case besides involving questions of that character, may also involve other questions. If the argument that a "case" includes part of a case were accepted, then it will be permissible for a Constitution Bench to hear the questions of constitutional importance and leave the rest of the case to be determined by a Division Court, though such a case is expressly excluded from the operation of the proviso and thus is directly within the terms of the main clause (3). Hence every case coming before this Court involving a question of constitutional importance may be dealt with in part in so far as it relates to that question by a Constitution Bench and the remaining part by a Division Court. That, in my opinion, was not intended by the framers of the Constitution. The term "case" therefore must mean the whole matter in controversy before this Court. Such a matter may relate to one of several questions in controversy in the original court, if the determination of that question is sufficient to dispose of the case within the meaning of the Explanation to article 132 of the Constitution.

It was further argued by the learned Attorney-General that the whole clause (3) of article 145 along with the proviso must be read together. But even so read, the language of clause (3) does not warrant the hearing of the case piecemeal by different Benches unless it comes within the purview of the proviso. The proviso is meant to cover only a limited class of cases which otherwise would have come within the purview of the main clause (3). But the proviso cannot have a larger effect than is justified by its language, *viz.*, that only a question of that description has to be referred for the opinion of the larger Bench, the case itself remaining on the file of the smaller Bench. The proviso thus makes a clear distinction between a "case" and a "question".

It has also been said there is an inherent power in the court to transact its business according to its established practice. In the first place, this Court is still in its formative stages and it cannot be said to

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have an "established practice". Secondly, it cannot establish a practice in the teeth of the provisions of the Constitution which it is pledged to uphold.

The reference to the decision of the Privy Council in *Moulvi Muhammad Abdul Majid* v. *Muhammad Abdul Aziz*(1) is not apt because in that case the hearing at the two stages of the trial was to be done by a court of co-ordinate jurisdiction; that is to say, a court which could hear and determine the whole case or each of the two parts of the case taken separately by itself, unlike the present case in which the two parts of the hearing have been done by two courts of unequal power. Similarly the reference to the maxim *"cursus curiae est lex curiae"* of Coke C.J. in *Burrowes* v. *High Commission Court*(2), referred to in *Habibar Rahman* v. *Saidannessa Bibi*(3) and to the other cases all proceed on the assumption that there is nothing in the statute law against such a course being taken. But, in my opinion, such a nebulous practice is opposed to the positive provisions of clause (3) of article 145.

In my opinion, therefore, the present case comes directly within the main clause (3) of article 145 of the Constitution and is admittedly not covered by the proviso to that clause. That being so, the petitioner's appeal to this court has not been heard and determined in accordance with the procedure established by this Constitution and therefore the petitioner is entitled to the benefit of the protection afforded by article 21 of the Constitution. His appeal, therefore, has got to be heard and determined in accordance with the procedure laid down in article 145(3) of the Constitution. I would therefore allow the petition to this extent only that the appeal be heard by a Constitution Bench on a declaration that the judgment of the Division Court dated the 5th March 1954 is not that of a competent court.

BY THE COURT: — In accordance with the judgment of the majority, the petition is dismissed.

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(1) L.R. 24 I.A. 22.
(2) 3 Bulst. 48, 53.
(3) I.L.R. 51 Cal. 331, 335.