

GUJARAT HIGH COURT

State of Gujarat

Vs.

Gordhandas Keshavji Gandhi

Criminal Appeal No. 381 of 1960

(K.T. Desai C.J., J.M. Shelat, N.M. Miabhoy, P.N. Bhagwati and M.R. Mody, JJ.)

31.10.1961

JUDGMENT

K.T. Desai, C.J.

(On Behalf of himself Shelat and Mody, JJ.):

1. This Special Full Bench has been constituted in order to consider the question relating to the binding nature of the judicial precedents of the Bombay High Court prior to 1st May, 1960, on this High Court. This very matter was considered by a Full Bench of three Judges of this Court including the then Chief Justice in the case of *Anand Municipality v. Union of India*, reported in¹ Later on, a Division Bench of this Court consisting of Mr. Justice Raju and Mr. Justice Bakshi found it difficult to accept the view expressed by the Full Bench in the aforesaid case and made a request for referring the question to another Full Bench for a re-consideration of the matter. It was held by the Full Bench of this Court in the aforesaid case of (1960) 1 Guj LR 82 : (AIR 1960 Gujarat 40) (FB) that the judicial precedents of the Bombay High Court prior to the 1st of May, 1960, i.e., the day on which the State of Gujarat came into being, fell within the ambit of the words "the law in force immediately before the appointed day" in Section 87 of the Bombay Reorganization Act of 1960 and were binding on this High Court. Section 87 of the aforesaid Act runs as follows:

"Territorial extent of laws. - The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to the State of Bombay shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

By the provisions of Part II of the aforesaid Act, the State of Gujarat was formed. Part II is made up of three sections. By section 3, it is provided that as from the appointed day, i.e., 1st of May, 1960, there would be formed a new State to be known as the State of Gujarat comprising some of the territories of the State of Bombay therein set out. It is provided that the said territories would cease to form part of the State of Bombay and the

¹(1960) 1 Guj LR 82 : (AIR 1960 Guj 40) (FB)

residuary State of Bombay would be known as the State of Maharashtra. By sub-clause (2) of section 3, certain villages in the Umbergaon Taluka have been constituted into a separate taluka of the same name and included in the Surat District. By the said sub-clause (2) certain villages have been included in the talukas therein mentioned. By section 4, the First Schedule to the Constitution has been amended for the purpose of showing under the heading "The States" the States of Gujarat and Maharashtra. By section 5, the power of the State Government to alter, after the appointed day, the name, extent or boundaries of any district, taluka or village in the State, has been preserved. Section 87 of the aforesaid Act therefore in effect provides that the formation of the separate State of Gujarat out of the territories forming part of the State of Bombay and the change in the territories of certain talukas and districts would not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extended or applied and that the territorial reference in any such law to the State of Bombay would, until otherwise provided by a competent legislature or other competent authority, be construed as meaning the territories within the State of Bombay immediately before the appointed day. The drift of this section is indicated by the marginal note; it is to provide for the territorial extent of laws. This section has been enacted with a view to provide for the continued extension and application of the laws in force immediately before the appointed day in the territories to which they applied prior to the appointed day, so that they may continue to extend to and apply in the territories forming part of the new State of Gujarat and the State of Maharashtra. When a new State is brought into being, in the absence of any other provision, the laws enacted by the old State would cease to apply to the territories of the new State. To provide against such a situation arising, the legislature, by the first part of section 87, has provided that in considering the territorial extent or application of the laws in force no change should be deemed to have taken place in the territories of the preexisting State of Bombay in spite of the fact that some territories have been carved out of such pre-existing State and a new State of Gujarat has been formed. Ordinarily when a law is enacted and in that law there is a territorial reference to a particular State, the reference is to the territories forming part of that State. If any new territories are included within that State, such a reference would cover such new territories. If any territories are excluded from that State, then the reference would not extend to such excluded territories. In order to provide for the continued operation of the laws in force within the territories of the pre-existing State of Bombay, in spite of the territories of the new State of Gujarat being excluded there from, it has been provided by the second, part of section 87 that the territorial reference in such law to the State of Bombay should be construed as meaning the territories which were within the State of Bombay immediately before the appointed day.

2. A question then arises as to the meaning of the expression "law in force immediately before the appointed day" in this section. It has been strongly urged by Mr. Vakil, in support of the construction placed upon these words by the Full Bench, that the expression "law" embraces within its ambit not merely statutory law or enacted law, but also personal law, customary law and judicial precedents of case law. It is urged that there is no reason, why the expression "law in force" should be confined to statutory or enacted law. In dealing with this aspect of the matter, it has been stated in the Full Bench decision in (1960) 1 Guj LR 82 at p.87 : (AIR 1960 Gujarat 40 at p.43) as under:

"It is next necessary to consider in turn whether decisions of the Bombay High Court are to be regarded as 'law in force' in the territories which constituted the State of Bombay. On this point Mr. Patel had little to say. We on our part find no difficulty in giving a comprehensive connotation to the expression 'any law in force immediately before the appointed day'. The Words should not, in our judgment, receive any technical meaning but should be understood in a sense which gives them a fair measure of amplitude. The crucial words so read must lead to the conclusion that decisions of the High Court of Bombay given before the appointed day are binding on this Court. x x x x x In any case we are of the opinion that judicial precedents are within the extensive ambit of section 87 of the Act."

The term "law" is a term of wide import in the English language. Its use is not confined to codified law or enacted law. We have personal law, customary law, case law, moral law, natural law and the law of nations or international law in various stages of development. Some such laws have binding force, others have none. In the First Book of Jurisprudence for Students of the Common Law, 5th Edition, Sir Frederick Pollock has observed that in English we use the word 'law' in a concrete sense to mean any particular rule, having the nature of law in the abstract sense, which is expressly prescribed by the supreme power in the State, or by some person or body having authority for that purpose, though not generally supreme. At page 16 of his book, he has observed as under:

"Therefore, although declarations of legal principles, or interpretations of express laws, by Courts of justice may well be said to form part of the law and so to be law in the abstract sense, we cannot say of any such declaration or interpretation that it is 'a law'."

"When we are using the term in this concrete sense it is not only correct enough for ordinary political purposes, but correct without qualification, to say that 'Laws are general rules made by the State for its subjects'."

The expression "law" is often used in an extended sense even in non-judicial matters. As observed by Sir Frederick Pollock, clubs and societies have their laws. There are laws of cricket and laws of whist and as might be expected, the distinction between the concrete and the abstract sense is not always exactly observed in popular usage.

3. We have to consider the meaning of the word "law" as used in the expression "law in force immediately before the appointed day" appearing in section 87 and consider the intention of the legislature when so legislating. As the language of the Section indicates it must be a law in force, that is, it must be a law in operation as such and it must extend or apply to the territories referred to in the said section. It must be a law enforceable in every Court having jurisdiction to enforce it, including the Supreme Court. Our attention has been called to the definition given in section 2(d) of the Act where it is provided as follows:

" 'Law' includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole Or in any part of the State of Bombay."

This definition is inclusive and not exhaustive. In the inclusive part, judicial precedents are not included as constituting law. The definition, however, would not exclude judicial precedents if they are otherwise included within the term 'law'. The learned Advocate-General who appears for the State of Gujarat has strongly urged before us that the words "law in force immediately before the appointed day" would not cover and are not intended to cover judicial precedents of the Bombay High Court immediately before the appointed day. Before considering the question whether judicial precedents could be regarded as law within the meaning of section 87, it is necessary to consider the nature and extent of the binding character of judicial precedents. Judicial precedents are divisible into two classes, those which are authoritative and those which are persuasive. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration and to which they will attach such weight as they consider proper. A persuasive precedent depends for its influence upon its own merits. The authoritative precedents recognized by English law are the decisions of the superior courts of justice in England, within certain limits. It may sometimes happen that a judicial precedent may be authoritative in One Court and persuasive only in another. In England the decision of the court of appeal is authoritative for the High Court but only persuasive for the House of Lords. Subject to various qualifications dealt with later in the course of this judgment, a court is bound by decisions of all courts higher than itself. In Halsbury's Laws of England, Third Edition, Volume 22, it is stated at page 801 that there is no statute or common law rule by which one Court is bound to abide by the decision of another court of coordinate jurisdiction. It is further stated that the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decisions of another Judge of first instance unless he is convinced that the judgment was wrong. The decisions, however, of subordinate courts are not recognized as being authoritative where there is another Court which is subordinate to that Court. It is stated in Salmonds Jurisprudence, 11th Edition at page 169 that the true rule of law was that one High Court Judge could not bind another. It is however further stated that such refusals to follow precedent were unusual for on the principle of judicial comity a Court would usually follow the decisions of its predecessors, so as to avoid conflicts of authority and to secure

certainty and uniformity in the administration of justice.

4. In India, some High Courts have both Original and Appellate jurisdiction and an appeal lies in certain matters from a decision of a single Judge of a High Court to a Division Bench of that Court. A decision of a High Court Judge of a State is regarded as binding on all the sub-ordinate courts in that State. A decision of a Division Bench of a High Court is regarded as binding on Judges of the same High Court sitting singly in the High Court. A decision of a Full Bench, i.e., a Bench of at least 3 Judges of a High Court is considered binding on all Judges of the same High Court sitting singly and on all Division Benches of the same High Court. A decision of the Supreme Court is binding on all the High Courts. By Article 141 of the Constitution of India it is laid down that the law declared by the Supreme Court shall be binding on all courts within the territory of India. A decision of one High Court is not binding on another High Court. Even a decision of a Full Bench of one High Court is not binding on a Judge sitting singly in another High Court. A decision of a High Court Judge sitting singly is not legally binding on another Judge of the same High Court sitting singly. So also a decision of a Division Bench of a High Court is not legally binding on another Division Bench of the same High Court. A decision of a Full Bench is not legally binding on another Full Bench of the same Court. One Judge of a High Court has, however, no right to overrule the decision of another Judge of the same High Court nor has one Division Bench of a High Court the legal right to overrule another decision of a Division Bench of the same High Court. In connection with the question whether a larger Full Bench can overrule a decision of a Full Bench of lesser number of Judges, Sir John Beaumont in a decision reported in *Emperor v. Ningappa Ramappa Kurbar*², observes at p.868 (of Bom LR) : (at p.409 of AIR) as follows:

"There seems to be very little authority on the powers and constitution of a Full Bench. There can be no doubt that a Full Bench can overrule a Division Bench and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely because the later bench consists of more Judges than the earlier. If that were the rule, by a majority of four to three, could overrule a unanimous decision of a bench of six Judges, though all the Judges were of co-ordinate jurisdiction. In *Enatullah v. Kowsher Ali*³, Sanderson, C.J., stating the practice in Calcutta, seems to have been of opinion that a decision of a Full Bench could only be reversed by the Privy Council or by a bench specially constituted by, the Chief Justice."

The principles of judicial comity and legal propriety require, in order to avoid conflict of authority and to secure certainty, uniformity and continuity in the administration of justice, that one Judge of a High Court sitting singly should follow the decision of another Judge of the same High Court sitting singly and that a Division Bench of a High Court should follow another Division Bench of the same High Court, that a decision of a Full Bench consisting of the same number of Judges should follow the decision of a Full Bench of equal number of Judges and that

a decision of a larger Full Bench should be considered authoritative and binding on all other benches constituted of a lesser number of judges.

5. The Supreme Court has dealt with the question relating to decisions of two different Full Benches in the case of *Atma Ram v. State of Punjab*, reported in⁴. In that case, the Supreme Court observes at page 527 as under:

"..... the better course would have been to constitute a larger Bench, when it was found that a Full Bench of three Judges, was inclined to take a view contrary to that of another Full Bench of equal strength. Such a course becomes necessary in view of the fact that otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another both equally binding upon them."

6. As regards the question whether one Division Bench of a High Court should follow the decision of another Division Bench of the same High Court and whether a Judge sitting singly should follow the decision of another Judge sitting singly in the same High Court,

²43 Bom LR 864 : (AIR 1941 Bom 408)

⁴ AIR 1959 SC 519

³ ILR 54 Calcutta 266 : (AIR 1926 Cal 1153) (SB)

the matter has been dealt with by the Supreme Court in the case of *Mahadeolal Kanodia v. Administrator General of West Bengal*, reported in⁵ In that case, at p.941 the Supreme Court has observed as follows:

"We have noticed with some regret that when the earlier decision of the two Judges of the same High Court in *Deorajin Debi v. Satyadhan Ghosal*⁶, was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between, dissentient judgments of their own High Court.

As far as we are aware it is the uniform practice in all the High Courts in India that if one Division Bench differs from an earlier view on a question of law of another Division Bench, a reference is made to a larger Bench."

7. In, the case of *Jai Kaur v. Sher Singh*, reported in⁷ the Supreme Court has laid down that a decision of a Full Bench should be regarded as binding on a Division Bench of the same High Court. In that case, the Supreme Court, at p.1122 observes as under:

"When a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided. We had recently occasion to disapprove of the action of a Division Bench in another High Court taking it upon themselves to hold that a contrary decision of another Division Bench on a question of law was erroneous and stressed the importance of the well-recognized judicial practice that when a Division Bench differs from the decision of a previous decision of another Division Bench the matter should be referred to a larger Bench for final decision. If, as we pointed out there, considerations of judicial decorum and legal propriety require that Division Benches should not themselves pronounce decisions of other Division Benches to be wrong, such considerations should stand even more firmly in the way of Division Benches disagreeing with a previous decision of the Full Bench of the same Court."

8. The rule that a Court should follow the decision of another Court of co-ordinate jurisdiction is subject however to several exceptions which have been dealt with in

⁵ AIR 1960 SC 936

⁷ AIR 1960 SC 1118

⁶58 Cal WN 64 : AIR 1954 Cal 119

Salmond's Jurisprudence, 11th Edn. at pages 199 to 217.

- (1) A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reserved or overruled by a higher Court.
- (2) A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute.
- (3) A precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher Court.
- (4) A Court is not bound by its own previous decisions that are in conflict with one another. If the new decision is in conflict with the old, it is given per incuriam and is not binding on a later Court.

Although the later Court is not bound by the decision so given per incuriam, this does not mean that it is bound by the first case. Perhaps in strict logic the first case should be binding, since it should never have been departed from and was only departed from per incuriam. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own the Court is free to follow either. It can follow the earlier, but equally, if it thinks fit, it can follow the later.

(5) Precedents sub silentio, are not regarded as authoritative. A decision passes sub silentio when the particular point of law involved in the decision is not perceived by the Court or present to its mind.

(6) Decisions of equally divided Courts are not considered binding.

A rule based on judicial decorum and legal propriety which requires a court to follow the decision of another Court of co-ordinate jurisdiction however firmly established cannot be raised to the level of a law in force so as to come within the ambit of the expression "law in force" in section 87 of the Bombay Re-organization Act, 1960. In our view, a decision of a single Judge of a High Court which may be authoritative for some courts in the State and which is liable to be followed by another judge of the same High Court sitting singly only on the basis of judicial comity and which is not binding on a Division Bench of the same High Court and which is liable to be overruled by such Division Bench and by the Supreme Court cannot be regarded as a 'law in force'. Similarly the decision of a Division Bench of a High Court which is liable to be followed by another Division Bench of the same High Court only on the basis of judicial comity and which is liable to be rendered ineffective by a Full Bench of the same High Court and which is liable to be overruled by the Supreme Court cannot be regarded as "law in force". In our view, it would be straining the language of the legislature to regard the same as 'law in force'.

9. Judicial precedents are often referred to as case law. It may with propriety be said that in England principles of equity have emanated from the Court of Chancery and the theory that judicial precedents are merely declaratory of the law would not be applicable thereto. In the context however of section 87 of the Bombay Re-organization Act, we cannot hold that the Indian Legislature intended, when dealing with the territorial extent of laws to include judicial precedents in the expression 'law in force' in section 87. Section 87 of the Bombay Re-organization Act, 1960, is in line with section 119 of the States Reorganization Act, 1956. The said section 119 provides as under:-

"Territorial extent of laws. -

The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to an existing State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

By Part II of the States Reorganization Act of 1956, various new States were brought into being. Several territories were transferred from the State of Hyderabad to the State of Andhra and from Travencore Cochin to the State of Madras. A new State of Kerala was formed out of some of the territories of Travencore Cochin and the State of Madras. A new part C State comprising the Laccadive, Minicoy and Amindivi islands was constituted. A new State of Mysore was formed out of the territories of the previous State of Mysore and the State of Coorg and some of the territories of the previous State of Bombay, Madras and Hyderabad. A new State of Bombay was

constituted having territories drawn from the then existing States of Bombay, Hyderabad, Madhya Pradesh, Saurashtra and Kutch. A new State of Madhya Pradesh was constituted comprising some of the territories of the then existing States of Madhya Pradesh, Madhya Bharat, Rajasthan, Bhopal and Vindhya Pradesh. A new State of Rajasthan was constituted out of the territories of the then existing State of Ajmer and some of the territories of the then existing States of Rajasthan, Bombay and Madhya Bharat, A new State of Punjab was created comprising the territories of the then existing States of Punjab, Patiala and the East Punjab States Union. If the expression "any law in force" within the meaning of section 119 was to include decisions of the various superior Courts of the States, the result would be very confusing and in different territories forming part of each new State different interpretations of the same or similar legislative enactments would prevail. The State of Gujarat comprises territories which at one time formed part not merely of the State of Bombay prior to the States Re-organization Act, 1956, but of the States of Saurashtra and Kutch. If by virtue of the provisions of section 119 of the States Re-organization Act, 1956, judicial interpretations given by the High Court of Saurashtra and the highest Court in Kutch were preserved as "law in force" in the territories of the former States of Saurashtra and Kutch the same would continue in Operation in those territories as 'law in force' under Section 87 of the Bombay Re-organization Act of 1960, unless the same were lawfully set aside or had ceased to operate by reason of legislative changes effected between 1st November, 1956, when the new State of Bombay was created and the 1st of May, 1960 when the new State of Gujarat was formed. Each newly created State has its own High Court under which various subordinate Courts function. There would be considerable confusion if Courts put different interpretations on the same enactment in different territories of the same State. We do not contemplate that the legislature could ever have had such an intention when enacting section 119 of the States Reorganization Act, 1956, or section 87 of the Bombay Re-organization Act, 1960.

10. Our attention was called to Section 88 of the Bombay Re-organization Act, 1960, where a power is given to the appropriate Government to adapt laws and to section 89 which deals with the question of the construction of laws and the language used in that connection. It is urged that in those sections the legislature had used the expression "law made before the appointed day" when referring to enacted law and that as similar words are not used in section 87, a different meaning should be given to the words "any law in force immediately before the appointed day" appearing in section 87. We are unable to accede to this argument. The expression 'law made before the appointed day' if used in section 87 may not have carried out the legislative intent. A law may have been made but the same or some provisions thereof may not have been in force. The legislature has intended by section 87 to refer not to laws made but only to the laws in force. Reading section 87 of the Act in the context in which the same appears and reading the section as a whole, we consider that the expression 'law in force immediately before the appointed day' was not intended to refer and does not refer to judicial precedents.

11. We may add here that the question of the binding character of judicial precedents has come up for consideration before various other High Courts as a result of the re-organization of various

Stats and the Constitution of new States. In none of the said cases provisions similar to Section 87 of the Bombay Re-organization Act, 1960, have been regarded as applicable to judicial precedents.

12. It is next urged that the decisions given by the Bombay High Court prior to 1st May 1960, should be regarded as decisions having the same force and effect as if the decisions had been given by the Gujarat High Court itself. It is urged that the Gujarat High Court is a Court of co-ordinate jurisdiction with the Bombay High Court and that the principles which apply to decisions of Courts of co-ordinate jurisdiction should be extended to the decisions of the Bombay High Court given prior to 1st May, 1960. This argument did not find favor with the Full Bench of this Court in the case of (1960) 1 Guj LR 82 : (AIR 1960 Gujarat 40) (FB), referred to by us earlier. A Full Bench of the High Court of Andhra had taken the view that the High Court of the State of Madras, out of which the State of Andhra was carved out, was a Court of co-ordinate jurisdiction with the High Court of Andhra. The previous Full Bench of this Court in dealing with the decision of the Full Bench of the Andhra High Court on this point has observed at page 88 of (1960) 1 Guj LR : (at page 43 of AIR) as follows:-

"We find considerable difficulty in agreeing with that view. We say this with some hesitation. Co-ordinate jurisdiction in the ordinary connotation of that expression is that which is exercised by different Courts of equal rank and status over the same subject-matter and within the same territory and ordinarily at the same time. Each Court must have jurisdiction to deal with the same subject-matter. We do not intend to suggest that for all purposes co-ordinate jurisdiction is to be equated with concurrent jurisdiction or simultaneous jurisdiction but we are unable to see our way to the conclusion that simply because this Court is in a sense a successor to the High Court of Bombay in respect of the territories which now form part of the State of Gujarat, it is a Court of co-ordinate jurisdiction with that predecessor."

13. The learned Advocate-General who represents the State of Gujarat before us, strongly urged that the Gujarat High Court is a Court of co-ordinate jurisdiction with the Bombay High Court as it existed prior to 1st May, 1960 and that the decisions of the Bombay High Court given prior to 1st May, 1960, should continue to have the same binding force and effect in the territories now forming part of the State of Gujarat. He urged that it was necessary in the interest of the certainty of law and the continuity of laws that the decisions of the former Bombay High Court prior to the appointed day should be regarded as binding by this High Court in the same sense in which the decisions of the Gujarat High Court itself are considered to be binding.

14. Our attention was called to the case of *Young v. Bristol Aeroplane Co. Ltd.*, reported in⁸ where Lord Green Master of Rolls in the Court of Appeal observes at page 749 as follows:-

"On a careful examination of the whole matter we have come to the clear conclusion that

this Court is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction."

15. Mr. Nanavaty, the learned advocate for respondent No.6, urged that the Bombay High Court prior to 1st May, 1960 should not be regarded as a Court of co-ordinate jurisdiction. He however urged that the Gujarat High Court should be regarded as a successor Court and that the decisions of the Bombay High Court prior to the appointed day being the decisions of a predecessor Court should be regarded as binding on the Gujarat High Court.

16. Difficulties have been experienced in defining with precision Courts of co-ordinate jurisdiction. The dictionary meaning of the word "co-ordinate" as stated in the Webster's New International Dictionary of the English language, 2nd Edn., at page 586, is "equal in, or in the same rank or order; not subordinate". "One that is co-ordinate" is shown as "one of equal rank, authority or importance with another". In Murry's English Dictionary, Vol.2, the meaning of the word 'co-ordinate' is given as "of the same order; equal in rank, degree or importance (with); opposed to subordinate". Sir Frederick Pollock in his first Book of Jurisprudence, 5th Edition, at page 324 has referred to decisions of "co-ordinate authority" as decisions of "courts of equal and exercising the same jurisdiction", a view which seems to us to be sound.

In the Full Bench case of the Andhra High Court, reported in *Subbarayudu v. State*⁹, Chief Justice Subba Rao, as he then was, has observed in his judgment at p.92 that he would apply the following test to ascertain whether two High Courts were of coordinate jurisdiction or not: "Whether the two Courts are of equal rank and status or of equal authority and exercise similar jurisdiction."

17. A Court of co-ordinate jurisdiction must be a Court of equal rank and of equal status. That test is satisfied in the present case. The Gujarat High Court is a Court of the same rank and of the same status as the High Court of Bombay immediately prior to the appointed day. By section 28 of the Bombay Re-organization Act, 1960, it is provided that as from the appointed day, there shall be a separate High Court for the State of Gujarat and the High Court of Bombay shall become the High Court for the State of Maharashtra. By section 29 it is provided that such of the judges of the High Court of Bombay holding office immediately before the appointed day as may be determined by the President shall on that day cease to be Judges of the High Court of Bombay and become Judges of the High Court of Gujarat. By section 30 it is provided that the High Court of Gujarat shall have, in respect of any part of the territories included in the State of

⁸(1944) 1 KB 718

⁹ AIR 1955 Andh 87 (FB)

Gujarat, all such jurisdiction, powers and authority as, under the law in force immediately before the appointed day, are exercisable in respect of that part of the said territories by the High Court of Bombay. By section 31 it is provided that the High Court of Gujarat shall have the like

powers to approve, admit, enrol, remove and suspend advocates and attorneys, as are, under the law in force immediately before the appointed day, exercisable by the High Court of Bombay. By section 32 it is provided that subject to the provisions of Part IV, the law in force immediately before the appointed day with respect to practice and procedure in the High Court of Bombay shall, with the necessary modifications, apply in relation to the High Court of Gujarat and accordingly, the High Court of Gujarat shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the appointed day exercisable by the Court of Bombay. By section 35 it is provided that the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and division Courts of the High Court of Bombay and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications apply in relation to the High Court of Gujarat. By section 37, a provision is made for transfer of certain proceedings from the Bombay High Court to the Gujarat High Court. By sub-section (4) of section 37 it is provided that any order made by the High Court of Bombay before the appointed day, in any proceeding transferred to the High Court of Gujarat by virtue of sub-section (2) and any order made by the High Court of Bombay in any proceedings with respect to which the High Court of Bombay retains jurisdiction by virtue of sub-section (3), shall for all purposes have effect not only as an order of the High Court of Bombay, but also as an order made by the High Court of Gujarat. The intention of the legislature as expressed in these sections is very clear. It is to invest the High Court of Gujarat with the same jurisdiction, powers and authority as was exercised immediately before the appointed day by the High Court of Bombay in respect of territories forming part of the new State of Gujarat. Both the Courts are courts of Record. The Gujarat High Court has succeeded to all power, authority and jurisdiction which the High Court of Bombay had until 1st May, 1960, in and in relation to the territories now forming part of the State of Gujarat. If the exercise of the same jurisdiction is the test, it is satisfied only to the extent that the jurisdiction exercised by the Gujarat High Court in respect of the territories forming part of the State of Gujarat was wholly exercised by the Bombay High Court prior to the appointed day in the same territories. The Bombay High Court has however exercised jurisdiction over other areas. It has also exercised ordinary original civil jurisdiction under Clauses 11 and 12 of the Letters Patent. The Gujarat High Court does not exercise similar jurisdiction in respect of any territory.

18. It is urged that the continued simultaneous existence of both the Courts constitute a test for considering whether they are Courts of co-ordinate jurisdiction. That, however, does not appear to us to be a test. A Court which has ceased to exist and to function can be regarded as a Court of co-ordinate jurisdiction with a Court which succeeds it, if the other conditions which govern the matter are satisfied. The case of *Pledge v. Carr*, reported in¹⁰ was cited, in this connection. Lord Herschell, L.C., sitting in the Court of Appeal in the Chancery Division, stated in that case in connection with the decision of

¹⁰(1895) 1 Ch 51

Vint v. Padget reported in¹¹ as under:-

"We cannot overrule (1858) 2 De G and J 611, for that was the decision of a Court co-ordinate in jurisdiction with ourselves."

Lord Justice Lindley and L.J. A.L. Smith concurred in that decision.

19. The case of *R. v. Cade*, reported in¹² decided by the Court of Criminal Appeal in England, was also referred to in this connection. In that case Lord Reading, C.J., in dealing with the case of *R. v. Riley* reported in¹³ considered the decision in that case as binding on the Court. The decision in (1896) 1 QB 309 was given by the Court for the consideration of Crown Cases Reserved. The jurisdiction of the latter Court had been transferred to the High Court when the decision in (1896) 1 QB 309 was given and was being exercised by the Judge of the High Court. The Court for the consideration of Crown Cases was abolished by The Criminal Appeal Act, 1907 and had ceased to exist when the decision in (1914) 2 KB 209 was given.

20. Thus there is no reason that two Courts must co-exist simultaneously in order to constitute themselves as Courts of co-ordinate jurisdiction. It follows that a successor court can be a Court of co-ordinate jurisdiction with its predecessor provided that the other conditions are satisfied.

21. The arguments advanced against the Bombay High Court prior to 1st May, 1960, being regarded as a Court of co-ordinate jurisdiction with the Gujarat High Court were that the two Courts were situate in different States and that the Bombay High Court exercised jurisdiction over larger territories and exercised jurisdiction under clauses 11 and 12 of the Letters Patent which the Gujarat High Court does not exercise. It is urged that where two Courts are Courts of co-ordinate jurisdiction there must be reciprocity and each court must consider the decision of the other binding. There is force in the aforesaid arguments. Though one of the aforesaid Courts was in the former State of Bombay and the other is in the new State of Gujarat, both the Courts are Courts in the same country. The larger territories over which the High Court of Bombay prior to 1st May, 1960 exercised jurisdiction are not situate within the State of Gujarat. The Gujarat High Court being a successor Court, the question of reciprocity does not arise. Though strictly speaking, the Gujarat High Court may not be regarded as a Court of co-ordinate jurisdiction with the Bombay High Court as it existed prior to 1st May, 1960, the principles which govern the decisions of Courts of co-ordinate jurisdiction would apply. The aforesaid principles were evolved by the Courts themselves with a view to secure uniformity, certainty and continuity of judicial decisions and there is no reason why the same should not be extended to a court which is a successor to another Court of the same rank and status, when the successor Court is invested with all the jurisdiction, power and authority of the other Court in respect of all the territories in respect whereof the successor Court exercises jurisdiction.

¹¹(1858) 2 De G and J 611

¹³(1896) 1 QB 309

¹²(1914) 2 KB 209

22. Taking all the circumstances into account, we are of the view and we hold that the decisions of the Bombay High Court given prior to 1st May, 1960, are binding on this High Court to the same extent as if they were given by this High Court itself.

23. In the Full Bench case reported in AIR 1955 Andhra 87 (FB), Bhimasankaram, J., in the course of his judgment observes at page 95 as under:-

".....where territories under the jurisdiction of one High Court are divided into two, each to be under the jurisdiction of a Separate High Court, it seems to me that the principle underlying the rule of precedents requires the continuity of case-law to be maintained, because there is no reason at all why the certainty of the law should be affected. The Andhra High Court is, in one sense, new of course but its jurisdiction is a jurisdiction which was once subject to one High Court and until 5-7-1954 governed by the case law as laid down by that High Court. A Court should be reluctant to favor innovations unless they are indispensable. Precedents are followed in the words of Blackstone:

"as well to keep the scales of justice steady and not liable to waver with a new Judge's opinion as also because..... What before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments."

This reasoning fortifies us in the decision which we have taken.

24. In the course of the arguments, our attention was called to a Full Bench decision reported in *in the case of Ma Mya v. Ma Thein*¹⁴. In that case the question referred to the Full Bench was whether the High Court of Rangoon in exercise of its ordinary original jurisdiction was bound by the authorized reports of the decisions of the Chief Court of lower Burma and if so, to what extent. In dealing with the matter Chief Justice Rutledge observes at p.4 as follows:

"To decide whether the decisions of the late Chief Court are binding upon this Court we must decide whether it is a Court of co-ordinate jurisdiction. Admittedly, it is not so in respect of territorial jurisdiction, as the Chief Court's jurisdiction was confined to lower Burma, while the High Court's jurisdiction extends to Upper Burma as well. In origin the Chief Court was the creation of the Indian Legislature and it was not a Court of Record. The High Court by its Letters Patent is the creation of the King Emperor and is declared to be a Court of Record. It is in fact the King's Court which the Chief Court never was. Its jurisdiction in certain respects, such as contempt and mandamus is greater than that of the Chief Court. I am therefore of opinion that the Chief Court can not be held to be a Court of co-ordinate jurisdiction with the High Court."

This decision is distinguishable as the two courts were not regarded as being Courts of equal rank or status. The Full Bench even in that case has observed that the decisions of the Chief Court

were conditional authorities of the highest value to which the greatest weight and respect must be attached and that the Judges of the High Court of Rangoon should not consider themselves free to set those decisions at naught except for the best

¹⁴AIR 1927 Ran 4 (FB)

and most urgent reasons. It further observed that the principle of stare decisis should be applied to those decisions in no narrow or technical spirit.

25. Our attention was also drawn to a decision of a Full Bench of the High Court of Madhya Bharat in the case of *Chandulal v. Babulal*, reported in¹⁵ The view taken in that case was that the Madhya Bharat High Court could not be looked upon as successor to the Indore High Court or any High Court of any Covenanting States. It has been held in that case that the High Courts in the Covenanting States were altogether abolished and as an independent High Court with power and stability and fresh outlook had come into existence the High Courts of the former Covenanting States could not be regarded as of equal rank with the Madhya Bharat High Court.

26. Our attention was also drawn to a decision reported in, *Ryru Nair v. Govindan Nair*¹⁶. It is a decision of a single Judge of that Court. In the course of his judgment he observes as follows:

"The Kerala State was constituted taking portions of the territories of the former State of Travencore Cochin and the former State of Madras and the Kerala High Court was constituted for this new State. Therefore, the Kerala High Court is not a successor of either the Travencore Cochin High Court or the Madras High Court and in that view the judges of the Kerala High Court are not bound by the decisions of either of the said High Courts."

Our attention was also called to a decision of the Mysore High Court in the case of *Basappa v. State* reported in¹⁷ Under the States Reorganisation Act, 1956, the new State of Mysore had been formed out of the territories of four different States. It was held in that case that the new High Court of the new State of Mysore could not be regarded as representative of the High Court of the former State of Mysore nor could the said High Court be regarded as a court of co-ordinate jurisdiction with the former Mysore High Court.

27. The aforesaid cases of the Courts of Rangoon, Madhya Pradesh, Kerala and Mysore can be easily distinguished. The territories of Gujarat State have been wholly carved out of the former State of Bombay and the whole of the jurisdiction which is being exercised by the Gujarat High Court was being exercised by the Bombay High Court prior to the appointed day in the territories which now form part of the State of Gujarat. The Gujarat High Court is a successor to the Bombay High Court. The Gujarat High Court is a court of equal rank and status with the Bombay High Court prior to the appointed day and even as a matter of sound practice, in order to avoid conflict of authority and to secure certainty, uniformity and continuity in the administration of justice the principles applicable to decisions of courts of co-ordinate jurisdiction in our view

must be extended to the decisions of the Bombay High Court given prior to 1st May 1960.

28. Our answer to the question referred to this Special Full Bench is that the decisions of the Bombay High Court given prior to the appointed day, i.e., to 1st May 1960, do not constitute "any law in force immediately before the appointed day" within the meaning of

¹⁵ AIR 1952 Mad Bha 171

¹⁷ AIR 1959 Mys 1 (FB)

¹⁶ AIR 1961 Ker 75

Section 87 of the Bombay Re-organization Act, 1960. We hold that the decisions of the High Court of Bombay given prior to 1st May 1960 have as much binding force and effect as if they were the decisions given by the Gujarat High Court itself. A decision of a single Judge of the Bombay High Court given prior to 1st May 1960 would have the same binding force and effect as a decision of a single Judge of the Gujarat High Court; a decision of a Division Bench of the Bombay High Court given prior to 1st May 1960 would have the same binding force and effect as a decision of a Division Bench of the Gujarat High Court and a decision of a Full Bench of the Bombay High Court given prior to 1st May 1960 would have the same binding force and effect as a decision of a Full Bench of the Gujarat High Court.

Miabhoy J.

29. With the greatest respect, I regret I am unable to agree with the view taken by the majority as to the correct interpretation of Section 87 of The Bombay Reorganization Act, 1960 and the application of the principle of co-ordinate Jurisdiction.

30. The question which arises for determination by this Full Bench is whether the High Court of Gujarat is bound by the judicial precedents created before 1st of May 1960 in the composite High Court of Bombay. This question arose, for the first time, before a Division Bench of this High Court consisting of the learned the then Chief Justice S.T. Desai and myself in the *Anand Municipality v. Union of India*¹⁸, At that time, our attention was drawn to a Full Bench decision of the High Court of Andhra reported in AIR 1955 Andh 87 (FB). The question that was considered by that Court was identical with the question which arose before the Division Bench of this High Court. The question before the Andhra High Courts which came to be established under almost the same circumstances in which the High Court of Gujarat came to be established with only one exception, was the same which arose before the Division Bench of this High Court. The question was considered by the Andhra High Court from three. aspects, viz. (i) whether the composite High Court of Madras was a Court of co-ordinate jurisdiction with the newly created High Court of Andhra, and, if so, whether the decisions of the composite Madras High Court were binding on the Andhra High Court on the principle of judicial comity; (ii) whether the decisions of the composite Court were binding on the principle of 'stare decisis'; and (iii) whether the precedents of the composite Madras High Court were binding under Section 53

of the Andhra State Act (30 of 1953), which corresponds to Section 87 of the Bombay Re-organization Act, 1960. The Full Bench of the Andhra High Court decided that the above two Courts were Courts of co-ordinate jurisdiction, that the decisions of the composite High Court were binding on the newly created Court on the principle of judicial comity and that these decisions were also binding on the principle of 'stare decisis.' The Full Bench, however, took the view that those precedents were not preserved under Section 53 of the Andhra State Act (30 of 1953). We then found some difficulty in agreeing with some of the reasons on which the Andhra decision was found. The question which was raised before the Division Bench of this Court was of considerable importance and its answer was bound to have far-reaching consequences on

¹⁸ Special Civil Application No.119 of 1960

the system of judicial administration in the State of Gujarat. Consequently, the Division Bench referred the matter to a Full Bench and the then learned Chief Justice constituted a Full Bench consisting of himself, my learned brother Bhagwati, J. and myself. The matter was argued from the same three aspects which were discussed in the Full Bench decision of the Andhra High Court. The learned counsel who appeared before that Full Bench did not seem to support the decision of the Andhra High Court on the principle of 'stare decisis'. The learned Advocate General who appeared for the respondent, however, supported the decision on the other two grounds and Mr. V.B. Patel, who appeared for the petitioner in (1960) Guj LR 82 : (AIR 1960 Gujarat 40) (FB), resisted both those grounds. The Full Bench unanimously decided that the correct interpretation of Section 87 of The Bombay Re-organisation Act, 1960, was that it preserved for the High Court of Gujarat the judicial precedents created by the composite Bombay High Court before 1st May 1960 and that those judicial decisions were impressed with the same strength or infirmity with which those precedents were impressed in the composite High Court of Bombay and that those precedents could be changed by this High Court only in the manner in which those precedents could be changed by the composite High Court of Bombay. In view of this decision, the Full Bench did not decide the question as to whether the composite High Court of Bombay was or was not a Court of co-ordinate jurisdiction with the High Court of Gujarat. The learned Chief Justice, who delivered the judgment of the Full Bench, however, made some observations on that subject on behalf of the Court. But, the judgment clearly shows that the observations were obiter and did not represent the decision of the Full Bench. It appears that the view taken by the Full Bench was challenged before a Division Bench of this Court consisting of Raju, J. and Bakshi, J. in *in the case of State v. Gordhandas Keshavji Gandhi and six others*¹⁹. The learned Judges were inclined to accept some of the criticisms which were offered against the Full Bench judgment and, in view of the great importance of the subject, which was likely to be raised almost everyday both in this Court and the subordinate Courts, the learned Judges felt it necessary to order that the matter should be placed before the learned Chief Justice so that, if he was so inclined, he might constitute another Full Bench for resolving the doubt. The learned Chief Justice, therefore, was pleased to order the constitution of the present Full Bench. The learned Advocate General, who had appeared before the former Full Bench and had succeeded in persuading that Bench to take the view that Section 87 of The Bombay Re-organisation Act, 1960, preserved the judicial precedents of the composite Bombay High Court before 1st May

1960, also appeared before the present Full Bench. The learned Advocate General, whilst conceding that the actual decision arrived at by the former Full Bench was a correct decision, submitted before the present Full Bench that the actual ground on which that decision was arrived at was not the correct ground. He submitted that the correct principle which applied to the problem was the principle of co-ordinate jurisdiction as held by the Full Bench of the Andhra High Court and that that was the only ground on which the former Full Bench decision of this Court should be sustained. Several learned counsel have also appeared before this Full Bench and Mr. S.B. Vakil was good enough to appear *amicus curiae*. There was a distinct cleavage of submissions made by those counsel. Mr. M.K. Joshi and Mr. N.C. Trivedi went to the extreme length of contending that no decision of the High Court of Bombay is binding upon this Court and that, on the creation of the High Court of Gujarat, the true legal position was that it started with a clean slate. Mr. I.N. Nanavaty agreed with the learned Advocate General that Section 87 of The Bombay Reorganization

¹⁹ Criminal Appeal No.381 of 1960

Act, 1960, did not apply. However, he did not agree with him that the High Court of Bombay and the High Court of Gujarat were also Courts of co-ordinate jurisdiction. His submission was that the High Court of Gujarat was the successor of the High Court of Bombay and the decisions of the latter Court were binding on this Court on the principle of succession. Mr. S.B. Vakil, on the other hand, argued that Section 87 of the Bombay Reorganization Act, 1960, was applicable to the problem and that the decision of the former Full Bench was a correct decision. He contended that the composite High Court of Bombay was not a Court of co-ordinate jurisdiction with the High Court of Gujarat. Very able and learned arguments were advanced at the bar for and against the proposition, and, during the course of the hearing, it was quite clear to me that several aspects with which the problem teems were not presented to the former Full Bench. The learned Advocate General who appeared before both the Full Benches said that, when the matter was argued before the former Full Bench, all the available literature on the interesting point in hand was not available to him, to his learned opponent and the Full Bench. He pointed out that, now that this Court and the Bar Library were possessed with a number of books and authorities, the learned counsel on both the sides had been able to do an excellent research on the problem and that a number of facets of the problem which had not been presented earlier had been unearthed and brought to light. During the course of the arguments, it appeared to me to be crystal clear that there were several aspects which needed consideration before a correct answer could be given to the question raised. After giving my best consideration to all the arguments which have been advanced at the bar and having had the benefit of learned discussion with My Lord the learned Chief Justice and my other Brother Judges, I have come to the conclusion that the view which was taken by the former Full Bench that Section 87 applied was the correct view and that the doubt regarding the application of the principle of co-ordinate jurisdiction has not come to be resolved. If at all, in my judgment, there is a number of strong arguments in favor of the view taken by the former Full Bench.

31. Before I deal with the question of interpretation of Section 87, The Bombay Re-organization

Act, 1960, (hereafter called the 'Act') it is necessary to make a few preliminary observations. The High Court of Gujarat has jurisdiction over the State of Gujarat. This State was created, for the first time, by Section 3 of the Act. Section 3 created two new States from 1st May 1960, the names of the States being the State of Gujarat and the State of Maharashtra. These two States were created from out of the former State of Bombay. Parliament has power to do this under Articles 2 and 3 of the Constitution. Article 2 provides, inter alia, that Parliament may, by law establish new States on such terms and conditions as it thinks fit. Article 2 provides the various modes by which a new State may be created and by which the area of an existing State may be either increased, diminished or the boundaries thereof altered. From the Act, it is quite clear that the Parliament was creating the two new States under Clause (a) of Article 3 which provides that Parliament may, by law, form a new State by separation of territory from any State. Section 3 of the Act specifies the territories of the State of Gujarat and assigns the residuary territories of the State of Bombay to the State of Maharashtra. Article 4 provides that any law referred to in Article 2 or Article 3 shall contain, inter alia, such provisions as may be necessary to give effect to the provisions of that law and may also contain such supplemental, incidental and consequential provisions as the Parliament may deem necessary. The Act created for the State of Gujarat a number of institutions and the High Court of Gujarat was one of them.

32. Part IV of the Act, beginning from Section 28 and ending with Section 40, contains provisions relating to the High Court. Section 28 states that, as from 1st May 1960, there shall be a separate High Court for the State of Gujarat. Section 30 provides that that High Court shall have, in respect of any part of the territories included in the State of Gujarat, all such jurisdiction, powers and authority as, under the law in force immediately before the appointed day, are exercisable in respect of that part of the said territories by the High Court of Bombay. Section 33 preserves for the High Court of Gujarat, subject to the provisions of Part IV, the law in force immediately before the appointed day with respect to practice and procedure in the High Court of Bombay and enjoins that the High Court of Gujarat shall have, with the necessary modifications, all such powers to make rules and orders with respect to practice and procedure which were exercisable by the High Court of Bombay before 1st May 1960. Section 34 enacts that the law in force immediately before 1st May 1960 with respect to the form of writs and other processes used, issued or awarded by the High Court of Bombay shall, with the necessary modifications, apply with respect to the form of writs and other processes used, issued or awarded by the High Court of Gujarat. Section 37 enacts that except as provided by the Act, the High Court of Bombay shall, from 1st May 1960, have no jurisdiction over the territories of Gujarat. This section also confers certain powers upon the Chief Justice of the High Court of Bombay in respect of matters pending before that Court and certain other incidental matters. These are some of the important provisions which are to be found in the Act in relation to the jurisdiction, powers, authority, practice and procedure of the High Court of Gujarat.

33. Chapter IX of the Act is headed as "Legal and Miscellaneous Provisions". Section 87 is material for the purpose of disposing off the question before this Full Bench and deserves to be quoted in full. It is as follows:

"87. Territorial extent of laws. - The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to the State of Bombay shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day".

Section 88 confers power upon appropriate Governments to make such adaptations and modifications of law, whether by way of repeal or amendment, as may be necessary or expedient for the purpose of facilitating the application in relation to the two new States of any law made before 1st May 1960. Section 89 confers a power upon the authorities mentioned therein, including courts of law, to construe the law in such manner without affecting the substance as may be necessary or proper in regard to the matters before such authorities notwithstanding that no provision or insufficient provision may have been made by the appropriate Government under Section 88 of the Act.

34. Section 2 of the Act is the defining section. Clause (a) thereof defines "appointed day" as meaning 1st day of May, 1960. Section 2(d) defines the term "law" and that definition deserves to be stated in full. It is as follows:

"2(d): 'Law' includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay".

35. These are the material provisions of the Act which require to be borne in mind for the purpose of determining the problem before this Full Bench. From the provisions of the Constitution, referred to above, it is quite clear that Parliament has power, whilst creating a new State, to make law containing such supplemental, incidental and consequential provisions as it may deem necessary. In interpreting the provisions of the Act, it will be necessary to bear in mind this power of Parliament. Under the Constitution, Parliament has also power to make laws in respect of the Central subjects, but it has no power to make laws in respect of the State subjects except under certain circumstances and situations. The provisions of the Act do not suggest that Parliament was purporting to change the laws in respect of the Central subjects under its ordinary powers or the State laws under its emergency powers. The preamble of the Act makes it clear that the object of the Parliament was to provide for the re-organization of the State of Bombay and for matters connected therewith. The main object of the Act was to split up the State of Bombay into two new States. There is nothing in the Act itself which gives any indication that the Parliament intended to change either the Central laws or the State laws or to break the continuity of the laws prevailing in the territory assigned to the State of Gujarat. On the contrary, there are a number of provisions in the Act which give an indication to the contrary and

express in clear terms the anxiety of the Parliament to preserve the laws prevailing in the territory of Gujarat before the re-organization.

36. The definition of the word "law" as given in Section 2(d) of the Act is noteworthy. It is an inclusive definition. It does not purport to define what law is, but it only includes within the ambit of the term "law", the matters mentioned therein. An analysis of those matters makes it clear that the things included in the term law are all law scripts, that is, written matters "which have the force of law in the whole or any part of the State of Bombay". The definition is not intended to circumscribe the ordinary connotation of the term "law", but it is intended to extend it by including therein things which otherwise may not have been taken as included in the term "law".

37. An analysis of the various sections of the Act, already quoted, discloses that the Legislature has used a number of expressions in those sections in relation to the term "law". The expressions are "law", "force of law", "law in force before the appointed day" and "law made before the appointed day". It is in the context of these different expressions that the first question relating to the construction of Section 87 will have to be decided.

38. As the term "law" has not been defined exhaustively, learned arguments were advanced at the bar as to what is the true meaning of that term. Reference was made to Salmond's Jurisprudence as to the correct definition of this term. From that book, it appears that there are two main theories propounded by the jurists as to the correct connotation of the term "law". One theory defines law as "general command issued by the State to its subjects and enforced through the agency of courts of law by the sanction of physical force", (vide Jurisprudence by Salmond, Eleventh Edition, page 53). The second theory defines law as that which is recognized and administered by the Courts. According to this theory, no rule which is not recognized and administered by the Courts is law. According to this theory "law" is not made by Legislature alone, but it is also made by law Courts. Therefore, Salmond says at page 41 of his book; "It is therefore, to the courts and not to the legislature that we must go in order to ascertain the true nature of law". The jurists are not agreed as to the rival merits of the theories and as to which of them is the correct theory. Salmond's own view seems to be that each of the aforesaid theories contains a certain aspect of truth, but, none of them represents, the whole truth. At page 56, Salmond says, "Law is not right alone, or might alone, but the perfect union of the two". However, it is not necessary to enter into a debate as to which of the two rival theories is correct, nor is it necessary to pursue the matter further, because, what we are called upon to decide in the present case is not what is the juridical connotation of the term 'law', but, as I shall presently show, what we have to decide is as to what is the correct interpretation of the expression "law in force before the appointed day".

39. The learned counsel were all agreed that there are several varieties or kinds of law which are dealt with by the Indian Law Courts and there was perfect unanimity that these varieties include

(i) constitutional law, (ii) statutory law, (iii) personal law, (iv) customary law and (v) the law of equity. Mr. S.B. Vakil submitted that judicial precedent or case-law is also a kind of law. The learned counsel who opposed the proposition that Section 87 includes precedents disputed this submission. According to them, the term 'case-law' is only a loose expression and that, if its true nature is analyzed, then, it will be found that it does not stand on the same footing as the other live kinds of law.

40. In order to decide the question in hand, it is necessary to make a few observations regarding the place of judicial precedents in the Indian legal system and to understand the place they occupied in the composite High Court of Bombay before 1st May 1960. There is no controversy as to what constitutes a judicial precedent. A judgment is not a judicial precedent. It is the principle on which a judgment is based that constitutes a judicial precedent. When a Court answers a point of law in the form of a general principle, then judicial precedent is created. When a question of law is answered by way of abstraction and after elimination of the immaterial elements, it becomes a judicial precedent. When such a general principle is enunciated, it is applicable not merely to the particular case in which it is enunciated, but it is applicable to all other cases which resemble that particular case in its essential features. This is known as the ratio decidendi of the case and it is this ratio which constitutes the judicial precedent.

41. Judicial precedents have different force and effect in different Courts depending upon the Court in which they are created, in which they are sought to be used and the relationship existing between the Court in which the precedent is created and the one in which it is intended to be used. It is, therefore, necessary first to know the hierarchy of Courts in the territories over which the composite High Court of Bombay exercised jurisdiction including, the territory assigned to the State of Gujarat. In the State of Bombay, the Courts were divided into two broad categories, viz., (i) subordinate Courts and (ii) co-ordinate Courts. Broadly speaking, in the former category were the Courts of (i) Judges of Junior Division, (ii) Judges of Senior Division, (iii) Judges of Small Cause Courts and (iv) District Judges and Judges of City Civil Courts; I propose to omit the criminal Courts for the purpose of the present discussion. In the High Court, all the Judges were co-ordinate Judges, but, they became Judges, exercising subordinate jurisdiction in relation to Division Benches and Full Benches.

42. The composite High Court of Bombay had ordinary original jurisdiction over the Greater Bombay. This jurisdiction, as a general rule, was exercised by a single Judge, i.e., the High Court was presided over by a single Judge when exercising this jurisdiction. The High Court of Bombay had also appellate jurisdiction over the whole State of Bombay. That jurisdiction was exercised by the High Court in some matters through single Judges. The High Court also exercised revisional jurisdiction over the whole State of Bombay. That jurisdiction also was, as a general rule, exercised by single Judges. The High Court also exercised extraordinary jurisdiction over the whole State outside the Greater Bombay. An appeal known as the Letters Patent Appeal lay under clause 15 of the Letters Patent of the High Court from the decisions of single Judges to

Division Benches presided over by two Judges of the High Court. Thus, an appeal lay from the decision of a single Judge given in the exercise of (i) original jurisdiction, (ii) first, appellate jurisdiction and (iii) second appellate jurisdiction, to a Division Bench. In the latter case, appeal lay only with the leave of the Judge who had decided the second appeal. There was no appeal from the judgment of a single Judge to a Division Bench in any other matter. Though this was so, for the purposes of following a precedent, all single Judges were considered as subordinate to Division Benches and Full Benches.

43. Division Benches of the High Court of Bombay exercised co-ordinate jurisdiction, that is to say, one Division Bench was not subordinate to another Division Bench. A Full Bench, whether consisting of three or more Judges, was also a Court of co-ordinate jurisdiction with any other Full Bench consisting of three or more Judges. Not only this, but a Full Bench was also a Court of co-ordinate jurisdiction with a Division Bench. A Full Bench of the Bombay High Court stood on the same footing as a Division Bench, because no appeal lay from a decision of a Division Bench to a Full Bench and thus there was no relationship, of subordination or superiority of one Bench over the other. Thus, Division and Full Benches were Courts of co-ordinate jurisdiction with one another.

44. Judges exercising jurisdiction in the sub-ordinate Courts were subordinate to the High Court. They were subordinate not only to Division Benches and Full Benches, but also to single Judges of the High Court. A judicial precedent created in the High Court of Bombay, whether by a single Judge or a Division Bench or a Full Bench, was binding on all the subordinate Courts on the ground that these Courts were under the appellate and revisional jurisdiction of the High Court and thus the relationship existing between the two sets of Courts was one of subordination superiority. When a judicial precedent of the High Court of Bombay was cited in a subordinate Court, the latter Court was bound to follow it. A failure to follow it was an error of law and was bound to be corrected by a Court of superior jurisdiction. Exactly for the same reason, a judicial precedent created by a Division Bench of the High Court was binding on a single Judge of the High Court. But, as Division Benches and Full Benches were Courts of co-ordinate jurisdiction, the judicial precedents created by any one of them were not binding on the other on the ground of subordination. However, the Division Benches considered themselves bound by the judicial precedents of other Division Benches on the principle of judicial comity. The practice which was followed by the High Court of Bombay in this respect was the same which was followed by the High Court of England and the Court of Appeal Cases. The principles which guided the latter Court in the matter of judicial precedents have been set out by that Court in (1944) 1 KB 718. All Division Benches considered themselves to be bound by the judicial precedents created by Full Benches not only on the ground of judicial comity but also on the ground that a Full Bench consisted of more number of Judges than a Division Bench. If a judicial precedent created by a Full Bench required to be reconsidered, then, the usual practice was to refer the matter to a Full Bench consisting of a more; number of Judges than the number which constituted the former Full Bench whose decision was sought to be revised. The practice was to regard the precedent of a

larger Full Bench as having greater efficacy and binding authority than the precedent of a Full Bench consisting of a smaller number of Judges. This practice was criticized by Beaumont, C.J. in 43 Bom LR 864 at p.868 : (AIR 1941 Bombay 408 at p.409). It is not necessary to express any opinion in this case as to whether this criticism was or was not justified. However, the observations made by the learned Chief Justice in the above case ignores the important fact that, when a Full Bench consists of a larger number of Judges, then, the decision is not merely of a greater number of Judges, but it is one arising from out of the joint deliberations and discussions of a greater number of Judges and that this fact may give to the decision of as Full Bench consisting of a larger number of Judges a greater binding authority than that of a Full Bench consisting of a smaller number of Judges. In Young's case, (1944) 1 K.B. 718 it was observed that, when two Division Benches of the Court of Appeal Cases create different precedents on the same subject, then, both the precedents hold the field and a subsequent Division Bench can follow the precedent of any of the two Division Benches. Such a practice was not recognized by the Bombay High Court. In that Court, as a general rule, a Division Bench followed the precedent of another Division Bench. If any conflict between the decisions of two Division Benches was brought to the notice of another Division Bench, then, the practice was to get the matter referred to the Chief Justice. Such a practice was also prevalent in the High Court of Calcutta as appears from the observations made in AIR 1960 Supreme Court 936. This practice appears to have been approved by the Supreme Court in two recent judgments reported in AIR 1960 Supreme Court 936 (supra) and AIR 1960 Supreme Court 1118 at p.1122. A precedent created by a Full Bench did not perhaps have the effect of over-ruling a precedent created by a Division Bench of a Full Bench of smaller size. But, the logical consequence of the observations made by the Supreme Court in the aforesaid two cases is that, when a Full Bench differs from a Division Bench on a point of law, apart from the fact that the sub-ordinate Courts are bound by the decision of the Full Bench, the Division Benches also are bound to follow the decision of the Full Bench on account of the operation of the principle of judicial comity. As already observed, the practice in the Bombay High Court was to follow the precedent of a larger Full Bench in preference to the precedent of a smaller Full Bench. However, according to Young's case, (1944) 1 KB 718 both the decisions would hold the field. In view of the observations made by Their Lordships of the Supreme Court in the aforesaid two cases, the view that should prevail in India is the view that the decision of a larger Full Bench should be followed in preference to the decision of a smaller Full Bench.

45. From the aforesaid observations, it is quite clear that, in the composite High Court of Bombay (i) a judicial precedent, whether created by a single Judge or by a Division Bench, was binding on all the subordinate Courts on the ground that the latter Courts were subject to the appellate and revisional jurisdictions of that former Court; (ii) that a judicial precedent created by a single Judge of the High Court was binding on all other single Judges of that Court on the principle of judicial comity, now approved by the Supreme Court; (iii) that a judicial precedent created by a Division Bench was binding on a Judge sitting singly in the High Court on the principle that the latter was subordinate to the former; (iv) that a judicial precedent created by a

Division Bench was binding on another Division Bench on the principle of judicial comity; (v) that the decision of a Full Bench was binding on a Division Bench on the same principle of judicial comity and perhaps because of the greater number of Judges participating jointly in the decision; and (vi) that a decision of a Full Bench consisting of a smaller number of Judges was liable to be displaced by a decision of another Full Bench consisting of a larger number of Judges. The principle on which the decision of a larger Full Bench displaced the decision of a smaller Full Bench is not clearly stated anywhere, but, perhaps it is founded both on the principle of judicial comity and the greater number of Judges participating jointly in the decision. In any case, there is no doubt that the composite High Court of Bombay considered the precedent created by a larger Full Bench as binding on all Division Benches of the High Court in preference to the decision of a smaller Full Bench.

46. From the aforesaid practice, it is possible to get a proper view as to the place which the judicial precedents enjoyed in the composite High Court of Bombay before 1st of May 1960. I may not be understood to say that the practice in that High Court has changed since then. I am using the expression 'before the 1st of May 1960' because it is necessary to do so in order to decide the point in hand.

47. Before I say anything further on the same subject, it is necessary to make a few observations on a topic which is of a controversial nature and over which different submissions were made in this Court. The question is whether a judicial precedent declares or creates law or whether it at all declares or creates anything. Two principal theories hold the field. One theory is known as the declaratory theory, according to which all precedents are merely declaratory and they do not make any law. This theory is based on the view that the Court administers justice according to law and that, when it decides a point of law, it does not create new law, but only decides what the law is. According to this theory, when a judicial precedent is created in the field of constitutional law, statutory law, personal law or customary law, the precedent does not purport to create any law, but, it only declares what the law in the relevant branch is. In other words, the law in these four branches existed and exists apart from the precedent and what the precedent does is only to ascertain and state what the law is. Some jurists seem to have admitted the correctness of this theory in the four branches of law; whereas some others, whilst admitting it, have maintained that, in the field of equity, a Judge does not merely declare law, but he also creates it. This is what Salmond says in his Jurisprudence at page 164:

"In the Court of Chancery this declaratory theory never prevailed, nor indeed could it, having regard to the known history of the system of equity administered by that court. There could be no pretence that the principles of equity were founded either in custom or legislation, for it was a perfectly obvious fact that they had their origin in judicial decisions. The judgments of each Chancellor made law for himself and his successors.

"It must not be forgotten", says Sir George Jessel, "that the rules of courts of equity are hot, like the rules of the common law, supposed to have been established from time

immemorial. It is perfectly well known that they have been established from time to time altered, improved and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented", (vide *In re Hallett's Estate; Knatchbull v. Hallett*²⁰,

After making these observations, the author proceeds:

"Both at law and in equity, however, the declaratory theory must be totally rejected if we are to attain to any sound analysis and explanation of the true operation of judicial decisions. We must admit openly that precedents make law as well as declare it. We must admit further that this effect is not merely accidental and indirect, the result of judicial error in the interpretation authoritative declaration of the law. Doubtless judges have many times altered the law while endeavoring in good faith to declare it. But we must recognize a distinct law-creating power vested in them and openly and lawfully exercised. Original precedents are the outcome of the intentional exercise by the courts of their privilege of developing the Law at the same time that they administer it.

Clause 19 of the Letters Patent of the High Court of Bombay is as follows:

"And we do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Bombay, in the exercise of its ordinary original Civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued".

The heading for this and the next two clauses is as follows: "Law to be administered by the High Court." From this clause, it is quite clear that the High Court of Bombay administered not merely law, but, also exercised equity jurisdiction. It was contended at the bar that the equity jurisdiction which the High Court of Bombay exercised was to be exercised on the same principles which were exercised by the Court of Chancery of the High Court of England and that no new principles could have been recognised by the High Court of Bombay. In other words, the contention was that the principles which had been settled by the Court of Chancery till the date of the Letters Patent were crystallised and no new principles could have been enunciated or applied by the High Court of Bombay. No authority was cited in support of this proposition. In the absence of any binding authority, I am not prepared to read the above clause in the aforesaid manner.

In my judgment, though it may be conceded that if a point arose under the equity jurisdiction and if any precedent of the Court of Chancery on the subject was found, the same would be respected by the High Court of Bombay; there is nothing in the clause itself to show that the High Court was bound by the decision of the Chancery Court. It was contended that this result follows from

the expression equity which would have been applied by the said High Courts to such case if these Letters Patent were not issued".

The High Court of Bombay before the issue of the aforesaid Letters Patent had inherited the jurisdiction of the Supreme Court at Bombay and according to Mulla's commentary at page 1.474 on Civil Procedure Code, Vol.II,

²⁰(1879), 13 Ch. D. 696 at p.710)

"the Supreme Court charters were not construed as applying the English Law to India in its entirety, but 'as nearly as the circumstance of the place and of the inhabitants admit'. English precedents and procedure should not be followed if they are against 'justice and right' or 'justice, equity and good conscience' which are the true guides to be followed according to the Charter Acts".

This passage shows that the rules of equity were not applied in toto by the Supreme Court at Bombay or the High Court of Bombay, before the above Letters Patent were issued, but that they were applied only in so far as those rules were in accordance with justice, equity and good conscience. If this is a correct statement of law, (and I have no doubt that it is), then, there is no doubt that, when exercising equity jurisdiction, the Judges of the Bombay High Court created law in the field of equity in the sense in which that expression is used by Salmond in the aforesaid passage. Apart from this, if an entirely new point arises and requires to be decided for the first time in the field of equity, then, I have no doubt whatsoever that under clause 19 the High Court of Bombay has jurisdiction to decide it in accordance with the rule of justice, equity and good conscience. When the High Court does this, there cannot be any doubt that it does create law in the sense used by Salmond in the above passage.

48. Apart from this, it is not correct to say that a Judge does not create law at any time. Statute law is comparatively a modern development. The purpose of this law is, as a general rule, to restrict the exercise of judicial discretion in the administration of justice. Though the statute law has recently encroached upon a very wide field of judicial discretion, it cannot be denied that there is still a considerable area in which judicial discretion has not been tied down. In fact, in several matters, modern tendency is to invest the judiciary with discretion in the administration of laws. The Legislature in such matters contents itself by only laying down broad principles on the basis of which the law is to be administered. The law of procedure and the law of evidence are instances in point. Although the Legislature has prescribed a number of laws on those subjects, it has left a number of other matters to be decided by Courts of law. In this field, which is left to the discretion of the Judges, whenever a question of law arises and is answered on a general principle, the Judge creates law which is binding on the inferior Courts on the principle of subordination and on the Courts of co-ordinate jurisdiction on the principle of judicial comity. In the field of personal law also, although the theory applies that Courts declare laws, it cannot now be denied that the Hindu and the Mahomedan Laws are now to be found not in the original texts, but are to be found in the judicial precedents which have been created by the Privy Council and the High Courts in India for over more than hundred years. With reference to Hindu Law,

this is what Mr. Desai states in his introduction to Mulla's Principles of Hindu Law, 12th Edition, at page 85:

"Judicial decisions on Hindu Law are sometimes spoken of as a source of law. Almost all the important points of Hindu law are now to be found in the law reports and to this extent it may be said that the decisions on Hindu law have superseded the commentaries. The decisions of the Privy Council and the Supreme Court are binding on all the Courts of India including the High Courts".

Practically, the whole of the law of torts is to be derived from the judicial precedents.

49. Such was the position in the pre-Constitution period. In my Judgment, the place of judicial precedents in all the five branches of law has become enhanced in the Indian legal system in the post-Constitution period. After the commencement of the Constitution, for the purpose of knowing what the law is in any of its different branches, it is not merely enough for any person to know what the statute law, the personal law, or the customary law is, but, he must also know whether that law is constitutionally valid. This involves the question whether the law does or does not offend any of the fundamental rights and/or whether the law creating authority was competent to create that law. Only the decision of a competent Judge can tell us whether a particular law is or is not constitutionally valid. Several of the fundamental rights are hedged in by restrictions. Our Constitution states, in respect of some of these restrictions that, in order to be valid, they must be reasonable. It is now well settled law that the final arbitrarum which determines what restriction is reasonable is the Supreme Court for the whole of India and, in the absence of a decision of that Court, the High Court operating in the territory in which the case arises. No other authority in India is invested with the authority of deciding this question. Therefore, in the constitutional field, the judicial precedents have a place of their own. Nobody can know what the law on a particular subject is unless and until he tests that law on the anvil of constitutionality. The final answer as to what the law on a subject is can be found not merely by reading statute law or text on personal law, but, by knowing what the Judges have said on the subject if they have said anything at all or by reasonably anticipating what they are likely to say on it.

50. Article 141 of the Constitution provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Apart from the question as to whether the Supreme Court does or does not create any law, having regard to Article 141, it cannot be doubted that it is that Court which settles what the law for the Indian Courts is and whatever may be the view of any jurist as to what the law is in certain branches, if the Supreme Court gives a decision on that subject, then, the law is as embodied in that decision and no other. It is true that this Article is not applicable to the law declared by the Indian High Courts; but, at the same time, having regard to the practice, which, as already mentioned, was being followed by the High Court of Bombay and which is also the practice which is being followed by all the other Indian High Courts, it cannot be denied that the decisions of the High Courts settle for the territories in

which they operate the laws of those territories subject to this that those laws are liable to be displaced by decisions of the Supreme Court.

51. Thus, whatever view one may take on the controversial topic as to whether Judges declare or create laws, one thing is quite certain that it is the Judges who settle the laws. It can be said with confidence that, if any person ignores judge-made-law, he does so at his own peril. The risk which he runs is that the law which he ignores is the only law which will be administered by all the courts in the territory in which the case-law operates. Thus, judicial precedents practically permeate the whole fabric of the Indian legal system to such an extent that it is impossible for any person to know what the law on a subject is unless he also knows the judge-made-law. In my judgment, so far as the legal system in India is concerned, it cannot be said that the law administered in the Indian courts is any law outside judicial precedents. Whenever a point of law arises, its answer must be found in a judicial precedent if there is one and if there is none, you must wait till an answer is given by a judicial precedent. Though this is my personal view on the subject, I do not propose to place much reliance on this view in this case. I do not do so, because, as I shall presently show, the aforesaid two rival theories have a relevance more on the subject of what is the source of law rather than on the subject as to what is law in force and, as I have already stated before, the crucial question which requires to be decided by the present Full Bench is what is 'law in force'. This Full Bench is not concerned with the abstract question as to what is law or what is the source of law. The questions for consideration are what was the 'law in force' in the territories over which the composite Bombay High Court exercised jurisdiction and which territories have now been assigned to the State of Gujarat and whether that 'law in force' is or is not preserved after the creation of the new State of Gujarat.

52. This brings me to the interpretation of Section 87 of the Act, which section has been already reproduced by me above. The section divides itself into two limbs. The first limb of the section states that the provisions of Part II of the Act shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day exists or applies. The second limb states that the territorial references in any such law to the State of Bombay shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day. There is some force in the view that the first limb of the section has been inelegantly worded. It was pointed out by the former Full Bench that the idea which was sought to be conveyed by this first limb could have been more elegantly expressed. However, in the course of the arguments at the bar in the present Full Bench, there was no dispute as to the correct meaning to be attached to this first limb except the interpretation of the expression 'law in force'. It was not disputed that this limb provides that the change of territories made by Part II of the Act shall not make any change in the 'law in force' in that territory before the change; and that, if the limb is read in conjunction with a portion of the second limb, it means that such law shall remain in force until otherwise provided by a competent Legislators or other competent authority. The corresponding part of Section 53 of the Andhra State Art which was worded exactly in the same terms was

interpreted by the Full Bench of the Andhra Court reported in AIR 1955 Andhra 87 (FB), at p.93, in the same way. The former Full Bench of this High Court also observed that

"The meaning of this first part of section 87 must necessarily be that it the territorial extent of those laws which were in force in all the territories of the State of Bombay immediately before the appointed day is to continue and the reorganization of the territories of the two States is not to effect any change in that position."

The section makes it clear that the provision was made because of the provisions contained in Part II. By that Part, the territories of the former State of Bombay were split into two parts. The territories of the State of Gujarat were defined and the residuary was given to the State of Bombay. It is obvious that the first limb was enacted in order to obviate an argument that, because of the change in the territories of the former State of Bombay, a change in the law in force had taken place. However, the argument in support of the interpretation other than the one given by the former Full Bench urged at the bar is that the expression 'law' as used in the first limb and the second limb was confined and restricted only to written law - *lex scripta* - and did not include within its purview non-written laws. The contention is supported on four grounds, viz. (i) the section creates a legal fiction and must necessarily be confined to the purpose for which the legal fiction is thus created; (ii) the object of the section; (iii) the second limb of Section 87 clearly expresses an intention that the Legislature is dealing with written laws only and, therefore, that second limb must control the interpretation of the first limb; and (iv) the marginal note indicates that the section dealt with written laws only. In substance the argument is that the term 'law' as used in Section 87 is not used in the wide sense as taking within its ambit the full connotation of that term, but, that it is essentially confined to the term 'law' as defined limitedly in Section 2(d) of the Act. Mr. Nanavaty reinforces the aforesaid argument by contending that the term 'law' in the section is used in a concrete sense and not in its abstract sense. In support of the rival contentions, the expression "any law in force immediately before the appointed day" is either split up into various parts or retained intact. According to one submission, the adjective 'any' gives a clue to the intention of the Legislature. According to another submission, the main term is 'law' and the words 'in force' only qualify that term. Mr. Nanavaty contends that the expression 'any law in force' should be cut up into two parts, viz. 'any law' and 'in force' and that the expression 'in force' is an expression of abridgment and not of extension. On the other hand, Mr. Vakil contends that it is improper to cut up the expression into different parts. He contends that the true legislative intent can be gathered only by interpreting the composite expression "any law in force immediately before the appointed day" as one indivisible whole. He submits that the intention of the Legislature is not to preserve only statute or written law, but the whole gamut of laws which was in force before 1st May 1960. The expression 'law in force' is to be found in some of the sections which I have quoted, specially in Sections 30, 32 and 34. The same expression is also to be found in siding which relates to the power of the High Court to enrol advocates and in Section 33 which deals with the custody of the seal of the High Court of Gujarat. I may mention that it is conceded by the learned Advocate

General that the expression used in these other sections includes not merely written laws, but, also other varieties of law, i.e. it includes not merely statute law, but also personal and customary laws. But, the argument, as I have already stated, is that, in the context in which the aforesaid expression is used in Section 87 and the object which the Legislature has in view in enacting it suggest that the expression must necessarily be confined to written laws only and that it cannot take within its ambit any other kind of law. It is the validity of each of these rival contentions which requires to be considered in the present case. I may also mention that, during the course of the arguments, the learned Chief Justice was pleased to suggest that, if the 'law in force' were interpreted in its wider connotation, then, if that interpretation is applied to Section 119 of the States Reorganization Act, 1956, which is in pari materia with Section 87 aforesaid, it will lead to such a chaos that it may be safely assumed that the Legislature can never have intended to bring about such a result. The final submission at the bar is that, in any case, even if the term 'law in force' is given its widest connotation, it can never take within its ambit 'case-law' and that, that was excluded from the aforesaid expression.

53. The first contention is that Section 87 creates a legal fiction. The contention is based upon the expression "deemed to have effected any change" in Section 87. In my judgment, the contention is not sound. The argument is based upon an assumption which is not correct. The argument attributes to the Legislature an intention which, I have no doubt, the Legislature never intended to entertain. The assumption is that, on the creation of the two new States, by splitting up the existing State of Bombay, the Legislature assumed that the laws existing in the territories before the creation of the new States would automatically lapse and would not enure for the benefit of the new States. I am unable to find any justification for this assumption. In the first instance, we have to remember that the two new States are not being brought into existence by an act of State. They are being brought into existence by a valid law. What is being brought into existence is not two independent States, but two new units in one and the same sovereign State. Therefore, unless the Legislature can be attributed an intention to create not only new States, but also to wipe off laws existing in the old State, it would not be proper to attribute the latter intention to the Legislature. The argument may be tested in another way. Though the residuum of the former Bombay State has been called the State of Maharashtra, there is no doubt that that State retains all that which is not separated from the State of Bombay. There is no doubt that the High Court of Bombay retains the same jurisdiction over the territories of the State of Maharashtra which it had over the whole State of Bombay and that the High Court of Bombay retains all its old jurisdiction intact except that its territorial jurisdiction is truncated. If this is so, then, there cannot be any doubt that the law administered by the High Court of Bombay for the State of Maharashtra will remain the same as before in spite of the splitting up of the former State of Bombay. If this is so in respect of the State of Maharashtra, then, one must look to the provisions of the Act carefully to find out whether the Legislature at all intended that there should be a sudden change in the laws which were prevailing in the territories now assigned to Gujarat. I have looked into the Articles of the Constitution, the preamble of the Act, all the provisions relating to the High Court and the provisions incorporated in the Chapter headed "Legal and

Miscellaneous Provisions", in vain, to find an intention of the Legislature to break the continuity of laws, to change them, or to start the State of Gujarat with a clean slate. In view of this, I would require strong evidence to convince me that the Legislature had acted on a principle different from what the legal position is, I find no justification whatsoever for holding the view that the Legislature did not know what the true legal position was or that it apprehended that the true legal position was different. On the contrary, in my judgment, the structure of the first limb of Section 87 does not leave any doubt that the Legislature was not acting on any such assumption. In my judgment, it is not correct to say that the Legislature thought it necessary to create a fiction, because it was necessary for it to create one as otherwise the laws operating in the transferred territory were going to lapse. In my judgment, the position of the negative 'not' in the section is an important key to the mind of the Legislature. If the assumption were correct, the sentence of the first limb of the section would have been, "The provisions of Part II shall be deemed not to have affected any change" and not as it stands to-day, viz. "The provisions of Part II shall not be deemed to have effected any change". In my judgment, though the Legislature has used language which one usually associates with the creation of a fiction, actually, the structure of the sentence shows that it was not enacted to create any fiction, but, it was enacted only for the purpose of clarification of what the position would be relating to the continuity of laws'. In spite of the aforesaid clear legal position that the laws in the transferred territory would not change with the creation of a new State, it is not improbable that some one may be induced to advance an argument to the contrary and, therefore, to baulk such an argument, the Legislature seems to have made the provision found in Section 87. The Legislature has enacted Section 87 to prevent anyone from arguing that any change in law had taken place. On the other hand, if the view which has appealed to the majority were to be accepted as the correct view, then, with due respect, it may be pointed out that that view implies that, whereas the Legislature knew or assumed that a change of law was taking place, it made a provision only for written laws and not for non-written laws which, as is well-known, includes a substantial proportion of the law in force. There is no reason for supposition as to why the Legislature should have made such a distinction between written and non-written laws. If the Legislature did not intend to create any change, was there any reason at all for supposing that the Legislature should intend that the written laws should remain in force and the non-written laws should go by the board? In my judgment, this is a very vital consideration which must be taken into account in interpreting S.87. However, it is contended that the legal effect of a change in territory is that it will create a change in the written law by reason of the splitting up of the territories, but that it will not do so in respect of non-written laws, I have already shown that this is not the correct legal position. Moreover, the argument is grounded on the fact that, usually, statute or written laws have a territorial content, whereas the non-statute or non-written laws have no such content. In my judgment, this assumption again is also not correct. In my judgment, personal and customary laws have as much territoriality as the statute laws. I will illustrate the point only by giving one example from Mahomedan Law. Mulla states in his Principles of Mahomedan Law, 15th Edition, page 24, that Halai Memons domiciled in Bombay are governed in all respects by the Mahomedan law and that Halai Memons of Porbundar in Kathiawar follow in matters of

succession and inheritance Hindu law. He also states that the Sunni Bohra Mahomedans of Gujarat and the Molesalam Girasias of Broach are governed by the Hindu law in matters of succession and inheritance. In my judgment, the personal law applicable to Halai Momens, Sunni Bohras and Molesalam Girasias have a territorial content dependent upon the domicile of these persons in the city of Bombay, the territory of Gujarat or the territory of Broach. Similar instances can also be found from other laws especially the Hindu Law. It is well known that, whereas Mitakshara law prevails in the territory of Maharashtra, Mayukha prevails in the territory of Gujarat There are many customary laws which prevail only in certain territories. The law of privacy is applicable in certain parts of Gujarat and that law is confined only to those territories by virtue of the custom prevailing therein. In my judgment, all these laws have a territorial content. If this is the correct position in law, then, by reading the section in the way in which the learned Advocate-General wants it to be read, the Legislature will be guilty of creating a fiction in favor of statute or written law only and not in respect of these other branches of law. In respect of those branches, the position will be that, whereas the Legislature by enacting section 87 preserved the statute or written laws, it left the personal and the customary laws hanging in the air. There is no sound reason why the Legislature should have done so.

54. In my judgment, therefore, section 87 does not create any fiction, but it enacts a prohibition which prohibition has been introduced for the sake of clarification. If somebody is minded to argue that a change of law has taken place, then, it is enacted to prevent him from so arguing and that, in my judgment, is the true scope and object of section 87.

55. The next argument is that the language of the second limb can apply only to statute laws and to no other. The argument is that the expression "territorial references in any such law to the State of Bombay" can only apply to statute laws inasmuch as such territorial references are to be found in statute laws and no other. I am unable to agree with this contention. In my judgment "such law" must necessarily refer back to the 'law in force' referred to in the first limb of the section. Moreover, I am not prepared to agree that territorial references can be found only in statute laws and not in any other law. I have already quoted certain passages from Mulla's Principles of Mahomedan Law, wherein territorial references are to be found in spite of the fact that that law is not a part of the statute law. I do not see anything in the second limb which can support the aforesaid contention. In my judgment, the second limb must stand or fail by the interpretation of the expression "law in force immediately before the appointed day" used in the first limb of the section. But, it is further contended That, if all laws were to be included, then, the second limb would not fit in with at least some branches of law in which territorial references do not occur, such as the Law of Torts. This argument cannot present any difficulty in interpretation. The words in the second limb are not only "such law" but "any such law" and, therefore, the second limb must necessarily apply to that 'law in force' in which there is a territorial reference. Obviously, it will not apply to a law in which there is no territorial reference. But, from this; it does not follow that the converse is true It does not follow that a law in which there is no territorial reference is not a law in force. In my judgment, the aforesaid argument is born out of

the fact that, ordinarily, statute laws refer to territories in which they are to operate. Though, by far and large, territorial references are to be found in statute laws, in my judgment, it need not necessarily be so in all cases.

56. The argument based upon the marginal note does not impress me also. It is well known that a marginal note cannot control the interpretation of the main provision. It is only in these cases where a doubt arises in the construction of the main provision that it is legitimate to take aid of the marginal note. The marginal note is not the key to the interpretation of the section. It is only at best an aid and shows in the main the drift of the legislative intent. Moreover, the marginal note does not necessarily support the argument. The marginal note is "Territorial extent of laws". I do not find anything in this marginal note which shows that it applies only to statute or written laws. The marginal note speaks of 'laws' and not of written or statute laws'. Moreover, I do not find any difficulty in interpreting the first or the second limb of the section which would justify resort to the marginal note for the purpose of construing both or any of the two limbs.

57. The argument that the expression 'any law in force' must be split up into different parts, does not appeal to me at all. In my judgment, the expression is a composite one and must be read and construed as a whole.

58. The argument that the adjective 'any' before the word 'law' shows that it is used in the concrete sense of the term law and not in its abstract sense, does not appeal to me. It is contended by Mr. Nanavaty that the adjective 'any' can be used only with reference to concrete law and not with reference to abstract law and he contends that the expression 'concrete law' is used only in respect of statute law and no other kind of law. In support of this argument, Mr. Nanavaty relies upon a passage from Salmond's Jurisprudence, Eleventh Edition, page 37, which is as follows:-

"The term law is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the law of England, the law of libel, criminal law and so forth. Similarly, we use the phrases law and order, law and justice, courts of law. In its concrete application, on the other hand, we say that Parliament has enacted or repealed a law; we speak of the by-laws of a railway company or municipality; we hear of the earn laws or the navigation laws. In the abstract sense we speak of law, or of the law; in the concrete sense we speak of a law or of laws. The distinction demands attention for this reason, that the concrete term is not co-extensive and coincident with the abstract in its application. Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws, but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law. A law means a statute, enactment, ordinance, decree or other exercise of legislative authority. It is one of the sources of law in the abstract sense".

It is on the latter part of this passage that Mr. Nanavaty very strongly relies. I do not think the passage, read as a whole, supports his contention. If any doubt is left in one's mind, that doubt is at once resolved by the latter part of the passage which Mr. Nanavaty did not quote. That latter part is as follows:-

"A law produces statute law or some other form of enacted law, just as a judicial precedent produces case law. There is much law recognised, applied and enforced in the courts of justice which has not been enacted by any law".

Therefore, the aforesaid passage does not help us in determining the content of the term 'law' used in section 87.

59. The argument that the term 'law' in the aforesaid expression is used in the limited sense given to it in the inclusive definition in section 2(d) of the Act and that the expression 'in force' is only a qualifying expression, also does not appeal to me. There is no justification either in principle, logic or reason for restricting the term 'law' herein as only that which is included in the aforesaid definition. If this argument were to be upheld, then, it will certainly exclude personal laws prevailing in the transferred territory. Such laws are derived from the holy texts. Though such laws may be written laws, they will not be so under section 2(d) of the Act.

60. The learned Advocate-General contends that the use of the words 'extends' and 'applies' in the first limb of section 87 suggests that the first limb is applicable only to statute laws and to no other. Though, usually, the term 'extends' is used with reference to statute laws, I cannot agree with the bald proposition that it must necessarily be confined to such laws. In any case, the term 'applies' is of wider ambit and applies not merely to statute laws but to other laws as well, (For example, we say that Sunni Bohras of Gujarat are governed by the Hindu Law or that Hindu Law applies to the Sunni Bohras of Gujarat.)

61. The learned Advocate-General also contends that section 87 embodies a rule of construction and, therefore, it can apply only to statute laws and not to others. I am unable to agree with this submission. So far as the first limb of section 87 is concerned, there is no doubt that it does not embody a rule of construction at all. The Legislature does not say so either expressly or impliedly. It is true that, in the latter part of section 87, the Legislature does state in express terms that any law in force which has a territorial content shall be construed as applicable to the respective States. But, as I have already pointed out, the scope of the second limb of section 87 is narrower than the scope of the first limb. Moreover, if my view is correct that territorial reference is to be found not only in statute law, but also in other kinds of laws, then, there is no difficulty arising from the fact that the Legislature has stated that a rule of construction shall be followed. That rule can equally be applied not only to statute laws, but also to laws in which there is a territorial reference.

62. In my judgment, none of the aforesaid, arguments can hold field, for the simple reason that, if it is conceded that the expression 'law in force' when used in the other sections of the Act include all laws, whether statute or non-statute, then, the burden lies heavily on the persons who propound that the expression is not used in that sense in the present section and, in my judgment, none of the aforesaid arguments can discharge that burden.

63. In my judgment, the key to the solution which this Full Bench is asked to find lies in the correct interpretation to be placed upon the expression "any law in force immediately before the appointed day" used in this section. It is this which is sought to be preserved by the section and the question is whether this expression only applies to written and statute laws and not to any other kind of law.

64. In my judgment, there is a vital distinction between 'law and law in force'. If we use the expression 'law' alone, then, we do not have in view the enforceability of law. But, when we use the expression 'law in force', we are thinking, not only of law, but law and its enforceability also. Therefore, in my judgment, the real point for enquiry before the present Full Bench is not merely to know what law is in the abstract, but to know what is the enforceable law which law has been preserved by the section. The expressions 'law', 'existing law' and 'laws in force' are used in various statutes. The last two expressions are used in our Constitution also. A reference was made to the Articles in. which these expressions were to be found such as Articles 13, 14, 366(10) and 372. There is no doubt whatsoever that the Constituent Assembly has made a distinction between these two expressions. But, it is noteworthy that, in some of the Articles, where the expressions have been used, special definitions have been given to clarify the legal position. In my judgment, it will not serve any useful purpose if a task is undertaken to ascertain the exact meaning of the aforesaid expressions as used in the aforesaid Articles. As and when the question will arise for interpretation of these expressions, the task will have to be undertaken in the context in which the expression has come to be used. I may only observe that our attention was drawn to the fact that the High Courts of Calcutta and Bombay have taken two different views regarding the expression 'law in force' used in Article 13 of the Indian Constitution. In *Naresh Chandra Bose v. Sachindra Nath Deb*, reported in²¹ the view is taken that that expression extends even to customary law, personal law like the Hindu and the Mohamedan Law and is thus more comprehensive than the expression 'existing Jaw' as defined in Article 366(10). In the *State of Bombay v. Narasu Appa Mali*, reported in²² however, the view is taken that personal law is not included in the expression 'law in force'. It is not

²¹ AIR 1956 Cal 222

²²53 Bom LR 779 : (AIR 1952 Bom 84)

necessary for me to express any opinion as to which of the aforesaid two views is correct. I may only observe in passing that, for taking the aforesaid view, the learned Judges of the Bombay High Court have not given any reason whatsoever and that view, if it is ultimately he'd to be binding on this Court as a result of this Full Bench ruling, may have to be examined over again and reconsidered.

65. To interpret the expression 'law in force', it is useful to approach the question in the following way. If a counsel is asked as to what was the law in force in any given branch before 1st May, 1960, then, what should the counsel do to answer the question? For example, if he is asked as to what was the law relating to perpetuities on that day then, how should the counsel approach the problem and what should be do to answer the question? In my judgment, in order to answer the question, it is not enough for the counsel to read only the provisions of section 14 of the Transfer of Property Act. A perusal of that section may tell him only what the section is, but it will not necessarily give him the whole information about the law in force' on the subject of perpetuities. To answer the question, the counsel must not only peruse the section, but he must also trace the case-law on that subject, and, if there is any decision of the Supreme Court, he must answer the question in terms of that decision. If there is no such decision, but there is a decision of the Privy Council, then, he must answer it accordingly and if there is no such decision of the Privy Council, then, he must answer it in accordance with a decision of the High Court of Bombay if there is one, and, if there are several and conflicting decisions of the High Court, then, he must answer it in the light of the practice prevailing in that High Court as to the efficacy of the decisions of the various limbs of the High Court already pointed out by me.

66. Though the Legislature creates statute law, it does not and cannot provide for all points of law which may arise on the topic on which it has legislated. That subject, more often than not, is settled only by judge-made-law. Therefore, on a matter not specifically provided for by the Legislature, the law in force is that which is settled or determined by case-law. For example, when the question arose for the first time as to whether a customs officer was or was not a police officer within the meaning of section 25 of the Indian Evidence Act, it was open to anyone to speculate on reading that section whether such an officer was or was not a police officer within the meaning of the Act. The question arose before the High Court of Bombay in *Nanoo Sheikh v. Emperor, reported in*²³ and it was decided therein that the Excise Officer was a police officer within the meaning of section 25 of the Indian Evidence Act. The moment this decision was given, it was no longer open to anyone to speculate as to what the law on the subject was. It is true the question was one of fact when it arose for the first time, but, it became a question of law after the decision was given. It is quite clear to me that, if any counsel were to express an opinion on the above subject by merely reading the Act alone, he would be guilty of negligence if his answer does not coincide with the Bombay case if the question was to be answered with reference to the Bombay territory, though it would be open to him to state that the Privy Council was likely to take a different view. But, if he was asked to express an opinion as to what the law in force' is as to whether an excise officer is or is not a police officer within the meaning of section 25 of the Indian Evidence Act, he is bound to answer that the law is as decided by the High Court of Bombay in the aforesaid case.

²³ ILR 51 Bom 78 : (AIR 1927 Bom 4)

67. There are several instances in the history of the Indian law where the case-law has decided a point which was not in accordance with the legislative intent or the intent of the original text

writer and though this was proved to be so, so long as the case which decided the point in the wrong way held the field, nobody could urge that the decision did not represent the law in force on the subject. For example, the Privy Council held that a wakf-al-aulad offended the rule against perpetuities. Though this was against the pure Muslim Law if was held to be the 'law in force' on the subject until the Wakf Validating Act was passed in 1913, which changed the law as determined by the Privy Council. The Privy Council decided that an agreement of sale was a document which required registration. Though this was against the legislative intent, it became the 'law in force' and had to be changed by the Indian Registration Act 3 of 1877.

68. That case-law plays an important part in settling the law which is in force has been recognized by the Legislature in a recent enactment. Section 4 of the Hindu Marriage Act, 1955, is as follows:-

"Save as otherwise expressly provided in this Act, -

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act".

Hindu Law has been stated by the Legislature in this definition to be not merely the original text but also the interpretation of the text which undoubtedly includes interpretation of the text by the Supreme Court, the Privy Council, the Federal Court and the other competent Courts in India.

69. Therefore, even so far as the statute law as concerned, the true position is that the counsel must know, not merely what the statute is but, he must also know how that statute has been interpreted. Therefore, a knowledge of enforceable statute law is not acquired merely by knowing what the statute is, but, by knowing what the statute is and how it has been interpreted by the Court of law. If this is so in the matter of the statute law, then, it is much more so in other branches of law.

70. Moreover, in the matter of the statute law, a mere knowledge of the statute is not the same thing as the knowledge of the law in force. If the statute has been challenged on constitutional grounds and if the statute has been held to be void as offending the fundamental rights or as beyond the competence of the Legislature, then, a knowledge of the statute will not give a counsel knowledge of the enforceable law, but, on the contrary, is likely to give him an incorrect information on the subject. The counsel must necessarily know whether a Court of Justice has or has not held that particular piece of statute law to be void or incompetent and the knowledge of the latter subject can by no means be derived by merely reading any statute book, but must necessarily be derived by access to the case-law. Therefore, though one must accept that it is the

Legislature which creates the statute law, in order to acquire knowledge of statute law in force, knowledge of case law is equally essential, because, enforceable law is not that which exists on the statute book, but, it is that which is to be found on the statute book and in the interpretation thereof by judicial precedents created by the competent Courts. If this is so in respect of statute law, it is much more so in respect of the other branches of law. If anybody wants to have information as to what the Hindu law on the power of a co-sharer to alienate his interest in coparcenary property is, it is not enough for him to know only the holy texts on the subject, but, he must know how that text has been interpreted by the judicial decisions and it is the latter which gives him the correct information of the 'law in force' and not the former. That the case-law or the judicial precedent thus permeates the fabric of 'law in force' is indicated by the usage developed not only by the learned members of the bar but also by many learned Judges. The law reports them with such expressions that the law on a particular subject is now well settled by a decision of such and such a Court.

71. Under the circumstances, in my judgment, whatever controversy there may be regarding the true connotation of the word 'law' or as to what is the true 'source of law', so far as the Indian legal system is concerned, the 'law in force' must mean not merely the statute, the personal, the customary or the equity laws, but, law in all these branches as settled and interpreted by the judicial precedents. The Legislature, in my judgment, must be presumed to have known that the system of law which prevails to India is of the aforesaid kind. Therefore, in my judgment, the Legislature has deliberately used the expression 'law in force' and not merely 'statute law' which it would have otherwise done if really such was the intention.

72. If there is any doubt left in one's mind on this subject, the matter, in my opinion, is clinched by comparing the expression "law in force immediately before the appointed day" with the expression "law made before the appointed day" used in sections 88 and 89 of the Act. It is a salutary rule of construction to follow that if Legislature uses two different expressions in one and the same statute, then, the Legislature ordinarily intends to express two different concepts thereby, especially when the Legislature deliberately uses two expressions in two different places where one expression will have been enough to meet both the situations. In the latter case, in my opinion, it is legitimate to infer that the Legislature intended to give two different meanings to the two expressions used by it. There cannot be doubt that the expression "law made before the appointed day" used in sections 88 and 89 refers only to statute laws and to no other. In my judgment, if the Legislature intended that section 87 should refer only to statute or written laws and not to other kinds of laws, the Legislature would have used the expression "law made before the appointed day" in preference to the expression "law in force immediately before the appointed day". The fact that the Legislature has not done this, which was the obvious thing to do if such was its intention, is a strong argument against the construction sought to be placed by the learned Advocate-General, Mr. Nanavaty, Mr. Joshi and Mr. Trivedi.

73. Another argument which is urged against the view that case-law permeates the expression

'law in force' is that it offends against an important attribute of the term 'law'. It is contended that one important attribute of law is that it is certain and does not change from time to time. It is urged that this important attribute will be lacking if we interpret the expression 'law in force' to mean not only the five branches of law, but also case-law. I am not impressed by this argument also. That law should be certain is an ideal for which all will aspire. But, if law does not happen to be certain, it does not cease to be law. Codification is claimed to have an advantage over case-law on the ground that it makes the law certain. But, even codified law cannot be said to be certain or final inasmuch as it is also liable to be amended. In fact, a system of law which does not permit of change is not necessarily a perfect system. Having regard to the fluid nature of social conditions, the law must keep pace with changing circumstances. Therefore, law must change from time to time; otherwise, it may be out of tune with social conditions and may become bad or obsolete law. It is true that case-law is less certain than statute law inasmuch as a judicial precedent created by one Court is liable to be displaced by another Court superior to it. But, the fact that the case-law suffers from this infirmity to a greater extent than the statute law does, cannot, in my opinion, take away from case-law the connotation of the expression 'law in force' if otherwise it happens to fall into the ambit of that expression.

74. Another argument urged is that if the aforesaid view were to be accepted, then, the precedents created by the High Court of Bombay will become petrified as 'law in force' for the State of Gujarat and this Court will have no jurisdiction to reverse a precedent which is found to be bad law even by a larger Bench. The contention is that the precedent being 'law in force', it can only be amended by a competent legislature. I cannot agree with this proposition also. In my judgment, though a precedent of the Bombay High Court will become the 'law in force before the appointed day' for the territory of Gujarat, it will travel to Gujarat, impressed with the same strength and infirmity which it possessed in Bombay at the time when the two new States were created. The precedent of the High Court of Bombay was liable to be displaced in that Court in one of the ways which I have already indicated above. Just as that precedent could have been displaced by the composite High Court of Bombay in one of those ways, similarly, it could be displaced by the High Court of Gujarat in the same manner in so far as it was operative in the territory of Gujarat. Moreover, in my judgment, section 32 of the Act has conferred this power upon this Court. That section preserves for this Court the law in force as regards the practice of the High Court of Bombay. It is true that section 32 does not preserve the practice of the High Court of Bombay as such, but, what it preserves is the 'law in force' with respect to practice. But, in my judgment, in this connection, the maxim '*Cursus curiae est lex curiae*' applies. Broom on Legal Maxims, Ninth Edition, at p.94, states as follows:-

"Every Court is the guardian of its own records and master of its own practice; and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience".

Cresswell, J., in *Fresman v. Tranahat*²⁴ page 414, has observed:

"It was a common expression of the late Chief Justice Tindal, that the course of the Court is the practice of the Court".

If any precedent of the High Court of Bombay is found not to have laid down the law correctly, I do not see any valid reason why it cannot be set aside by this Court the same way in which a Full Bench of the High Court of Bombay could have set it aside. However, it is contended that if this were so, then, this Court will be exercising a

²⁴(1852) 12 CB 406

jurisdiction in respect of a precedent of the High Court of Bombay which, in law, it does not possess. I cannot agree with this proposition also. In my judgment, when a precedent of the composite High Court of Bombay comes to be disturbed by this Court, it does not disturb that precedent for the High Court of Bombay. It disturbs only the law which is in force in the territory of Gujarat. The new precedent will be binding on the subordinate Courts in the territory of Gujarat on the principle of subordination and upon the co-ordinate Courts on the principle of judicial comity.

75. The next argument which requires to be examined is based upon section 119 of the States Re-organisation Act, 1956. That section is in the same terms as section 87 of the Act. By the States Re-organisation Act, 1956, territories of some States came to be transferred to some other States and, for some States, the old High Courts were continued and for some other States, independent High Courts were established. It is contended that, if the expression 'law in force' is construed to include case-law, it will create a state of chaos in the administration of laws in those High Courts inasmuch as the case-law which the High Courts will apply will not be a uniform case-law, but will differ according to the territory from which the case comes up in the High Court. It is contended that It will be very unusual and odd that the same High Court should apply different precedents for different territories. Prima facie, the argument appears to be attractive. But, in my judgment, if the argument is closely analyzed, it will be found that, at least in respect of those territories where new High Courts are created, an opposite view will create a greater chaos and the interpretation, which I am placing upon the expression 'law in force' will not only save the territories from chaos, but will be in consonance with the ordinary principles of justice, equity and good conscience and with a principle analogous to the principle of "stare decisis". For example, if the majority view is the correct law, if in the States of Kerala, Mysore and Rajasthan, a point of law arises before a subordinate Court, that Court will be completely at large and will be in a position to decide it on its own view of the matter, untrammelled by anything whatsoever and the point will remain res integra until the matter comes before the relevant High Court. The High Courts created in these three territories are separate and independent. The Mysore High Court took this view in AIR 1959 Mysore 1 (FB). Therefore, that High Court immediately after its establishment did not have precedents which could have guided its subordinate Courts. The

result of this is that, whereas a territory which formerly belonged to one or other integrating State, had a settled law, the aforesaid interpretation will throw the legal system in that territory out of gear and, so to say, a situation will arise in which nobody will be able to know, until the matter is finally decided by the High Court, as to what law is applicable to the territory. On the other hand, if the view which appeals to me is adopted, then, the subordinate Courts, before which the point of law arises will be bound to answer the point in the same manner in which it was being answered in that territory before the integration. It may be that, when the matter comes up before the High Court the latter may have to consider whether the precedent followed in that territory should be adopted or should be overruled. If, in the interest of justice, the High Court feels that the precedent should be overruled and a different precedent created, it is open to the High Court to do so. Even so, the High Court will have a duty to consider whether the principle of 'stare decisis' does or does not apply to the facts of the case. The learned Chief Justice observed in the course of the discussion that two large chunks of territories merged in the State of Bombay in 1956 which were now parts of the State of Gujarat and that laws of State of Bombay had been applied to those territories for about four years only and there was no reason why the same should not be displaced if the new law so applied was found to be bad or inconvenient. The learned Chief Justice also suggested that if the view I am propounding was the correct view, the law which would have to be administered by the subordinate Courts in those territories would be the self-same laws which were prevailing before 1956 or earlier, according as the case came from one or the other territory and that, such a State of affairs could not have been contemplated by the legislative authority. With the greatest respect, I cannot agree with this objection. In my judgment, the objection assumes that the legislative intent was to create uniform laws, for both the merged and the old territories. In my judgment, not only is there no authority or reason for this proposition, but, section 119 itself is a clear indication of the legislative intention that the laws are not to be disturbed even on the interpretation sought to be placed by the majority view. According to the majority view, section 119 applies to statute laws and these laws are completely preserved. Now, there is no doubt whatsoever that, on a number of subjects, the statute laws prevailing in the merged territories were different from those prevailing in the State of Bombay. There cannot be any doubt that those statute laws are preserved in spite of the change of territories. If the Legislature did this with respect to statute laws, I am unable to discover any reason why they should have entertained a different intention with respect to other laws. On the contrary, in my judgment, the presumption should be that the Legislature did not intend to create a partial change of this kind and thereby to shock the conscience of the people by suddenly breaking them away from a legal system, to which they were used till then. It is true that the Legislature has now brought some of those laws in harmony with the laws of the former Bombay State. But, that appears to have been done by subsequent legislation and as a matter of policy and after due deliberation. If the Legislature applied this method for change in the statute law, it is legitimate to think that it intended the same method to be used in respect of the other laws also. The Legislature instead of giving a free hand to the subordinate Courts to decide the cases untrammelled by any judicial precedent whatsoever must have intended those Courts to administer the laws in accordance with the principles which were obtaining in these territories

and must have left the question as to whether any particular law was proper and just for the High Court to decide in course of time or for it to change if it intended to do go in the interest of uniformity of laws. In any case, this does not appear to me to be a formidable objection. The same objection can also be urged with perhaps greater force to the application of the principle of 'stare decisis' applied by some of the High Courts under similar circumstances, the cases of which I propose to consider a little later. Moreover, the argument is based entirely upon the rule of inconvenience. It is true that this rule can be resorted to in the case of a doubtful law; but, it is not a proper canon of construction to attribute a certain intention to the Legislature and then try to interpret a section to suit the assumed intention. I see nothing in section 119 of The States Re-organisation Act, 1956, or section 53 of the Andhra State Act or section 87 of the Act which should compel me to take the view that the legal system is so much likely to be disjointed as a result of the aforesaid interpretation that that interpretation must be rejected on the ground of hardship. On the contrary, as already pointed out by me, the view which I am taking will cause less disturbance, less hardship and less inconvenience and will permit in fullness of time, without creating any litters, a uniform system of law to be brought into existence either by the method of legislation or by the creation of judicial precedents.

76. If the argument of the learned Advocate-General and the other learned counsel were correct that the Parliament had by enacting the Act interfered with the laws as settled by the High Court of Bombay for the territory of Gujarat, then, two serious objections arise. One is that the Parliament had expressed its intention in an indirect and implied manner on a subject which is of as vital an importance, if not more, as the creation of a new State and secondly, that the Parliament was interfering with laws which were within its competence but was also interfering with laws which were outside its competence except when it was exercising emergency powers. There is nothing whatsoever in the Act to suggest that the Parliament intended to exercise emergency powers.

77. This brings me to the case-law on the subject. Section 53 of the Andhra State Act, which is in the same terms as section 87 of the Act, came up for construction before the Full Bench of the Andhra High Court in the case reported in AIR 1955 Andhra 87 (FB), already referred to. At page 93, in paragraph 26, after stating that that section can only mean that the change of territories provided for by Part II of the Act will not make any change in the law obtaining in that territory before the change, till otherwise provided by a competent Legislature, the learned Chief Justice Subba Rao proceeded to observe,

"If there was a law obtaining in the Andhra area before the Constitution of the Andhra State to the effect that the Madras High Court decisions would be binding on the Andhra High Court, this provision can legitimately be invoked. But, obviously, there could not have been any such law, for the simple reason that there was no High Court of Andhra in existence prior to its constitution. On this simple ground, this contention should be negatived".

With the greatest respect, the observations do not appear to indicate the correct approach. The question for consideration is whether the expression, 'the law in force', includes case-law and that aspect of the case, with due respect, does not appear to have been considered by the learned Chief Justice at all. The observations made by Bhimasankaren, J., at page 95, instead of supporting the view taken by the learned Chief Justice with which he concurs, supports the view which I am taking. The observations are:-

"On the other hand, where territories under the jurisdiction of one High Court are divided into two each to be under the jurisdiction of a separate High Court, it seems to me that the principle underlying the rule of precedents requires the continuity of case-law to be maintained, because there is no reason at all why the certainty of the law should be affected".

These observations lead to the same result which was arrived at by the former Full Bench of this High Court.

78. Before a Full Bench of the Rangoon High Court consisting of nine Judges reported in AIR 1927 Rangoon 4, the question arose as to whether a judicial precedent of the former Chief Court of Lower Burma was binding on that High Court, after the abolition of the Chief Court of Lower Burma. One of the sections which this Full Bench had to consider was section 17 of the Letters Patent of that High Court which stated, inter alia, that the law to be applied to each case coming before the High Court of Judicature at Rangoon, in the exercise of its ordinary original civil jurisdiction, would be such law as would have been applied by the Chief Court of Lower Burma to such a case if the Letters Patent had not been issued. The question for consideration was whether the term 'law' as used in this section included case-law. Rutledge, C.J., who delivering the judgment on behalf of the majority of Judges, made the following observation:-

"At first sight this would seem to apply the law as decided by the decisions which were binding upon the Original Side of the Chief Court; for Judge made law is as much law as the enactments of the Legislature".

However, after making these observations, the learned Chief Justice went on to consider whether the term in the context in which it was used included the case-law or not and reached the conclusion that it did not and the reasons given by the learned Judge are to be found at page 6 of the report, which are as follows:-

"While an appeal lay from the Recorder's Court to the Calcutta High Court, the decisions of that Court were followed when they differed from those of other High Courts, vide: *Peth permall Chetty v. Phillips*²⁵, The Lower Burma Courts Act, which established the Chief Court, took away the right of appeal from Rangoon to Calcutta and during the 22

years that the Chief Court of Lower Burma was in existence I have been unable to remember any occasion where the decisions of the Calcutta High Court were considered of greater authority than those of Madras or Bombay by reason of the Burma Laws Act, section 13(2). This is of considerable importance for if the word "law" in that sub-section included the judicial decisions binding on the Original Side of the Calcutta High Court, it would clearly have been otherwise. Several learned Judges have construed the word "law" as covering not merely legislative enactments but also the English Common Law and they must be taken to have considered that it did not include the judicial decisions of the Calcutta High Court. In this construction I consider that they were justified".

The only reason given for not including in the term "law" case-law is that, in the remembrance of the learned Chief Justice, for nearly 22 years no one at the bar had raised the contention that the term "law" used in section 13(2) of Act 21 of 1863 of the Burma Laws Act of 1898 included case-law. With respect, this can hardly be regarded as a good or sufficient reason in itself. Duckworth, J., made the following observations in this case regarding case-law:-

"It seems to me that the word "Law" as used in Clause 17 of the Letters Patent, merely means the legal enactments of the Indian and Burmese Legislatures, the English Common Law and Equity, etc., which was applied by the late Chief Court of Lower Burma. I cannot see that of necessity it must be read so as to include the published decisions of that Court which decisions, until merged in an enactment, or used to modify or repeal any enactment, are not strictly speaking law at any rate to the extent to which case law in England is law. We have, in this matter, to free our minds from British preconceptions".

With respect again, the reason adduced by the learned Judge can hardly be regarded as convincing. It assigns to case-law in the Burma system of laws a place different from

²⁵(1891) Selected Judgments 555

what is assigned to it in the English system. In any case, to any one, familiar with the law administered by the composite High Court of Bombay, this reason can hardly appeal as valid and proper. As already shown by me, the case law has the same place in India as it has in England. Das J. at page 13 also gave the same reason as Rutledge, C.J., for not regarding law as including case-law. He said:

"During the 22 years of the existence of the Chief Court, it had never been contended before the Chief Court that the Original Side of the Chief Court was bound by the case law of the Calcutta High Court".

79. The same question arose in the case reported in AIR 1959 Mysore 1 (FB), before a Full Bench of the Mysore High Court which was created by section 49 of the States Reorganization Act, 1956. The question was whether judicial decisions of the former Chief Court of Mysore and of the former High Court of Mysore delivered upto 1-11-1956 were binding upon the new High

Court. The answer was in the negative, S.R. Das Gupta, C.J. based his decision on the ground that a new and an independent High Court had been created and that the former Courts and the new Court were not Courts of co-ordinate jurisdiction. There is no reference to Section 119 of the States Reorganization Act, 1956, in the judgment of the learned Chief Justice. However, there is a reference to that section in the judgment of Nittoor Sreenivasa Rau, J. and on p.4, the learned Judge observes as follows:

"It is no doubt true that by virtue of Section 119 of the States Reorganization Act, 1956, the laws operative in the respective areas continue to be operative until otherwise provided by a competent legislature or other competent authority.

It should, however, be stated that such laws do not include what is called Judge-made law as has been held in AIR 1927 Rangoon 4 (FB) in similar circumstances".

The learned Judge follows the Judgment of the Rangoon Court and does not give any independent reasons for holding that the Judge-made law is not 'law' within the meaning of section 119. The learned Judge has also made reference to the confusion which, in his opinion, was likely to arise if case-law was included in the expression 'law in force'. This is what he says:

"Nor can it be suggested that this Court should apply to cases arising in different areas the law as interpreted by the High Courts respectively exercising jurisdiction formerly over those areas in regard to the same provision of law. That would mean that this High Court would not be functioning as an integral entity but would have split itself into different entities, possibly taking different views on the same question of legal principle arising from interpretation or application of any provision of law. There cannot be an after illustration of this point than the case which has given rise to this reference. The Bombay and Madras High Courts on the one hand and the erstwhile Mysore High Court on the other have taken conflicting views in regard to the meanings of the proviso to Section 132 of the Evidence Act".

I have already considered this aspect of the matter in a previous part of this judgment. For the reasons given therein, I do not think I can agree with the aforesaid observation of the learned Judge. With respect, I may say that, when the learned Judge in the latter part of his judgment applies the principle of 'stare decisis', exactly the same situation, if not worse, arises, which situation the learned Judge intends to avoid by the above observations. In fact, the learned Judge while taking the view that case-law is not included in the term 'law', ultimately, finds that it is likely to create chaos in the subordinate Courts and, therefore, points out at page 6 rule which these subordinate Courts should follow. With respect again, if case-law is not included in 'law in force', it is difficult to see on which principle the subordinate Courts can be directed to respect and follow the decisions of the former Courts which operated in different parts of the territory of the State of Mysore.

80. The same point arose for decision in AIR 1952 Madhya Bharat 171 (FB). The Madhya Bharat High Court had to consider whether it should or should not follow the precedents created by the Indore State High Court and the High Courts of other covenanted States. The answer was in the negative. The decision was based on the ground that the Madhya Bharat High Court was a new High Court and that it was not a Court of co-ordinate jurisdiction with the High Courts of the former covenanted States. In the principal judgment of the Court, no reference is made to clauses 3 and 5 of Ordinance II of 1948 which were relevant for the purpose of considering the question in hand. In the judgment of Kaul, C.J., reference is made to clause 5 of Ordinance II of 1948. By that clause, it was provided that the High Court of Madhya Bharat "shall apply the laws and the usages prevailing in any State forming part of the United States of Madhya Bharat to Civil, Criminal and other proceedings in that State till such time as a duly constituted authority modifies them". The learned Chief Justice disposed of the question as to whether the expression "laws and the usages" includes case-law or not in the following words:

"The Full Bench (referring to a former Full Bench of the High Court), if I may say so without disrespect, rightly held that the term "Laws and usages" as used in these two clauses "cannot be held strictly speaking to cover judicial decisions".

There is no further discussion on the subject on this point at all, nor is the above view supported by any further reasoning.

81. The same question arose before a Full Bench of the Kerala High Court in the case of *Lakshmikutty Amma v. Madhavan Pillai*, reported in²⁶ The question for consideration was whether decisions of the Travencore and Cochin High Courts were binding on the High Courts of Travencore-Cochin and Kerala. The answer was in the negative. With respect, no reasons have been given for this conclusion as would appear from a paragraph at page 114 of the report.

"The Judges of the Travencore-Cochin High Court had no similar reason to take a view knowing it to be illogical or wrong. To them (and to us) the decisions of the Travencore and Cochin High Courts have only a persuasive effect and when the concerned decisions themselves say that the view taken in them is not very logical

²⁶ AIR 1958 Ker 111 (FB)

and are only by way of attempts to reconcile conflicting ideologies, it is needless to observe that their persuasive value amounts to little or nothing."

82. The same view was taken by a single Judge of the Kerala High Court reported in AIR 1961 Kerala 75. That view was entirely grounded upon the principle that the former and the new Courts were not Courts of co-ordinate jurisdiction.

83. In the case of *Hasti Mal v. Shanker Dan*, reported in²⁷ the expression 'law' used in subsection (1) of section 3 of Rajasthan Administration Ordinance (I (1) of 1949) had to be

construed. It was contended in the High Court of Rajasthan that the expression 'law' as used in the above section did not include case-law. The contention was upheld. With respect, this decision is correct. This is so because, as appears from the judgment of Wanchoo, C.J., the term 'law' was defined in that Ordinance and the definition was not inclusive as in the Act, but was exhaustive. The definition clearly excluded case-law from the term 'law'.

84. The view which I am taking is certainly better than the principle of 'stare decisis' which appealed to the learned Judges of the Rangoon Court in AIR 1927 Rangoon 4 (FB) (supra) and the learned Judges of the Andhra High Court in AIR 1955 Andhra 87 (FB) (supra). If that principle is applied, it petrifies the law in those territories for all time. Such case-law cannot be changed by subsequent precedents and it can only be changed by legislative interference.

85. For the above reasons, I have come to the conclusion that the view taken by the former Full Bench that section 87 of the Act saves the precedents of the High Court of Bombay for the territory of Gujarat was the correct view.

86. The second question to be considered by the Full Bench is whether the precedents created in the High Court of Bombay before 1-5-1960 are binding on the High Court of Gujarat on the principle that the two High Courts are Courts of co-ordinate jurisdiction. The question was raised, for the first time, before the Division Bench in the case of *Anand Municipality v. Union of India and others and, as has been stated by the learned Chief Justice S.T. Desai in*²⁸ both he and I felt difficulty in accepting that contention. The contention was based mainly upon the decision in AIR 1955 Andhra 87 (FB). The principle that, when two Courts are of co-ordinate jurisdiction, the precedents of one are binding on the other on the principle of judicial comity was never in dispute. That principle has also not been challenged by any side before the present Full Bench. The main question for consideration is as to what is the exact connotation of the expression "a Court of co-ordinate jurisdiction". The test which was laid down by Subba Rao, the learned Chief Justice in M. Subbarayudu's case, AIR 1955 Andh 87 (FB), was as follows: "Whether the two Courts are of equal rank and status or of equal authority and exercise similar jurisdiction". The Division Bench aforesaid found difficulty in accepting the latter part of the test laid down by the learned Chief Justice. This doubt arose on another ground also. Can it be stated that a Court which was already in existence long before another Court came into existence was a Court of co-ordinate jurisdiction with the latter Court although the latter Court was not in existence when the precedents of the former Court

²⁷ AIR 1952 Raj 7 (FB)

²⁸(1960) 1 Guj LR 82 : (1960) 1 Guj H.C.R. 92 : (AIR 1960 Guj 40) (FB)

were created? The point was argued by the learned Advocate-General at some length before the first Full Bench and, though that Full Bench did not pronounce a judgment finally upon the submissions then made, the learned Chief Justice, whilst delivering the judgment, expressed himself as follows:

"Applying that test, (the test laid down in the Andhra case), his Lordship reached the

conclusion that the two Courts, the High Court of Andhra and the High Court of Madras were courts of co-ordinate jurisdiction and, therefore, the decisions of Madras High Court at the relevant time were binding on the Andhra High Court. We find considerable difficulty in agreeing with that view. We say this with some hesitation. Coordinate jurisdiction in the ordinary connotation of that expression is that which is exercised by different courts of equal rank and status over the same subject-matter and within the same territory and ordinarily at the same time. Each Court must have jurisdiction to deal with the same subject-matter. We do not intend to suggest that for all purposes co-ordinate jurisdiction is to be equated with concurrent jurisdiction or simultaneous jurisdiction but we are unable to see our way to the conclusion that simply because this court is in a sense a successor to the High Court of Bombay in respect of the territories which now form part of the State of Gujarat, it is a Court of co-ordinate jurisdiction with that predecessor."

The arguments advanced at the bar before this Full Bench, in my judgment, have not been able to resolve all the doubts which first arose in my mind whilst sitting in the Division Bench and which persisted whilst sitting in the former Full Bench. On the contrary, some new points, which emerged during the course of the discussion, have lent edge to some of these doubts. With this preliminary observation, I now proceed to deal with the points which were argued at the bar.

87. The supporters of the theory of co-ordinate jurisdiction are not unanimous in stating the ground on which they supported the theory. The learned Advocate-General contends that the composite High Court of Bombay and the High Court of Gujarat are Courts of co-ordinate jurisdiction in its fullest sense. Mr. Nanavaty and Mr. Trivedi on the other hand, contend that the two Courts are not Courts of co-ordinate jurisdiction, but, that the true legal position is that the composite High Court of Bombay is now extinct and that two new Courts have come into existence - the High Court of Maharashtra and the High Court of Gujarat, - that, both these Courts are co-inheritors of the jurisdiction of the composite High Court in their respective territories and that the precedents of the composite High Court are binding on the High Court of Gujarat as the successor Court of the composite High Court of Bombay.

88. I am not in agreement with the submission of Mr. Nanavaty and Mr. Trivedi that the High Court of Bombay is, extinct and that the present High Court of Maharashtra at Bombay is a successor of the composite High Court of Bombay. The argument is that, by the Act, two new States and two new High Courts are created. It is not necessary to express any opinion on the first limb of this argument as to whether the residuary State of Bombay, after the separation of the territories assigned to Gujarat, is a new State or a residuum of the old State of Bombay. The question with reference to the High Court of Bombay must be answered with reference to the provisions contained in Part IV and some other relevant sections. Section 28 states that, as from the appointed day, there shall be a separate High Court for the State of Gujarat. Mr. Nanavaty and Mr. Trivedi emphasise the use of the adjective 'separate'. That section further provides that the High Court of Bombay shall become the High Court for the State of Maharashtra (hereinafter

referred to as the High Court at Bombay). Both the learned counsel emphasise the use of the word 'become' and the change of nomenclature from the High Court of Bombay to High Court at Bombay. It is contended that, if the old High Court of Bombay was intended to be continued, the Legislature would have used the verb 'be' instead of 'become'. From the provisions of Chapter IV as a whole, it appears that the Legislature has used the expression 'High Court of Bombay' for the old composite High Court and the expression 'High Court at Bombay' for the High Court of the State of Maharashtra. It is true that if the identity of the residuary High Court of Bombay was not intended to be changed, the verb 'be' was more appropriate than the verb 'become'. 'Become' indicates a change of position or status. It is true that there has been a change in the nomenclature of, the High Court for the State of Maharashtra. But, at the same time, there is reason to believe that the change of nomenclature was more a drafting device than a definite provision for extinction of the old High Court and the creation of a new High Court for the State of Maharashtra. If such a drastic change was intended by the Parliament, then, some important omissions would not have been there as they are to be found in the Act. If a new High Court was to be created for the State of Maharashtra, then, provision would be made for conferring on it jurisdiction, power and authority in respect of the matters dealt with by sections 30, 31, 32, 33, 34, 35, 36 and 38 for the High Court at Bombay as they have been made for the High Court of Gujarat. There would have been also some provision either for the appointment or the continuance of the Judges for the High Court at Bombay other than those who came to be transferred by the President under section 29. The power conferred upon the learned Chief Justice of the Bombay High Court in respect of pending litigation and the jurisdiction conferred upon the High Court at Bombay in respect of litigation pending in that Court all suggest that the High Court at Bombay was the same High Court but with, a truncated territorial jurisdiction. It is hardly probable that the Legislature would not have made the aforesaid provisions for the High Court at Bombay if it had intended to create a new High Court for the State of Maharashtra. Under the circumstances, I cannot agree with the submissions of Mr. Nanavaty and Mr. Trivedi. Mr. Nanavaty alternatively contends that, even if the High Court of Bombay is not extinct, the High Court of Gujarat must be considered to be a successor of the High Court of Bombay, (described in the Act as the High Court of Bombay) in relation to the territory of Gujarat. He contends that though the expression 'succession' is, usually used in connection with inheritance, that expression is not confined in law only to the law of inheritance. A person or an institution can be said to succeed another living person or institution if, on the former, devolves the jurisdiction, power and authority of the latter, either in whole or in part. Mr. Nanavaty may be right in making this submission. But, as a general rule, one does not associate the word 'successor' with the estate of a living person. If a person gets right, title and interest of another by a transfer inter vivos, then, the word which one uses is not 'succession' but 'devolution'. Therefore, in order to avoid any confusion on the subject, the correct terminology which may be used to describe the relationship existing between the two High Courts is that the jurisdiction, power and authority of the composite High Court of Bombay in respect of the territory of Gujarat has devolved upon the High Court of Gujarat. Therefore, the correct legal position appears to be that the High Court of Gujarat is the High Court on which the jurisdiction of the composite High

Court of Bombay has devolved in respect of the territory of Gujarat over which the composite High Court of Bombay exercised jurisdiction in common with the present existing territory over which it exercises jurisdiction and the question as to whether the precedents of the composite High Court of Bombay are inherited by or are binding to the High Court of Gujarat must be answered in the light of this legal position. If this legal position is correctly understood, then the two High Courts will not be Courts of co-ordinate jurisdiction, but will stand in the same relationship as a transferor or a transferee in relation to the territory of Gujarat and, unless one is prepared to extend the principle of co-ordinate jurisdiction to a situation of this type, the precedents of the High Court of Bombay may not bind the High Court of Gujarat. The situation is unique and none of the learned proponents of the principle of co-ordinate jurisdiction was able to cite any authority in support of the latter proposition nor was he able to indicate the correct principle to be applied and the reasons therefore in a situation of the aforesaid type. During the course of the arguments, there was a persistent assumption that there was no difference in law between Courts of co-ordinate jurisdiction and a set of Courts, one of which was exercising jurisdiction over a whole territory at one time and the other is now exercising jurisdiction over a part thereof only, the result of the latter process being that the territorial jurisdiction of the first Court has become truncated.

89. Before I consider the question whether the principle of co-ordinate jurisdiction can apply to a situation of the above kind and examine the question of the tests to be applied for determining which are Courts of co-ordinate jurisdiction, I may first dispose of a few general submissions which were made by Mr. Vakil on this point.

90. Mr. Vakil contends that the principle of co-ordinate jurisdiction is a principle peculiar to British jurisprudence and that the basis for the application of that principle to the Indian jurisprudence is completely lacking. The contention is that the principle of co-ordinate jurisdiction can apply only to Courts situated in one and the same realm and following the same legal system. He contends that the principle is based on the fundamental fact that both the Courts administer one and the same system of law and, in order that the law may be uniform for the whole realm, it is necessary or expedient to evolve a principle that Courts exercising the same jurisdiction and having the same rank and status should follow the precedents of each other, so that there may be no confusion of uncertainty in the administration of law. The argument is interesting at first sight and even attractive. But, in my judgment, there is a fallacy in at least a part of this argument. The States in India are not sovereign States and, therefore, it is a fallacy to call them as operating in different realms. India is one country. It is one sovereign republic and the constituent States are only different members of one and the same entity. Mr. Vakil may be right in saying that the system of law which prevails in different States is not necessarily the same. It is true that the Constitution is one. But, even in the matter of the Constitution, there are some provisions which are applicable to some States and not to others. As a general rule, the Central laws are the same, but, not in all cases. In the matter of the State legislation, there is diversion. But I am not convinced that the need for the principle of co-ordination necessarily

arises because of the prevalence of one uniform system of law. The laws which the Courts may have to administer may be different, but, that fact will not prevent Courts from being Courts of co-ordinate jurisdiction. As has been pointed out by the Supreme Court in AIR 1960 Supreme Court 936, the principle is based on the principle of judicial comity. 'Comity' means according to the Shorter Oxford English Dictionary, Third Edition, "Courtesy, civility urbanity; kindly and considerate behavior towards others". The true basis of this principle appears to be a considerate and kindly behavior of one Court towards another. It is true that such courtesy or civility will be shown by one Court to another if both of them are considering the same system of law. But, it is not always necessary that the system of law which each one must administer must be identical with the other. Therefore, in my judgment, the principle of co-ordination cannot be denied on the ground urged by Mr. Vakil.

91. That the identity of the legal system is not a necessary concomitant of the principle of co-ordination can be illustrated by " a practice which was prevalent in the composite State of Bombay amongst its subordinate Courts and must be now prevalent in the Courts subordinate to this High Court Judges in the mofussil exercising jurisdiction in one and the same civil Court will be Judges exercising co-ordinate jurisdiction. The successors of each of the Civil Judges will also be Judges of the same category if the principle of succession is recognized in the application of the principle of co-ordination. The system of laws which each of the Judges exercises within his jurisdiction is the same. Still, the principle of co-ordinate jurisdiction has never been applied at the level of subordinate Courts. No one has ever argued that a decision given by one District Judge was binding upon his joint or successor District Judge, or that the decision of a Judge of the Senior Division was binding on his joint or successor Civil Judge or the decision of a Judge of the Junior Division was binding on his joint or successor Civil Judge. This is a good illustration to show that the principle of co-ordination is not brought into existence in the interests of uniformity or certainty of law. This principle so far as I know and that has not been disputed at the bar, is applicable only to the higher strata of Courts. In fact, in the composite State of Bombay it was applicable amongst the Judges of the Court, although I may mention that I was told that the Judges of the City Civil Court of Bombay had evolved a similar practice for themselves. In any case, the principle has been confined to the higher Courts and the principle obviously appears to have been evolved to preserve decorum and respect amongst the Judges of High Courts.

92. Mr. Vakil further contends that co-ordination implies an organism and different limbs and that the necessity for co-ordination between limbs can arise only if the limbs form part and parcel of the same organism. The analogy is interesting, but, I fail to see how it brings out the true nature of the principle of co-ordination or affects the argument of the proponents of that principle. This argument, in my judgment is another form of the argument which I have already considered above and, for the same reasons, in my judgment, it cannot be upheld.

93. Mr. Vakil next contends that the principle of co-ordination is based upon the principle of

harmony. This is also, in my judgment a rehash of the same argument. I am not convinced that the principle has been brought into existence to bring laws into uniformity or to avoid confusion only, though this is one of the practical results of the application of the principle. In my judgment, the Courts of co-ordinate jurisdiction consider the precedents of one another binding on each other not because the law is to be brought into uniformity or is to be made certain, but, out of mutual respect for each other and to show a courteous behavior towards institutions which are of equal rank, status and which exercise the same jurisdiction.

94. Mr. Vakil also contends that if the principle of co-ordinate jurisdiction were to be applied between the composite High Court of Bombay and the High Court of Gujarat, the latter High Court will become a subordinate Court of the High Court of Bombay. In any case, he contends that the principle will be one of subjugation and not of co-ordination. In my judgment, there is a fallacy in this argument also. The precedents which will be binding on this Court will not be the precedents created or brought into existence after the 1st of May 1960. The precedents which will be binding will be those which were created before that date. Therefore, when this High Court follows a precedent of the composite High Court of Bombay, it will not be by way of subordination, but on the same principle of co-ordinate jurisdiction on which the Judges of the composite Court acted. The result will be that just as the High Court of Bombay had power of revising its own precedent to accordance with the practice in vogue in that Court, the High Court of Gujarat will have the same power of revising that precedent in so far as it applies to the territory of Gujarat.

95. Mr. Vakil then contends that the whole principle is self-stultifying. He says that, in the ultimate analysis, the principle of co-ordinate jurisdiction has its root of authority only in the precedents of the two Courts of co-ordinate authority and the root can be cut off by one of the two Courts at any moment. He says that if the High Court of Gujarat accepts this principle today, it can on the very next day create a precedent to the contrary and there will be no certainty that the principle will be applied at all times. The argument points out more a flaw inherent in the principle of co-ordination than refutes the plea for the application thereof. In my judgment the defect cannot be used as a ground for denying the existence of the principle which as I have already pointed out above, is well settled as a principle of judicial practice.

96. According to Halsbury, Third Edition, Volume 22 page 801, paragraph 1689, there is no statute or common law rule by which one Court is bound by the decision of another Court of co-ordinate jurisdiction. That book describes the application of the principle of co-ordination as a rule of modern practice. This is what it says:

"Where, however, a judge of first instance, after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision: and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance

unless he is convinced that judgment was wrong".

97. This brings me to the important question as to what tests should be applied for determining whether two sets of Courts are Courts of Co-ordinate jurisdiction. I have already set out the tests which were applied in the Andhra Full Bench case. Two tests were laid down in that case: viz. (i) the two Courts should be of equal rank and status or of equal authority and (ii) the two Courts should exercise similar jurisdiction. There is no dispute regarding the first test. That test is implied in the natural and grammatical meaning of the term 'co-ordinate'. The Shorter Oxford Dictionary defines the term as meaning "Of the same order; equal in rank (with)". Webster's New World Dictionary, 1966 Edition, defines it as "of the same order or importance; equal in rank". The word 'co-ordinate' is used in contradistinction to the word 'subordinate'. In other words, if a relationship of superiority and inferiority is existing between two Courts, then they are not Courts of co-ordinate jurisdiction. However, if both the Courts are of equal rank and authority, only one of the tests for the application of the principle of co-ordination is satisfied, but not the whole test. It is quite clear that the above test alone cannot bring the principle into play. The second test has been described in the Andhra Full Bench case as the test of similar jurisdiction. The controversy centres round this second test. Is the test of similar jurisdiction enough? Is it not necessary that jurisdiction should be the same? Probably, the concept of similar jurisdiction is emphasized because otherwise there will be no distinction between co-ordinate jurisdiction and concurrent jurisdiction or simultaneous jurisdiction. If two Courts are of equal rank and if they exercise the same jurisdiction, then, they will be Courts of concurrent jurisdiction and not Courts of co-ordinate jurisdiction alone. Therefore, a test must be found which will distinguish between a concurrent Court and a co-ordinate Court. It is for this reason that, in the former Full Bench the test was not completely rejected. But, the controversy is as to what is the test which is to be applied for the purpose of distinguishing a Court of concurrent jurisdiction from a Court of co-ordinate jurisdiction. One of the arguments is that concurrent Courts are also Courts of co-ordinate jurisdiction; but, the latter Courts have a wider connotation inasmuch as they include in their ambit predecessor and successor Courts also. Therefore, it is urged that the test which distinguishes a concurrent or simultaneous Court from a co-ordinate Court is that, in the case of the former the two Courts must exist simultaneously at one and the same time; whereas, in the latter case, the two Courts may exist one after another. It follows from this that the jurisdiction of one Court may be anterior in point of time than that of another Court and yet, if the first test is satisfied, the Courts will be Courts of co-ordinate jurisdiction. There is high authority for this proposition. In English Courts, the question as to whether the precedent of a predecessor Court of equal rank is or is not binding on a successor Court has always been answered in the affirmative. It was so held in *Young's case*, (1944) 1 KB 718. In (1895) 1 Ch 51, the question arose whether a precedent of a predecessor Court was binding upon the Court of Chancery which succeeded to the jurisdiction of that Court. It was conceded at the bar that the appellant had no case if the ruling of the predecessor Court was binding upon the successor Court. Therefore, the learned counsel for the appellant in that case concentrated all his attention to establish that such was not the correct legal position. The case was disposed of by Lord Herschell, L.C. in a short judgment

wherein His Lordship held that the Court of Chancery was bound by the Precedent created by the predecessor Court. Similarly, in *Lavy v. London County Council*²⁹, at p.581, when reliance was placed on *London County Council v. Cross*³⁰, Lindley, L.J., expressed himself emphatically as follows:

"The case of *London County Council v. Cross*³¹, is a decision which I not only think is correct, but it is a decision of the Court of Appeal which we should be bound to follow whether we thought it right or not".

The decision of *London County Council v. Cross*³², was a decision of a Court of Appeal to whose jurisdiction the Queen's Bench Division succeeded. Similarly, in (1914) 2 KB 209 at p.211, it was held by Lord Reading, C.J. that the Court regarded itself as bound by the decision of its predecessor. In Salmond's Jurisprudence at page 190, it is stated that the aforesaid principle was not followed in *Mills V. Jennings*³³, It is stated by Salmond that the Court of Appeal refused to follow the decision of its predecessor the Lords

²⁹(1895) 2 QB 577

³¹(1892) 61 LJ MC 160

³³(1880) 13 Ch D 639

³⁰(1892) 61 LJ MC 160

³²(1892) 61 LJMC 160

Justices of Appeal in Chancery. This is not quite an accurate reading of (1880) 13 Ch D 639. The aforesaid principle was not only not denied, but, was actually affirmed by that decision. The ground on which the former decision of the Lords Justices of Appeal in Chancery was not followed in (1880) 13 Ch D 639, was that the former Court itself did not consider its own decisions to be binding, so that this case does not deny, but actually affirms the principle that a successor Court of co-ordinate jurisdiction was bound by the decision of a predecessor Court of the same jurisdiction. It is true that in none of the above English cases, any reasoning is given in support of the proposition aforesaid. But it cannot be denied that the Courts which decided the point were composed of Judges of great eminence and learning, such as Lord Herschell. Lord Scrutton, Lord Davy, Lord Lindley and Reading, C.J. I would require very strong ground to differ from a proposition laid down by such eminent and learned Judges. Therefore, I accept it as a correct principle that a successor Court is bound by the precedent of a predecessor Court of equal rank. This supplies a good point for distinguishing a concurrent Court from a co-ordinate Court, but it does not answer the question whether the test of similar jurisdiction is correct or not.

98. On principle, I have no doubt whatsoever that the test of territorial jurisdiction is an important test, for the purpose of considering the principle of co-ordination. It is well known that the three High Courts established in the Presidency Towns of Calcutta, Madras and Bombay exercised the same kinds of jurisdiction. It is equally well known also, though some learned Judges have expressed a wish that this was not so, that none of these High Courts considered itself bound by the decisions of the other Courts although each showed the highest respect for the other. The sole ground on which the principle of co-ordination does not come to be applied by these three High Courts is the ground of the difference in territorial jurisdiction. Because each Court exercised

jurisdiction in a different territory, it did not consider itself to be a Court of co-ordinate jurisdiction with the other two Courts. To a certain extent, this principle was accepted by the proponents of the theory of co-ordination, but the point of distinction which they urged was that the identity of territorial jurisdiction was not a necessary ingredient. According to them, some territorial connection was necessary, but, a complete connection was not. None of the learned counsel was able to explain where and how to draw the line of distinction - where it was to begin and where it was to end - and, the arguments on this subject, with great respect, appeared to me to be vague and based more on the ground of expediency with a desire to achieve a certain result than on any concrete and well-considered principle.

99. Some of the cases cited at the bar in connection with this principle are not, in my judgment, of any assistance in determining the point in hand. In AIR 1952 Madhya Bharat 171, the precedents were not held binding because the High Courts of the covenanted States were held not to be the predecessors of the Madhya Bharat High Court. The latter High Court Was considered to be an independent High Court. That being so, the question of the application of the territorial test was not of any importance in that case. The same observations can be made about the cases AIR 1958 Kerala 111, AIR 1961 Kerala 75 and AIR 1959 Mysore 1 (FB). The case of AIR 1927 Rangoon 4, however, is of some assistance on this topic. In that case, the majority judgment was based, inter alia, on the ground that the territory over which the Chief Court of Lower Burma exercised jurisdiction did not extend over the whole territory over which the High Court of Rangoon exercised its jurisdiction.

100. One of the grounds which was urged in support of the application of the principle of co-ordination was that the test of territorial jurisdiction must be applied with reference to the time when the High Court of Gujarat came into existence. It was contended that, before 1st of May 1960, the composite Bombay High Court had the same kind of jurisdiction over the territory of Gujarat which the High Court of Gujarat exercises after that date over the same territory. It was contended that, therefore, the test of territorial jurisdiction ought not to be applied with reference to two different points of time. It was contended that the jurisdiction of the two Courts over the territory of Gujarat being identical at different points of time, one Court would be co-ordinate with the other, in spite of the fact that, at the time when the composite High Court of Bombay exercised its jurisdiction over the territory of Gujarat, it also happened to exercise jurisdiction over the territory which is now the territory of Maharashtra.

I am by no means convinced about the validity or correctness of this argument. In my judgment, there is considerable force in the argument that, in order that Courts may be Courts of co-ordinate jurisdiction, they must be Courts which must respect the decisions of each other and that the principle of mutuality must apply in such cases. If the situation is such that only one Court happens to respect the decision of another Court and the latter Court does not respect the decision of the former, then, the two Courts cannot be said to be Courts of co-ordinate jurisdiction. Co-ordination implies mutual respect and mutual good behavior and if this is lacking, then the very basis for the application of the principle of co-ordination is shaken. However, the answer which

is given by the proponents of the principle of co-ordination is that, on the very face of it, the test of mutuality is inapplicable in the case or predecessor and successor Courts. It is said that if one of the two Courts is extinct, then, it is fatuous to talk about the two Courts showing respect for each other. I have already indicated that, in my view, the High Court of Bombay is not extinct. That High Court is still in existence. If that is the correct position, then from the mere fact that the territorial jurisdiction of the Bombay High Court is now truncated, the test of mutuality cannot cease to apply. But, it is urged that, when the High Court of Gujarat respects the decisions of the composite High Court of Bombay, it does not give respect to the present High Court of Bombay, but, it gives respect to the composite High Court on the ground that the jurisdiction of that High Court has devolved upon the High Court of Gujarat in respect of the territory assigned to Gujarat. Therefore, respect is accorded to the jurisdiction which was exercised by the former High Court in the territory of Gujarat and to the High Court itself. I am unable to agree with this distinction also. The principle of judicial comity is applicable to Courts and not to jurisdictions, though jurisdiction is an important test for the application of the principle of co-ordinate jurisdiction. But, even if there was any justification for this contention, in my judgment, Mr. Vakil is right in pointing out that the test of mutuality is not altogether inapplicable even in respect of Courts which have become extinct or whose jurisdictions have become divided. In such cases, it may be said that the test remains dormant. However, on an examination of the same issue, if it is found that in case of the re-merger of the territory of Gujarat with the territory over which the present High Court of Bombay exercises its jurisdiction, the present High Court of Bombay will not, on the principle of judicial comity, respect the decisions of the High Court of Gujarat then, the latter Court cannot extend the Principle of comity to the former Court. In my judgment, having regard to the view taken in AIR 1927 Rangoon 4 in a contingency of the aforesaid type, there is no doubt whatsoever that the High Court of Bombay is not likely to respect the decisions of the High Court of Gujarat. In that view of the matter also, in my judgment, the principle of co-ordination is inapplicable in the present case.

101. In my judgment, there is also some substance in the argument of Mr. Vakil that the jurisdiction which the composite High Court exercised is not the same as the jurisdiction conferred upon the High Court of Gujarat by the Act. According to the Letters Patent, the composite High Court of Bombay exercises ordinary original jurisdiction over Greater Bombay. The original side of that High Court also exercises jurisdiction over persons residing in the territory of the whole State. Under the Act, this jurisdiction is not and cannot be inherited by the High Court of Gujarat. It is true that the High Court of Gujarat does exercise original jurisdiction in some matters, such as, a few matters arising under the Indian Companies Act and under the Banking laws. But, that jurisdiction is different from the jurisdiction which is exercised by the original side of the High Court of Bombay. Having regard to these differences in the matter of jurisdiction of the two High Courts, in my judgment, it cannot be said that the two High Courts are exercising the same jurisdiction.

102. The test of similar jurisdiction enunciated by the Andhra High Court appears to me to be

vague and uncertain. That test is not capable of reducing itself to any definite and certain principle. It is difficult to formulate any definite test for determining as to which jurisdictions are similar and which are not. In my Judgment, it will be risky and dangerous to resort to such an illusory and evasive test for the purpose of reaching a conclusion on such an important subject as the binding nature of precedents.

103. Reliance was placed upon a passage in Halsbury, Third Edition, Volume 22, page 805, paragraph 1693. That passage is as follows:

"1693. Stare decisis in special courts or tribunals:

The decisions of the Railway and Canal Traffic Commission which, before its abolition, was a court of record and of co-ordinate jurisdiction with the Queen's Bench Division, were binding on the commission; that commission was similarly bound by a decision of a court of the Queen's Bench Division": It was contended that this passage was a complete answer that the jurisdictions of two Courts of co-ordinate jurisdiction should be identical. The passage, at first sight, does support the contention of the proponents of the principle of co-ordination. However, at the time of the arguments, the original authorities quoted in Halsbury were not available in the Court. After the hearing, I have had access to the two authorities on which the aforesaid passage is based. On reading the judgments delivered in the two cases, I find that the passage is not an accurate reproduction of the decisions in the two cases. No such principle as is enunciated in the paragraph has been laid down in any of the two English cases on which the passage is based. Moreover, it is important to notice that Halsbury has put the principle not under the heading of "principle of co-ordinate jurisdiction", but under that of the principle of "stare decisis", which is a totally different principle on which, as I have already stated, none of the members of the bar relied, either before the former Full Bench or before the present Full Bench.

104. For the aforesaid reasons, I have come to the conclusion that the proponents of the principle of co-ordinate jurisdiction are not right in contending that this Court is a Court of co-ordinate jurisdiction with the High Court of Bombay as it existed before 1st May 1960 and, consequently, in my judgment, the precedents created in that Court cannot be held to be binding on the principle of judicial comity.

105. For the aforesaid reasons, I have reached the following conclusions:

I. The law which was administered by the former High Court of Bombay and as interpreted by the precedents of that Court was the law in force on 1st May 1956 for the territory of Gujarat and that law in force is preserved intact by Section 87 of the Act and, consequently, the precedents created by the High Court of Bombay before that date are binding on this Court on the ground that it forms a part and parcel of the law in force preserved by section 87 of the Act.

II. Those precedents will be binding on the different hierarchies of Courts in the territory of Gujarat in the same manner as they were binding to the same or corresponding

hierarchies during the period when the composite High Court of Bombay was exercising jurisdiction over the territory now assigned to Gujarat. In other words,

- (i) those precedents, including the decisions of single Judges of the High Court of Bombay, are binding on all the Courts subordinate to the High Court of Gujarat;
- (ii) precedents of single Judges of the composite High Court of Bombay are binding on single Judges of the High Court of Gujarat; and,
- (iii) precedents created by Division Benches and Full Benches of the composite High Court of Bombay are binding on the Division Benches of the High Court of Gujarat.

It follows from these conclusions that (1) if a single Judge of the High Court of Gujarat differs from a single Judge of the composite High Court of Bombay, then, if he is so minded, it is open to him to refer the matter to a Division Bench which will consider the precedent on its own merits and arrive at a conclusion of its own. (2) If a Division Bench of the High Court of Gujarat happens to differ from a decision of a Division Bench or a Full Bench of the composite High Court of Bombay, then, it must refer the matter to a Full Bench or a larger or a special Bench, as the case may be, under the practice prevailing in the High Court of Gujarat. (3) As a general rule, if a decision of a Full Bench is to be displaced, it must be done by a larger Full Bench, but, I do not wish to express any opinion on this subject finally and wish to bind the Court for ever. It may happen that the number of Judges presiding over this High Court may be less than the number of Judges constituting the Full Bench of the composite High Court of Bombay and I do not wish to be understood to say that, in such a contingency, this High Court will have no power of displacing a precedent of a Full Bench of the composite High Court of Bombay of the above kind,

III. The precedents of the composite High Court of Bombay will be binding subject to the following rules:

- (i) If any precedent happens to be displaced by the Privy Council or the Federal Court, then, the precedent of the latter two Courts will be followed by this Court and not the precedent of the composite High Court of Bombay so displaced.
- (ii) If any of the precedents mentioned in the previous sub-part is displaced or overruled by a decision of the Supreme Court, then, the decision of the Supreme Court will be followed by this Court.
- (iii) A precedent, though not expressly overruled by a decision of Privy Council, Federal Court or Supreme Court, which is inconsistent with the decision of any of these bodies or Courts will not be binding on this Court.
- (iv) A precedent which is given per incuriam or a decision which is given sub silentio will not be followed by this Court.

IV. On the principle of co-ordinate jurisdiction, I have come to the conclusion that that principle is not applicable between the composite High Court of Bombay and the High Court of Gujarat

and that the precedents of the composite High Court of Bombay cannot be followed by this Court on the basis of that principle.

V. I may make the following observations on a point which is connected but which does not directly arise for decision. In Young's case, (1944) 1 KB 718, it has been laid down that when there are two conflicting decisions of the same Court, then, the Court is entitled and bound to decide which of the two conflicting decisions of its own, it will follow. I have given my anxious thought to this principle and, on the whole, I have come to the conclusion that this principle is not consistent with the principle of judicial comity on which the principle of co-ordination is based. In my judgment, if it is found that a subsequent decision has not followed a former decision, then, in my judgment, on the principle of judicial comity, it must be held that the subsequent Court committed a breach of that principle and it is improper to evolve another principle which will perpetuate the breach for ever. If a Court has committed a breach of the principle, then, its decision is not entitled to respect and it is the duty of the co-ordinate Court to set the matter right and to follow the first precedent which did not happen to be followed by the second precedent. If, however, it disagrees with the precedent created by the first decision, then, the proper course is to refer it to a Full Bench.

106. Although I have thought fit for the reasons aforesaid to deliver a separate judgment, as I felt duty bound to do so, I wish to express my definite opinion that the matter must be taken to have been concluded by the decision of the majority of the Full Bench and all the subordinate Courts and all the branches of this Court must take the matter settled by the majority judgment as finally concluded and until a different decision happens to be given by the Supreme Court, I have no doubt whatsoever that everybody concerned with the administration of law in this State will feel himself bound without the slightest hesitation by the answer given about this difficult problem by the majority judgment.

Bhagwati, J.

107. I have had the advantage of reading the judgment just delivered by my Lord the Chief Justice and I am in entire agreement with the conclusion reached in that judgment but inasmuch as I was a party to the judgment of the Full Bench in 1960 Guj LR 82 at p.87 : (AIR 1960 Gujarat 40) it is but proper that I should give my reasons for doing so.

108. Soon after the constitution of this High Court under the Bombay Reorganization Act, 1960, the question arose whether this High Court was bound by the decisions of the High Court of Bombay given prior to 1st May 1960. The question being a question of considerable importance and consequence, was referred for decision to a Full Bench of this High Court. The question came to be considered by a Full Bench consisting of S.T. Desai, C.J., as he then was and my brother Miabhoy and myself. The learned Advocate General who appeared on behalf of the Union of India submitted that the decisions given by the High Court of Bombay prior to 1st May

1960 should be considered binding on this High Court and he advanced three contentions in support of this submission. The first contention was- and it was this contention which found favor with us then- that the decisions of the High Court of Bombay given prior to 1st May 1960 were included in the expression "any law in force immediately before the appointed day" in Section 87 of the Bombay Reorganization Act, 1960 and that their binding character therefore, continued notwithstanding the bifurcation of the former State of Bombay and they were accordingly binding on this High Court. Dealing with this contention S.T. Desai, C.J., as he then was speaking on behalf of the Full Bench observed as follows:

"It is next necessary to consider in turn whether decisions of the Bombay High Court are to be regarded as 'law in force' in the territories which constituted the State of Bombay. On this point Mr. Patel had little to say. We on our part find no difficulty in giving a comprehensive connotation to the expression "any law in force immediately before the appointed day". The words should not, in our judgment, receive any technical meaning but should be understood in a sense which gives them a fair measure of amplitude. The crucial words so read must lead to the conclusion that decisions of the High Court of Bombay given before the appointed day are binding on this Court. It may be that some of those decisions may later on be overruled by that High Court. In any such case it would be open to this Court to decide and state for itself the law on the subject. No such position has arisen in the case before us and we need not linger on that aspect of the matter. One way of dealing with any such situation would be for a Full Bench of this High Court to consider the question and decide the matter for itself. Nor need we discuss the importance of judicial precedents and their place in the corpus juris. In any case we are of the opinion that judicial precedents are within the extensive ambit of Section 87 of the Act."

The second contention was that this High Court and the High Court of Bombay prior to 1st May 1960 were Courts of co-ordinate jurisdiction and that the decisions given by the High Court of Bombay prior to 1st May, 1960 should, therefore, be regarded as binding on this High Court on the well-known and well-recognized principle of judicial comity and legal procedure which requires that a Court should regard as binding on itself the decisions of a Court of co-ordinate jurisdiction. This contention was sought to be supported by a decision of a Full Bench of the Andhra High Court reported in AIR 1955 Andhra Pradesh 87 (FB). Much argument was not advanced before us on this contention since we indicated to the parties that we were inclined to accept the first contention based on the construction and meaning of Section 87 of the Bombay Reorganization Act, 1960. We did not, therefore, examine this contention in any detail but on the arguments advanced before us we felt some difficulty in reaching the conclusion that this High Court could be regarded as a Court of co-ordinate jurisdiction with the High Court of Bombay prior to 1st May 1960. S.T. Desai, C.J., as he then was, again speaking on behalf of the Full Bench, expressed our difficulty in accepting this contention in the following terms:

"We turn to the second argument pressed for our acceptance by the learned Advocate-

General. It is said that this High Court is in a real sense an off-spring of the pre-reorganization High Court of Bombay. We contemplate the Pedigree with filial sentiment and gratitude. Then it is said that we are a Court of co-coordinating jurisdiction with the High Court of Bombay as regards citation of decisions of the High Court of Bombay prior to the appointed day and it is in support of this proposition that the Advocate-General has relied on the Full Bench decision of the High Court of Andhra of which we have made mention. We should have examined the argument here in some detail and also referred to the views expressed by The learned Judges who decided the Full Bench case but it will not be necessary to do so in view of the conclusion already reached by us on the construction and meaning of Section 87 of the Reorganization Act. The learned Chief Justice of the Andhra High Court, as he then was, has in his judgment in that case expressed the opinion at page 91 of the report that it would not be inappropriate to call a successor Court a Court of co-ordinate jurisdiction, with its predecessor its jurisdiction at the point of time they exercised it are similar to or co-extensive with each other. The learned Chief Justice has applied the test which is as follows:

'Whether the two Courts are of equal rank and status or of equal authority and exercised similar jurisdiction.'

Applying that test, His Lordship reached the conclusion that the two Courts, the High Court of Andhra and the High Court of Madras were courts of co-ordinate jurisdiction and therefore, the decisions of Madras High Court at the relevant time were binding on the Andhra High Court. We find considerable difficulty in agreeing with that view. We say this with some hesitation. Co-ordinate jurisdiction in the ordinary connotation of that expression is that which is exercised by different courts of equal rank and status over the same subject-matter and within the same territory and ordinarily at the same time. Each Court must have jurisdiction to deal with the same subject-matter. We do not intend to suggest that for all purposes co-ordinate jurisdiction is to be equated with concurrent jurisdiction or simultaneous jurisdiction but we are unable to see our way to the conclusion that simply because this Court is in a sense a successor to the High Court of Bombay in respect of the territories which now form part of the State of Gujarat, it is a Court of co-ordinate jurisdiction with that predecessor."

The third contention was that the decisions of the High Court of Bombay prior to 1st May 1960 should be regarded as binding on this High Court because the systems of law in the new States of Maharashtra and Gujarat were derived from the parent State of Bombay of which each formed a part. This contention was also not pursued since we reached the conclusion that the decisions given by the High Court of Bombay prior to 1st May 1960 were binding on this High Court as "law in force" under Section 87 of the Bombay Reorganization Act, 1960. S.T. Desai, C.J. as he then was, delivering the judgment of the Full Bench observed as follows in regard to this contention:

"It is lastly argued by the learned Advocate-General that decisions of the Bombay High

Court prior to the appointed date are binding on this Court because the systems of law in the new States of Maharashtra and Gujarat are derived from the parent State of Bombay of which each formed a part. That decisions of the predecessor Court of the parent Court in any such situation should be accepted with all the respect due to them is not in doubt or dispute. The question is whether the decisions of that Court are binding as precedent. We should have pursued the matter but since we have already reached our conclusion on a reading of the sections of the Reorganization Act and particularly that of Section 87, we need not burden this judgment with any discussion of the same."

We accordingly on the question referred to us gave the opinion that the decisions of the High Court of Bombay given prior to 1st May 1960 are binding on this High Court.

109. This decision being a decision of a Full Bench of this High Court was followed unquestioningly by all Judges of this High Court whether sitting singly or as members of a Division Bench until 19th June 1961 when an appeal came up for hearing before a Division Bench of this High Court consisting of Raju and Bakshi, JJ. two decisions, one a decision of the High Court of Bombay given prior to 1st May 1960 and the other a decision of the High Court of Punjab, which took conflicting views on a particular point of law which was material to the decision of the appeal, were cited, before the Division Bench. The competing claims of these two decisions for acceptance raised the question whether the decisions of the High Court of Bombay given prior to 1st May 1960 should be regarded as binding on this High Court. The decisions of the Full Bench concluded the question so far as the Division Bench was concerned but the Division Bench on examining the reasoning adopted in the decision of the Full Bench felt that the reasoning was defective and led to startling consequences which could not have been possibly intended by the legislature. The Division Bench, therefore, made a request to my Lord the Chief Justice to constitute a Special Bench for a re-consideration of the question. This Special Bench was, therefore, constituted to re-consider the question whether the decisions given by the High Court of Bombay prior to 1st May 1960 should be regarded as binding on this High Court.

110. When the hearing commenced I entertained some doubt, for reasons which I shall give later in the course of this judgment, whether the Special Bench consisting of five Judges of this High Court could disregard the decision of the previous Full Bench consisting of three Judges of this High Court and declare that the law was not correctly laid down by the previous Full Bench in that decision, when the previous Full Bench was a Bench of co-ordinate jurisdiction with the Special Bench, I, therefore, invited argument on this preliminary question. The learned Advocate-General appearing on behalf of the State contended that since the Special Bench consisted of a larger number of Judges than the previous Full Bench, the Special Bench was not bound by the decision of the previous Full Bench and it was open to the Special Bench to reconsider the question whether the decisions given by the High Court of Bombay prior to 1st May 1960 were binding on this High Court and to pronounce upon the correctness of the decision of the Previous Full Bench. This contention of the learned Advocate-General was based on the acceptance of the principle of superiority of numerical strength amongst Benches of co-

ordinate jurisdiction in the same court - a principle which, as I shall presently point out, has been rejected in England in its application to the Divisional Court and the Court of Appeal. The learned Advocate-General, however urged that this principle has been consistently adopted in Indian High Courts and has received the approval of the highest Court of the country namely, the Supreme Court and that the Special Bench should, therefore, consider itself free to disregard the decision of the previous Full Bench by reason of the superiority of numerical strength of the Judges composing the Special Bench. This preliminary question raises a point of considerable importance relating to the doctrine of judicial precedents and it is necessary at this stage to determine the same before entering upon a detailed discussion on the question whether the decisions of the High Court of Bombay given prior to 1st May 1960 should be regarded as binding on this High Court.

111. In order to arrive at a correct determination of this preliminary question it is necessary to understand and appreciate the nature and extent of the doctrine of judicial precedents as it exists to-day in Corpus Juris. This inquiry will not only help in the determination of this preliminary question but will also reveal the true principle on which the question referred to the Special Bench should, in my opinion, be decided. The doctrine of judicial precedents is peculiar to the English system of administration of justice and since we in India have inherited the English system of administration of justice the doctrine of judicial precedents plays an extremely important role in the administration of justice by Courts in India. When I refer to the doctrine of judicial precedents, I mean the doctrine of judicial precedents in the strict sense in which the authority of individual precedent is regarded as absolutely binding on the Court. The doctrine of judicial precedents in the loose sense prevails perhaps in all legal systems "for it is a natural practice of the human mind, whether legal or non-legal, to accept the same pattern in similar or analogous cases". The doctrine of judicial precedents as it exists in the English and the Indian systems of administration of justice, however, attaches an absolute binding character to individual precedent and obliges a Court to follow individual precedent in a subsequent case even though the court may be convinced that the individual precedent which it is bound to follow has been erroneously decided and it is in this characteristic that the English and the Indian systems of administration of justice differ from the continental system. If a novel point arises, which has never previously been decided the Court will seek for an analogy which it could, but is not bound to follow. So far the English and Indian systems of administration of justice resemble the Continental one, but if the point has already been decided in a prior case, then the English and the Indian systems of administration of justice apply the doctrine of judicial precedents in a strict and more technical sense. The prior case, being directly in point, is not longer one which may be used as a pattern; it is one which must be followed in the subsequent case. It is treated as something more than a model; it is regarded as a fixed and binding rule. The doctrine of judicial precedents so understood, does not owe its existence to any statute or common law rule but has been evolved by the English Judges in course of time as a matter of judicial comity. This origin of the doctrine of judicial precedents has been emphasized in various cases and no better statement of it can be found than in the case of *The Vera Cruz*, reported in (1884) 9 P.D. 96, where Brett, M.R., has observed:

"It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity among Judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions: it does so again on the grounds of judicial comity."

I shall have occasion later on to refer also to some decisions of our own Supreme Court which point out that the doctrine of judicial precedents ultimately rests on judicial comity and judicial decorum and does not owe its origin to any statute or common law rule. The history of the doctrine of judicial precedents clearly illustrates that it is by a process of self-stultification that the English Judges have developed the doctrine in its present form and that there is no statute or common law rule which compels obedience to an individual precedent. The process which ultimately culminated in the acceptance of the doctrine of judicial precedents as it exists to-day was a long and slow process and may be described in the words of Sir Carleton Allen as follows:

"In English law, the habit of noting decisions seems to have arisen very early in the legal profession. Bracton lays down certain principles for judicial uniformity and was himself an industrious collector of cases, many of which served as material for his institutional treatise, though they were not 'reports' in the modern sense. By the thirteenth century, the Judges show a distinct desire to tread the beaten path. In the Year Books, although citation of specific cases by name is infrequent (being at this period difficult and nearly impossible), there is considerable evidence that both Judges and counsel frequently reasoned by the analogy of previous decisions, for the most part drawing upon their personal recollection or possibly upon private notes. But there is no trace of a doctrine in the Middle Ages that precedents were 'binding' and if a court considered an alleged decision to have been ill founded it had no hesitation in rejecting it. At the same time, there is an unmistakable consciousness on the part of Judges that their decisions are helping to settle the law for the future; and on occasion they said so in plain terms. In the sixteenth century, with Dyer's reports, a system of citations begins to be consolidated on well-recognised lines and this technique may be said to have been finally established by Coke. Many of the 'precedents' of the sixteenth and seventeenth centuries are precedents of pleading and practice rather than of substantive law; and these possessed a peculiar stringency. But the importance of substantive precedents is well established. In the latter half of the seventeenth century, Vaughan C.J., C.P., lays down certain principles concerning the relative values of different kinds of precedents. While fully conscious of the importance of case-law, he is clear that 'if a Court gives judgment judicially, another Court is not bound to give like judgment, unless it thinks that judgment first given was according to law'. He even denies the force of procedural precedents unless they are according to law. Sir Matthew Hale was of much the same opinion. Nevertheless,

throughout this period the influence and authority of precedent are steadily growing. In the eighteenth century, precedent forms a regular and integral part of judicial technique. In the time of Lord Mansfield, the duty of judicial 'loyalty' was fully recognized and repeatedly asserted, though Lord Mansfield himself, while remaining a firm believer in *stare decisis*, did not himself always adhere faithfully to it. By the end of the eighteenth century, all the foundations of the modern doctrine of precedent were laid but it could not reach its final development until certain changes, especially in the system of judicature and in the nature of the law reports, had been fulfilled. By 1833 it is recognized that the decisions of higher tribunals are binding in lower tribunals, unless plainly unreasonable and inconvenient' and that no judge is at liberty to depart from a principle once laid down merely on the ground that it is not 'as convenient and reasonable as he himself could have devised'. In the latter half of the nineteenth century the system of judicature is simplified, the reports are regularized, the hierarchy of authority becomes settled and the general rules for the application of precedents are well defined and observed".

There are certain general rules which are now well recognized, as governing the application of precedents so far 'as the Courts in England are concerned. Each Court is bound by the decisions of Courts above it and the degrees of authority in the judicial hierarchy are well understood and observed, except that some doubt still exists concerning the relative status of the Court of Appeal and the Court of Criminal Appeal. Individual Judges of the High Court are not bound by each other's decisions and this rule is instanced by a line of cases in which Judges have refused to follow precedents of their own rank or have declared their freedom to do so. Individual Judges of the High Court may even refuse to follow their own previous decisions. Such refusals to follow precedent are, however, unusual for on the principle of judicial comity individual Judges of the High Court will not lightly dissent from the considered opinions of their brethren and will usually follow them, so as to avoid conflicts of authority and to secure certainty and uniformity in the administration of justice. If a High Court Judge refuses to follow a decision of another High Court Judge, he does not and cannot overrule the earlier decision, because overruling is the act of a superior authority. In such cases it remains for a higher Court to settle the antinomy; meanwhile, both decisions, though contradictory, remain open to be followed even by an inferior Court. Just as one High Court Judge cannot bind another, so, with much stronger reason, a High Court Judge cannot bind a Divisional Court, consisting of two or more High Court Judges. The Divisional Court can refuse to follow an earlier decision of a puisne Judge. The Divisional Court cannot, however, overrule such decision; and another individual Judge may prefer the judgment of his brother to that of the Divisional Court, for the Divisional Court is not superior to an individual Judge in the judicial hierarchy. A High Court Judge sitting as a Judge of first instance is strictly not bound by the decisions of the Divisional Court for his relation to his brother judges in the Divisional Court is one of equality and not of subjection. So far as the Divisional Court itself is concerned, it is now well-settled as a result of two decisions namely, *Police Authority for Huddersfield v. Waston*³⁴, and *Younghusband v. Luftig*³⁵, that the Divisional Court is bound by its own decisions and that a full Divisional Court has no greater powers of overruling itself than a

Court of three or even of two Judges. The principle of superiority of numerical strength has been rejected by the Divisional Court. Lord Goddard C.J., in the latter case of 1949-2 KB 354 observed as follows in this connection:-

"Before considering the law applicable to the case, we think it well to emphasize that a Divisional Court of five Judges has no greater powers than one of three or even two. This Court is bound by its own decisions as is the Court of Appeal, whatever be the number of Judges that may constitute it".

³⁴(1947 KB 842)

³⁵1949 (2) KB 354

The Court of Appeal is also, like the Divisional Court, bound by its own previous decisions irrespective of the number of Judges constituting the Court. This was authoritatively settled in (1944) 2 All England Reporter 293. Even prior to 1944 there was a stream of authority for this view, broken only by a few dissentient voices. The minority opinions were, however, disapproved in Young's case, 1944-2 All England Reporter 293 and Lord Greene, M.R., delivering the judgment of the full Court of Appeal held after a careful examination of the whole matter, that the Court of Appeal is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The learned Master of Rolls also dispelled the impression that the full Court has any greater powers than a Division of the Court or that the full Court can over-ride a decision of a Division of the Court and rejected the principle of superiority on numerical strength in the following words:-

"It is true that in this and similar cases the Court which held itself to be bound by previous decisions consisted of three members only. But we can find no warrant for the argument that what is conveniently but inaccurately called the Full Court has any greater power in this respect than a Division of the Court consisting of three members only.

The Court of Appeal is a creature of statute and its powers are statutory. It is one Court though it usually sits in two or three divisions; each division has co-ordinate jurisdiction, but the full Court has no greater power or jurisdiction than any division of the Court;.....Neither in the statute itself nor.....in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect, although we are unable to agree with certain views expressed by Green, L.J. as will presently appear we think that he was right in saying that what can be done by a full Court can equally well be done by a division of the Court. The corollary of this is, we think, clearly true, namely, that what cannot be done by a Division of the Court cannot be done by the full Court." It is thus clear that in England the practice so far as the application of precedents is concerned is widely divergent between Judges of the High Court exercising original jurisdiction on the one hand and the Divisional Court and the Court of Appeal on the other. While the doctrine of judicial precedents in the sense in which we understand it to-day- the sense which attaches absolute binding character to individual precedent- does not apply to the former, it applies in all its rigour to the latter and the rigour is so severe and unmitigated that even a Bench

or Division Consisting of a larger number of Judges is not permitted to disregard the decision of another Bench or Division consisting of a smaller number of Judges. The principle of course is that each Bench or Division has co-ordinate jurisdiction with the other irrespective of the number of Judges constituting the Bench or Division and there is, therefore, no reason why one Bench or Division should be permitted to disregard the decision of another bench or Division merely on the ground that the former consists of a larger number of Judges than the latter. The jurisdiction or powers of a Bench or Division do not increase or change with the number of Judges composing it and it would be illogical to hold that a Bench or Division consisting of the same number of Judges cannot overrule the decision of another Bench or Division, but a Bench or Division consisting of a larger number of Judges can disregard such decision. Barton J., in the concluding paragraph of his judgment in the Tramways case, (1914) 18 CLR 54, has expressed the same view while dealing with the power of the High Court in Australia to review its own previous decisions-According to that learned Judge "changes in the number of appointed Justices can,.....never of themselves furnish a reason for review". The rule regarding the application of judicial precedents in the Divisional Court and the Court of Appeal thus represents an extreme development of the doctrine of judicial precedents. The same position also obtains in regard to the House of Lords which is the highest Court of Appeal in England. In a number of cases in the later nineteenth century it was still debated whether the House of Lords was bound by its own decisions, but in 1898 the House of Lords finally settled the question and held that the House of Lords was bound by its previous decisions (vide *London Street Tramways Company v. London County Council*³⁶). This principle is now so well recognized that if, as sometimes happens, an even number of peers are sitting and they are equally divided in opinion, then, by the practice of the House, the appeal is deemed to have failed and the resultant negative is regarded as a precedent for the future. The result is that once the House of Lords has spoken, it has spoken for all time and its mistakes are beyond judicial recall. If there is any error it can be rectified only by the extremely difficult and expensive process of legislation.

112. Considerable literature has grown round this doctrine which requires implicit and unquestioned obedience to precedent and various reasons have been given by English Judges and text-book writers in justification of this doctrine. To my mind, however, the most important reason for this doctrine of judicial precedent is that it achieves certainty in the law and helps to build up law as a science. In 1833 Parke J., one of the greatest Common lawyers of his age gave this very reason in support of the theory of judicial precedents in terms which have been accepted as a locus classicus and which may be reproduced as follows:-

"Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules

are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

A little reflection would show that certainty in the rules of law by which men have to guide themselves is of greater importance than arriving at the rule which is best in itself or most logically harmonious as part of a system. It may be that a principle which is once established by decisions is not as perfect and rational as it ought to be but that is no reason why it should be reversed. It is often more important that the law should be certain than that it should be ideally perfect. Wherever a decision is departed from, the certainty of the law is sacrificed to its rational development and the evils of uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The decision, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been

³⁶1898 AC 375

dealt with in reliance on it; important contracts may have been made on the strength of it; it may have become to a great extent the basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision, though founded in error, shall stand inviolate none-the-less *communis error facit jus*. "It is better" said Lord Eldon, "that the law should be certain than that every Judge should speculate upon improvements in it." This need for certainty has also been emphasized by Earl of Halsbury L.C. in his judgment in 1898 AC 375: "Of course I do not deny that cases of individual hardship may arise and there may be a current of opinion in the profession that such and such a judgment was erroneous, but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience - the disastrous inconvenience - of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions"

Certainty of law is thus the essential characteristic of and the basic reason for the doctrine of judicial precedents and it is in achieving certainty of law that the doctrine of judicial precedents finds its greatest justification.

113. But this very characteristic which is the chief merit of the doctrine of judicial precedents is also its greatest drawback for it brings about rigidity which hampers the growth of law. There is an obvious antithesis between rigidity and growth and the doctrine of judicial precedents has often been criticized on the ground that by reason of the rigidity produced by it "the law loses the capacity to adapt itself to the changing spirit of the times which has been described as the life of the law." It is axiomatic that the law cannot at the same time be certain and still be flexible. When a rule has once become decided, even though wrongly the law becomes to that extent rigid and it is difficult or impossible to depart from it. The binding force of precedent acts as a fetter on the discretion of the Judge for the Judge is bound to follow the precedent even if he is satisfied that the precedent is erroneous. The Judge thus becomes "a slave to the past and a despot for the future, bound by the decisions of his dead predecessors and binding for generations to come the

judgments of those who will succeed him." The doctrine of judicial precedents eliminates the opportunity for judicial locus penitentiae and once a rule is established by a precedent, the Judge in a subsequent case is obliged to accept the rule and to follow it even though the result of doing so might be to reproduce and perpetuate the error. It is because of this rigidity produced by the doctrine of judicial precedents that cases occur when the Court finds itself bound by its own prior decisions of which it now disapproves but which nevertheless it is forced to follow. A good illustration of this may be found in *Olympia Oil and Cake Co. Ltd. v. Produce Brokers' Co. Ltd*³⁷, where the Court of Appeal followed its own prior decisions with the greatest reluctance. Buckley L.J., said:

"I am unable to adduce any reason to show that the decision which I am about to pronounce is rightBut I am bound by authority, which of course it is my duty to follow."

Phillimore L.J., was even more emphatic:

"With reluctance - I might almost say with sorrow - I concur in the view that this appeal must be dismissed. I trust that the case will proceed to the House of Lords".

³⁷(1915) 112 LT 744

Cases also arise where the Court is compelled in the interests of justice to spuriously distinguish its previous decisions because it cannot by reason of the doctrine of judicial precedents disregard them. The Court being powerless to overrule its previous decisions is driven to find distinctions which do not exist and which the Court would not have adopted if it had been open to the Court to disregard the previous decisions. This spurious distinguishing complicates the law by introducing unnecessary refinements and even illogicalities into the law. Also, the necessity for distinguishing sometimes leads to extraordinary mental gymnastics, which are hardly conducive to the scientific and rational development of the law. It is for this reason that a considerable body of Jurists hold the view that the doctrine of precedents far from being an instance of the superior quality of English law introduces an element of weakness in the English system of administration of justice.

114. It will thus be seen that the doctrine of judicial precedents as developed and formulated in England has achieved some measure of certainty in law but has led itself open to the criticism of rigidity. One Bench of the Divisional Court cannot disregard the decision of another Bench of the Divisional Court even though the decision of the previous Bench may be erroneous and may not commend itself to the reasoning of the subsequent Bench. An erroneous decision once given cannot be set right by any Bench of the Divisional Court and resort must be had in civil cases to the Court of Appeal. So also in the Court of Appeal an erroneous decision once given stands immune from attack and the Court of Appeal is powerless to overrule the erroneous decision. Errors of the Court of Appeal can only be corrected by the House of Lords provided the litigants

are prepared to face the costs of the appeal to the House of Lords. Speaking of the House of Lords, its errors are beyond judicial recall and the extremely difficult and expensive process of legislation has to be resorted to if the law is to be rectified. The position in India is, however, different in so far as the doctrine of binding nature of judicial precedents is concerned. The doctrine of judicial precedents as it prevails in India achieves a certain amount of balance between the opposing points of view and without sacrificing the merit of certainty it removes to a large extent the vice of rigidity in law. There are various States in India and the High Court is at the apex of the judicial hierarchy in each State. The decisions of the High Court whether they are given by a Bench of a single Judge or by a Bench of two or more Judges are binding on all Subordinate Courts within the State. Within the High Court itself the decisions may be rendered by a single Judge or by a Division Bench of two Judges or by a Full Bench of three or more Judges. Now Clause 36 of the Letters Patent of the High Court of Bombay which applies to this High Court by reason of the provisions of Sections 30 and 35 of the Bombay Reorganization Act, 1960, provides that any function which is directed to be performed by this High Court in the exercise of its original or appellate jurisdiction can be performed by any Judge of the High Court or by any Division Court constituted of two or more Judges of the High Court. It follows from this as a necessary corollary that all Judges of the High Court have co-ordinate jurisdiction meaning thereby the same jurisdiction in its entirety. Whatever can be done by a single Judge can be done by Division Bench of two or more Judges and vice versa. Each Bench of the High Court whether consisting of one Judge or two or more Judges has co-ordinate jurisdiction and if the principle which has been accepted in the Divisional Court and the Court of Appeal in England is applied, the result would be that the decision of a single Judge would be binding on a Division Bench of two Judges and a Full Bench of three or more Judges and the decision of a Division Bench of two Judges would be binding on a Full Bench of three or more Judges. The numerical strength of the Judges constituting the Bench would become an irrelevant consideration. This would, however, introduce the vice of rigidity for in that event an erroneous decision of a single Judge of the High Court would be immune from challenge before any Bench of the High Court and the only remedy of the litigant would be to approach the Supreme Court for reversal of the decision - a remedy which apart from being expensive, can be pursued only in the limited class of cases specified in Article 133 of the Constitution of India. The principle of superiority of numerical strength has, therefore, been accepted in Its application to the High Courts in India, for this principle removes to a certain extent the vice of rigidity and imparts a certain amount of flexibility to the law by providing the machinery for correction of erroneous decisions within the framework of the High Court.

115. So far as a Judge sitting singly in the High Court is concerned, he is bound to follow the previous decisions of another single Judge of the High Court on the principle of judicial comity which requires that a Court should abide by the decision of another of coordinate jurisdiction. This rule governing the application of precedents to single Judges of the High Court has been recognized in various decisions of the High Court of Bombay and other High Courts and I shall only refer to one such decision namely, *Tyabji Dayabhai and Co. v. Jetha Devji and Co*³⁸, where Sir Amberson Marten observed:

"The proper course, I think, for the learned Chamber Judge would have been to have followed that decision without expressing, if he liked, any opinion of his own and leaving it to the parties to appeal if they thought that that decision was wrong. That is the undoubted practice which prevails in the English Courts and the observations of Sir Lawrence Jenkins in *Hafizaboo v. Mahomed Cassum*³⁹ approving of a similar course taken by Mr. Justice Batty in the Court below, show incidentally that they should be adopted here and for this very good reason. The English system of law and procedure is different from that obtaining in continental countries. One essential element of it is that the Courts should deem themselves bound by decisions of Courts of co-ordinate jurisdiction and that it should not be left in cases precisely on all fours for Judge A to decide points of law in one way and Judge B in another. Think for a moment of the embarrassment that would be caused to the legal profession and to the litigating public if there was no such thing as a settled point of law and if there could be no certainty as to what the decision on any point of law would be until after judgment had been given."

The Supreme Court has also recently approved this rule which requires a Judge sitting singly in the High Court to follow the previous decisions of another single Judge of the High Court in the following passage in the judgment in AIR 1960 Supreme Court 936:

".....Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear. If Judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench and holding the view that the earlier decision is wrong,

³⁸29 Bom LR 1196 : (AIR 1927 Bom 542)

³⁹8 Bom LR 734

itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court."

This passage not only emphasises that a Judge sitting singly in the High Court should consider himself bound by the previous decision of another single Judge of the High Court but also points out the reason of this rule and the legal basis of it. This rule is required to be followed in the High Courts not by reason of any statute or common law rule but on the ground of judicial propriety and decorum. If a single Judge of the High Court is of opinion that the previous decision of

another single Judge of the High Court on a question of law is wrong, he must not give effect to his own view. He must either leave the parties to approach the appellate Court if they so desire or refer the matter to a Division Bench. A Division Bench of the High Court would not be bound by the decision of a single Judge of the High Court and would be free to consider the correctness of such decision and to declare if it so found that the law was not correctly laid down in such decision. Here one finds the first manifestation of the principle of superiority of numerical strength. A Division Bench of two Judges of the High Court can disregard the previous decision of a single Judge of the High Court even though the single Judge is a Judge of coordinate jurisdiction with the Judges constituting the Division Bench. The principle which requires that a Court should hold itself bound by the previous decision of another of co-ordinate jurisdiction is thus departed from in favor of the principle of superiority of numerical strength. The origin of this practice may perhaps be traceable to the fact that an appeal lies to the High Court under Clause 15 of the Letters Patent from the decision of a single Judge of the High Court and that such appeal is under the rules made by the High Court almost always heard by a Division Bench constituted of two Judges of the High Court. In England also the decision of the Divisional Court in respect of matters of procedure is considered binding on a single Judge of the High Court even though the single Judge and the Judges constituting the Divisional Court are all judges of the same High Court having co-ordinate jurisdiction with one another. The reason is that the determination of the single Judge in respect of matters of procedure is subject to appeal to the Divisional Court. Lord Green M.R., in *Youngs' case* 1944-1 KB 718 (supra) also observed while negating the argument that the full Court of Appeal can overrule the previous decision of a Division of the Court of Appeal consisting of lesser number of Judges:

"Certainly it cannot be said that there is any statutory right of appeal from a decision of the Court of Appeal to the full Court."

Of course the analogy of the Divisional Court is not very appropriate for it is not every decision of the Divisional Court which is binding on a single Judge but it is only the decision rendered by the Divisional Court on matters of procedure in exercise of its appellate jurisdiction over the decision of a single Judge that is binding on a single Judge whereas the decision of a Division Bench of the High Court is regarded as binding on a single Judge of the High Court irrespective of the fact whether the decision is rendered by a Division Bench in exercise of its original jurisdiction or in exercise of its appellate jurisdiction in appeal against the decision of a subordinate Court or in appeal against the decision of a single Judge of the High Court. The analogy is, however, useful to indicate the origin of the practice which regards the decision of a Division Bench of the High Court as binding on a single Judge of the High Court and makes it possible for a Division Bench of the High Court to disregard the previous decision of a single Judge of the High Court. Whatever be its origin the real principle behind the rule appears to be the principle of superiority of numerical strength. When in accordance with this rule a Division Bench of the High Court disregards the previous decision of a single Judge of the High Court and declares that the law was not correctly laid down in such decision, such decision ceases to have

any binding force as a precedent either for the subordinate Courts or for single Judges of the High Court and for all practical purposes such decision is treated as overruled by the decision of the Division Bench.

116. A Division Bench of the High Court is of course bound to follow the previous decision of another Division Bench of the High Court. When I refer to a Division Bench of the High Court I mean a Division Bench constituted of two Judges of the High Court. But here again another inroad is made on the principle which compels a Court to abide by the decision of another of co-ordinate jurisdiction. A Full Bench consisting of three or more Judges of the High Court can disregard the previous decision of a Division Bench of the High Court and declare that the law was not correctly laid down in such decision even though the Division Bench and the Full Bench are Benches of co-ordinate jurisdiction. This rule also recognizes the principle of superiority of numerical strength amongst Benches of coordinate jurisdiction. If a Division Bench of the High Court is of opinion that the previous decision of another Division Bench of the High Court is erroneous, the subsequent Division Bench should not pronounce upon the correctness of the decision of the previous Division Bench but should refer the matter to a Full Bench so that, the Full Bench can reconsider the matter and decide whether the decision of the previous Division Bench correctly lays down the law. The Full Bench may consist of three or more Judges and once a decision is rendered by the Full Bench, it should be regarded as binding on all single Judges and Division Benches of the High Court. This principle has been approved by the Supreme Court in the following passage from the judgment in Mahadeolal's case, AIR 1960 Supreme Court 936 (supra):-

"As far as we are aware it is the uniform practice in all the High Courts in India that if one Division Bench differs from an earlier view on a question of law of another Division Bench, a reference is made to a larger Bench But quite apart from any rule, considerations of judicial propriety and decorum ought never to be ignored by Courts in such matters."

There are also observations to the same effect in a later decision of the Supreme Court reported in AIR 1960 Supreme Court 1118, where it has been stated:-

"..... We had recently occasion to disapprove of the action of a Division Bench in another High Court in taking it upon themselves to hold that a contrary decision of another Division Bench on a question of law was erroneous and stressed the importance of the well-recognized judicial practice that when a Division Bench differs from the decision of a previous decision of another Division Bench the matter should be referred to a larger Bench for final decision. If, as we pointed out there, considerations of judicial decorum and legal propriety require that Division Benches should not themselves pronounce decisions of other Division Benches to be wrong, such considerations should stand even more firmly in the way of Division Benches disagreeing with a previous decision of the

Full Bench of the same Court."

These observations of the highest tribunal in the land finally set the seal of approval on the rule which requires that a Division Bench of the High Court should regard itself bound by the previous decision of another Division Bench of the High Court or a Full Bench of the High Court and that if a Division Bench of the High Court is inclined to take a view different from that taken in the previous decision of another Division Bench of the High Court, the Division Bench should not give effect to that view but should refer the matter to a Full Bench. It is also clear from these observations that this rule governing the application of precedents to Division Benches of the High Court rests not on any requirement of law but on considerations of judicial comity and judicial decorum.

117. This takes me to a consideration of the question as to how far and in what manner the doctrine of judicial precedents applies in relation to Full Benches of the High Court. The rule which requires a Court to abide by the decision of another of co-ordinate jurisdiction is sacrificed in favor of the principle of superiority of numerical strength in the case of single Judges and Division Benches of the High Court. A Division Bench of the High Court is, as I have already pointed out above, not bound by the previous decision of a Single Judge of the High Court and can in effect overrule such decision by pronouncing it to be incorrect and similarly a Full Bench of the High Court is not bound by the previous decision of a Division Bench of the High Court and can examine the correctness of such decision and declare that the law is not correctly laid down in such decision. In these cases the principle of superiority of numerical strength amongst Benches of co-ordinate jurisdiction is recognized and given effect to and a departure is made from the rule which requires that a Court should hold itself bound by the decision of another of co-ordinate jurisdiction. Now the question is, of these two competing principles which should prevail so far as Full Benches of the High Court are concerned. It is of course axiomatic that a Full Bench constituted of three Judges of the High Court - which is the minimum strength of a Full Bench - is bound by the previous decision of another Full Bench constituted of three Judges of the High Court. That this should be so is clear from the fact that both the Full Benches are Benches of co-ordinate jurisdiction and the numerical strength of the Judges composing both the Full Benches is the same. What is the position however, when a Full Bench consisting of more than three Judges of the High Court is confronted with the previous decision of another Full Bench consisting of three Judges of the High Court or a Full Bench consisting of a larger number of Judges of the High Court is confronted with the previous decision of another Full Bench consisting of a lesser number of Judges of the High Court? Is the subsequent Full Bench of the High Court bound to follow the decision of the previous Full Bench of the High Court, though the previous Full Bench consisted of a lesser number of Judges than the subsequent Full Bench? The question ultimately resolves itself into a narrow one, namely, how far the principle of superiority of numerical strength should be carried. If the principle of superiority of numerical strength is applied to Full Benches of the High Court whatever be the numerical strength of the Judges constituting the Full Benches, a Full Bench of four Judges would be able to override the

previous decision of a Full Bench of three Judges, a Full Bench of five Judges would be able to override the previous decision of a Full Bench of four Judges and so on and so forth. Beaumont, C.J., expressed a doubt as regards the correctness of this position in 43 Bom LB 864 : (AIR 1941 Bombay 408) in the following terms:-

"..... Apparently it was considered that five Judges by a majority of four to one, could overrule a unanimous decision of four Judges, the net result being that the opinion of four Judges prevailed over the opinion of five Judges of co-ordinate jurisdiction. There seems to be very little authority on the powers and constitution of a Full Bench. There can be no doubt that a Full Bench can overrule a Division Bench and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely because the later bench consists of more Judges than the earlier. If that were the rule, it would mean that a Bench of Seven Judges, by a majority of four to three, could overrule a unanimous decision of a Bench of six Judges, though all the Judges were of co-ordinate jurisdiction."

The question which arose before the Court in that case was considered in 1894 by a Full Bench of the High Court of Bombay consisting of four Judges (Sargent C.J., Telang, Candy and Fulton, JJ.), in *Queen Empress v. Mugapa*⁴⁰, and a particular conclusion was reached by the Full Bench on that question. This decision of the Full Bench of four Judges was reconsidered in 1921 by another Full Bench of five Judges (Macleod, C.J., Shah, Pratt, Fawcett and Setalvad, JJ.) in *Emperor v. Purshottam*⁴¹, Four out of the five Judges who constituted the later Full Bench came to the conclusion that the decision of the previous Full Bench was wrong. Shah, J., however, disagreed and held that the law was correctly laid down in the decision of the previous Full Bench. The net result was that the opinion of four Judges prevailed over the opinion of five Judges of co-ordinate jurisdiction and the decision of the previous Full Bench ceased to be a binding authority even though five Judges subscribed to the view taken in that decision as against four Judges who subscribed to the view taken in the later decision. It was the anomaly of this situation which prompted Beaumont, C.J., to make the aforesaid observations. This anomaly is, however, inherent in the principle of superiority of numerical strength and should not stand in the way of acceptance of that principle in its application to Full Benches of the High Court. The same anomaly also arises when four or five Judges of the High Court, each sitting singly take one view of the law on a particular point while a Division Bench consisting of two Judges takes a different view or when three or four Division Benches, each consisting of two Judges, take one view on a point of law while a Full Bench of three Judges takes a different view. The opinion of two Judges prevails over the opinion of four or five Judges in the former case while in the latter case the opinion of three Judges prevails over the opinion of eight or ten Judges, though all the Judges are of co-ordinate jurisdiction. This anomaly cannot, therefore, be a valid argument against the application of the principle of superiority of numerical strength amongst Full Benches of the High Court. The principle of superiority of numerical strength is a principle which, as I have already pointed out above, imparts

⁴⁰ ILR 18 Bom 377 (FB)

⁴¹ ILR 45 Bom 834 : (AIR 1921 Bom 3) (FB)

flexibility to the law and provides an easy machinery within the framework of the High Court itself for correction of erroneous decisions which would otherwise stand inviolate, immune from challenge except on appeal to the Supreme Court.

There is, therefore, no reason or principle why this rule based on superiority of numerical strength should not be applied amongst Full Benches of the High Court. As a matter of fact the principle of superiority of numerical strength has been accepted in its application amongst Full Benches of the High Court both by the Madras High Court in *Rajah of Mandasa v. Jagannayakulu*⁴², and the Calcutta High Court in AIR 1926 Calcutta 1153. But apart from the authority of the Madras and Calcutta High Courts, there is the high authority of the Supreme Court in AIR 1959 Supreme Court 519 which has finally settled the question beyond any controversy. In that case a Full Bench of three Judges of the High Court of Punjab did not follow the previous decision of another Full Bench of three Judges and took a view different from that reached in the previous decision and this course was disapproved by the Supreme Court in the following words:

"....Perhaps, the better course would have been to constitute a larger Bench, when it was found that a Full Bench of three Judges was inclined to take a view contrary to that of another Full Bench of equal strength. Such a course becomes necessary in view of the fact that otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another, both equally binding upon them....."

In this passage is implicit the proposition that a Full Bench consisting of a larger number of Judges can override the decision of another Full Bench consisting of a lesser number of Judges and declare that the law was not correctly laid down in Such decision. The result in such a case of course would be that the previous decision would cease to be a binding authority and would, for all practical purposes, be regarded as overruled by the later decision. It cannot therefore, be controverted that the Special Bench constituted of five Judges of this High Court can re-consider the question whether the decisions given by the High Court of Bombay prior to 1st May 1960 are binding on this Court notwithstanding the previous decision of the Full Bench of three Judges of this High Court. This preliminary question having been settled, I will now proceed to consider the main question referred to the Special Bench namely, whether the decisions of the High Court of Bombay given prior to 1st May 1960 are binding on this High Court.

118. The argument which found favor with the previous Full Bench was that the decisions of the High Court of Bombay given prior to 1st May 1960 could be regarded as "law in force" in the territories which constituted the State of Bombay and their binding character, therefore, continued under Section 87 of the Bombay Reorganisation Act, 1960, notwithstanding the bifurcation of the territories forming part of the State of Bombay. The previous Full Bench took the view that judicial precedents were within the extensive ambit of Section 87 and that the

bifurcation of the territories forming part of the State of Bombay did not, therefore, affect the applicability of the decisions given by the High Court of Bombay prior to 1st May 1960 to the territories now forming part of the State of Gujarat. It was this process of reasoning which led the previous Full Bench to come to the conclusion that the decisions given by the High Court of Bombay prior to 1st

⁴² ILR 55 Mad 883 : (AIR 1932 Mad 612) (FB)

May 1960 are binding on this High Court. I may at once point out that there was not much argument on this part of the case before the previous Full Bench and various aspects of the question which have been discussed in the course of the arguments before the Special Bench were not even touched in the course of the hearing before the previous Full Bench. There was considerable debate before the Special Bench round the question as to what is the exact scope and ambit of the expression "law in force" in Section 87 and the question was examined from different angles and viewpoints and subjected to a searching and penetrating analysis. Examining the question again in the light of the full and detailed arguments advanced before the Special Bench, I find that the view taken by me as a member of the previous Full Bench was erroneous. The true position in law appears to be that the decisions given by the High Court of Bombay prior to 1st May 1960 cannot be regarded as "law in force" within the meaning of Section 87 and their binding character as judicial precedents cannot be said to be continued under the provisions of that Section as held by the previous Full Bench. There are several reasons which have induced me to come to this conclusion and I shall now proceed to discuss those reasons.

119. The Bombay Reorganization Act, 1960, received the assent of the President and became law on 25th April 1960. By the provisions contained in Part II, the State of Bombay was reorganized by the formation of a new State known as the State of Gujarat. Part II was made up of three Sections namely, Sections 3, 4 and 5. Section 3(i) provided that as from the appointed day which was defined to mean 1st May 1960, there should be formed a new State to be known as the State of Gujarat comprising some of the territories of the State of Bombay therein set out and that the said territories should thereupon cease to form part of the State of Bombay. It was also provided by Section 3(1) that the residuary State of Bombay should be known as the State of Maharashtra. By Section 3(2) certain villages in the Umbergaon Taluka were constituted into a separate Taluka of the same name and included in Surat District. There was also some provision made in Section 3(2) for including certain villages in the Songadit Taluka of Surat District and Sagbara Taluka of Broach District. Consequential amendments were also made in the First Schedule to the Constitution by Section 4 for the purpose of showing under the heading "The States" the States of Gujarat and Maharashtra. Section 5 saved the power of the State Government to alter after the appointed day the name, extent or boundaries of any District, Taluka or Village in the State. The result was that certain territories specified in Section 3(1) were carved out of the territories forming part of the State of Bombay and constituted into the new State of Gujarat while the State of Bombay with the residuary territories continued in the name of the State of Maharashtra. Having brought about this result by the provisions contained in Part II, the Legislature made various provisions in the subsequent Parts dealing with the problems arising from the bifurcation

of the territories of the State of Bombay and the creation of the new State of Gujarat. Part III provided for representation in the Legislatures; Part IV dealt with High Courts; Part V concerned itself with authorisation of expenditure; Part VI referred to the apportionment of assets and liabilities; Part VII made provisions as to certain Corporations; Part VIII contained provisions as to services and Part IX included various legal and miscellaneous provisions. I am not concerned with the provisions contained in any of these Parts except Parts IV and IX which are the only Parts which contain provisions bearing upon the question presently under consideration. Section 28 which occurs in Part IV provided that, as from the appointed day, there should be a separate High Court for the State of Gujarat to be referred to as the High Court of Gujarat and the High Court of Bombay should become the High Court for the State of Maharashtra. Sections 29 to 40 made various provisions consequent upon the establishment of the High Court of Gujarat and Section 41 provided for the setting up of a permanent Bench of the High Court for the State of Maharashtra at Nagpur. I shall have occasion later in the course of this judgment to refer to some of the provisions contained in these Sections when I examine the question whether the High Court of Bombay prior to 1st May 1980 could be said to be a Court coordinate in jurisdiction with this High Court but it is sufficient to state at this stage that this High Court by virtue of the provisions contained in these Sections succeeded to the entire jurisdiction, powers and authority of the High Court of Bombay in respect of the territories now forming part of the State of Gujarat and took the place of the High Court of Bombay completely in relation to such territories. Part IX contained, as its very heading suggests, various legal and miscellaneous provisions. Section 87 which is the Section on which the previous Full Bench relied for the purpose of coming to the conclusion that the decisions given by the High Court of Bombay prior to 1st May 1980 are binding on this High Court was one of the provisions contained in this Part and it was in the following terms:

"87. Territorial extent of laws: The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial reference in any such law to the State of Bombay shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

The previous Full Bench held on a construction of Section 87 that the judicial precedents of the High Court of Bombay prior to 1st May 1960 were within the extensive scope and ambit of the words "law in force" in that Section and were, therefore, binding on this High Court. It is this construction of Section 87 which has been assailed before the Special Bench and the question, therefore, is what is the true scope and ambit of the expression "law in force" in Section 87.

120. The language of Section 87 does not present any difficulty in interpretation if one approaches it bearing in mind certain well-established principles of construction. Of course where the language of an enactment is plain and clear upon its face and of itself susceptible of

only one meaning then ordinarily that meaning would have to be given by the Court. In such a case the task of interpretation can hardly be said to arise, for the language best declares without more the intention of the law-giver and is decisive of it. But language at best is an imperfect medium of expression and a variety of significations may often lie in a word or expression. It has, therefore, been said that the words of a statute must be understood in the sense in which they best harmonies with the subject of the enactment and the object which the Legislature has in view and their meaning must be found not so much in a strictly grammatical or etymological propriety of language, nor in its popular use, as in the subject or in the occasion on which they are used and the object to be attained. It is not because the words of a statute read in one sense will cover the case, that that is the right sense. Grammatically they may cover it; but whenever a statute is to be construed it must be construed not according to the mere ordinary general meaning of the words but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used. Language is rarely so free from ambiguity as to be incapable of being used in more sense than one and to adhere strictly to its literal and primary meaning in all cases would be to miss its real meaning in many. The words must, therefore, be construed having regard to the subject and the occasion and the object of the enactment. It is also an established rule of construction that the intention of the Legislature must be gathered from the language used and the Court's function is not to say what the Legislature meant but to ascertain what the Legislature has said it meant. The Court should not speculate upon the intention of the Legislature in enacting any particular provision of the statute and then construe the provision in a manner which would effectuate such intention. The Court must ascertain the legislative intent from the words used and not bend the words of the statute to accord with pre-conceived intention.

It must also be remembered that where the words of a statute are sufficiently flexible, it must not be construed in a sense which attributes to the Legislature an intention to bring about an absurd or mischievous result. The construction put by the previous. Full Bench on the language of Section 87 does not accord with these well-known principles of interpretation and is founded on the erroneous view that the words "law in force" occurring in that Section are words of the widest amplitude sufficient to take within their meaning and coverage judicial precedents of the High Court of Bombay prior to 1st May 1960.

121. The provisions of Part II carved out certain territories from the State of Bombay and constituted them into the State of Gujarat and the State of Bombay with the residuary territories continued as the State of Maharashtra. Now ordinarily when a new State is formed out of the territories carved out from another State, the laws of the old State would, in the absence of any other provision, cease to apply to the territories of the new State. The old State would have no legislative competence in respect of the territories forming part of the new State and since the laws of the old State can operate only within the territories of the old State, they would not apply to the territories forming part of the new State as soon as the said territories cease to form part of the old State. The principle of law that when a new State is created out of the territories belonging to other State or States, the pre-existing laws of such State or States continue in force

until altered, amended or repealed by the new State, is a principle of State succession which applies only when the formation of the new State involves change of sovereignty and cannot apply when the new State is formed out of the territories of other existing State or States within the Union of India under the authority of the Constitution, for no change of sovereignty is involved in such process. It is, therefore clear that if there were no other provision, the laws of the State of Bombay in force immediately prior to the appointed day would have ceased to apply to the territories now forming part of the State of Gujarat as soon as the said territories ceased to form part of the State of Bombay and constituted the State of Gujarat. Section 87, therefore, provided in effect that the formation of the State of Gujarat out of the territories belonging to the State of Bombay should not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extended or applied and that the territorial reference in any such law to the State of Bombay should until otherwise provided by a competent Legislature or other competent authority, be construed to mean the territories within that State immediately before the appointed day. The object of Section 87 was clearly to provide that the bifurcation of the territories of the State of Bombay should not affect the territorial extent or application of the laws in force immediately before the appointed day so that notwithstanding the taking out of certain territories from the State of Bombay and the constitution of the said territories into the State of Gujarat, the laws in force immediately before the appointed day, if they applied to the said territories at that point of time, should continue to apply to the said territories. The provisions of Part II effected the bifurcation of the territories of the State of Bombay but the effect of the bifurcation was sought to be nullified by Section 87 in so far as the territorial extent or application of the laws in force immediately before the appointed day was concerned. Section 87 therefore, provided that the laws in force immediately before the appointed day should continue to apply to the same territories to which they applied immediately before the appointed day as if no bifurcation of the territories of the State of Bombay had taken place under the provisions of Part II. Now this provision was obviously necessary only for the laws in force immediately before the appointed day which extended or applied to the territories affected by the bifurcation made by the provisions of Part II and which as a result of such bifurcation would have ceased to apply to that part of the territories which went out of the State of Bombay to form the State of Gujarat. If there were any laws in force immediately before the appointed day which extended or applied to the territories affected by the bifurcation made by the provisions of Part II but the extent or application of which to any part of the said territories was not liable to be affected by such bifurcation, there was obviously no necessity to make any provision for preserving and continuing the extent or application of such laws to the said territories.

It is, therefore, obvious that Section 87 was enacted with a view to preserving and continuing the territorial extent and application of the laws in force immediately before the appointed day which extended or applied to the territories affected by the bifurcation made by the provisions of Part II and which as a result of such bifurcation would have ceased to apply to that part of the territories which was carved out of the State of Bombay and constituted the State of Gujarat. The marginal note also emphasizes this object and purpose of the enactment of Section 87. Though the

marginal note cannot be referred to for the purpose of construing a Section, the marginal note can certainly be looked at in order to see the general trend of the Section. The marginal note furnishes a clue as to the meaning and purpose of the Section and for this limited purpose it is permissible to make use of the marginal note. The marginal note clearly shows that the subject dealt with by Section 87 was the territorial extent of laws and that it was in order to preserve the territorial extent of laws notwithstanding the bifurcation made by the provisions of Part II that Section 87 was enacted. It is in the light of this discussion that the words "law in force" in Section 87 must be construed, for as I have already pointed out above, it is an elementary principle of construction that the words of an enactment must be construed having regard to the subject and the occasion and the object of the enactment and that meaning must be given to the words which would best harmonise with the subject of the enactment and the object of the Legislature. So construed, the words "law in force" in Section 87 must refer not to any and every law but only to such law which being in force immediately before the appointed day extended or applied to the territories affected by the bifurcation made by the provisions of Part II and which as a result of such bifurcation would have ceased to apply to the portion of the territories which went out of the State of Bombay to constitute the State of Gujarat. This meaning would be obviously more restricted than that attached by the previous Full Bench and would exclude from the scope and ambit of Section 87 judicial decisions- even if they could be regarded as law in its broadest and widest sense.

122. Before I proceed further I must refer to a distinction which was sought to be made by the learned Advocate General in regard to the use of the word "law" in different Sections of the Act. The learned Advocate General pointed out that the word "law" was used in three different combinations in various Sections of the Act. The word "law" simpliciter was used in Sections 44 and 94, the words "law made" were used in Section 88 and the words "law in force" were used in Sections 30 to 36, 87 and 90. Two contentions were advanced by the learned Advocate General founded on the distinction in these three different combinations in which the word "law" was used.

123. The first contention of the learned Advocate General was that as contrasted with the word "law" which might mean only statute law, the words "law in force" had a wider connotation and included not only statute law but also non-statute law such as personal law, customary law, common law and what is loosely termed "case law". This contention is manifestly wrong. I do not see how the addition of the words "in force" can have the effect of enlarging the scope and meaning of the word "law" when it occurs in the combination "law in force". The words "in force" must be read with the words which follow and which indicate the point of time at which law must be in force and so read the words "in force" restrict rather than enlarge the scope and meaning of the word "law" as used in that combination. The words "law in force" do not comprise every law but refer only to such law as was in force immediately before the appointed day. Take for example a law which was made by the Legislature in the sense that it was put on

the statute book but which was not brought into force by following the machinery provided by the Legislature or a law which was made by the Legislature but which was declared null and void by the Courts. In such a case the law made by the Legislature would certainly be "law" but would not be "law in force" immediately before the appointed day. The word "law" by itself according to its plain and grammatical meaning would include not only statute law but also non-statute law such as personal law, customary law and common law. Whether or not what is commonly known as "case law" is included within the word "law" is a controversial matter with which I will deal a little later in the course of this judgment. But one thing is certain that the word "law" ordinarily includes law other than codified law or statute law unless there is anything in the context to limit its meaning.

The meaning of the word "law" may be limited by the context to statute law and non-statute law may be excluded from its scope and ambit; but whatever be the meaning of the word "law" having regard to the context, whether it includes statute law or non-statute law, the addition of the words "in force" has no other effect except restricting such law to that which was in force immediately before the appointed day. By no process of reasoning can the words "in force" possibly affect the meaning of the word "law" except by cutting out of the circle of what is comprised within the meaning of the word "law" - which ordinarily includes every law, whether statute law or non-statute law, in the absence of anything on the context to limit its meaning - a segment which comprises law which was in force immediately before the appointed day. The correct approach to the interpretation of the words "law in force" is, therefore, to ascertain first of all the true scope and ambit of the word "law" having regard to the subject and the occasion and the object of the Section and then to take a cross-section by reference to the question whether it was or was not in force immediately before the appointed day. That part of the law which was in force immediately before the appointed day would be included within the words "law in force" and the rest would be excluded.

It will thus be seen that the word "law" when occurring in the combination "law in force" has no wider meaning than the word "law" simpliciter but has, on the contrary a more restricted meaning. Whether the word "law" in any particular Section means only statute law or also includes non-statute law must, therefore, depend upon the context in which the word "law" is used and the subject and the occasion and the object of the Section and the combination in which the word "law" occurs namely "law in force" would not help in the determination of the question.

124. The second contention of the learned Advocate-General was based on the distinction in the combinations in which the word "law" was used in Sections 87 and 88 of the Act. The learned Advocate-General pointed out that the words "law made" were used in Section 88 whereas the words used in Section 87 were "law in force". The words "law made" in Section 88, argued the learned Advocate-General obviously referred to statute law and since different words namely "law in force" were used in Section 87, it was obviously the intention of the Legislature to convey a different meaning and the latter words should, therefore, be construed, to include not only statute law but also non-statute law. Where the Legislature wanted to refer only to statute law - so the argument ran - the Legislature used appropriate language namely the words "law

made" in Section 88 and since those words were not used in Section 87 but the words used were different namely "law in force", the Legislature clearly meant to refer not only to statute law but also to non-statute law in Section 87. A little examination would show that this contention is not well-founded. It is undoubtedly true that it is a well-established rule of construction that distinction in language to be found in a statute is intentional and must be given effect to and that if the Legislature has used different language in different parts of the statute, the Legislature has done so deliberately and advisedly with a view to conveying different meanings. It is also true that the words "law made" in Section 88 refer only to statute law and that since these words have not been used in Section 87 but the words used there are "law in force", it can be legitimately urged that a different meaning was sought to be conveyed by the Legislature by using the latter words. But from this it does not follow that the words "law in force" in Section 87 include not only statute law but also non-statute law. The words "law in force" in Section 87 must undoubtedly bear a meaning different from that attaching to the words "law made" in Section 88 but the difference is not that the words "law made" refer only to statute law and the words "law in force" refer both to statute law and to non-statute law. The difference lies in this namely that while the words "law made" refer only to statute law, the words "law in force" refer to all law, whether statute or non-statute law, which was in force immediately before the appointed day. Of course the meaning of the term "law" in the expression "law in force" may vary with the context and the context may limit the meaning to any particular class or classes of law but whatever be the meaning of the term "law", the expression "law in force" refers to such part of the law as was immediately in force before the appointed day. The words "law in force" have been used in Section 87 because the Legislature wanted to refer not to statute laws made by the Legislature but to laws which were in force immediately before the appointed day. The words "law made" if used in Section 87 would not have carried out the legislative intent. A law may have been made by the Legislature but may not be in force and in that event though it would be covered by the words "law made" it would not be within the scope and intendment of the words "law in force". The difference in the language employed in Sections 87 and 88 cannot, therefore, be urged as a ground for holding that the words "law in force" include not only statute law but also non-statute law. The determination of this question must depend upon the true scope and meaning of the term "law" as used in the expression "law in force" in Section 87.

125. Amongst the counsel who appeared before us those who wanted to confine the meaning of the words "law in force" in Section 87 to statute law leaned heavily on the definition of "law" in Section 2(d) which referred only to statute law and which was in the following terms:

"2. Definitions: In this Act, unless the context otherwise requires-

* * * * *

(d) "law" includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having, immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay." This definition, however, cannot be employed to restrict the meaning of the words "law in force" in Section 87 to

statute law. It is an inclusive and not an exhaustive definition and it does not circumscribe the plain and grammatical meaning of the term "law" but merely brings within the meaning of that term certain specifically enumerated items so that no agitation can be permitted whether they are or are not within the meaning of that term. The term "law" is a term of wide import and its plain and grammatical meaning cannot be cut down by reference to an inclusive definition of law. This definition cannot, therefore, be of any help in construing the words "law in force" in Section 87 and these words cannot be restricted to statute law merely by reason of this definition.

126. It was on the other hand contended by those who wanted to put a broad construction on the words "law in force" in Section 87 so as to take in even judicial precedents, that these words were words of widest amplitude and included not only statute law, but also non-statute law such as personal law, customary law, common law and what is commonly known as "case law". Now it is no doubt true as pointed out by me above that the term "law" is a term of wide import and its use is not confined to statute law or enacted law and that whether or not what is commonly known as "case law" is included within the term "law", it is indisputable that the term "law" ordinarily includes law other than codified law or statute law unless there is anything in the context to limit its meaning. The words "law in force" in Section 87 would, therefore, according to their plain and natural connotation include both statute law and non-statute law.

The same words also occurred in Section 292 of the Government of India Act, 1935 and were judicially interpreted by the Federal Court in *United Provinces v. Atiqa Begum*⁴⁴, as including not only statute law but also non-statute law. Sulaiman, J., in that case, while dealing with Section 292 of the Government of India Act, 1935, observed that that Section "applies not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws". Article 372 of the Constitution of India also contains the same words and they have been interpreted in the same manner by the High Court of Bombay in *Bank of India v. John Bowman*⁴⁵,

It is therefore, clear that the words "law in force" are words of wide amplitude which can

⁴⁴ AIR 1941 FC 16

⁴⁵ AIR 1955 Bom 305

take in not only statute law but also non-statute law but the question is whether in the context in which they occur in S.87, they bear such broad meaning or their meaning is restricted by the context as also by the subject of the enactment and the scope and object in contemplation. I have said before and I may say again that words used with reference to one subject-matter or set of circumstances may convey a meaning quite different from that which the same words used with reference to another set of circumstances and another subject-matter would convey. General words admit of indefinite extension or restriction, according to the subject to which they relate and the scope and object which they are designed to achieve. It is, therefore, not enough to say that the words "law in force" according to their plain and grammatical meaning include not only statute law but also non-statute law and that these words used in Section 87, therefore, include

judicial precedents on the assumption that judicial precedents are within the meaning of the term "law". If that were so, the task of interpretation could hardly be said to arise. I must consider whether having regard to the subject matter and the context, the object of the Legislature and the language employed and applying the well-recognized principles of interpretation, the words "law in force" can be construed to include not only statute law but also non-statute law including judicial precedents or whether a limited and circumscribed meaning should be given to those words.

127. The next question to which I must address myself is whether judicial precedents can be said to be law for it is only if judicial precedents can be regarded as law that the question would arise whether on a true construction, the words "law in force" in Section 87 include judicial precedents. Judicial precedents are often referred to as Judge made law but this term, though it contains a partial truth, is apt to be misleading. So far as statute law is concerned, it cannot with any reason be contended that the Judge makes law when he interprets the statute and applies it to the facts of the case before him. The law is to be found in the statute made by the Legislature and the Judge merely ascertains the law by construing the statute according to the intent of the Legislature. The Judge does no more than to gather from the language used, the intention of the Legislature and to declare what is the law enacted by the Legislature. The Judge's function is to ascertain the legislative will by interpreting the words used in the statute and not to legislate. When the Judge interprets the statute, the Judge does not make law but merely declares what is the law made by the Legislature and gives effect to it. The law exists in the statute independently of the decision of the Judge and is not the product of judicial reasoning. It is, therefore, entirely inappropriate in the case of statute law to say that the Judge makes law when he interprets a statute enacted by the Legislature. Even in the case of non-statute law, the Judge's function is essentially interpretative and not legislative. His whole effort is to find the law and not to manufacture it. In the vast majority of cases which are directly or indirectly governed by decisions, the Judge does not 'make' law as an act of original creation. He merely applies a principle illustrated by previous examples. He ascertains the principle from precedents cited before him and applies it to the facts of the case before him. He is in this process limited in his material; he can work only upon materials which exist in the present or the past; he does not consciously project a rule into the future, but applies what he conceives to be an existing rule derived from precedents to the concrete case before him. There are no doubt a large number of cases of first impression in which he can find no specific authority to guide him; but here also it would not be correct to say that he "makes" law. In such cases he decides "not on precedent but on principle". He decides upon considerations which his professional training leads him to believe are consistent with the general principles of law.

"If he has to decide upon the authority of natural justice, or simply 'the common-sense of the thing' he employs that kind of natural justice or common-sense which he has absorbed from the study of the law and which he believes to be consistent with the general principles of..... jurisprudence. The 'reason' which he applies is, as Coke said, not

'every unlearned man's reason', but that technically trained sense of legal right with which all his learning imbues him". What he in reality does is to apply the existing principle to new sets of facts and circumstances. His function in such cases may best be described in the following words of the Judicial Committee of the Privy Council in *Juttendromohun Tagore v. Ganendromohun Tngore*⁴⁶,

".....it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wensleydale in the opinion delivered by him as a Judge in the House of Lords, in the case of *Mirehouse v. Kennel*⁴⁷ at p.546 in accordance with principles generally recognised. 'This case', said Lord Wensleydale, 'is in some sense new, as many others are which continually occur, but we have no right to consider it because it is new as one for which the law has not provided at all; and because it has not yet been decided to decide it for ourselves, according to our judgment of what is right and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents and for the sake of attaining uniformity, consistency and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science".

It is, therefore, no 'childish fiction' - as Bentham called it- to say that the judge does not and cannot 'make' law. The Judge's powers are quite different in this respect from those of the Legislator in the proper sense of that term. The Judge's function is to interpret and not to legislate. Though in the process of interpretation the Judge inevitably affects the development of the law and to that extent, his function is certainly creative but to attribute to him any law-making power is to ignore the real nature of the judicial function. It was not without reason that Lord Eshej M.R., said in *Willis v. Baddeley*⁴⁸,-

"There is in fact no such thing as Judge-made law,, for the judges do not make the law, they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable". Scrutton L.J., also gave expression to the same view in *Harnett v. Fisher*⁴⁸, when he observed:

⁴⁶ I.A. Sup Vol 47 (PC)

⁴⁸(1892) 2 Q.B. 324

⁴⁷(1833) 1 CI and F 527

"This Court, sits to administer the law; not to make new law if there are cases not provided for". It may be that in the Court of Chancery in England the theory that judicial

precedents are merely declaratory of law could not prevail having regard to the known history of the system of equity administered by that Court. The principles of equity which emanated from the Court of Chancery were indubitably the products of judicial reasoning and could not be considered to be independent and pre-existing and the declaratory theory of judicial precedents could not, therefore, apply in relation to decisions of the Court of Chancery. But so far as common law and statute law are concerned, even in England the declaratory theory of judicial precedents must be accepted for reasons which I have already mentioned above. These reasons apply with equal force to decisions of Courts in India and whether such decisions relate to statute law or to non-statute law, they are merely declaratory of law and cannot themselves be regarded as law. The declaratory theory of judicial precedents is not difficult of acceptance in so far as statute law is concerned and whatever doubt is felt is only in regard to its application to non-statute law. The doubt is, however, in my opinion, not justified and I have already given reasons for my opinion based on principle. But apart from principle I find that there is high judicial authority for the view that the declaratory theory of judicial precedent must be accepted as offering a sound analysis and explanation of the true operation of judicial decisions even in regard to non-statute law. In *Balwant Rao v. Baji Rao*⁴⁹, a question arose relating to Hindu Law of Succession which required the Judicial Committee of the Privy Council to consider whether decisions given by Courts in regard to declines of Hindu Law made law or were merely declaratory of law. One Bapuji, whose ancestors live in Maharashtra in Bombay Presidency, immigrated to a place called Chikni in the Central Provinces. He lived in Chikni and when his end was near, he started on a pilgrimage in the course of which he died leaving a daughter behind him. The daughter succeeded to the immovable property of the deceased which was situate in the Central Provinces- During her lifetime, the daughter alienated various portions of the immovable property to different persons. After her death her sons brought suits to recover the alienated portions and cross-suits were brought by the purchasers. All the suits depended on the determination of the question whether the daughter had an absolute right in the immovable property inherited by her, or had she only the same class of limited interest as is possessed by a Hindu widow. Since the quality of the right which a daughter takes who inherits immovable property from her father, has been differently determined in different parts of India, the question arose as to what was the law which regulated the succession of the deceased. Now it is absolutely settled that the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question. Prima facie any Hindu residing in a particular province in India is held to be subject to the particular doctrines of Hindu law recognized in that province. But this law is not merely a local law. It becomes the personal law and part of the status of every family which is governed by it and consequently, where any such family migrates to another province governed by another law, it carries its own law with it. The personal law of the

⁴⁹47 Ind App 213: (AIR 1921 PC 59)

immigrant would, therefore, be the law of the place from where he migrated unless of course it has been shown that he has renounced his original law in favor of the law of the place to which he migrated. It was in the light of this statement of the law that the Judicial Committee of the Privy Council considered the question and came to the conclusion that the personal law of the deceased was the law as expounded in the Presidency of Bombay where the dominating commentary is the Mayukha and that according to that law the daughter succeeded to the deceased in an absolute inheritance. The decision that according to the Mayukha the daughter succeeds to her father in an absolute inheritance was, however, given by the High Court of Bombay in 1859 in *Pranjivandas v. Devkuvarbhai*⁵⁰ Note (Bom) where as the family of the deceased had immigrated from the Presidency of Bombay sometime in 1800.

The argument was, therefore, advanced that the daughter is entitled to succeed absolutely to her father was laid down for the first time in 1859 and that since that was not the law in 1800 at the time when the family of the deceased migrated to Chikni in the Central Provinces, the succession of the deceased was not governed by that law, for the law must be the personal law as it was when the family of the deceased migrated to Chikni in the Central Provinces. This argument involved the acceptance of the proposition that the decision of the High Court of Bombay in 9 Moo Ind App 528 Note (Bom) (supra) made for the first time the law that the daughter succeeds to her father in an absolute inheritance and was not declaratory of the law as it always existed. This argument found favor with the Judicial Commissioner from whose decision the Judicial Committee of the Privy Council was hearing the appeal but it was rejected by the Judicial Committee of the Privy Council in the following words:-

".....Now, Mr. Drake-Brockman, reading the text for himself and following the decision of Mr. Neill, Judicial Commissioner in 1886, came to the conclusion that there was no difference on the point at issue between the Mayukha and the Mitakshara and that the proper Interpretation was that given by the Courts other than Bombay. In so doing, he was necessarily going in the teeth of the decision of the High Court of Bombay in the case of 9 Moo Ind App 528 (Note) (Bom). He, however, was sitting in a Court not subject to the High Court of Bombay; and he thought to avoid the question of whether that decision applied to the family with which he was dealing, by pointing out that the family had emigrated from Berar in 1800 and the date of the High Court decision was 1859. In this their Lordships hold that he was clearly wrong. He was treating the decision of 1859 as if it were a statute which imposed law for the first time. It was nothing of the sort. It was declaratory of the law as it had existed".

* * * * *

"It was argued by Sir E. Richards that this would entail the consequence that the law of the emigrated family would be subject to every change brought about by the decisions of the Courts of the Province where they no longer were. This is not so. The law must be the family law as it was when they left. A judgment declaratory of law as having always been

would bind; but it would be a different thing if subsequent customs became incorporated in the law. The distinction is pointed out in the case of *Vasudevan v. Secy. of State*⁵¹, a

⁵⁰⁹ Moo Ind App 528

⁵¹ ILR 11 Madras 157

p.162 in the judgment of the Court (Sir A. Collins C.J. and Muttusami Ayyar J.)"

It will, therefore, be seen that the Judicial Committee of the Privy Council also regarded judicial decisions given on questions of personal law as declaratory of the law as it always existed and not as of themselves making the law. If the declaratory theory of judicial precedents was recognized and accepted in relation to personal law by the Judicial Committee of the Privy Council which until recently was the highest Court of Appeal so far as this country is concerned, I do not see any reason why it should not be accepted as a valid theory explaining the true basis and operation of judicial decisions in regard to other non-statute law. This is one of the main reasons why I incline to the view that judicial precedents cannot be regarded as law so as to fail within the scope and ambit of the words "law in force" in S.67.

128. There is another equally clear and effective reason which impose me to come to the conclusion that judicial precedents cannot be regarded as law. Judicial precedents are considered binding on subordinate Courts and Courts or co-ordinate jurisdiction and that is why in relation to such Courts it is often said, though loosely, that judicial decision are law. This terminology is, however, misleading and ignores the true principle underlying the binding character of judicial decisions. Judicial decisions are often loosely referred to as law due to a misconception as to the real basis of operation of judicial precedents. I have already dealt with this subject at great length in the earlier portion of this judgment and pointed out that binding character attaches to judicial decisions not by reason of any common law or statutory rule but by reason of what may be called comity among Judges. It is only on the principle of judicial comity and judicial decorum that judicial decisions are under certain circumstances and qua certain Courts invested with binding authority. There is no rule founded either in statute or in common law which requires implicit and unquestioning obedience to the individual precedent of another Court under any circumstances. When a Court regards itself as bound by the individual precedent of another Court, it does so only on grounds of judicial comity and propriety. The decisions of the Supreme Court in AIR 1960 Supreme Court 936; AIR 1960 Supreme Court 1118 and AIR 1959 Supreme Court 519 to which I have already made reference while considering the question relating to the powers of the Special Bench, also emphasize that the true principle explaining the binding character of judicial precedents is the principle of judicial comity and judicial decorum. The history of the evolution of the doctrine of judicial precedents which I have traced earlier while dealing with the same question also points unmistakably to the conclusion that it is this principle which furnishes the true explanation of the binding character of judicial precedents. It is clear that it is by a process of self-stultification - by forging fetters on their own feet - that the Judges have evolved the doctrine which attaches absolute binding character to judicial precedents. The evolution of the doctrine in India has been, as I have pointed out, different from the evolution in England and much of the rigidity which affects the doctrine as it prevails in England is absent in India. This difference in

the operation of the doctrine in the two countries - -which is by no means inconsiderable - again those into bold relief the true basis and operation of judicial precedents and illustrates the validity of this principle based on judicial comity and judicial decorum, I may refer in this connection to a paradoxical position which arises in regard to decisions of the House of Lords and which brings out clearly the point which I wish to make. The legal view in England today is that the House of Lords is bound by its own decisions. Suppose a lawyer who puts forward this proposition is asked what is his authority for it. He will certainly say that the House of Lords is bound by its own decisions because that was decided in 1898 AC 375 (supra). But this answer plainly involves the fallacy of begging the question. It assumes that which it seeks to prove. For the case referred to is itself a decision of the House of Lords and the whole question is whether such a decision is binding on the House of Lords. The doctrine of precedent cannot be authoritatively supported by reference to precedent. The doctrine of precedent cannot, to use the words of Sir John Salmond "pull itself up by its own bootstraps". It would, therefore, be logically possible for the House of Lords to declare that it is not bound by its own decisions and that the first decision which it proposes to overrule is 1898 AC 375. It would thus be clear that binding character attaches to decisions of the House of Lords not because any rule of law says so but because the House of Lords itself has said so and according to logic and reason the House of Lords can at any time say to the contrary and declare that it shall not be bound by its own decisions and that it was wrong when it said that it was bound by its own decisions. This illustration emphasizes the true principle on which binding character attaches to judicial precedents. That principle is based not on any rule of common law or on any statutory rule but on considerations of judicial comity and judicial decorum. If this is the position it is difficult to see how judicial decisions can be regarded as law. If judicial decisions are law, they must be binding on Courts as law and their binding effect should not depend on the insecure foundation of judicial comity and judicial decorum. The Courts are constituted to administer law and under their constitution, they are bound to administer law as a matter of legal obligation and not as a matter of judicial propriety or comity. If, therefore, judicial decisions are law, Courts would be bound by judicial decisions and would have to give effect to the law as found in judicial decisions as a matter of legal obligation and not on considerations of judicial propriety and decorum. Law for its binding effect cannot depend on consideration of judicial comity and decorum; its compulsive effect must depend on the sanction of the State. The absolute binding character of judicial precedents, however, rests as I have pointed out above, on the principle of judicial comity and decorum and they have no binding effect except by reason of what may be called comity amongst Judges. Judicial precedents thus lack the most distinctive characteristic of law and I do not see how they can be regarded as law.

129. But quite apart from this argument there is another argument which is equally fatal to the contention that judicial decisions must be regarded as law. Judicial precedents are divisible into two classes, which may be distinguished as authoritative and persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice. An authoritative precedent is one which the Judges must follow whether they approve of it or not. It is binding upon them and excludes their judicial discretion for the future. A

persuasive precedent on the other hand is one which the Judges are under no obligation to follow, but which they will take into consideration and to which they will attach such weight as they consider proper. A persuasive precedent depends for its influence upon its own merits and not upon any legal claim which it has to recognition. Now a little reflection would show that this classification does not divide judicial precedents into two mutually exclusive classes. The same judicial precedent may be authoritative in one Court and persuasive only in another. Thus a judicial decision of a single Judge of the High Court is authoritative for the subordinate Courts and for single Judges of the High Court but persuasive only for a Division Bench or a Full Bench of the High Court and for the Supreme Court. In the same way a judicial decision of a Division Bench consisting of two Judges of the High Court is authoritative for the subordinate Courts as also for single Judges and Division Benches consisting of two Judges of the High Court but it is persuasive only for a Full Bench of the High Court and the Supreme Court. The same position obtains in regard to a judicial decision of a Full Bench of the High Court. The judicial decision though authoritative for the subordinate Courts and single Judges, Division Benches consisting of two Judges and Full Benches consisting of the same or lesser number of Judges of the High Court, is persuasive only for Full Benches consisting of a larger number of Judges of the High Court and the Supreme Court. It is under these circumstances impossible to regard a judicial decision of the High Court as law. How can a judicial decision be law for one Court and not be law for another Court? Law cannot vary from Court to Court; there cannot be one law for one Court and another law for another Court. Law cannot change at different stages in the course of the litigation merely because progressively superior Courts are approached at such stages. Take for example a judicial decision of a single Judge of the High Court. Such judicial decision would be binding on the subordinate Courts and would, therefore, be, if the argument which found favor with the previous Full Bench were accepted, law for the subordinate Courts. The litigation would have to be decided by the subordinate Courts in accordance with such judicial decision. When the litigation reaches the stage of appeal before the High Court and the appeal comes up for hearing before a Division Bench consisting of two Judges of the High Court, such judicial decision would cease to be law because it would not be binding on the Division Benches of the High Court. The Division Bench of the High Court would be free to decide the litigation unfettered by such judicial decision. The result would be that such judicial decision would be law at one stage of the litigation but would cease to be law at another stage. Such judicial decision would be law in one Court and cease to be law in another Court. The same absurdity would result also in the case of a judicial decision of a Division Bench consisting of two Judges of the High Court or even a Full Bench consisting of three or more Judges of the High Court. If a judicial decision is law, it must be law which governs the rights and liabilities of the parties in all Courts and it should not make any difference as to whether the litigation in respect of such rights and liabilities is pending in the subordinate Court or before a single Judge or a Division Bench or a Full Bench of the High Court or in the Supreme Court. That, however, is obviously not the position. This circumstance, in my opinion, strongly militates against the contention that judicial decisions must be regarded as law.

130. There is also another argument which logically follows upon the previous argument and must lead to the conclusion that judicial decisions cannot be regarded as law. A judicial decision of a single judge of the High Court though authoritative for the subordinate Courts and for single Judges of the High Court, would be liable to be overruled by a Division Bench of two Judges of the High Court or by a Full Bench of three or more Judges of the High Court. Similarly a judicial decision of a Division Bench consisting of two Judges of the High Court would, though authoritative for the subordinate Courts and single Judges of the High Court and Division Benches consisting of two Judges of the High Court, would be liable to be rendered ineffective by a Full Bench consisting of three or more Judges of the High, Court and would also be liable to be overruled by the Supreme Court. A judicial decision of a Full Bench consisting of three or more Judges of the High Court would also have no finality for it would be liable to be rendered ineffective by a Full Bench consisting of a larger number of Judges of the High Court and would also be liable to be overruled by the Supreme Court. This being the position, I do not see how any judicial decision of the High Court - whether of a single Judge or of a Division Bench consisting of two Judges or of a Full Bench consisting of three or more Judges - can be regarded as law. If such judicial decision is law, it must be administered and given effect to in all Courts and no Court can set it at naught. I cannot conceive how if such judicial decision is law, a larger Bench of the High Court or the Supreme Court can in effect alter the law by overruling such judicial decision. The effect of declaring erroneous or overruling such judicial decision would be to alter the law - if such judicial decision were regarded as law - and I do not think it has yet been given to Courts of law to alter the law. The Courts exist for the purpose of administering the law and not for the purpose of creating it or altering it. The result of the acceptance of the argument which invests judicial decisions with the character of law would be to recognize a distinct law making machinery apart from the Legislature with its own hierarchy capable at each stage of altering the law created by such machinery. This would indeed be a startling result contrary not only to all accepted notions but also to the Constitution which vests all the law-making power in the Legislature and does not entrust any part of it to the Courts. This argument by itself would, in my opinion, be sufficient to dispose of the contention that judicial decisions should be regarded as law.

131. But the matter does not rest there. There are various anomalies which would arise if judicial decisions were regarded as law. Suppose there are two decisions - each of a single Judge of the High Court- which have taken conflicting views on a point of law. This may have happened through inadvertence because the earlier decision was not cited before the Judge who gave the later decision or the "inadvertence" may be intentional- a Nelsonian "blind-eye". The question might well be asked in such a case; which of the two decisions is law? Now if a judicial decision is regarded as law because it has binding authority on other Courts, it is clear that the answer to the question must be that neither decision is law for in view of the conflict it cannot be said of either decision that it has any binding authority on other Courts. It is well-settled law that where decisions of equal standing are irreconcilably in conflict, the Court is not bound by either decision and is free to pick and choose between them. Neither decision can, therefore, be

regarded as law. The result would be that though when the later decision was not given the earlier decision held the field and, because of its binding force, could be regarded as law, the earlier decision was robbed of its binding force and, therefore, ceased to be law on the later decision being given. This would indeed be a strange result, for its effect would be to make the law dependant on the accident of litigation. The rule laid down by the earlier decision which was law while the earlier decision held the field would cease to be law merely by reason of the inadvertent or deliberate refusal of the Judge who gave the later decision to follow the earlier decision. But the anomaly does not end here. While the two decisions stand side by side, neither the rule laid down by the earlier decision can be regarded as law nor can the rule laid down by the later decision be regarded as law, for as pointed out above, neither decision can be considered law. There would thus be a vacuum in law. Now pushing the example a little further, suppose that a Division Bench of the High Court accepts the view taken in the earlier decision and rejects the view taken in the later decision. The decision of the Division Bench would, according to the present argument, be law because of its binding authority and the rule laid down in the earlier decision and accepted by the Division Bench would, therefore, have the force of law. The result would be that the rule which was law while the earlier decision held the field and which ceased to be law on the later decision being given, would again become law by reason of the decision of the Division Bench. Though the same rule when laid down in the earlier decision was not law during the period when the two decisions of single Judge stood side by side with each other, it would be law from the date of the decision of the Division Bench. This would indeed be a highly anomalous situation. Then again suppose a Full Bench of the High Court takes a different view and accepts the later decision of the single Judge as correct and rejects the earlier decision of the single Judge and the decision of the Division Bench as erroneous. Until the Full Bench decision was given, the decision of the Division Bench was binding and was, therefore, law and the effect of the decision of the Full Bench would, therefore, be to change the law. Another consequence of the decision of the Full Bench would be that the rule laid down by the decision of the division Bench which was law while the earlier decision of the single Judge held the field and which ceased to be law during the period when the two decisions of single judge stood side by side and which again became law after the decision of the Division Bench would again cease to be law after the decision of the Full Bench. If on the other hand it is regarded that the rule laid down by the Full Bench was always law and that the Full Bench merely declared what was always law, it would follow that the rule laid down by the Division Bench was not law even when the decision of the Division Bench held the field and was not overruled by the decision of the Full Bench. But that would negative the theory that the decision of the Division Bench was law so long as that decision stood unreversed by the Full Bench. These and others are the anomalies which would arise if the theory that judicial precedents are law is pushed to its logical conclusion. The real explanation behind the operation of judicial decisions seems to be that judicial decisions are not law but they are merely declaratory of law. The law exists not by virtue of the decisions but is merely declared by the decision. When the Division Bench in the case given above accept; the view taken in the earlier decision of the single Judge and rejects the view taken in the later decision of the single Judge, the Division Bench does not give to the rule recognized by it the

impress of law for the first time but merely declares that the rule is the law as it always existed and that the law was correctly laid down in the earlier decision and not in the later decision of the single Judge. Similarly when the Full Bench accepts the later decision of the single Judge and rejects the earlier decision of the single Judge and the decision of the Division Bench, the Full Bench does not make or change any law. The Full Bench merely declares that the Division Bench and the single Judge who gave the earlier decision had erred in ascertaining the law and that the rule recognized by it is the law as it always existed. The entire process is one of ascertainment of the law and judicial decisions merely ascertain and declare the law and cannot of themselves be regarded as law.

132. There is also another argument in favor of the view that judicial decisions cannot be regarded as law and it really follows upon the previous argument. That argument can best be illustrated by an example. Suppose there is a decision of a Full Bench of the High Court which lays down a particular rule relating to a point of Hindu Law. If the argument which found favor with the previous Full Bench were to be accepted, the rule laid down by the decision of the Full Bench would be law and would govern the rights and liabilities of the parties. Now suppose the Supreme Court overrules the decision of the Full Bench and lays down another rule on the particular point different from the rule laid down by the decision of the Full Bench. When the Supreme Court overrules the decision of the Full Bench and lays down a different rule, the Supreme Court in effect says that the law was erroneously declared in the decision of the Full Bench and that the rule laid down by the Supreme Court was always the law. Once the Supreme Court gives its decision, the rule laid down by the Supreme Court represents the law as it always existed even before the decision of the Supreme Court. It must, therefore, follow that the rule laid down by the Supreme Court was the law even at the time when the decision of the Full Bench stood unreversed by the Supreme Court and that consequently the decision of the Full Bench did not represent the correct law. The law was always that which was ultimately declared by the Supreme Court and it was that law which governed the rights and liabilities of the parties. The Full Bench had erroneously declared the law and such erroneous declaration was set right by the Supreme Court. I fail to see how under these circumstances the decision of the Full Bench can be said to be law. So long as no finality attaches to a judicial decision it is impossible to regard the judicial decision as law. The decision of the High Court can always be overruled by the Supreme Court and once the Supreme Court has overruled the decision of the High Court, the rule laid down by the Supreme Court is the law as it always existed and the contrary rule laid down by the decision of the High Court cannot at any time be said to have been the law. Even so far as the Supreme Court is concerned, the decisions of the Supreme Court do not make law; the Supreme Court merely declares the law and that is why Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all the Courts within the territories of India. I do not think, therefore, that it would be right to regard judicial decisions as law.

133. These are some of the considerations which impel me to come to the conclusion that judicial

decisions cannot be regarded as law so as to fall within the scope and meaning of the words "law in force" in Section 87. But even apart from these considerations it is clear that judicial decisions cannot possibly be regarded as included within the scope and meaning of the words "law in force" occurring in that Section. The words "law in force" as I have already pointed out above refer not to any and every law but only to such law which being in force immediately before the appointed day extended or applied to the territories affected by the bifurcation of the State of Bombay and which as a result of such bifurcation would have ceased to apply to the portion of the territories carved out of the State of Bombay to form the State of Gujarat. The law contemplated by Section 87 is law which had territorial extent and application in the territories affected by the bifurcation immediately before the appointed day and which as a result of such bifurcation would have ceased to apply to the portion of the territories which went out of the State of Bombay to constitute the State of Gujarat. If there was any law in force immediately before the appointed day which had no territorial extent or application in the territories affected by the bifurcation or which, extended or applied to the said territories but the extent or application of which to any part of the said territories was not liable to be affected by the bifurcation, such law would obviously not be within 'the scope and ambit of the words "law in force" in Section 87 for it would not be necessary in the case of such law to make any provision for preserving and continuing the extent or application of such law to the said territories. It is, therefore, necessary that the law in order to fall within the meaning and intendment of the words "law in force" should satisfy two requirements. Firstly, the law must have had immediately before the appointed day territorial extent or application in the territories affected by the bifurcation and secondly, the law must be such that but for Section 87 it would have, as a result of the bifurcation, ceased to apply to the portion of the territories carved out of the State of Bombay to form the State of Gujarat. It is only if these two conditions are satisfied that the law can come within the scope and ambit of Section 87. Such law would obviously be only statute law. It is clear that it Cannot be said of judicial decisions that they have any territorial extent or application at all. Judicial decisions are binding on certain Courts under certain circumstances on considerations of judicial comity and judicial decorum and they do not extend or apply to any territories as such. Take the case of two parties resident in Calcutta. Suppose they enter into a contract in Calcutta a part of which is to be performed in Madras and a breach of the contract is committed by one of the parties whom I will for the purpose of the present discussion call the defendant. Now it is obvious that the suit to recover damages for breach of the contract can be filed by the other party namely the plaintiff either in Calcutta or in Madras. If the suit is filed in Calcutta, the rights and liabilities of the parties would be adjudicated upon in accordance with the judicial precedents of the High Court of Calcutta bearing upon the particular point of law of contract arising in the case while if the suit is filed in Madras the rights and liabilities of the parties would be adjudicated upon in accordance with the judicial precedents of the High Court of Madras bearing upon that point. If judicial precedents are regarded as law, the result would be that the law governing the rights and liabilities of the parties would depend not upon the facts of the case such as residence of the parties, situs of the contract etc., but would depend upon the Court in which the suit is brought. If the suit is brought in Calcutta, the law applicable would be

one while if the suit is brought in Madras, the law applicable would be another on the same set of facts. The law governing the rights and liabilities of the parties would thus depend upon the accident of the forum rather than the substance of the matter. This would indeed be a strange result and without anything more, it should be sufficient to induce the Court to take the view that judicial decisions cannot be regarded as law. But the point which I wish to emphasize in this connection is that judicial precedents cannot be said to have any territorial extent or application. If in the case given above the suit is brought in Calcutta, the rights and liabilities of the parties would be determined in accordance with the judicial precedents of the High Court of Calcutta and since the parties are resident in Calcutta and the contract is made in Calcutta and is to be substantially performed in Calcutta, it may be possible in such a case to regard the judicial precedents of the High Court of Calcutta as having some nexus with the territories within the jurisdiction of the High Court of Calcutta. But if the suit is brought in Madras then even though the parties are resident in Calcutta and the contract is made in Calcutta and is to be substantially performed in Calcutta, the rights and liabilities of the parties would be determined in accordance with the judicial precedents of the High Court of Madras and not in accordance with the judicial precedents of the High Court of Calcutta. The result would be that the rights and liabilities of the parties resident in Calcutta in respect of a contract entered into in Calcutta and to be substantially performed in Calcutta would be adjudicated upon not in accordance with the judicial precedents of the High Court of Calcutta but in accordance with the judicial precedents of the High Court of Madras. The judicial precedents of the High Court of Calcutta would not govern the determination of the rights and liabilities of the parties though the parties are resident in Calcutta and the contract is made in Calcutta and is to be substantially performed in Calcutta but the rights and liabilities of the parties would be determined in accordance with the judicial precedents of the High Court of Madras because the forum in which the suit is brought would under the doctrine of judicial precedents be bound by the judicial precedents of the High Court of Madras. This example illustrates very forcibly the preposition with which I started namely, that judicial precedents merely bind certain Courts under certain circumstances on the principle of judicial comity and judicial decorum and they do not extend or apply to any territories as such as to fall within the scope and ambit of the words "law in force" in Section 87.

134. There is also another reason why I am inclined to take the view that judicial decisions cannot be regarded as coming within the scope and ambit of the words "law in force" in Section 87. If judicial decisions are regarded as included within the scope and meaning of the words "law in force" in Section 87 it is obvious that even a decision of a single judge of the High Court of Bombay would be law in force and would continue under Section 87 to apply to the territories now forming part of the State of Gujarat as law in force. But if a decision of a single Judge of the High Court of Bombay is continued as law in force in the territories now forming part of the State of Gujarat, it must follow as a necessary corollary that until amended, altered or repealed by the Legislature, such decision would bind not only single judges of this High Court but also Division Benches and Full Benches of this High Court and even the Supreme Court in relation to appeals from this High Court, for it would be the law in force in the territories now forming part

of the State of Gujariat. Being law in force in the territories now forming part of the State of Gujarat, all Courts including Division Benches and Full Benches of this High Court and the Supreme Court would be bound to give effect even to the decision of a single Judge of the High Court of Bombay and would be powerless to ignore it or to overrule it. The anomalous situation would arise that even though a Division Bench of the High Court for the State of Maharashtra would be entitled to overrule a decision of a single Judge of the High Court of Bombay and declare that the law was erroneously laid down in such decision, a Division Bench or a Full Bench of this High Court or even the Supreme Court in relation to appeals from this High Court, would have no power to set at naught or to overrule such decision even though the law was erroneously laid down by such decision. This result surely could not have been intended by the Legislature. If the Legislature intended to include within the scope and ambit of the words "law in force" in Section 87, judicial decisions given by the High Court of Bombay prior to the appointed day, the Legislature would have certainly provided the machinery for setting at naught or overruling such judicial decisions in the same manner in which it could be done by the High Court for the State of Maharashtra. The Legislature would have created a legal fiction that the decisions given by the High Court of Bombay prior to the appointed day should be deemed to be decisions of this High Court for in that event this High Court could have considered the correctness of such judicial decisions in accordance with the well recognized rules governing the application of judicial precedents. The Legislature has, however, not provided such machinery and the inference must, therefore, be irresistible that the Legislature did not intend to include judicial decisions given by the High Court of Bombay prior to the appointed day within the scope and meaning of the words "law in force" in Section 87. The Legislature could not have intended that so far as the State of Gujarat is concerned, the law as declared in the decisions of the High Court of Bombay given prior to the appointed day- whether the decisions be of a single Judge or of a Division Bench or of a Full Bench- should be petrified and that it should not at all be open to this High Court or to the Supreme Court hearing appeals from this High Court to set right any erroneous declaration of law contained in such decisions. The consequence of accepting the argument that the decisions of the High Court of Bombay given prior to the appointed day are "law in force" within the meaning of that expression as used in Section 87 is so startling that the argument must straightway be rejected. The effect of the acceptance of the argument would be to place this High Court in an inferior position as compared to the other High Courts and to emasculate the powers of this High Court to such an extent that this High Court must accept the law as declared in the decisions of the High Court of Bombay given prior to the appointed day- whether the decisions be of a single Judge or of a Division Bench or of a Full Bench- and that this High Court should not have the power to question the correctness of any such decisions even in accordance with the rules governing the application of judicial precedents. I cannot accept a construction which leads to such absurd and mischievous result. It was contended in reply to this argument that the result would not be so absurd or mischievous for it would always be open to this High Court to declare that the law was not correctly laid down in any decision of the High Court of Bombay given prior to the appointed day and that until this High Court so declared, the law laid down by the decision of the High Court of Bombay would continue as the law in force.

This contention, in any opinion, suffers from two defects. The first defect is that it assumes the existence of a power in this High Court to alter, amend or repeal the law which power is obviously not found in any provision of the Act. If the decisions given by the High Court of Bombay prior to the appointed day were law in force and continued in their application to the territories now forming part of the State of Gujarat as law in force, I do not see how such law could be changed by this High Court unless express power in that behalf was conferred on this High Court. The second defect is that if it is conceded that it is open to this High Court to declare that the law was not correctly laid down in any decision of the High Court of Bombay given prior to the appointed day, it would prove the argument against the acceptance of judicial decisions as law in force rather than refute it. If this High Court can question the correctness of any decision of the High Court of Bombay and decide for itself what the law really is, it must follow that the decisions of the High Court of Bombay given prior to the appointed day are not law in force for the existence of such a power in this High Court would be inconsistent with the judicial decisions given by the High Court of Bombay prior to the appointed day, being law in force. I must, therefore, hold that judicial decisions cannot be regarded as coming within the scope and ambit of the words "law in force" in Section 87.

135. Before I part with this question I must refer to Section 119 of the States Reorganization Act, 1956, which is a Section similar to Section 87 of the Bombay Reorganization Act, 1960. By Part II of the States Reorganizations Act, 1956, various new States were brought into existence. Several territories were transferred from the former State of Hyderabad to the State of Andhra and from the former State of Travencore-Cochin to the State of Madras. There was formed the new State of Kerala out of some of the territories of the former State of Travencore-Cochin and the former State of Madras. The islands of Laecadivi, Minicoy and Amindivi were constituted into a new Part C State. The new State of Mysore was formed out of the territories of the former States of Mysore and Coorg and some of the territories of the former States of Bombay, Madras and Hyderabad. The new State of Bombay was constituted with its territories drawn from the then existing States of Bombay, Hyderabad, Madhya Pradesh, Saurashtra and Kutch. Some of the territories of the then existing States of Madhya Pradesh, Madhya Bharat, Rajasthan, Bhopal and Vindhya Pradesh were combined to form the new State of Madhya Pradesh. Similarly the new State of Rajasthan was constituted out of the territories of the then existing State of Ajmer and some of the territories of the then existing States of Rajasthan, Bombay and Madhya Bharat. The new State of Punjab was also created out of the territories of the then existing States of Punjab and the Patiala and East Punjab States Union. The political map of India was thus redrawn and the boundaries of some of the existing States were altered while other States were abolished and new States were brought into being. To provide for the continued territorial extent and application of laws in this set up, Section 119 was enacted in the States Reorganizations Act, 1956. That Section was in the following terms:

"119. Territorial extent of laws:- The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to an existing

State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

Now it is obvious that the words "law in force" in Section 119 of the States Reorganizations Act, 1956, must bear the same meaning as those words in Section 87 of the Bombay Reorganizations Act, 1960, for both the Sections were enacted for the same purpose namely, preserving the territorial extent and application of laws which were in force immediately before the appointed day. The Legislature did not want the territorial extent and application of laws in force immediately before the appointed day to be in any way disturbed or affected by the transfer of territories from one State to another or by the creation of new States. The political map of India was redrawn due to various political exigencies but the continuity of laws in force immediately before the appointed day was not intended to be interrupted or broken so that notwithstanding the transfer of the territories from one State to another and the constitution of new States, laws in force immediately before the appointed day should continue to extend and apply to the same territories to which they extended or applied immediately before the appointed day. Now if the words "law in force" in Section 119 of the States Reorganizations Act, 1956, included decisions of various superior Courts in the territories affected by the reorganization of States, the result would indeed be disastrous. Take for example the State of Bombay which as a result of the reorganization of the States lost some of its territories to the State of Mysore and acquired the territories of the then existing States of Saurashtra and Kutch and some of the territories of the then existing States of Hyderabad and Madhya Pradesh. Over the territories drawn from these different States different High Courts exercised jurisdiction and if judicial decisions were regarded as law in force, there would be within the State of Bombay as newly constituted, different interpretations of the same or similar legislative enactments as also different rules of law on the same or similar points. If the High Court of Saurashtra had placed one particular interpretation for example on a Section of the Transfer of Property Act and the High Court of Bombay had placed another construction, the construction placed by the High Court of Saurashtra would have to be given effect to in the territories comprised in the former State of Saurashtra and the construction placed by the High Court of Bombay would have to be given effect to in the territories forming part of the State of Bombay prior to its reorganization. Similarly the interpretation placed by the High Court of Madhya Pradesh will prevail in the territories forming part of the former State of Madhya Pradesh and the same position will obtain in regard to the territories forming part of the former State of Hyderabad. The High Court of the reorganized State of Bombay would, therefore, have to give different interpretations to the particular Section of the Transfer of Property Act according as the matter came from one territory or another within the State. The High Court of the reorganized State of Bombay would have to speak different voices in different territories of the State and far from there being uniformity in the administration of justice- which the doctrine of judicial precedents is intended to achieve- there would be chaos and confusion. The High Court of the Reorganised State of Bombay would be placed in the most embarrassing and inconsistent position in which it would have to uphold

different interpretations of the same or similar enactments as correct expositions of the Legislative will depending upon the territories from which the matter comes before it. I do not see how the High Court of the Reorganised State of Bombay could say in a matter coming from one territory within the State that a particular interpretation is the correct interpretation of an enactment and at the same time declare in a matter coming from another territory within the State of Bombay that a different interpretation is the correct interpretation of the same enactment. The same position would also obtain in, regard to non-statute law. The High Court of the reorganised State of Bombay in a matter coming from one territory within the State would have to declare that a particular rule is the correct law and at the same time declare in a matter coming from another territory within the State that that rule is not the correct law but that a different rule is the correct law. The Legislature surely could not have intended to bring about such an absurd and mischievous result by the provisions of Section 119 of the States Reorganizations Act, 1956. It might also be noted that if judicial decisions were regarded as law in force, judicial decisions given by the High Court of Saurashtra and the Highest Court in Kutch would be preserved as law in force in the territories of the former States of Saurashtra and Kutch by virtue of the provisions of Section 119 of the States Reorganizations Act, 1956 and the same would continue in operation in the said territories as law in force under the provisions of Section 87 of the Bombay Reorganizations Act, 1980, unless the same were lawfully set aside or had ceased to operate by reason of legislative changes effected between 1st November 1956, when the State of Bombay was reorganized and 1st May 1960, when the State of Bombay was bifurcated and the State of Gujarat was constituted. The result would be that judicial decisions given by the High Court of Saurashtra and the highest Court in Kutch would continue as law in force in the territories of the former States of Saurashtra and Kutch even after the formation of the new Slate of Gujarat and the constitution of this High Court. This High Court would, therefore, in a matter coming from the territories of the former State of Saurashtra be bound by the decisions of the former High Court of Saurashtra and in a matter coming from the territories of the former State of Kutch, this High Court would be bound by the decisions of the highest Court in Kutch and the binding effect of these decisions would extend not only to this High Court but also to the Supreme Court in matters coming from the respective territories. This would be a startling result which I am sure could never have been intended by the Legislature. It is, therefore, clear that the words "law in force" in Section 119 of the States Reorganisation Act, 1956, could not include judicial decisions. If the words "law in force" in Section 119 of the States Reorganisation Act, 1956, could not bear a meaning wide enough to include judicial decisions, it must follow that the same words in Section 87 of the Bombay Reorganisation Act, 1960, also cannot be construed to include judicial decisions and judicial decisions cannot be regarded as law in force within the meaning of that expression as used in Section 87 of the Bombay Reorganisation Act, 1960.

136. These are the reasons which have induced me to take a different view from that reached by me as a member of the previous Full Bench on this important question whether judicial decisions are within the scope and meaning of the words "law in force" in Section 87. Section 87 provides that the bifurcation of The territories of the State of Bombay shall not be deemed to have effected

any change in the territories to which any law in force immediately before the appointed day extended or applied. This High Court must, therefore, in order to find out what is the law in force in the territories forming part of the State of Gujarat, ascertain what was the Law in force immediately before the appointed day which extended or applied to the territories affected by the bifurcation, for Section 87 declares that the territorial extent or application of such law shall not be affected by the bifurcation and such law shall continue to apply to the territories comprised in the State of Gujarat. This High Court must ascertain the law for itself unfettered by any decision of any other High Court for there is no provision in the Act which says that this High Court should regard itself as bound by the decisions of any other High Court for the purpose of ascertaining the law. It is the law ascertained by this High Court unfettered by any decision of the High Court of Bombay which would continue in force in the territories forming part of the State of Gujarat under Section 87. Take for example a particular Section of the Transfer of Property Act. The correct meaning of this Section would be the law in force in the territories of the State of Bombay immediately before the appointed day and for the purpose of ascertaining the law in force it would be open to this High Court to determine the correct meaning even though it be different from that placed on the Section by the High Court of Bombay. The High Court of Bombay may have placed an erroneous interpretation on the Section. It is not the erroneous interpretation of the Section which would be in force in the territories of the State of Bombay immediately before the appointed day. The law in forces immediately before the appointed day in the territories of the State of Bombay would be the correct meaning of the Section and it would be open to this High Court to ascertain the correct meaning without being bound by the meaning put upon the Section by the decisions of the High Court of Bombay. This would show that there is nothing in Section 87 which should compel the conclusion that judicial decisions of the High Court of Bombay are "law in force" within the meaning of those words as used in that Section or that they should be regarded as binding on this High Court.

137. I may add here that the question of the binding character of judicial precedents has come up for consideration before various High Courts as a result of the reorganization of various States and the constitution of new States. But in none of these cases provisions similar to Section 87 have been construed to include judicial precedents and judicial precedents have not been regarded as law within the meaning of those provisions. There are at least three decisions of different High Courts in India where the view has been taken that in provisions similar to Section 87, law cannot include judicial precedents. They are AIR 1927 Rangoon 4, AIR 1952 Madhya Bharat 171 (FB) and, AIR 1959 Mysore 1 (FB). These decisions clearly support the view I have taken in regard to the question whether judicial precedents can be regarded as law in force within the meaning of Section 87 so as to be binding on this High Court.

138. I must next consider whether apart from Section 87 there is any principle of law on which decisions given by the High Court of Bombay prior to the appointed day can be regarded as binding on this High Court. It was contended by the learned Advocate General relying on the decision of the Full Bench of the Andhra Pradesh High Court in AIR 1935 Andhra 87 (FB)

(supra), that the High Court of Bombay prior to the appointed day was a Court of co-ordinate jurisdiction with this High Court and that the decisions given by the High Court of Bombay prior to the appointed day were, therefore, binding on this High Court on the well-known and well-established principle of judicial comity which requires that a Court should regard itself bound by the decisions of another of co-ordinate jurisdiction. The same contention was advanced before the previous Full Bench by the learned Advocate General who then appeared on behalf of the Union of India. But S.T. Desai, C.J., as he then was and my brother Miabhoy and myself, who constituted the Full Bench, found some difficulty in accepting the contention. We, however, did not examine the validity of the contention in any detail, for we were inclined to accept the construction of Section 87 put forward by the learned Advocate General on behalf of the Union of India which included judicial decisions within the scope and ambit of that section. The contention has been fully debated before us this time and after giving my most anxious and careful consideration to the arguments advanced on all sides, I am of the opinion that the view which I was then inclined to entertain was the correct view and that the High Court of Bombay prior to the appointed day cannot be regarded as a Court of co-ordinate jurisdiction with this High Court.

139. Considerable argument was advanced before us as to when two Courts can be said to be Courts of co-ordinate jurisdiction. Various attempts were made to formulate a precise definition which would indicate with certainty and definiteness the circumstances under which two Courts can be said to be Courts of co-ordinate jurisdiction. But in my opinion all those attempts were futile. I find that it is not possible to formulate any precise test for determining when two Courts can be said to be Courts of co-ordinate jurisdiction. All that the Court can do is to apply certain tests by reference to certain features which must exist if two Courts are to be Courts of coordinate jurisdiction and declare, if any one of those tests is not satisfied, that the two Courts are not Courts of co-ordinate jurisdiction. One of the tests is whether the two Courts are Courts of equal rank and equal status. That this characteristic of equal rank and equal status should be present is apparent from the word "co-ordinate". The dictionary meaning of the word "co-ordinate" as stated in Webster's New International Dictionary of the English language, 2nd Edition, at page 586, is "equal in, or in the same rank or order; not subordinate". "One that is co-ordinate" is described as "one of equal rank, authority or importance with another". In Murray's English Dictionary, Volume 2, the meaning of the word "co-ordinate" is given as "of the same order; equal in rank, degree or importance (with); opposed to subordinate". The dictionary meaning thus clearly brings out the sameness of rank and status as an important characteristic which must exist before two Courts can be said to be Courts of co-ordinate jurisdiction. The same characteristic is also emphasized by Sir Frederick Pollock in his First Book of Jurisprudence, 5th Edition, at page 324 where he has referred to decisions of "co-ordinate authority" as decisions of "Courts of equal rank and exercising the same jurisdictions". This statement of Sir Frederick Pollock also emphasizes another important characteristic which must be present in order that two Courts can be said to be Courts of co-ordinate jurisdiction. That characteristic is that the two Courts must exercise the same jurisdiction. The two characteristics

of co-ordinate jurisdiction thus are that the two Courts should be of equal rank and equal status and should exercise the same jurisdiction. If either of these characteristics is absent, the two Courts cannot be said to be Courts of co-ordinate jurisdiction. The first characteristic was accepted by the Full Bench decision of the Andhra Pradesh High Court in AIR 1955 Andhra 87 (FB) (supra), as a valid test for ascertaining whether two Courts are Courts of co-ordinate jurisdiction but so far as the second characteristic is concerned, the Full Bench decision of the Andhra Pradesh High Court did not accept it in the form suggested by Sir Frederick Pollock but formulated it in words which enlarge the area of the concept of co-ordinate jurisdiction. The Full Bench decision of the Andhra Pradesh High Court laid down as the second characteristic that two Courts should exercise similar and not same jurisdiction before they can be regarded as Courts of co-ordinate jurisdiction. The test which was thus formulated by the Full Bench decision of the Andhra Pradesh High Court for ascertaining whether two Courts are Courts of co-ordinate jurisdiction was "Whether the two Courts are of equal rank and status or of equal authority and exercise similar jurisdiction?". I on my part find it difficult to accept this test as a valid test for determining whether two Courts are Courts of co-ordinate jurisdiction. According to this test it is not necessary that the two Courts should exercise the same jurisdiction but it would be enough if the jurisdiction exercised by the two Courts is similar. This would considerably widen the scope of the concept of co-ordinate jurisdiction and bring within the concept many Courts which are admittedly not Courts of co-ordinate jurisdiction. Take for example the High Court of Madras and the High Court of Calcutta. Both these Courts are Courts of equal rank and status and they undoubtedly exercise similar jurisdiction in the respective territories for which they are constituted High Courts. The jurisdiction exercised by the High Court of Madras in relation to the territories of the State of Madras is similar to the jurisdiction exercised by the High Court of Calcutta in relation to the territories of the State of West Bengal. If therefore, the test formulated by the Full Bench decision of the Andhra Pradesh High Court is correct, the High Court of Madras and the High Court of Calcutta would be Courts of co-ordinate jurisdiction and if that is so, the decisions of either High Court would be binding on the other. This, however, is admittedly not the position and it must, therefore, be concluded that the premise itself is incorrect and that similarity of jurisdiction does not afford a test for determining whether two Courts are Courts of co-ordinate jurisdiction. It is the sameness of jurisdiction which provides the real test and forms the essential characteristic of co-ordinate jurisdiction. I must, therefore, apply this test and consider whether this High Court enjoyed the same rank and status as the High Court of Bombay prior to the appointed day and the jurisdiction exercised by this High Court is the same as that exercised by the High Court of Bombay prior to the appointed day.

140. Before, however, I consider this question, I must refer to a contention which was urged in the course of the arguments and it was that the continued simultaneous existence of two Courts is necessary before they can be considered Courts of co-ordinate jurisdiction. The contention was that two Courts cannot be said to be Courts of co-ordinate jurisdiction unless they are functioning at the same time; if one Court has ceased to exist it cannot be regarded as a Court of co-ordinate jurisdiction with another which is functioning. The contention sought to equate co-ordinate

jurisdiction with concurrent or simultaneous jurisdiction. The contention is, in my opinion, not well founded and cannot be supported either on principle or on authority. I have already referred to the dictionary meaning of the word "co-ordinate" and I have also quoted the relevant statement from Sir Frederick Pollock's First Book of Jurisprudence and. it will be clear from the aforesaid discussion that the connotation of the word "co-ordinate" is not the same as that of the words "concurrent" or "simultaneous". The concept of co-ordinate jurisdiction and the concept of concurrent or simultaneous jurisdiction are totally different concepts touching the question of jurisdiction at different angles. The concept of concurrent or simultaneous jurisdiction has reference to the point of time at which jurisdiction is exercised while the concept of co-ordinate jurisdiction has reference to the sameness of quantity or degree. Simultaneity or co-existence is not a necessary ingredient of co-ordination; co-ordination has no reference to point of time and can take in successive acts of the same status or level. The jurisdiction of two Courts may, therefore, be concurrent or simultaneous without being necessarily co-ordinate and similarly the jurisdiction of two Courts may be co-ordinate without being necessarily concurrent or simultaneous. It would not, therefore, be right to equate co-ordinate Jurisdiction with concurrent or simultaneous jurisdiction. It is not necessary that two Courts should be simultaneously in existence in order that they can be regarded as Courts of co-ordinate jurisdiction. Even a Court which has ceased to exist can be said to be a Court co-ordinate in jurisdiction with an existing Court. Any other view would lead to a rather absurd and inconsistent result. Suppose there are two Courts of the same rank and status functioning within the same territory and possessing the same jurisdiction. These Courts would undisputedly be Courts of co-ordinate jurisdiction and the decisions of the one will be binding on the other. Now suppose one of these Courts is abolished, would the decisions of the abolished Court cease to bind the other Court which continues to exist? Until abolition the decisions of the abolished Court bound the other Court as a Court of co-ordinate jurisdiction. But would the binding effect of those decisions cease merely because the Court which gave those decisions is abolished? If that were so, the result would be that the decisions of the abolished Court would bind the other Court upto a certain date and would thereafter cease to bind that Court. This would be a strange result which apart from being irrational and illogical, would be inconsistent with the avowed purpose of the doctrine of judicial precedents. How would uniformity, continuity and certainty in the administration of justice be advanced by regarding the decisions of the abolished Court as binding on the other Court up to a certain 'time and thereafter treating them as without any binding authority on that Court? It is obvious that the decisions of the abolished Court must continue to bind the other Court even after the abolition in the same manner as they bound the other Court prior to the abolition and the only ground on which this conclusion can be founded is that the abolished Court was a Court co-ordinate in jurisdiction with the other Court. If it could be said of the abolished Court prior to the abolition that it was a Court of co-ordinate jurisdiction with the other Court, I fail to see what difference could the abolition make to the relative position of the two Courts. If the content of the jurisdiction of the two Courts was the same prior to the abolition and that is why they were regarded as Courts of co-ordinate jurisdiction, the abolition could not affect the content of the jurisdiction of either Court and if the abolished Court was a Court of co-ordinate jurisdiction with

the other Court prior to the abolition, it would equally be a Court co-ordinate in jurisdiction with the other Court after the abolition. It is not the exercise of jurisdiction at the same point of time that is determinative of the matter but it is the sameness of the content of jurisdiction, whether exercised at one point of time or at different points of time, that affords the true test for determination of the question whether two Courts are Courts of co-ordinate jurisdiction. But the matter does not rest merely on principle. There are authorities both of the English Courts and of the Courts in India in which the view has been taken that the simultaneous continued existence of two Courts is not a necessary concomitant of co-ordinate jurisdiction and that even a Court which has ceased to exist can be regarded as a Court co-ordinate in jurisdiction with an existing Court. Turning first to the English authorities, I must refer to the decision of the Court of Appeal in (1895) 1 Ch. 51. That was a decision given by the Court of Appeal on 12th November 1894 in an appeal from the Chancery Division of the High Court. The Division of the Court of Appeal which gave the decision consisted of three very eminent Lord Justices Lord Herschell, L.C., Lord Justice Lindley and Lord Justice A.L. Smith. The decision of the Court of Appeal in Chancery in (1858) 44 E R 1126 was cited before the Court of Appeal as a decision directly in favor of the respondent and if that decision was binding on the Court of Appeal, the appellant was bound to fail. The Court of Appeal regarded that decision as binding on itself even though it was given by the Court of appeal in Chancery and the ground on which it was regarded as binding was that the Court of Appeal in Chancery was a Court co-ordinate in jurisdiction with the Court of Appeal. Lord Herschell, L.C., observed:

"We cannot overrule (1858) 44 ER 1126 for that was the decision of a Court co-ordinate in jurisdiction with ourselves; all we can do, therefore, is to dismiss this appeal".

and Lord Justice Lindley and Lord Justice A.L. Smith concurred in these observations. The Court of Appeal thus regarded the Court of Appeal in Chancery as a Court of co-ordinate jurisdiction with the Court of Appeal even though the Court of Appeal in Chancery had ceased to exist by reason of the Supreme Court of Judicature Act, 1873. The Judicial Committee of the Privy Council in an appeal from the Supreme Court of New Brunswick also regarded the decision of the Court of Exchequer Chamber in *Merchant Shipping Co. v. Armitage*⁵², as an authority binding the English Courts upto and including the Court of Appeal (vide *Maine and New Brunswick Electrical Power Co. v. Hart*⁵³). Of course the Judicial Committee of the Privy Council did not state that the decision of the Court of Exchequer Chamber which had ceased to exist by reason of the Supreme Court of Judicature Act, 1873, was binding on the Court of Appeal because the Court of Exchequer Chamber was a Court co-ordinate in jurisdiction with the Court of Appeal. But having regard to the decision of the Court of Appeal in (1895) 1 Ch. 51 (supra), one can safely assume that 'that must have been the ground on which the Judicial Committee of the Privy Council regarded the decision of the Court of Exchequer Chamber as binding on the Court of Appeal. The decision of the Court of Criminal Appeal in (1914) 2 K.B. 209 may also be referred to in this connection though it is not clear from the decision whether in treating the decision of the Court for the consideration of the Crown Cases Reserved in (1896) 1

Q.B. 309, as binding on the Court of Criminal Appeal, Lord Reading, C.J., proceeded upon the ground that the Court for the consideration of the Crown Cases Reserved which ceased to exist as a result of Section 20(4) of the Criminal Appeal Act, 1907, was a Court co-ordinate in jurisdiction with the Court of Criminal Appeal. This must, however, emerge very clearly from this decision that the decisions of the Court for the Consideration of the down Cases Reserved are regarded as binding on the Court of Criminal Appeal even though the Court for the Consideration of the Crown Cases Reserved ceased to exist and its place was taken by the Court of Criminal Appeal by virtue of the provisions of Criminal Appeal Act, 1907. Apart from these decisions of the English Courts there are at least two decisions of the High Courts in India which support the view that Courts of co-ordinate jurisdiction need not be Courts of concurrent or simultaneous jurisdiction. This very question arose before the Full Bench of the Andhra Pradesh High Court in AIR 1955 Andhra 87 (supra) and the Full Bench negated the contention that co-ordinate jurisdiction connotes the same idea as concurrent jurisdiction or simultaneous jurisdiction and held that in order to be Courts of co-ordinate jurisdiction it is not necessary that the Courts should be Courts of concurrent jurisdiction or simultaneous jurisdiction and that in a given case even a

⁵²(1873) 9 Q.B. 99

⁵³1929 A.C. 631

successor Court can be a co-ordinate Court with the predecessor Court. The Rangoon High Court in AIR 1927 Hang 4 (supra) did not directly decide this question but it is implicit in the decision of the Rangoon High Court that according to the Rangoon High Court the continued simultaneous existence of two Courts was not necessary to constitute them Courts of co-ordinate jurisdiction. In that case the question was whether the decisions of the Old Chief Court of Lower Burma should be regarded as binding on the High Court of Rangoon. The Full Bench of the Rangoon High Court proceeded to consider whether the Old Chief Court of Lower Burma could be regarded as a Court of co-ordinate jurisdiction with the Rangoon High Court and came to the conclusion that it was not a Court of co-ordinate jurisdiction because it was not of the same rank and status as the High Court of Rangoon and besides, its territorial jurisdiction was narrower than that of the High Court of Rangoon. The Full Bench of the High Court of Rangoon did not hold that the Old Chief Court of Lower Burma could not be regarded as a Court of co-ordinate jurisdiction with the High Court of Rangoon because the two Courts were not simultaneously in existence. The Full Bench of the Rangoon High Court clearly understood the concept of co-ordinate jurisdiction in the sense accepted by me, for otherwise, the entire discussion in the various judgments of the Full Bench would have been unnecessary and the Full Bench could have easily disposed of the matter on the basis that the High Court of Rangoon could not be a Court of coordinate jurisdiction with the Chief Court of Lower Burma which had ceased to exist. I am, therefore, of the opinion that two Courts need not exist simultaneously in order to be Courts of co-ordinate jurisdiction and that even if one of the Courts has ceased to exist, it can be regarded as a Court co-ordinate in jurisdiction with the existing Court provided the other conditions are satisfied.

141. The question which I must therefore, consider is whether this High Court has the same rank

and status as that possessed by the High Court of Bombay prior to the appointed day and whether the jurisdiction exercised by this High Court is the same as that exercised by the High Court of Bombay prior to the appointed day Both these conditions must be satisfied for it is only then that the next step can be taken in the process of determination of the question whether the High Court of Bombay prior to the appointed day was a Court co-ordinate in jurisdiction with this High Court. My Lord the Chief Justice has in his judgment referred to various sections of the Bombay Reorganizations Act, 1960, which clearly show that this High Court has been invested with the same jurisdiction, power and authority as was exercised immediately before the appointed day by the High Court of Bombay in respect of the territories now forming part of the State of Gujarat. This High Court has succeeded to all the jurisdiction, power and authority which the High Court of Bombay had until the appointed day in and in relation to the territories now forming part of the State of Gujarat. This High Court is, therefore, obviously a Court of the same rank and status as the High Court of Bombay immediately before the appointed day. The question, however, is whether this High Court has the same jurisdiction which was possessed by the High Court of Bombay prior to the appointed day. It is here that the difficulty arises in regarding the High Court of Bombay as a Court of co-ordinate jurisdiction with this High Court. The High Court of Bombay prior to the appointed day had jurisdiction not only over the territories now forming part of the State of Gujarat but also over other territories which now form part of the State of Maharashtra whereas the jurisdiction of this High Court extends only to the territories now forming part of the State of Gujarat. The territorial jurisdiction of the High Court of Bombay immediately before the appointed, day was larger than the territorial jurisdiction possessed by this High Court. Apart from this in equality in territorial jurisdiction, there is also a difference, though in a small measure in the nature of the jurisdiction exercised by the High Court of Bombay prior to the appointed day and that exercised by this High Court. The High Court of Bombay immediately prior to the appointed day exercised ordinary original Civil Jurisdiction under Clauses 11 and 12 of the Letters Patent whereas such jurisdiction is not possessed by this High Court. Can it be said under these circumstances that the jurisdiction exercised by this High Court is the same as that exercised by the High Court of Bombay prior to the appointed day? The answer must obviously be in the negative and if that is so, I do not see how the High Court of Bombay prior to the appointed day could be regarded as a Court co-ordinate in jurisdiction with this High Court.

142. it was contended in the course of the arguments that the High Court of Bombay prior to the appointed day was a Court of co-ordinate jurisdiction with this High Court since the jurisdiction exercised by this High Court in respect of the territories forming part of the State of Gujarat was wholly exercised by the High Court of Bombay prior to the appointed day in the said territories. It was immaterial - so the argument ran- that this High Court did not enjoy the same territorial jurisdiction as the High Court of Bombay prior to the appointed day and that the territorial jurisdiction of the High Court of Bombay prior to the appointed day was larger than that of this High Court. It was sufficient that the High Court of Bombay prior to the appointed day enjoyed the whole of the jurisdiction exercised by this High Court in respect of the territories forming part

of the State of Gujarat. The contention in other words was that though this High Court did not enjoy the same territorial jurisdiction as the High Court of Bombay prior to the appointed day and could not, therefore, be said to be a Court co-ordinate in jurisdiction with the High Court of Bombay prior to the appointed day the converse position was not true, for the High Court of Bombay prior to the appointed day enjoyed the whole of the jurisdiction exercised by this High Court in respect of the territories forming part of the State of Gujarat and could, therefore, be regarded as a Court co-ordinate in jurisdiction with this High Court. This contention is, in my opinion, devoid of merit and I cannot accept the same for several reasons. If the concept of co-ordinate jurisdiction involves the element of sameness of jurisdiction, it is obvious that the territorial jurisdiction of two Courts must be the same before they can be said to be Courts of co-ordinate jurisdiction. The sameness or equality of territorial jurisdiction must be accepted as an essential feature of co-ordinate jurisdiction. Judged by this criterion, I do not see how the High Court of Bombay prior to the appointed day could be said to be a Court co-ordinate in jurisdiction with this High Court when its territorial jurisdiction was admittedly larger than that of this High Court. How could the jurisdiction of the High Court of Bombay prior to the appointed day be said to be the same as the jurisdiction of this High Court when at least in relation to territorial extent it was undisputedly larger than that exercised by this High Court? If the territorial jurisdiction of the High Court of Bombay prior to the appointed day was larger than the territorial jurisdiction of this High Court- and that fact is not disputed before us- the High Court of Bombay prior to the appointed day could not possibly be said to be a Court co-ordinate in jurisdiction with this High Court. But apart from this there is another equally cogent and effective reason, which compels me to take the view that the High Court of Bombay prior to the appointed day could not be regarded as a Court co-ordinate in jurisdiction with this High Court. The concept of co-ordinate jurisdiction must involve the element of mutuality. That this element of mutuality should be present is also apparent from the requirement of sameness of jurisdiction. If the jurisdiction of one Court is the same as the jurisdiction of another Court, it is axiomatic that the jurisdiction of the other Court must be the same as the jurisdiction of the first Court. If, therefore, one Court has co-ordinate jurisdiction with another Court because it enjoys the same rank and status and exercises the same jurisdiction as the other Court, the other Court must equally for the same reason be a Court co-ordinate in jurisdiction with the first Court. I cannot possibly conceive of any case where one Court is co-ordinate in jurisdiction with another Court without that other Court being co-ordinate in jurisdiction with the first Court. The very words "co-ordinate jurisdiction" themselves import the idea of mutuality and if one Court is co-ordinate in jurisdiction with another Court, the other Court must equally be a Court co-ordinate in jurisdiction with the first Court. If therefore, the High Court of Bombay prior to the appointed day could be said to be a Court co-ordinate in jurisdiction with this High Court, this High Court must also be regarded as a Court co-ordinate in jurisdiction with the High Court of Bombay prior to the appointed day. But this, it is conceded, is not the position and even the contention pressed for our acceptance does not go so far. It is not disputed before us that this High Court cannot be regarded as a Court co-ordinate in jurisdiction with the High Court of Bombay prior to the appointed day for this High Court does not possess the whole Of the jurisdiction enjoyed by the

High Court of Bombay prior to the appointed day and the decisions of this High Court could not, therefore, have been binding on the High Court of Bombay prior to the appointed day if the latter High Court had continued to exist with the same jurisdiction. But if that is so, it must follow, as a necessary corollary that the High Court of Bombay prior to the appointed day also could not be regarded as a Court co-ordinate in jurisdiction with this High Court and that the decisions of the High Court of Bombay prior to the appointed day could not bind this High Court of co-ordinate jurisdiction.

It may also be noted that the acceptance of the contention urged before us would lead to absurd and startling results. It is clear from the provisions of Part IV which deal with High Courts that the High Court of Bombay continued under the name of the High Court for the State or Maharashtra as from the appointed day i.e., 1st May 1960. The High Court of Bombay prior to the appointed day had jurisdiction not only over the territories forming part of the State of Maharashtra but also over the territories forming part of the State of Gujarat but as from the appointed day i.e., 1st May 1960, the High Court of Bombay ceased to have jurisdiction over the territories forming part of the State of Gujarat and the jurisdiction of the High Court of Bombay became limited to the territories forming part of the State of Maharashtra. Now it is obvious that as from the appointed day i.e., 1st May 1960, the High Court of Bombay which became the High Court for the State of Maharashtra could not be said to be a Court co-ordinate in jurisdiction with this High Court because the territorial jurisdiction of the High Court of Bombay as from the appointed day i.e., 1st May 1960 was different from the territorial jurisdiction of this High Court. The only contention urged was that the High Court of Bombay prior to the appointed day could be regarded as a Court co-ordinate in jurisdiction with this High Court because the jurisdiction exercised by this High Court in respect of the territories forming part of the State of Gujarat was wholly exercised by the High Court of Bombay prior to the appointed day in the said territories. A little scrutiny would, however, reveal that this contention must break when applied in relation to the High Court of Bombay prior to 1st November 1956 which was the appointed day under the States reorganization Act, 1956. Prior to 1st November 1956, the jurisdiction of the High Court of Bombay did not extend to the former States of Saurashtra and Kutch and it could not, therefore, be said that the jurisdiction exercised by this High Court in respect of the territories forming part of the State of Gujarat was wholly exercised by the High Court of Bombay Prior to 1st November 1956 though it was certainly exercised in its entirety by the High Court of Bombay during the period 1st November 1956, upto 1st May 1960. If the High Court of Bombay prior to 1st November 1956 did not enjoy the whole of the jurisdiction exercised by this High Court in respect of the territories forming part of the State of Gujarat, it is obvious that even according to the present contention the High Court of Bombay prior to 1st November 1956 could not be considered to be a Court co-ordinate in jurisdiction with this High Court. The logical outcome of the acceptance of the present contention would be that the High Court of Bombay prior to 1st November 1956 would not be a Court co-ordinate in jurisdiction with this High Court nor would the High Court of Bombay from 1st May 1960 be a Court co-ordinate in jurisdiction with this High Court but the High Court of Bombay only during the period 1st November 1956 upto 1st May 1960 would be a Court co-ordinate in jurisdiction with this High Court. If that is so,

the result would be that only those decisions of the High Court of Bombay which were given during the period 1st November 1956 to 1st May 1960 would be binding on this High Court and that the decisions given by the High Court of Bombay prior to 1st November 1956 and subsequent to 1st May 1960 would not be Binding on this High Court. Then again consider the position which would arise if some territories were added to the State of Gujarat subsequent to 1st May 1960, which territories were not comprised within the State of Bombay. It was conceded that if such territories were added to the State of Gujarat, from the very beginning when the State of Gujarat was constituted, by the very Act which effected bifurcation of the State of Bombay and constituted the State of Gujarat, the High Court of Bombay prior to 1st May 1960 could not be said to be a Court co-ordinate in jurisdiction with this High Court for the jurisdiction exercised by this High Court in respect of the territories forming part of the State of Gujarat could not in that event be said to be wholly enjoyed by the High Court of Bombay prior to 1st May 1960. But if that is so, could it make any difference if such territories were added to the State of Gujarat not from the very beginning but sometime after the constitution of the State of Gujarat? When such territories would be added, the same argument would apply and it would not then be possible to say that the High Court of Bombay prior to the appointed day enjoyed the whole of the jurisdiction exercised by this High Court in respect of the territories forming part of the State of Gujarat. The High Court of Bombay prior to the appointed day would in such a case cease to be a Court co-ordinate in jurisdiction with this High Court and even the decisions of the High Court of Bombay given during the period 1st November 1956 upto 1st May 1960 would cease to be binding on this High Court. These results which logically flow from the acceptance of the present contention urged before us are irrational and illogical and provide the most complete answer against the validity of that contention. I cannot therefore, persuade myself to take the view that though this High Court could not be considered to be a Court co-ordinate in jurisdiction with the High Court of Bombay prior to the appointed day, the High Court of Bombay prior to the appointed day could be regarded as a Court co-ordinate in jurisdiction with this High Court so as to render the decisions given by the High Court of Bombay prior to the appointed day binding on this High Court as decisions given by a Court of co-ordinate jurisdiction.

143. There is one other aspect of the matter which I must mention before I leave this subject, It was stressed before us in the course of the arguments that two Courts cannot be said to be Courts of co-ordinate jurisdiction if they are situate in different States. This proposition standing by itself may appear unexceptionable but I very much doubt its applicability in the present case where the two Courts which, it is contended, are Courts of co-ordinate jurisdiction are not simultaneously existent in two different States but one of the Courts is the inheritor of a part of the jurisdiction of the other Court which, when it functioned, exercised the whole of the jurisdiction possessed by the first Court. I need not tarry any longer on this proposition for I have already come to the conclusion, on other grounds discussed in the preceding paragraphs of this judgment, that the High Court of Bombay prior to the appointed day could not be regarded as a Court of co-ordinate jurisdiction with this High Court.

144. In the course of the arguments before us, various decisions were cited where the question as to when Courts could be said to be Courts of co-ordinate jurisdiction came up for consideration as a result of the reorganization of various States and the constitution of new States. My Lord the Chief Justice has in the majority judgment made a careful examination of all the decisions and expressions of opinion on this point and I am in respectful agreement with it. I do not, therefore, consider it necessary to say anything more in regard to those decisions.

145. But merely because the High Court of Bombay prior to the appointed day could not be regarded as a Court co-ordinate in jurisdiction with this High Court, it does not follow that the decisions given by the High Court of Bombay prior to the appointed day are not binding on this High Court. There is another principle on which the decisions given by the High Court of Bombay prior to the appointed day must be regarded as binding on this High Court. It is clear from the various provisions of the Act which have been analysed by My Lord the Chief Justice in the majority judgment that this High Court has; succeeded to all the jurisdiction, power and authority which the High Court of Bombay exercised until the appointed day in and in relation to the territories forming part of the State of Gujarat. The entire jurisdiction, power and authority exercised by this High Court was possessed by the High Court of Bombay immediately prior to the appointed day and this High Court can rightly be regarded as a successor to the High Court of Bombay in respect of the territories forming part of the State of Gujarat. If this High Court has taken the place of the High Court of Bombay in its entirety in and in relation to the territories forming part of the State of Gujarat and has inherited the entire jurisdiction, power and authority possessed by the High Court of Bombay immediately prior to the appointed day in respect of the said territories, I do not see any reason why the decisions of the High Court of Bombay given prior to the appointed day should not be regarded as binding on this High Court in the interests of certainty, uniformity and continuity in the administration of justice. The principle which obliges a Court to abide by the decisions of another Court must apply not only when two Courts are Courts of co-ordinate jurisdiction but also when one Court is the successor of the other Court. If judicial comity requires that when there are two Courts of co-ordinate jurisdiction one should abide by the decisions of the other, I do not see why the same judicial comity should not require that when one Court has succeeded entirely to the jurisdiction, power and authority of another Court in respect of a part of the territories over which the other Court exercised jurisdiction, the decisions of the other Court should not be regarded as binding on the first Court. After all the rules governing the application of the doctrine of judicial precedents have been evolved with a view to securing uniformity, certainty and continuity in the administration of justice and if it is found necessary in order to achieve the same object that the doctrine of judicial precedents should also be applied to a Court which is a successor to another Court of the same rank and status and which is invested with all the jurisdiction, power and authority of the other Court in respect of all the territories over which it exercises jurisdiction, the Court should not shrink from so applying the doctrine of judicial precedents. There are various decisions of different High Courts in India which support the view that the successor Court must regard itself bound by the decisions of the predecessor Court when the successor Court can trace its entire jurisdiction to the predecessor

Court and there is also a decision of the Supreme Court which impliedly accepts this as the correct view. But even if there were no decisions I do not see why on principle the decisions of the predecessor Court should not be regarded as binding on the successor Court when the whole of the jurisdiction exercised by the successor Court was possessed by the predecessor Court and could, therefore, be properly and legitimately said to have been inherited by the successor Court from the predecessor Court. Must there be a precise precedent for everything? Were the Judges of the last century who evolved the doctrine of judicial precedents in the present form the generation last vested with authority to apply old principles in new forms? Why can we not extend the principle underlying the binding character of judicial precedents and apply it to a Court which is a successor Court so that the decisions of the predecessor Court should be regarded as binding on the successor Court in order to secure certainty, uniformity and continuity in the administration of justice? But as I stated before, mine is not a lone voice for there are decisions of various High Courts which support me in the view which I am inclined to take on principle. The first decision to which I must refer is the Full Bench decision of the Madhya Bharat High Court in AIR 1952 Madhya Bharat 171 (FB), (supra). There the question was whether the decisions of the High Court of the former State of Indore were binding on the High Court of Madhya Bharat. Chaturvedi, J., examined the question from the angle whether the High Court of Madhya Bharat could be considered as the successor of the High Court of the former State of Indore and observed as follows:

"By no stretch of imagination Madhya Bharat High Court can be looked upon as successor to Indore High Court or any High Court of any Covenanted States".

The learned Judge also observed a little later in the course of his judgment

:

"It is not a case where a High Court had succeeded either a Chief Court or a Court of Judicial Commissioner and so the ratio decidendi in *Gurbhaj v. Lachhman*⁵⁴, *Sherkhan v. Muzaffar Khan*⁵⁵, or *Lachhman Singh v. Naman*⁵⁶, cannot be made applicable to the case before us."

These observations clearly show that according to the learned Judge if the High Court of Madhya Bharat could be regarded as a successor of the High Court of the former State of Indore, the decisions of the High Court of the former State of Indore would have been binding on the High Court of Madhya Bharat. The same view also appears to have been taken by the Full Bench decision of the Mysore High Court in AIR 1959 Mysore 1 (FB)

⁵⁴ AIR 1927 Rang 4, ILR 6 Lah 87 : (AIR 1925 Lah 341) ⁵⁶ AIR 1929 Lah 174

⁵⁵ ILR 1 Lah 25 : (AIR 1920 Lah 321 (1))

⁵⁵ (supra), where the question was whether the Mysore High Court was bound by the decisions of the former Chief Court of Mysore and the decisions of the High Court of the former State of Mysore as it existed prior to 1st November 1956. S.R. Das Gupta, C.J., considered the question from two different angles. The learned Chief Justice considered in the first instance whether the High Court of Mysore could be regarded as a successor of the High Court of the former State of

Mysore as it existed prior to 1st November 1956 and came to the conclusion that it could not be so regarded. The conclusion may best be set out in the words of the learned Chief Justice himself:

"It is difficult to see how under these circumstances this High Court can be said to be a representative or successor-in-interest of the High Court of the former State of Mysore. If it can be held to be a representative or successor-in-interest of the High Court of the former State of Mysore, then it can be equally called a representative-in-interest of the High Courts of the former State of Bombay and/or of Madras and/or of Hyderabad. It is no more a representative of the one than of the other. If then, as I have held, this High Court is not a successor-in-interest of the High Court of the former State of Mysore, then there is no reason as to why this High Court should be bound by the decisions of the Chief Court of Mysore or of the High Court of Mysore delivered prior to 1-11-1956".

The learned Chief Justice then proceeded to consider whether the High Court of Mysore and the High Court of the former State of Mysore could be regarded as Courts of co-ordinate jurisdiction and held that the contention that these two Courts should be regarded as Courts of co-ordinate jurisdiction could not be accepted by him. These observations of the learned Chief Justice which I have quoted above also clearly support the view that the successor Court should be regarded as bound by the decisions of the predecessor Court. I must next refer to the decision of the High Court of Kerala in AIR 1961 Kerala 75. Dealing with the question whether the decisions of the former Travencore-Cochin High Court were binding on the High Court of Kerala, Raghavan, J., observed as follows:

"The Kerala State was constituted taking portions of the territories of the former State of Travencore-Cochin and the former State of Madras and the Kerala High Court was constituted for this new State. Therefore the Kerala High Court is not a successor of either the Travencore-Cochin High Court or the Madras High Court and in that view the Judges of the Kerala High Court are not bound by the decisions of either of the said High Courts."

It follows as a necessary corollary from these observations that the learned Judge would have considered the decisions of the Travencore-Cochin High Court as binding on the High Court of Kerala if the High Court of Kerala could be regarded as a successor of the former Travencore-Cochin High Court. These decisions to which I have referred proceed upon the view that the decisions of the predecessor Court are binding on the successor Court provided of course the entire jurisdiction, power and authority possessed by the successor Court can be traced to the predecessor Court. In such a case the successor Court can almost be regarded as a continuation of the predecessor Court and the decisions of the predecessor Court must, therefore, be given the same recognition and effect as if they were decisions of the successor Court. The Supreme Court in an appeal from the High Court of East Punjab in AIR 1960 Supreme Court 1118 (supra),

treated the High Court of East Punjab as the same Court as the Lahore High Court so far as the territories forming part of the State of East Punjab were concerned. Though there was a Full Bench decision of the Lahore High Court on the particular point, a Division Bench of the High Court of East Punjab in a subsequent decision refused to follow the Full Bench decision of the Lahore High Court. The Supreme Court strongly disapproved this course adopted by the Division Bench of the East Punjab High Court in terms which clearly indicate that the Supreme Court regarded the High Court of East Punjab as the same Court as the Lahore High Court, presumably by reason of the continuity established by the succession of the High Court of East Punjab to the jurisdiction, power and authority of the Lahore High Court in respect of the territories forming part of the State of East Punjab. The Supreme Court observed: "One would have thought that after this pronouncement by a Full Bench of the High Court the controversy would have been set at rest for at least the Punjab Courts. Surprisingly however only a few years after the above pronouncement, the question was raised again before a Division Bench of the East Punjab High Court".

".....such considerations should stand even more firmly in the way of Division Benches disagreeing with a previous decision of the Full Bench of the same Court".

These observations of the Supreme Court lend considerable support to the view that the successor Court must be regarded in effect and substance as a continuation of the predecessor Court when the entire jurisdiction, power and authority possessed by the successor Court can be traced to the predecessor Court and the decisions of the predecessor Court must, therefore, be accorded the same binding character and effect as if they were decisions of the successor Court. This, in my opinion, is the true ground on which must rest the binding authority of decisions of the High Court of Bombay given prior to the appointed day qua this High Court.

146. I, therefore, agree with the answer given by My Lord the Chief Justice in the majority judgment to the question referred to the Special Bench and hold that the decisions of the High Court of Bombay given prior to the appointed day i.e., 1st May 1960, do not constitute "law in force" within the meaning of Section 87 of the Bombay Reorganizations Act, 1960, but have the same binding force and effect as if they were decisions of this High Court.

Reference answered.