REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.201 of 2005

PANKAJAKSHI (DEAD) THROUGH
L.RS. & OTHERS …APPELLANTS

VERSUS

CHANDRIKA & OTHERS …RESPONDENTS

WITH

CIVIL APPEAL NO.8576 OF 2014

PULPARAMBIL VASUDEVAN …APPELLANT

VERSUS

NANGANADATH PULPARAMBIL
DEVADASAN AND OTHERS …RESPONDENTS

J U D G M E N T

R.F. Nariman, J.

1. The present appeals arise out of two reference orders – one by a Division Bench of this Court dated 8.11.2010 to 3 learned Judges of this Court, and the second by a 3-Judge Bench of this Court dated 27.8.2014, placing the matter before 5 learned Judges of this Court.

2. The reference order by two learned Judges, after referring to Section 98 of the Code of Civil Procedure, 1908, reads as follows:-

> "6. The above view was followed by three Judge Bench Court in P.V. Hemalatha vs. Kattamkandi Puthiya Maliackal Saheeda and Anr. AIR 2002 SC 2445. That was a case in which the High Court of Kerala had, relying upon Section 98 of CPC, confirmed the decree under appeal despite difference of opinion between the two Judges comprising the Bench on a question of fact. This Court held that while Section 23 of the Travancore-Cochin High Court Act is the general law, Section 98(2) is a special provision. Section 23 of the Travancore-Cochin High Court Act reads as under:
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> "23. Reference by Chief Justice.--Where two Judges forming a Division Bench agree as to the decree, order or sentence to be passed, their decision shall be final. But if they disagree, they shall deliver separate judgments and thereupon the Chief Justice shall refer, for the opinion of another Judge, the matter or matters on which such disagreement exists, and the decree, order or sentence shall follow the opinion of the Judges hearing the case."
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> 7. Section 9 of the Kerala High Court Act by which the Travancore-Cochin High Court Act was repealed to the extent of its repugnance may also be extracted. It reads:
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> "9. Repeal.--The provisions of the Travancore-Cochin High Court Act, 1125 (5 of 1125), insofar as they relate to matters provided in this Act, shall stand repealed."
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> 8. In our opinion Section 23 of the Travancore-Cochin Act is in the nature of a special provision while Section

98(2) is in the nature of general law. As between the two, the former would apply in preference to the latter. The decision of this Court in P.V. Hemalatha's v. Kattamkandi Puthiya Maliackal Saheeda and Anr. (supra) to the extent it takes a contrary view, in our opinion, requires to be reconsidered.

9. That apart, the question whether in an appeal arising out of an order passed by the High Court to which Section 98(2) of the CPC applies, this Court can in exercise of its power under Article 136 of the Constitution direct the matter to be placed before a third Judge to resolve the conflict arising from two differing judgments, has not been examined either in P.V. Hemalatha's or Tej Kaur's case. We, therefore, consider it appropriate to refer to a larger Bench for consideration and an authoritative pronouncement the following two questions:

(1) Whether Section 23 of the Travancore-Cochin Act remains unaffected by the repealing provisions of Section 9 of the Kerala High Court Act. If so, whether Section 23 is in the nature of a special provision vis-à-vis Section 98(2) of CPC.

(2) Whether this Court can under Articles 136 and 142 of the Constitution direct in any appropriate case a reference to a third judge to resolve the conflict arising between two judges of the High Court hearing an appeal, on a question of fact."

3. The 3-Judge Bench in turn referred the matter to a 5-Judge Bench as follows:-

"In the reference order, the 2-Judge Bench has doubted the correctness of the decision of this Court in P.V. Hemalatha Vs. Kattamkandi Puthiya Maliackal Saheeda and Anr. Since the decision has been given by a 3-Judge Bench in P.V. Hemalatha, we are of the view that correctness of the decision in P.V. Hemalatha has to be considered by a Bench of 5 Judges.
2. The matter is, accordingly, referred to a Bench of 5 Judges.

3. The matter may be placed before the Chief Justice for appropriate administrative order in this regard.

S.L.P. (Civil) No. 34457 of 2010
Leave granted.
2. The issues involved in the present Appeal are identical to the issues that arise in Civil Appeal No. 201 of 2005. Civil Appeal No. 201 of 2005 has been referred to a Bench of 5 Judges.
3. For the self same reasons, this Civil Appeal is also referred to a Bench of 5 Judges to be heard along with Civil Appeal No. 201 of 2005.
4. The matter may be placed before the Chief Justice for appropriate administrative order in this regard."

4. In order to appreciate the controversy, which lies in a narrow compass, we need first to advert to the decision in **P.V. Hemalatha v. Kattamkandi Puthiya Maliackal Saheeda & Another**, (2002) 5 SCC 548. In that judgment this Court has held that the Travancore-Cochin High Court Act, Section 23 of which contains a provision which states that if two Judges forming a Division Bench of the High Court disagree, they shall refer their disagreements to the opinion of another Judge and the opinion of the majority will then prevail, was said to be general as against Section 98(2) of the Code of Civil Procedure which was said to be special. It may be stated that Section 98(2) in dealing with appeals to a superior court generally, has a reference to a third or more Judges in the event of disagreement between two Judges only on a point of law. If the disagreement exists on a point of fact, the lower court judgment is to be confirmed. **Hemalatha's case** (supra) therefore

decided:

> **"**Submission made on comparing Section 23 of the Travancore-Cochin Act and Section 4 of the Kerala Act read with Section 9 of the latter Act is that as the procedure indicated to Judges constituting a Division Bench delivering separate judgments is governed by Section 23 of the Travancore-Cochin Act and as it is not covered by Section 4 of the Kerala Act, the former cannot be said to have been repealed by Section 9 of the Kerala Act. The submission, therefore, is that the Judges of the Division Bench of the High Court of Kerala could take recourse to Section 23 of the Travancore-Cochin Act and as they had delivered two separate judgments they could refer the matter to the Chief Justice for the opinion of the third Judge.
>
> The above argument advanced is attractive but cannot be accepted for another reason. In our view, the law contained in the Travancore-Cochin Act and the Kerala Act regulating the practices, procedure and powers of the Chief Justice and Judges of the High Court in relation to all cases from all enactments appearing before them is a *general law* which cannot be made applicable to appeals from the Code of Civil Procedure regulated by *special law* that is contained in Sections 96 to 98 of the Code. There is a clear conflict between the provisions contained in Section 23 of the Travancore-Cochin Act which allows the reference by differing Judges who have delivered separate judgments or opinions to a third Judge on *issues both on fact and law and* the provisions contained in proviso of sub-section (2) of Section 98 of the Code which permits reference to one or more Judges only on the *difference of opinion on the stated question of law*. When the Courts are confronted with such a situation, the Courts' approach should be "to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific". The principle is expressed in the maxims *generalia specialibus non derogant* (general things do not derogate from special things) and *specialia generalibus derogant*(special things derogate from

general things). These principles have also been applied in resolving a conflict between two different Acts and in the construction of statutory rules and statutory orders. (See *Principles of Statutory Interpretation* by Justice G.P. Singh, 7th Edn., 1999, pp. 113-14.)

Assuming for the sake of argument that provisions of Section 23 of the Travancore-Cochin Act are saved by Section 9 of the Kerala Act and are applicable to the High Court of the new State of Kerala, in our considered opinion since provisions contained in Section 98 of the Code is a *special law* as compared to the *general law* contained in Section 23 of the Travancore-Cochin Act read with Section 9 of the Kerala Act, the "special law" will prevail over the general law and the provisions of Section 98 of the Code in all its terms will have to be applied to civil appeals arising from civil suits which are regulated by the Code.

Undisputedly, the High Court of Kerala is not a Chartered High Court and was not a court in British India. It was a High Court established after formation of the new State of Kerala in 1956 under the SR Act of 1956. The High Court of Kerala, therefore, has no Letters Patent. The Travancore-Cochin Act and the Kerala Act are not Letters Patent of the High Court and therefore they cannot be held to have been saved under the provisions of sub-section (3) of Section 98 of the Code. It is interesting to note that provision similar to Section 98(2) of the Code of Civil Procedure, 1908 and proviso thereunder has been on the statute-book in Section 577 of the old Civil Procedure Code of 1877. These provisions in the Code of Civil Procedure were in existence when the Travancore-Cochin Act, 1125 (Indian calendar 1948-49) and the Kerala Act, 1958 were enacted but at no point of time any change was made by amendment to sub-section (3) of Section 98 of the Code to give an overriding effect along with the Letters Patent of the Chartered High Courts to other enactments dealing with formation of new High Courts for new States under the SR Act of 1956 or any other laws." [at paras 32 – 34 and 38]

Shri V. Giri, learned senior counsel, who has argued on behalf of the appellants in the present cases, has referred to a judgment of five learned Judges of this Court in **P.S. Sathappan v. Andhra Bank Ltd.** (2004) 11 SCC 672, by which learned counsel has referred to the exactly opposite finding insofar as appeals under the Letters Patent are concerned. According to the learned senior counsel, this judgment having decided that for the purpose of Section 4 of the Code of Civil Procedure, Section 98 not being a specific law to the contrary would therefore govern the present case as well, as it has been expressly held in that decision that qua the Letters Patent, the Code of Civil Procedure is general and the Letters Patent is special. Furthermore, in this case also, since the Travancore-Cochin High Court Act, being the old Charter of the Kerala High Court, is similarly a special law qua the general law contained in the Code of Civil Procedure. Shri V. Giri's entire argument is that therefore **Sathappan's case** (supra) concludes the issue at hand and being inconsistent with the 3-Judge Bench in **Hemalatha's case** (supra), the law declared in **Hemalatha's case** (supra) is no longer good law.

5. Apart from the above, Shri V. Giri also based his arguments on a judgment of the Privy Council contained in **Bhaidas Shivdas v. Bai Gulab & Another**, AIR 1921 PC 6, as followed and

explained in various decisions including two Full Bench decisions in particular, **Immidisetti Dhanaraju & Another v. Motilal Daga & Another**, AIR 1929 MAD 641 and **Shushila Kesarbhai & Ors. v. Bai Lilavati & Others**, AIR 1975 Guj 39 (FB). According to Shri V. Giri, the Privy Council judgment as followed in the two Full Bench decisions referred to hereinabove again makes it clear that Section 4 of the Code of Civil Procedure when pitted against a High Court Charter like the Letters Patent, the said Charter being a special law would prevail over the Code of Civil Procedure unless there is a specific provision to the contrary in the Code of Civil Procedure itself. Section 98 was directly held not to be such specific provision to the contrary in the Privy Council judgment and therefore it is clear that Section 98(2) did not apply to Letters Patent Appeals, whether intra court or appeals that arose from subordinate courts and would have their origins in Section 96 of the Code of Civil Procedure. His further submission is that when the legislature, by amendment in the year 1928, introduced Section 98(3) into the Code of Civil Procedure, it made the position amply clear that all High Courts were excluded from the ambit of Section 98. Since, in 1928, only High Courts established by Letters Patent existed in British India, the Letters Patent alone was referred to in the said provision. However, after India became

independent and other High Courts were either set up, or assimilated from the princely States into the constitutional framework of India, the same position would necessarily obtain inasmuch as the various High Court Acts setting up High Courts other than those already set up by the Letters Patent would also be the basic Charter (like the Letters Patent) of each High Court. Section 98(3) therefore only declares what is already contained in Section 4, namely, that qua the High Courts in this country, Section 98 would not be a specific provision to the contrary and that the High Court Acts being special in this regard would necessarily prevail by virtue of the other provisions of Section 4 over the general provision contained in Section 98(2) of the Code of Civil Procedure.

6. Shri K.V. Viswanathan, learned senior counsel appearing on behalf of the respondents, countered these submissions and marshalled his arguments on four different points. He argued the case with great ability and learning and we heard him with considerable interest. According to learned counsel, the Code of Civil Procedure Amendment Act of 1951, which extended the Code of Civil Procedure to the whole of India, contained a provision (namely Section 20) by which all laws that corresponded to the Code of Civil Procedure in the territory of India were repealed.

Therefore, according to learned counsel, Section 23 of the Travancore-Cochin High Court Act, being a law which corresponded to the Code of Civil Procedure, was repealed. This being so, there is no conflict between any provision of the Kerala High Court Act, 1958 and the Code of Civil Procedure and hence Section 98(2) would be the only provision governing the field. He further argued that, assuming that, he were to fail on the first argument, Section 98 read with Sections 117, 120, 122, 125 and 129 of the Code of Civil Procedure are specific provisions to the contrary for the purposes of Section 4(1) of the Code of Civil Procedure and that Section 98 would therefore prevail over Section 23 of the Travancore-Cochin High Court Act. A third submission is that, in any event, Section 98(2) is a special provision which deals with appeals under Section 96 of the Code of Civil Procedure, and since all appeals under the Kerala High Court Act, 1958 are appeals under Section 96 of the Code of Civil Procedure, Section 98 which is an adjunct to Section 96 would alone apply. For the purposes of this argument, he made a distinction between appeals which arise under clause 15 of the Letters Patent, where appellate jurisdiction is conferred by the Letters Patent, as contrasted with clause 16 of the Letters Patent, which referred only to appellate jurisdiction conferred by other laws

including the Code of Civil Procedure. He further argued that viewed thus, Section 98 is undoubtedly a special provision and Section 23 of the Travancore-Cochin High Court Act would thus be a general provision in this regard. His fourth submission is that Articles 136 and 142 cannot be used to apply Section 23 of the Travancore-Cochin High Court Act, if it were otherwise clear that the said provision had been expressly excluded and Section 98(2) alone were to apply.

7. Having heard learned counsel for the parties, we need to first set out the relevant statutory provisions:

Code of Civil Procedure, 1908

> **"S. 4:- Savings**
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> (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.
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> (2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.
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> **S. 96:- Appeal from Original Decree**
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> (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the

decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.

S. 98:- Decision where appeal heard by two or more judges.

(1) Where an appeal is heard by a bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a court consisting of more Judges than those constituting the Bench and Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority(if any) of the Judges who have heard the appeal including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court.

S. 117:- Application of Code to High Courts.

Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

Section 120 - Provisions not applicable to High Court in original civil jurisdiction

(1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17and 20.

Section 121 - Effect of rules in First Schedule

The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Section 122 - Power of certain High Courts to make rules

High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Section 129 - Power of High Courts to make rules as to their original civil procedure

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

Travancore-Cochin High Court Act, 1125

Preamble –

Whereas it is necessary to make provision regulating the business of the High Court of Travancore-Cochin, for fixing the jurisdiction and powers of single Judges, Division Benches and Full Benches and for certain other matters connected with the functions of the High

Court;

It is hereby enacted as follows:-

S. 18:- Jurisdiction and powers of the High Court-

(1) Subject to the provisions of this Act of the High Court shall have and exercise all the jurisdiction and powers vested in it by this Act and any other law in force or which may hereafter come into force and any jurisdiction vested in existing High Court immediately prior to the coming into force of this Act.

S. 21:- Powers of Division Benches of two Judges-

A Division Bench consisting of two Judges of the High Court, is empowered:
(i) to hear and decide appeals against orders passed by a single Judge under sub-clause (A) (X) of clause (4) of Section 20: to hear and decide appeals against judgments passed by a single Judge under sub-clause (c) of clause (4) of Section 20 where the Judge who passed the Judgment declares that the case is a fit one for appeal and to hear and decide applications or appeals or other proceedings that a single Judge may refer under Section 20;
(ii) (a) to hear and decide all appeals, civil and criminal, preferred from the decrees, orders, convictions or sentences of the civil and criminal courts where the same are allowed by law.
(b) to hear and decide all appeals preferred from such orders as are provided in Section 104 of the Civil Procedure, 1903, of a single Judge of the High Court passed in exercise of the original jurisdiction;
(c) to hear and decide all appeals preferred against convictions or sentences and orders of acquittal passed by a single Judge of the High Court in the exercise of original jurisdiction:
(iii) to transfer on its own motion civil or criminal cases from one court to another;
(iv) to dispose of references made by the subordinate courts in non-appealable civil cases, and to revise on its own motion or otherwise, the proceedings of the civil courts in non-appealable cases;

(v) to revise convictions or sentences or orders passed by subordinate criminal courts in cases called up by the High Court on its own motion and to pass orders on references made by subordinate criminal courts;
(vi) to hear and determine applications under Section 491 of the Code of the Criminal Procedure, 1898; and
(vii) to pass orders on all petitions and applications, civil or criminal not falling under any of the preceding clauses.

Section 23:– Reference by Chief Justice-

Where two Judges forming a Division Bench agree as to the decree, order or sentence to be passed, their decision shall be final. But if they disagree, they shall deliver separate judgments and thereupon the Chief Justice shall refer, for the opinion of another Judge, the matter or matters on which such disagreement exists, and the decree, order or sentence shall follow the opinion of the majority of the judges hearing the case."

Kerala High Court Act, 1958.

Preamble-

WHEREAS it is expedient to make provision regulating the business and the exercise of the powers of the High Court of the State of Kerala.

BE it enacted in the Ninth Year of the Republic of India as follows:--

Section 2 – Definition

In this Act, "High Court" means the High Court of the State of Kerala.

Section 4 - Powers of a Bench of two Judges
The powers of the High Court in relation to the following matters may be exercised by a Bench of two

Judges, provided that if both Judges agree that the decision involves a question of law they may order that the matter or question of law be referred to a Full Bench:--

(1) Any matter in respect of which the powers of the High Court can be exercised by a single Judge.

(2) An appeal--

(a) from a decree or order of a Civil Court, except those coming under section 3;

(b) from the judgment of a Criminal Court in which a sentence of death or imprisonment for life has been passed on the appellant or on a person tried with him.

(3) A reference--

(a) under section 113 of the Code of Civil Procedure, 1908;

(b) under section 307, section 374 or section 432 of the Code of Criminal Procedure,1898.

(4) An application under Rule 2 of Order XLV of the First Schedule to the Code of Civil Procedure, 1908.

(5) An application for the exercise of the powers conferred by section 491 of the Code of Criminal Procedure, 1898 or by clause (1) of article 226 of the Constitution of India where such power relates to the issue of a writ of the nature of habeas corpus.

(6) An appeal from any original judgment, order or decree passed by a single Judge.

(7) All matters not expressly provided for in this Act or in any other law for the time being in force.

Section 9 – Repeal

The provisions of the Travancore Cochin High Court Act, 1125 (5 of 1125) in so far as they relate to matters provided in this Act, shall stand repealed."

8. Before proceeding to resolve the controversy at hand, it first needs to be stated that Section 9 of the Kerala High Court Act, 1958, set out hereinabove, repeals the provisions of the Travancore-Cochin High Court Act, insofar as the said Act relates to matters provided in the Kerala High Court Act. Though Mr.

Viswanathan sought to urge to the contrary, ultimately it was common ground between the parties that there is no provision corresponding to Section 23 of the Travancore-Cochin High Court Act in the Kerala High Court Act, 1958 and that therefore the said provision continues in force, not having been repealed by Section 9 of the Kerala High Court Act, 1958.

9. Shri Viswanathan's first submission requires us to set out Section 20(1) of the 1951 amendment to the Code of Civil Procedure. The said Section reads as follows:-

> **"20. Repeals and Savings.-**
>
> **(1)** If immediately before the date on which the said Code comes into force in any Part B State, there is in force in that State any law corresponding to the said Code, that law shall on that date stand repealed**:**
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> Provided that repeal shall not affect-
> (a) The previous operation of any law so repealed or anything duly done or suffered thereunder, or
> (b) Any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, or
> (c) Any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if this Act has not been passed."

10. Travancore-Cochin was a princely state till the year 1956. The Constitution of India as originally enacted referred to princely states as Part B states. Apart from Travancore-Cochin, there were

7 other princely states which got assimilated into India by the Constitution. Prior to 1951, the Code of Civil Procedure did not extend to these princely states as even the Adaptation of Laws Order of 1950 did not extend the Code of Civil Procedure to Part B States. The 1951 amendment to the Code of Civil Procedure, for the first time, applied the Code of Civil Procedure to Part B States, and as a consequence repealed any law which corresponded to the Code of Civil Procedure in Part B States. According to Shri Viswanathan, the Travancore-Cochin High Court Act, being a law corresponding to the Code of Civil Procedure, was repealed, and Section 23, being a part of the said High Court's Act, would also therefore stand repealed. For this purpose Shri Viswanathan relied upon several authorities. First he relied upon **Krishan Prasad Gupta v. Controller, Printing & Stationery**, (1996) 1 SCC 69 to buttress this submission. In this judgment, this Court had to consider Section 28 of the Administrative Tribunals Act, which stated that authorities constituted under the Industrial Disputes Act or any other corresponding law for the time being in force, were exempted from the provisions of Section 28. In construing the expression "any other corresponding law" this Court relied upon a New Zealand judgment and observed as follows:-

> **"**The word 'corresponding' is defined in *Shorter Oxford Dictionary* as "answering to in character and function;

similar to." This meaning has been adopted in *Winter* v.*Ministry of Transport* [1972 NZLR 539] in which it has been observed as under:

"We read 'corresponding' in Section 20-A as including a new section dealing with the same subject-matter as the old one, in a manner or with a result not so far different from the old as to strain the accepted meaning of the word 'corresponding' as given in the *Shorter Oxford English Dictionary* — 'answering to in character and function; similar to'. The new (section) answers to the old one … in character and function; it is similar in purpose, prescribes the same thing to be done, and is designed to produce the same result. We hold it to be a 'corresponding' section." (See *Words & Phrases*, 3rd Edn., Vol. 1)

Our conclusion, therefore, is irresistible that the 'Authority', constituted under Section 15 and the appellate authority under Section 17 of the Payment of Wages Act, fall within the exception indicated in Section 28 of the Administrative Tribunals Act and this Act, namely, Payment of Wages Act, is positively covered by the connotation "corresponding law" used in that section. Consequently, the jurisdiction of the Authority to entertain and decide claim cases under Section 15 of the Payment of Wages Act is not affected by the establishment of the Administrative Tribunals." [at paras 37 and 38]

The test laid down in this decision for a law to correspond to another is whether it deals essentially with the same subject matter as was dealt with by the old law.

11. Similarly, in **A.B. Abdulkadir & Others v. The State of Kerala & another** [1962] Suppl. 2 SCR 741, this Court dealt with Section 13(2) of the Finance Act which provided that on and from 1.4.1950, any law corresponding to the Central Excise and Salt Act, 1944 will stand repealed from that date. What had to be

determined is whether the Cochin Tobacco Act had been so repealed.

12. In arriving at the conclusion that the said Act had been so repealed, this Court held that the main object and purpose of both Acts being the same, namely to provide for control on tobacco from the time it is grown till the time it reaches the ultimate seller, and the fact that both Acts levied an excise duty on tobacco, albeit in completely different ways, the Cochin Act was said to correspond with the Central Excise Act in that the main object and purpose of both Acts was in substance the same, and they both dealt with the same subject matter, namely, control of the tobacco trade and the levying of excise duty on tobacco.

13. Similarly, in **The Custodian of Evacuee Property, Bangalore v. Khan Saheb Abdul Shukoor, etc.** [1961] 3 SCR 855, the question before this Court was whether a later Mysore Act had been repealed by an earlier Mysore Act. It was held by this Court, that as both Acts dealt with evacuee property, the fact that the scheme under the second Act was different from the first would make no difference as the subject matter that was dealt with was in substance the same.

14. Applying the test laid down by the aforesaid decisions of this Court, namely, that the subject matter of the two statutes must

essentially be the same and/or that the main object and purpose of the statutes should be substantially similar, we find that the Travancore-Cochin High Court Act formed the Charter for jurisdiction to be exercised by the said High Court. This jurisdiction is exercised not only in civil matters but criminal and other matters as well. The main object and purpose of the Travancore-Cochin Act is to lay down the jurisdiction and powers of the High Court that was established in the said State. On the other hand, the subject matter of the Code of Civil Procedure is to lay down procedure in all civil matters, and no others. Also, the said Code would apply to all courts which deal with civil matters, subject to the exceptions contained therein, and not only the High Court. For this reason, it is difficult to say that the Code of Civil Procedure corresponds to the Travancore-Cochin High Court Act. Shri Viswanathan's first contention must therefore fail.

15. Shri Viswanathan also relied upon two High Court judgments to buttress his submission that the Travancore-Cochin High Court Act had been repealed by the introduction of the Code of Civil Procedure in 1951. He relied upon **Jelejar Hormosji Gotla v. The State of Andhra Pradesh**, AIR 1965 AP 288, in which the Andhra Pradesh High Court held that with the coming into force of Section 80 of the Code of Civil Procedure, the Hyderabad Suits

against Government Act stood repealed. He also relied upon **Gurbinder Singh and Others v. Lal Singh and Others**, AIR 1959 P&H 123, whereby it was held that Section 49(2) of a Pepsu Ordinance had been repealed by the introduction of the Code of Civil Procedure by the 1951 Amendment Act.

16. Neither of these decisions carries the matter any further. In the Andhra Pradesh decision, the Hyderabad Act dealt only with civil suits against the Government and thus dealt with civil procedure insofar as it applied to such suits. In the Punjab and Haryana case, the High Court itself states that the Pepsu Ordinance, which stood repealed, earlier provided for the civil procedure to be applied in all civil courts in Pepsu. Both cases, therefore, were cases in which the repealed Act dealt with the same subject matter as the corresponding law, that is civil procedure.

17. We now come to the main argument in this case, which is the correct construction of Section 4(1) of the Code of Civil Procedure. The scheme of Section 4(1), as its marginal note provides, is to “save” any special or local law from the applicability of the Civil Procedure Code. The said Section therefore states that whenever there is a special, local, or other law which deals with

any matter specified in the Code, those laws will continue to have full force and effect notwithstanding that they deal with the same matter as is contained in the Code of Civil Procedure. From this, however, an exception is carved out, and that exception is that there should not be any "specific provision to the contrary" contained in the Code itself.

18. At one point in time it was not clear as to whether such specific provision should be in the Code itself or could also be contained in any other law. In fact, in **Mati Lal Saha v. Chandra Kanta Sarkar & Others**, AIR 1947 Cal 1, the Calcutta High Court held that such specific provision to the contrary could be contained in a third Act, namely, the Presidency Small Causes Courts Act, and need not be contained even in the two competing Acts, namely the Code of Civil Procedure and a Bengal Agricultural Debtors Act.

At this point it is necessary to advert to the *pari materia* provision contained in the Criminal Procedure Code. Section 1(2) of the Code of Criminal Procedure, 1898 stated:

> "**Section 1. Short title and commencement.**
> (2) It extends to the whole of India except the State of Jammu and Kashmir; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply –

(a) The Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay;
(b) Heads of villages in the State of Madras as it existed immediately before the 1st November, 1956; or
(c) Village police-officers in the State of Bombay as it existed immediately before the 1st November, 1956;

Provided that the State Government may, if it thinks fit, by notification in the Official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons.

In 1973, however, the new Code of Criminal Procedure repeated the same provision in Section 5 as under:

"Section 5 - Saving

Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

It will be noticed that Section 1(2) of the old Code corresponds almost exactly to Section 4(1) of the Code of Civil Procedure. The change in phraseology in Section 5 clarifies that what was intended was that the specific provision to the contrary should only be contained in the Code itself and nowhere else. Taking note of the legislative scheme contained in the Code of Criminal Procedure, we have no doubt in construing Section 4(1) to say that the specific provision to the contrary must be contained in the Code of Civil Procedure itself and nowhere else.

19. The next inquiry that needs to be made is what is the meaning of the expression "specific provision to the contrary". In **Maru Ram v. Union of India and others**, (1981) 1 SCC 107, a Constitution Bench dealt with the *pari materia* provision to Section 4(1) of the Code of Civil Procedure contained in Section 5 of the Code of Criminal Procedure. This Court relied upon the Lahore High Court and the Allahabad High Court to explain what is meant by "specific provision". This Court held:-

> **"**Section 1(2) of the Criminal Procedure Code, 1898, is the previous incarnation of Section 5 of the Present Code and contains virtually the same phraseology. The expression "specific provision to the contrary" in the Code of 1898 was considered in the two Full Bench decisions (supra). The setting in which the issue was raised was precisely similar and the meaning of "specific provision to the contrary" was considered by Young, C.J., in the Lahore case where the learned Judge observed: [AIR 1940 Lah 129, 133]
>
> "The word 'specific' is defined in Murray's Oxford Dictionary as 'precise or exact in respect of fulfilment, conditions or terms; definite, explicit'."
>
> In a similar situation, the same words fell for decision in the Allahabad case where Braund, J., discussed the meaning of "specific provision" in greater detail and observed: [AIR 1940 All 263, 269]
>
> "I have, I confess, entertained some doubt as to what exactly the words 'specific provision' mean. I think first, that they must denote something different from the words 'express provision'. For a provision of a statute to be an 'express' provision affecting another statute or part of it, it would have, I think, to refer in so many words to the other statute or to the relevant portion of it and also to the effect intended to be produced on it. Failing this, it could hardly be said to be 'express' .... But the word 'specific' denotes, to my

mind, something less exacting than the word ‘express’. It means, I think, a provision which ‘specifies’ that some ‘special law’ is to be ‘affected’ by that particular provision. A dictionary meaning of the verb ‘to specify’ as given in *Murray's New English Dictionary*, is ‘to mention, speak of or name (something) definitely or explicitly; to set down or state categorically or particularly....’ and a meaning of the adjective ‘specific’ in the same dictionary is ‘precise ... definite, explicit ... exactly named or indicated, or capable of being so, precise, particular’. What I think the words ‘specific provision’ really mean therefore is that the particular provision of the Criminal Procedure Code must, in order to ‘affect’ the ‘special … law’, clearly indicate, in itself and not merely by implication to be drawn from the statute generally, that the 'special law' in question is to be affected without necessarily referring to that ‘special law’ or the effect on it intended to be produced in express terms. Lord Hatherley in (1898) 3 AC 933 at p. 938 [*Thomas Challoner* v. *Henry WF Bolikow*, (1878) 3 AC 933] has defined the word ‘specific’ in common parlance of language as meaning ‘distinct from general’…. It would, no doubt, be possible to multiply illustrations of analogous uses of the words ‘specify’ and ‘specific’. But this is I think sufficient to show that, while requiring something less than what is ‘express’, they nevertheless require something which is plain, certain and intelligible and not merely a matter of inference or implication to be drawn from the statute generally. That, to my mind, is what is meant by the word ‘specific’ in Section 1(2) CPC....”

In an *English case* [Re Net Book Agreement, 1957, (1962) 3 All ER 751 (RPC)] Buckley, J., has interpreted the word ‘specific’ to mean explicit and definable. While Indian usage of English words often loses the Atlantic flavour and Indian Judges owe their fidelity to Indian meaning of foreign words and phrases, here East and West meet, and “specific” is specific enough to avoid being vague and general. Fowler regards this word related to the central notion of species as distinguished from genus and says that it is “often resorted to by those who have no clear idea of their meaning but hold it to diffuse an air of educated precision”. [Fowler's

> Modern English Usage, 2nd Edn., p. 574] Stroud [Stroud's Judicial Dictionary Vol 4, 3rd Edn., p. 2836] says “specifically ...” means “as such”. Black [Blacks Law Dictionary 4th Edn., p. 1571] gives among other things, the following meaning for “specific”: definite, explicit; of an exact or particular nature ... particular; precise. While legalese and English are sometimes enemies we have to go by judicialese which is the draftsman's lexical guide.
>
> The contrary view in the *Biram case* [(1976) 3 SCC 470 : 1976 SCC (Cri) 428 : 1976 Supp SCR 552] is more assertive than explanatory, and ipse dixit, even if judicial, do not validate themselves. We are inclined to agree with the opinion expressed in the Lahore and Allahabad cases. [*Biram Sardar* v. *Emperor*, AIR 1941 Bom 146 - [AIR 1939 PC 47 : 1939 IA 66 : 40 Cri LJ 364] A thing is *specific* if it is explicit. It need not be express. The antithesis is between “specific” and “indefinite” or “omnibus” and between “implied” and “express”. What is precise, exact, definite and explicit, is specific. Sometimes, what is specific may also be special but yet they are distinct in semantics. From this angle, the Criminal Procedure Code is a general Code. The remission rules are special laws but Section 433-A is a specific, explicit, definite provision dealing with a particular situation or narrow class of cases, as distinguished from the general run of cases covered by Section 432 CrPC. Section 433-A picks out of a mass of imprisonment cases a specific class of life imprisonment cases and subjects it explicitly to a particularised treatment. It follows that Section 433-A applies in preference to any special or local law because Section 5 expressly declares that specific provisions, if any, to the contrary will prevail over any special or local law. We have said enough to make the point that “specific” is specific enough and even though “special” to “specific” is near allied and “thin partition do their bounds divide” the two are different. Section 433-A escapes the exclusion of
> Section 5. [at paras 35 – 38]

20. Thus, “specific provision” must mean that the particular provision in the Code of Civil Procedure must clearly indicate in

itself and not merely by implication that the special law in question is to be affected. It is important to note that one of the meanings of the word “specific” is that it is distinct from something that is general. In **Maru Ram’s** case, Section 433A of the Code of Criminal Procedure, 1973, was challenged as being against various provisions of the Constitution. That challenge was repelled by this Court. Section 433-A begins with a *non obstante* clause specifically dealing with a particular situation, that is, where a sentence of imprisonment for life is imposed in certain circumstances, then notwithstanding the commutation power contained in Section 433, such person is not to be released from prison unless he has served at least 14 years of imprisonment. In applying Section 5 of the Code of Criminal Procedure, 1973 to Section 433A, great emphasis was placed on the *non obstante* clause contained in Section 433A, and it was ultimately held that Section 433A picks out of a mass of imprisonment cases a specific type of case – namely, life imprisonment cases and subjects such cases explicitly to a particularized treatment. It was for this reason that Section 433-A was held to be a specific provision to the contrary to the Prison Rules which were subsumed in the general provision contained in Section 432 of the Code of Criminal Procedure, 1973.

21. It is in this primary sense that the expression “specific provision” is used in Section 4(1) of the Code of Civil Procedure because, as we have seen above, it carves out an exception to special, local, or other laws which deal with the same subject matter as the Code of Civil Procedure but get overridden by the Code of Civil Procedure.

22. Viewed in this perspective, we have to discover whether the various provisions of the Code of Civil Procedure referred to by Shri Viswanathan can be said to be “specific provisions to the contrary” for the purpose of Section 4(1) of the Code of Civil Procedure.

23. Section 117 is a general provision which applies the Code to the High Courts of this country. Similarly, Section 120 is another general provision which states that Section 16, 17 and 20 of the Code do not apply to the High Courts in exercise of their original civil jurisdiction. Sections 122, 125 and 129 equally are general provisions and not specific to the case at hand, namely, what is to happen if two Judges hearing an appeal differ with each other. This leaves Section 98, which will be dealt with a little later in this judgment.

24. Shri Viswanathan also relied upon a Division Bench judgment of this Court in **Kulwant Kaur and Others v. Gurdial**

Singh Mann (dead) by LRS and Others, (2001) 4 SCC 262, to submit that this decision is an authority for the proposition that there is no need to expressly refer to a local law when the legislative intent to repeal local laws inconsistent with the Code of Civil Procedure is otherwise clear.

The judgment in **Kulwant Kaur's case** raised a question which arose on an application of Section 41 of the Punjab Courts Act, 1918. This Section was couched in language similar to Section 100 of the Code of Civil Procedure as it existed before the Code of Civil Procedure (Amendment) Act, 1976, which amended Section 100 to make it more restrictive so that a second appeal could only be filed if there was a substantial question of law involved in the matter. The question this Court posed before itself was whether Section 41 stood repealed by virtue of Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976, which reads as under:-

> **"97. Repeal and savings**
>
> (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed."

This Court concluded that Section 41 of the Punjab Courts Act was repealed because it would amount to an amendment

made or provision inserted in the principal Act by a State Legislature. This Court further held that, in any event, Section 41 of the Punjab Courts Act being a law made by the Legislature of a State is repugnant to a later law made by Parliament, namely, Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976, and that therefore, by virtue of the operation of Article 254 of the Constitution of India, the said provision is in any case overridden. In arriving at the aforesaid two conclusions, this Court held:-

> "Now we proceed to examine Section 97(1) of the Amendment Act and the amendment of Section 100 CPC by the said 1976 Act. Through this amendment, right to second appeal stands further restricted only to lie where, "the case involves a substantial question of law." This introduction definitely is in conflict with Section 41 of the Punjab Act which was in *pari materia* with unamended Section 100 CPC. Thus so long there was no specific provision to the contrary in this Code, Section 4 CPC saved special or local law. But after it comes in conflict, Section 4 CPC would not save, on the contrary its language implied would make such special or local law inapplicable. We may examine now the submission for the respondent based on the language of Section 100(1) CPC even after the said amendment. The reliance is on the following words:
>
> "100. (1) Save as otherwise expressly provided … by any other law for the time being in force…."
>
> These words existed even prior to the amendment and are unaffected by the amendment. Thus so far it could legitimately be submitted that, reading this part of the section in isolation it saves the local law. But this has to be read with Section 97(1) of the Amendment Act, which reads:
>
> "97. (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a

> High Court before the commencement of this Act shall, except insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed." (Noticed again for convenience.)
>
> Thus language of Section 97(1) of the Amendment Act clearly spells out that any local law which can be termed to be inconsistent perishes, but if it is not so, the local law would continue to occupy its field.
>
> Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of *Ganpat* [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled." [at paras 27 – 29]

25. We are afraid that this judgment does not state the law correctly on both propositions. First and foremost, when Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 speaks of any amendment made or any provision inserted in the principal Act by virtue of a State Legislature or a High Court, the said Section refers only to amendments made and/or provisions inserted in the Code of Civil Procedure itself and not elsewhere. This is clear from the expression "principal Act" occurring in Section 97(1). What Section 97(1) really does is to state that where a State Legislature makes an amendment in the Code of Civil Procedure, which amendment will apply only within the four corners of the State, being made under Entry 13 of List III of the 7th

Schedule to the Constitution of India, such amendment shall stand repealed if it is inconsistent with the provisions of the principal Act as amended by the Parliamentary enactment contained in the 1976 amendment to the Code of Civil Procedure. This is further made clear by the reference in Section 97(1) to a High Court. The expression "any provision inserted in the principal Act" by a High Court has reference to Section 122 of the Code of Civil Procedure by which High Courts may make rules regulating their own procedure, and the procedure of civil courts subject to their superintendence, and may by such rules annul, alter, or add to any of the rules contained in the first schedule to the Code of Civil Procedure.

26. Thus, **Kulwant Kaur's** decision on the application of Section 97(1) of the Code of Civil Procedure Amendment Act, is not correct in law.

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British

India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force. Shri Viswanathan's reliance upon this authority therefore does not lead his argument any further.

28. Shri Viswanathan drew our attention to Section 29(2) of the Limitation Act which reads thus:-

> "**29. Saving.**
> (2) Where any special or local law prescribes for any

> suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

29. He also referred us to various judgments, namely, **Hukumdev Narain Yadav v. Lalit Narain Mishra**, (1974) 2 SCC 133 at page Nos.146-147, (para 17), **Anwari Basavaraj Patil v. Siddaramaiah**, (1993) 1 SCC 636, at page 639 (para 8), **Gopal Sardar v. Karuna Sardar**, (2004) 4 SCC 252 at page 264 (para 13), which construed the expression "expressly excluded" as including something that one can derive from the scheme and words used in a statute without necessarily referring to the subject matter at hand specifically.

30. The three decisions cited by him do not carry the matter much further for the simple reason that the expression "express exclusion" is to be gleaned from the special or local law and not from the Limitation Act. Section 29(2) of the Limitation Act thus differs from Section 4(1) of the Code of Civil Procedure in a very important respect, namely, that the specific or express exclusion must be contained in the special or local law, so far as the Limitation Act, 1963 is concerned, as opposed to Section 4(1) of

the Code of Civil Procedure, where we have to look for the specific exclusion in the Code of Civil Procedure itself, and not in the special or local law. It is for this reason that the judgments cited by Shri Viswanathan embarked upon a survey of the scheme of the Representation of the People Act, 1951, and the West Bengal Land Reforms Act, 1955, and held that the said Acts were a complete Code dealing with elections to Parliament and to preemptions in the State of West Bengal, respectively, which expressly excluded Section 5 of the Limitation Act. In the present case, there is no question of examining the scheme of the Travancore-Cochin High Court Act to see whether it contains any provision which expressly excludes the applicability of the Code of Civil Procedure.

31. This brings us to the main contention urged by both parties, namely, whether the Constitution Bench in **Sathappan's case** (supra) concludes the issue in the present case.

32. Since the judgment in **Sathappan's case** was strongly relied upon by both sides, we need to refer to it in a little detail. **Sathappan** was a judgment which dealt with the correct interpretation of Section 104 of the Code of Civil Procedure. Section 104 provides:

> **"Section 104 - Orders from which appeal lies**
>
> (1) An appeal shall lie from the following orders, and

save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:--

* * * * * * * *

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

No appeal shall lie from any order passed in appeal under this section." [at para 6]

33. The question which arose before this Court was whether Letters Patent Appeals, which were referred to in "any other law for the time being in force", and therefore outside Section 104(1), could be said to be governed by Section 104(2) which provided that no appeal shall lie from any order passed in appeal under this Section. After noticing several earlier judgments of this Court, this Court concluded:-

"Thus the unanimous view of all courts till 1996 was that Section 104(1) CPC specifically saved letters patent appeals and the bar under Section 104(2) did not apply to letters patent appeals. The view has been that a letters patent appeal cannot be ousted by implication but the right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation. The express provision need not refer to or use the words "letters patent" but if on a reading of the provision it is clear that all further appeals are barred then even a letters patent appeal would be barred." [at para 22]

This Court then went on to hold:

“Thus, the consensus of judicial opinion has been that Section 104(1) of the Civil Procedure Code expressly saves a letters patent appeal. At this stage it would be appropriate to analyse Section 104 CPC. Sub-section (1) of Section 104 CPC provides for an appeal from the orders enumerated under sub-section (1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by any law for the time being in force. Sub-section (1) therefore contemplates three types of orders from which appeals are provided, namely,
(*1*) orders enumerated in sub-section (1),
(*2*) appeals otherwise expressly provided in the body of the Code, and
(*3*) appeals provided by any law for the time being in force.
It is not disputed that an appeal provided under the Letters Patent of the High Court is an appeal provided by a law for the time being in force.

As such if an appeal is expressly saved by Section 104(1), sub-section (2) cannot apply to such an appeal. Section 104 has to be read as a whole. Merely reading sub-section (2) by ignoring the saving clause in sub-section (1) would lead to a conflict between the two sub-sections. Read as a whole and on well-established principles of interpretation it is clear that sub-section (2) can only apply to appeals not saved by sub-section (1) of Section 104. The finality provided by sub-section (2) only attaches to orders passed in appeal under Section 104 i.e. those orders against which an appeal under “any other law for the time being in force” is not permitted. Section 104(2) would not thus bar a letters patent appeal. Effect must also be given to legislative intent of introducing Section 4 CPC and the words “by any law for the time being in force” in Section 104(1). This was done to give effect to the Calcutta, Madras and Bombay views that Section 104 did not bar a Letters Patent appeal. As appeals under “any other law for the time being in force” undeniably include a letters patent appeal, such appeals are now specifically saved. Section 104 must be read as a whole and harmoniously. If the intention was to exclude what is specifically saved in sub-

section (1), then there had to be a specific exclusion. A general exclusion of this nature would not be sufficient. We are not saying that a general exclusion would never oust a letters patent appeal. However, when Section 104(1) specifically saves a letters patent appeal then the only way such an appeal could be excluded is by express mention in Section 104(2) that a letters patent appeal is also prohibited. It is for this reason that Section 4 of the Civil Procedure Code provides as follows:

"4. *Savings*.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land."

As stated hereinabove, a specific exclusion may be clear from the words of a statute even though no specific reference is made to Letters Patent. But where there is an express saving in the statute/section itself, then general words to the effect that "an appeal would not lie" or "order will be final" are not sufficient. In such cases i.e. where there is an express saving, there must be an express exclusion. Sub-section (2) of Section 104 does not provide for any express exclusion. In this context reference may be made to Section 100-A. The present Section 100-A was amended in 2002. The earlier Section 100-A, introduced in 1976, reads as follows:

"100-A. *No further appeal in certain cases*.—Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such Single Judge in

such appeal or from any decree passed in such appeal."

It is thus to be seen that when the legislature wanted to exclude a letters patent appeal it specifically did so. The words used in Section 100-A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the legislature knew that in the absence of such words a letters patent appeal would not be barred. The legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 CPC. Thus now a specific exclusion was provided. After 2002, Section 100-A reads as follows:

"100-A. *No further appeal in certain cases*.— Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."

To be noted that here again the legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100-A no letters patent appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100-A nor Section 104(2) barred a letters patent appeal.

Applying the above principle to the facts of this case, the appeal under clause 15 of the Letters Patent is an appeal provided by a law for the time being in force. Therefore, the finality contemplated by sub-section (2) of Section 104 did not attach to an appeal passed under such law.

It was next submitted that clause 44 of the Letters Patent showed that Letters Patent were subject to amendment and alteration. It was submitted that this showed that a Letters Patent was a subordinate or subservient piece of law. Undoubtedly, clause 44 permits amendment or alteration of Letters Patent, but then which legislation is not subject to amendment or

alteration? CPC is also subject to amendments and alterations. In fact it has been amended on a number of occasions. The only unalterable provisions are the basic structure of our Constitution. Merely because there is a provision for amendment does not mean that, in the absence of an amendment or a contrary provision, the Letters Patent is to be ignored. To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters Patent. As has been held in *Vinita Khanolkar case* [(1998) 1 SCC 500] and *Sharda Devi case* [(2002) 3 SCC 705] a Letters Patent is the charter of the High Court. As held in *Shah Babulal Khimji case*[(1981) 4 SCC 8] a Letters Patent is the specific law under which a High Court derives its powers. It is not any subordinate piece of legislation. As set out in the aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the High Court concerned. The Civil Procedure Code is a general law applicable to all courts. It is well-settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between the Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of the Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 of the Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 CPC only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100-A." [at paras 29 – 32]

34. Based on the aforementioned extracts from the Constitution Bench decision, Shri Viswanathan sought to urge that a specific exclusion need not refer to the very provision that is sought to be excluded but it was enough if the subject matter at hand is referred

to and that therefore it is not necessary for any provision in the Code of Civil Procedure to expressly refer to Section 23 of the Travancore-Cochin High Court Act, but that it would be enough that on a reading of the said provision it would be clear that the particular special, local, or other law would not apply.

35. As has been stated by us above, for the exclusion to be specific, we must first hold that the provision contained in Section 98(2) is special as against Section 23 of the Travancore-Cochin High Court Act. This we are afraid we cannot do, as it would be in the teeth of the Constitution Bench judgment in **Sathappan's case,** in particular paragraph 32 thereof. This Court has unequivocally held that a Letters Patent is a special law for the High court concerned, the Code of Civil Procedure being a general law applicable to all courts, and that it is well settled that in the event of a conflict between the two, the special law must always prevail. In the present case, substitute the words "High Court's Act" for "Letters Patent". What follows is that the High Court's Act is a special law for the High Court concerned, the Code of Civil Procedure being a general law applicable to all courts. This according to us really concludes the matter in favour of the appellants. **Hemalatha's case** (supra) has therefore been wrongly decided and must therefore be overruled.

36. Shri Viswanathan referred various judgments to us on the applications of the general versus special principle. In particular he relied strongly on **Life Insurance Corporation of India v. D.J. Bahadur and Others**, (1981) 1 SCC 315. The question that arose before this Court in that case was whether the Life Insurance Corporation Act, 1956 is a special statute qua the Industrial Disputes Act, 1947 when it came to a dispute regarding conditions of service of the employees of the Life Insurance Corporation of India. This Court ultimately held that the Industrial Disputes Act would prevail over the Life Insurance Corporation of India Act as the Industrial Disputes Act relates specially and specifically to industrial disputes between workmen and employers, whereas the LIC Act is a general statute which is silent on what happens to disputes between management and workmen. The fact that the LIC Act must be considered to be a special legislation regulating the takeover of private insurance business not being relevant to the subject matter at hand would not make the said Act special in any sense. The working test laid down by this Court to determine which statute is general and which special, is laid down in paragraph 52 of the said judgment thus:-

> **"**In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for

> certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes — so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission — the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to."

37. Applying the aforesaid test, we have no doubt that the principal subject matter contained in the present case is appeals before the High Court of Kerala. The particular perspective that we are concerned with is what is to happen, in such appeals, if there is a difference of opinion between two Judges hearing such appeals in the High Court. Viewed from this perspective there can be no doubt that the subject matter pertains to appeals in the High

Court alone and not other courts. Those appeals can deal with civil, criminal, and other matters. The particular perspective therefore demands the application of a uniform rule to all such appeals, which rule is provided by the special rule contained in Section 23 of the Travancore-Cochin High Court Act, which in turn displaces the general rule which applies under Section 98(2) of the Code of Civil Procedure to all Courts and in civil proceedings only.

38. Viewed from another perspective, even the topics for legislation contained in the 7th Schedule of the Constitution of India would show that civil procedure is dealt with differently from jurisdiction and powers of courts. In this regard the relevant entries in the 7th Schedule make interesting reading:-

> "1. **List III entry 13**
>
> 13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.
>
> 2. **List I entry 95**
>
> 95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.
>
> 3. **List II entry 65**
>
> 65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.
>
> 4. **List III entry 46**

> 46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List."

39. We now turn to the arguments based on Section 98(3) of the Code of Civil Procedure.

40. As has been stated hereinabove, Section 98(3) was introduced in the year 1928 when all the High Courts in British India were governed only by the Letters Patent establishing them. The reason for the introduction of the said Section goes back to the landmark judgment of the Privy Council in **Bhaidas' case** and various other judgments following the said landmark judgment.

41. In **Bhaidas' case** (supra), the Privy Council had to decide whether clause 36 of the Letters Patent would prevail over Section 98 of the Code of Civil Procedure. Clause 36 of the Letters Patent was similar to Section 23 of the Travancore-Cochin High Court Act. The Privy Council, after setting out Section 4 of the Code of Civil Procedure, held:-

> "There is no specific provision in section 98, and there is a special form of procedure which was already prescribed. That form of procedure section 98 does not, in their Lordships' opinion, affect. The consequence is that the appellant is right in saying that in this instance a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by

judgments in Madras, in Allahabad and in Calcutta."

42. The controversy which reared its head after the aforesaid judgment was as to whether appeals under the Code of Civil Procedure, being referred to in clause 16 of the Letters Patent, would also be covered by clause 36. In order to appreciate the aforesaid controversy, it is necessary to set out clauses 15, 16 and 36 of the Letters Patent as follows:-

> **"*Clause 15. Appeal from the courts of original jurisdiction to the High Court in its appellate jurisdiction:-***
>
> And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, on or after the first day of February, 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right to appeal from other judgments of Judges of the said High Court or of such

Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided.

Clause 16. Appeal from Courts in the Provinces:-
And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulation now in force.

Clause 36. Single Judges and Division Courts:—

And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at (Madras), (Bombay), Fort William in Bengal in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of section 108 of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it."

43. It will be seen that clause 36 refers to the "appellate jurisdiction" of the High Court, which jurisdiction would contain appeals both under clause 15 of the Letters Patent and under Section 96 of the Code of Civil Procedure. Despite this, some High Courts took the view that appeals under Section 96 of the

Code of Civil Procedure would not be covered by clause 36 of the Letters Patent, and that therefore Section 98(2) and not Clause 36 would be applied in such appeals before the High Courts.

44. In an instructive Full Bench judgment in **Immidisetti Dhanaraju & Another v. Motilal Daga & Another**, AIR 1929 MAD 641, owing to the difference of opinion between two learned Judges of the High Court, the question that had to be decided was whether clause 36 of the Letters Patent would apply or Section 98 of the Code of Civil Procedure. Phillips,J. after referring to the Privy Council judgment in **Bhaidas' case**, stated:-

> "There is no specific provision in S. 98, and there is a special form of procedure which was already prescribed. That form of procedure S. 98 does not, in their Lordships' opinion, affect."
> This is a very general statement and is wide enough to include the statement that S. 98 does not affect the procedure laid down in the Letters Patent. That procedure is given in Cl. 36 which applies to cases arising both under Cl. 15 and Cl. 16. It would, therefore, appear that this dictum would apply equally to Cls. 15 and 16 of the Letters Patent and this is supported by the judgment of Lord Sumner in *Sabitri Thakurain* v. *Savi* where he observes.
> "In conclusion, there is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters."

In an interesting passage, Phillips,J. went on to hold:-

> "It is suggested that the amendment of S. 98 merely leaves the law as it was before, but as there has been no pronouncement of the Privy Council saying that S. 4 did not protect Cl. 36 equally with Cl. 15, which it was definitely held to protect, it cannot be said that S. 98,

prior to the amendment, necessarily affected Cls. 16 and 36. The distinction drawn between the jurisdiction of the High Court under Cl. 15 and Cl. 16 was based on the language of S. 96; for, it has been held that S. 96 refers only to appeals from Subordinate Courts and not to appeals from one Judge of the High Court to the High Court, S. 96 does not in terms exclude appeals from one Judge to the other Judges of the High Court; for, it includes all appeals from "any Court exercising original jurisdiction to the Court authorised to hear appeals from decisions of such Court." This language is wide enough to include appeals from one Judge to the other Judge of the High Court. If that is so then S. 96, applies to all appeals and S. 98 which clearly relates back to S. 96 must also deal with all appeals. If S. 98 does not affect appeals under Cl. 15, how can it be held to affect appeals under Cl. 16? It appears to me that in view of the judgments of the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab* and *Sabitri Thakurain* v. *Savi*[1] Sec. 4 of the Civil Procedure Code of 1908 was enacted in order to save, amongst other enactments, the provisions of the Letters Patent. That this was the view of the Legislature is now made clearly the very recent amendment of S. 98, Civil Procedure Code."

45. In the Full Bench decision in the same case, Ramesam,J., agreed with the view of Phillips, J., and held:-

"The result is that it is now beyond all doubt that Cl. 36 of the Letters Patent applies to all appeals. It may be asked, when does S. 98 of the Civil Procedure Code have any operation and why should the legislature not say that the section does not apply to Chartered High Courts instead of adding an explanation to the section? The reply is that S. 98 applies now only to Courts other than the Chartered High Courts, that is, the Chief Courts, and Courts of Judicial Commissioners and the reason why the legislature adopted this particular form of elucidating the matter is that it was intended to retain S. 98, as applicable even to Chartered High Courts, but to make the application subject to Cl. 36 of the Letters Patent. If, at any time, Cl. 36 of the Letters

> Patent ceases to exist, S. 98 will come into operation. It is to attain this particular result that the explanation was added to S. 98, instead of saying that S. 98 does not apply to Chartered High Courts at all. I would answer the question referred to us thus:
> "The procedure adopted by the High Court should be governed by Cl. 36 of the Letters Patent."

While so holding, the Full Bench of the Madras High Court held that Section 98(3) was declaratory of the law as it always stood. It was held:

> "It is true that the Amending Act is intended to be declaratory, that is, not only is its object to make the law clear from its date but also to make the Act retrospective; that is, there is no change in the law. The law both before the amendment and after the amendment is the same. To this extent I agree with the argument of the learned Advocate, that the amendment is declaratory. But to assume from this that the Amending Act did not intend to alter the law, as expounded by the decisions up to that date, does not follow: In the first place, it is not correct to say that there is a well-understood rule of law prior to the amendment, in the manner stated by the learned Advocate for the respondents. The decision in *Lachmam Singh* v. *Ram Lagan Singh* and *Veeraraghava Reddi* v. *Subba Reddi* indicate the contrary. In my opinion, the object of the amendment is to make it now perfectly clear that for any purpose Cl. 36 of the Letters Patent should never be controlled by the Civil Procedure Code. This was the view of Lord Buckmaster in *Bhaidas Shivdas* v. *Bai Gulab* and the cases approved therein. The Amending Act is really the response of the legislature to the invitation of Page, J."

46. In an instructive Full Bench judgment reported in **Shushila Kesarbhai & Ors. v. Bai Lilavati & Ors.,** AIR 1975 Guj. 39 (FB), the Full Bench of the Gujarat High Court had to consider whether a

decision given by the Full Bench of the Bombay High Court in **Bhuta v. Lakadu Dhansing** reported in AIR 1919 Bom 1 (FB), laid down the correct law. After an exhaustive discussion discussing the entire history of the CPC Acts starting from 1859 right up to 1908 the Gujarat High Court held:

> **"**It would thus be seen that under the Code of 1882 the High Courts of Bombay, Calcutta, Madras and Allahabad were all agreed that Section 575 superseded Clause 36 and since appeals from subordinate Courts were covered, by Section 575, the procedure in case of difference of opinion in such appeals was governed by Section 575 and not by Clause 36, though, if Section 575 had not been there and Clause 36 had not been superseded by it, the procedure applicable would have been that set out in Clause 36. There was difference of opinion amongst the High Courts only in regard to the procedure applicable in case of intra-High Court appeals under the Letters Patent. The Calcutta High Court took the view that even in case of intra-High Court appeals, Section 575 applied and Clause 36 was excluded while the Madras and Allahabad High Courts held that the procedure in case of intra-High Court appeals was governed by Clause 36 and not by Section 575."

After setting out Sections 98 and 117 of the Code of Civil Procedure the Full Bench further went on to say:

> **"**If these were the only relevant Sections there can be no doubt that by reason of Section 117, Section 98 would ordinarily apply in case of difference amongst Judges hearing an appeal from a subordinate Court as did Section 575 by reason of Section 632 of the Code of 1882. But Section 4, sub-section (1) provides in so many terms that nothing in the Code and since the Code includes Section 98, nothing in Section 98, shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for

the time being in force. We have already discussed the scope and content of Clause 36 and it is apparent from that discussion that Clause 36 is wide enough to include appeals from subordinate Courts as well as intra-High Court appeals and, therefore, the procedure for resolving difference of opinion, set out in Clause 36 is applicable not only in case of intra-High Court appeals but also in case of appeals from subordinate Courts. This procedure is different from that set out in Section 98 and it is clearly, qua Section 98, a special form of procedure prescribed by Clause 36. Now there is no specific provision to the contrary in Section 98 or any other provision of the Code and nothing in Section 98 is, therefore, to be deemed to limit or otherwise affect the special form of procedure prescribed by Clause 36 and consequently notwithstanding Section 98, Clause 36 must operate in its fullness and apply to appeals from subordinate Courts. Section 4, subsection (1) saves the special form of procedure prescribed in Clause 36 and provides that it shall prevail despite conflict with Section 98. It is therefore, clear as a matter of plain grammatical construction that under the present Code the procedure in case of difference of opinion in appeals from subordinate Courts is governed by Clause 36 and not by S. 98.

This would appear to be the undoubted position in principle but let us see what the decided cases say. The first decision to which we must refer in this connection is the decision of the Full Bench of the Bombay High Court in 21 Bom LR 157 : (AIR 1919 Bom 1 (FB)) (supra) but before we do so, we may make a brief reference to an earlier decision of the Bombay High Court in *Suraj Mal* v. *Horniman*, 20 Bom LR 185 : (AIR 1917 Bom 62 (SB)). That was a case of an intra-High Court appeal under Clause 15 and the question arose whether on difference of opinion amongst the Judges, Section 98 applied or Clause 36. The Division Bench observed that Clause 36 prescribed a special form of procedure in certain cases where the Judges of a Division Bench differed and this special form of procedure was saved by Section 4, sub-section (1) and the applicability of Section 98 excluded in cases to which this special form of

> procedure applied. It was held that Section 129 made it abundantly clear that the intention of the Legislature was that in trial of oases on the Original Side as well as appeals arising in the Original Jurisdiction, nothing should be done which is inconsistent with the Letters Patent and, therefore, the special form of procedure prescribed in Clause 36 applied in case of intra-High Court appeals arising from the Original Side and Section 98 had no application in case of such appeals. This decision was no doubt given in the context of intra-High Court appeals but the principle on which it was based must apply equally in relation to appeals from subordinate Courts. Clause 36, as we have already pointed out, embraces appeals from subordinate Courts as well as intra-High Court appeals and, therefore, if the special form of procedure prescribed in Clause 36 is saved from intra-High Court appeals, it must be held equally to be saved for appeals from subordinate Courts and Clause 36 must accordingly be held to apply in relation to them and not Section 98."

The Full Bench of Gujarat then went on to state that the Full Bench of the Bombay High Court stood overruled by referring to **Bhaidas' case** in the following terms:-

> "This fallacy underlying the decision of the Full Bench in 21 Bom LR 157 : (AIR 1919 Bom 1 (FB)) was exposed by the Judicial Committee of the Privy Council in a decision given only two years later in *Bhaidas Shivdas* v. *Bai Gulab*, 23 Bom LR 623 : 48 Ind App 181 : (AIR 1921 PC 6). That was, of course, a case of an intra-High Court appeal under Clause 15 and while dealing with the question as to what is the procedure to be followed in case of difference of opinion in such an appeal, Lord Buckmaster, after referring to Section 4, sub-section (1) of the Code of 1908 observed:—
>
> "There is no specific provision in Section 98, and there is a special form of procedure which was already prescribed. That form of procedure Section 98 does not, in their Lordships' opinion, affect. The consequence is that the appellant is right in saying that

> in this instance a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by judgments in Madras, in Allahabad, and in Calcutta: see *Roop Lal* v. *Lakshmi Doss*, (1906) ILR 29 Mad 1: *Lachman Singh* v. *Ram Lagan Singh*, (1904) ILR 26 All 10 and *Nundeepat Mahta* v. *Urquhart*, (1870) 4 Beng LR 181." These observations were undoubtedly made in the context of intra-High, Court appeals but the reasoning behind these observations is equally applicable in case of appeals from subordinate Courts because both categories of appeals are embraced by Clause 36. This decision of the Privy Council must, therefore, be held to have overruled 21 Bom LR 157 : (AIR 1919 Bom 1 (FB)) by necessary implication. Moreover, the Judicial Committee pointed out that the view taken by them in regard to the inter-action of Section 98 and Clause 36 was not novel for it was supported inter alia by the judgment of the Calcutta High Court in 1870 Beng LR 181 (supra). The case of 1870 Beng LR 181 as we have pointed out above, related to an appeal from a subordinate Court and it was held by the Calcutta High Court in that case that the procedure in case of difference of opinion in such an appeal was governed by Clause 36. This decision of the Calcutta High Court was approved by the Judicial Committee and it must, therefore, be held that according to the Judicial Committee it is Clause 36 and not Section 98 which applies in case of an appeal from a subordinate Court. The decision in 21 Bom LR 157 : (AIR 1919 Bom 1) (FB) cannot, therefore, be regarded as good law after the decision of the Judicial Committee in 23 Bom LR 623 : (AIR 1921 PC 6) and it need not deter us from taking a different view."

After this long discussion on the point at hand, the Full Bench went on to consider the amendment made in Section 98 by adding Section 98(3). The Full Bench held that Section 98(3) merely clarified the existing legal position by removing a doubt which was

cast upon it by some judicial decisions. The very Statement of Objects and Reasons of the Repealing and Amending Act of 1928 said that the object of introduction of sub-section (3) in Section 98 is to enact more clearly a provision which was previously implied in Section 4 of the Code. Thus, the Full Bench of the Gujarat High Court held:-

> **"**This sub-section makes it clear beyond doubt that nothing in Section 98 shall be deemed to alter or otherwise affect Clause 36. Clause 36 is not to be controlled by Section 98. If there is any area in which Section 98 and Clause 36 operate simultaneously. Clause 36 must prevail and Section 98 must give way. Now we need not repeat that Clause 36 embraces exercise of appellate jurisdiction in both categories of appeals, namely, appeals from subordinate Courts as well as intra-High Court appeals under Clause 15. It is, therefore, obvious that, at any rate, since the introduction of sub-section (3), the procedure in case of difference of opinion in appeals from subordinate Courts must be held to be governed by Clause 36 and not by Section 98. In fact as we have pointed out above, that was always the law under the Code of 1908 even before the amendment by reason of Section 4, sub-section (1). Sub-section (3) of Section 98 merely clarified the existing legal position by removing a doubt which was cast upon it by some judicial decisions. That is made clear by the Statement of Objects and Reasons of the Repealing and Amending Act 18 of 1928 where it is stated that the object of introduction of sub-section (3) in Section 98 is to enact; more clearly the provision which was previously implied in Section 4 of the Code. The respondents relied on the decision of the Allahabad High Court in *Muhammad Ishaq Khan* v. *Muhammad Rustam Ali Khan*, ILR 40 All 292 : (AIR 1918 All 412) and urged that it is a recognised rule that where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as

interpreted by the decisions is altered, the rule laid down by the decisions must be adhered to. We accept this principle but we do not see how it has any application here. The law prior to the amendment was never different. The amendment did not seek to alter the law: it merely clarified what was always the law under the Code of 1908 and what that law was on a proper interpretation of Section 4, sub-section (1) has already been discussed by us. But even if the view be taken that prior to the amendment, the law was that appeals from subordinate Courts were governed by Section 98 despite the existence of Section 4, sub-section (1). sub-section (3) introduced in Section 98 made it very clear that Clause 36 must operate in its fulness and its applicability to appeals from subordinate Courts should not be excluded by Section 98 and to that extent the preexisting law must be held to have been altered. The decision in 21 Bom LR 157 : (AIR 1919 Bom 1) (FB) (supra) cannot, therefore, in any view of the matter, stand after the introduction of sub-section (3) in Section 98.

We may now turn to the decisions of the other High Courts. The Madras High Court in a Division Bench judgment in *Veeraraghava Reddy* v. *Subba Reddy*, ILR 43 Mad 37 : (AIR 1920 Mad 391) (SB) held that even in case of appeals from subordinate Courts. Clause 36 applies and not Section 98 but this judgment is not of much help because it does not contain any discussion of the question on principle. This question again came up for consideration before a Division Bench of the Madras High Court in *Venkatasubbiah* v. *Venkatasubbamma*, AIR 1925 Mad 1032. The Division Bench held that the previous practice of the Court was to apply Section 98 to appeals from subordinate Courts and the decision in 23 Bom LR 623 : (AIR 1921 PC 6) was not intended to override the rule of law enshrined in this practice. This decision is plainly incorrect for reasons which we have already discussed. We need not repeat those reasons. The Madras High Court was again called upon to consider this question in *Dhanaraju* v. *Motilal*, AIR 1929 Mad 641 (FB) which was a Full Bench decision. The Full Bench relied on 23 Bom LB 623 : (AIR 1921 PC 6) (supra) and also emphasized Section 98. sub-section

(3) for taking the view that Clause 36 is not controlled by Section 98 and it applies to all appeals, whether from a Single Judge of the High Court or from subordinate Court. This decision of the Full Bench has been consistently followed in the Madras High Court and it supports the view we are taking.

The view taken by the Calcutta High Court on this point varied from time to time, though there was no specific decision on the point in *Suresh Chandra* v. *Shiti Kanta*, AIR 1924 Cal 855 (SB), Page J., observed in that case that Clause 36 applies to all appeals, whether intra-High Court or from subordinate Courts. Two different views were expressed in the subsequent case of *Becharam* v. *Purna Chandra*, AIR 1925 Cal 845 (FB). There Walmsley, J., took the view that Clause 36 applies not only to intra-High Court appeals but also to appeals from subordinate Courts while Suhrawardy J., observed that so far as appeals from subordinate Courts are concerned, they are governed by Section 98. The next decision which followed was that in *Prafulla Kamini* v. *Bhabani Nath*, AIR 1926 Cal 121. In this case Page, J., who was a party to the judgment in AIR 1924 Cal 855 (supra) changed his opinion and held that 23 Bom LR 623 : (AIR 1921 PC 6) was confined to appeals under the Letters Patent and did not apply to appeals from subordinate Courts and Walmsley, J., also allowed himself to be persuaded to take the same view as Page, J. Page, J., observed in the opening paragraph of his judgment that this controversy can be satisfactorily set at rest “only by the action of the Legislature now long overdue” and invited the legislature to solve the doubts and differences by an express enactment. There were in fact no doubts and differences. The effect of Section 4, sub-section (1) was clear and indubitable and in our opinion, it saved the full content and operation of Clause 36 notwithstanding Section 98. But even so the Legislature in response to the invitation of Page J., and with a view to leave no scope for doubts or debate, introduced sub-section (3) in Section 98 by the Repealing and Amendment Act 18 of 1928. Since then the Calcutta High Court has taken the view that the procedure in case of difference of opinion in appeals from subordinate Courts also is governed by Clause

36.

So far as the Lahore High Court is concerned, a Division Bench of that Court held in AIR 1926 Lah 65 (supra) that appeals under the Code were governed by Section 98 and those under the Letters Patent by Clause 36. Shadilal, C.J., who presided over the Bench pointed out that if the matter were res integra, he would have held that Clause 26 of the Letters Patent of the Lahore High Court applied to all appeals heard by the High Court and it was immaterial whether they were appeals within the High Court itself or from Courts of inferior jurisdiction but he felt compelled by authorities to take a different view. We do not think, for reasons "which we have already discussed, that the learned Chief Justice should have felt constrained to decide the case contrary to his personal opinion. The personal opinion entertained by the learned Chief Justice was plainly correct. This question again came up for consideration before a Full Bench of the Lahore High Court in *Mt. Sardar Bibi* v. *Haq Nawaz Khan*, AIR 1934 Lah 371. The Full Bench held relying on AIR 1929 Mad 641 (FB) (supra) and *Debi Prasad* v. *Gaudham Rai*, AIR 1933 Pat 67 that "It is now well-settled that with the addition of sub-section (3), Section 98 of the CPC, made by the Repealing and Amending Act, 18 of 1928, that Section has no application to cases heard by a Division Bench of a Chartered High Court, whether in appeals from decrees of subordinate Courts or from decrees passed by a Judge of the High Court on the original side, and that all cases of difference of opinion among the Judges composing the Division Bench are governed by Clause 26, Letters Patent". This decision completely supports the view we are taking.

We have no decision of the Patna High Court prior to the introduction of sub-section (3) in Section 98 — at any rate none was cited before us. The first case where the question of competing claims between Section 98 and Clause 28 of the Letters Patent of the Patna High Court in relation to appeals from subordinate Courts came to be considered by the Patna High Court was that in AIR 1933 Pat 67 (supra). The Division Bench held in that case that the introduction of subsection (3) in Section 98 had

> resolved the controversy and it was clear that Clause 28 applied to all appeals, irrespective whether they were intra-High Court appeals or appeals from subordinate Courts. The same view was reiterated by the Patna High Court in *Rajnarain* v.*Saligram*, (1948) ILR 27 Pat 332 and *Bokaro and Bangur Ltd.* v. *State of Bihar*, AIR 1966 Pat 154.
>
> It would, therefore, be seen that there is now a consensus amongst most of the High Courts in the country that the procedure in case of difference of opinion in appeals from subordinate Courts is governed by the appropriate clause of the Letters Patent and not by Section 98 and the view we are taking is in accord with the decisions of the other High Courts."

47. The Gujarat High Court's Full Bench decision, with which we respectfully concur, is important on several counts. Not only does it correctly explain what is meant by a "specific provision to the contrary" in Section 4 of the Code of Civil Procedure, but it also goes on to state that what was achieved by Section 98(3) of the Code of Civil Procedure was already previously implied in Section 4 of the Code of Civil Procedure inasmuch as Section 98 being a general provision could not possibly be said to be a "specific provision" which would take away the effect of the Letters Patent in that case. The self same reasoning would apply to the question of law presented before us. If the Letters Patent, being the Charter of the High Courts in British India, was a special law governing the High Courts untouched by any specific provision to the contrary in the Code of Civil Procedure, so would the High Court Acts, being

the Charter of other High Courts, similarly remain as special laws untouched by any specific provision in the Code of Civil Procedure for the self-same reason. Viewed from any angle, therefore, it is clear that Section 23 of the Travancore-Cochin High Court Act, alone is to be applied when there is a difference of opinion between two learned Judges of the Kerala High Court in any appeal, be it civil, criminal, or otherwise, before them.

48. At this juncture, we may also point out that if we were to accept Shri Viswanathan's argument, several anomalous situations would arise. First and foremost, Section 23 of the Travancore-Cochin High Court Act would not apply to appeals under the Code of Civil Procedure before the High Court, but would apply to criminal and other appeals, making appeals before the same High Court apply a different procedure, depending upon their subject matter. As against this, having accepted Shri V. Giri's argument, a uniform rule applies down the board to all appeals before the High Court, whether they be civil, criminal, or otherwise by applying Section 23 of the Travancore-Cochin High Court Act to all of them. In fact, in Civil Appeal No. 8576 of 2014 which on facts arises out of the Malabar region of Kerala, Clause 36 of the Letters Patent of the Madras High Court would directly apply. As we have seen, Clause 36 of the Letters Patent is *pari materia* to Section 23

of the Travancore Cochin High Court Act. This being so, even for regions that were governed by a different law – namely, the Letters Patent of the Madras High Court – a uniform rule is to be applied to the entire Kerala High Court. It may be mentioned here in passing that the Letters Patent of the Madras High Court which applied to the Malabar region in the State of Kerala has been continued by virtue of Article 255 of the Constitution of India read with Sections 5, 49(2), 52 and 54 of the States Reorganisation Act, 1956.

49. At this juncture it is necessary to refer to the decision in **Tej Kaur and another v. Kirpal Singh and another**, (1995) 5 SCC 119, which was referred to in the course of arguments by both Shri Giri and Shri Viswanathan. This judgment only decided that a difference between two Judges of the Punjab and Haryana High Court would have to be decided in accordance with the provisions of Section 98(2) of the Code of Civil Procedure because Section 98(3) of the Code of Civil Procedure would not apply, as the Punjab High Court is not governed by the Letters Patent. What appears to have been missed by this decision is the fact that the Punjab and Haryana High Court continues to be governed by the Letters Patent governing the High Court set up at Lahore. The Lahore Letters Patent contains a provision similar to clause 36 of

the Letters Patent that governed Bombay and Calcutta by a *pari materia* provision contained in clause 26 of the Lahore Letters Patent. In accordance with our judgment, therefore, it is clear that this authority is no longer good law inasmuch as Section 98(3) of the Civil Procedure Code, 1908 would expressly save the said Letters Patent, and would thus make clause 26 applicable in place of Section 98(2) of the Code of Civil Procedure. [1]

50. Even between the High Courts themselves another anomalous situation would arise. Those High Courts, such as Bombay, Calcutta and Madras, which are "Letters Patent" High Courts so to speak, would not be governed by Section 98 in view of sub-section (3) thereof, but if we were to accept Shri Viswanathan's argument, High Courts like the Kerala High Court which are not established by any Letters Patent, would be so governed. This again would lay down two different rules for different sets of High Courts depending upon a wholly irrelevant circumstance – whether their Charter originated in the Letters Patent or in a statute. Here again the acceptance of Shri V. Giri's argument leads to one uniform rule applying down the board to all

[1] In fact, even the PEPSU Ordinance which governed the princely states of Punjab and which had set up a High Court for such states, also contained a provision similar to Clause 26 of the Letters Patent. Clause 56 of this PEPSU Ordinance stated as follows:

Clause 56 – Difference of opinion between two judges – In all appeals or other proceedings heard by two judges, if there is a difference of opinion between them, each judge shall record his separate opinion and the case shall be laid for hearing before a third judge and the decision of the Court shall be in accordance with the opinion of such third judge.

the High Courts in this country.

51. For the aforesaid reasons we conclude that Hemalatha's case was wrongly decided and answer Question 1 referred to us by stating that Section 23 of the Travancore-Cochin High Court Act remains unaffected by the repealing provision of Section 9 of the Kerala High Court Act, and that, being in the nature of special provision vis-à-vis Section 98(2) of the Code of Civil Procedure, would apply to the Kerala High Court.

52. In view of the answer to Question 1, it is not necessary to answer Question 2. The reference is disposed of accordingly.

……J.
(Anil R. Dave)

……J.
(Kurian Joseph)

……J.
(Shiva Kirti Singh)

……J.
(Adarsh Kumar Goel)

……J.
(R.F. Nariman)

New Delhi;
February 25, 2016.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 201 OF 2005

PANKAJAKSHI (DEAD) THROUGH L.RS.
AND OTHERS ... APPELLANT (S)

VERSUS

CHANDRIKA AND OTHERS ... RESPONDENT (S)

WITH

CIVIL APPEAL NO. 8576 OF 2014

PULPARAMBIL VASUDEVAN ... APPELLANT (S)

VERSUS

NANGANADA TH PULPARAMBIL
DEVADSAN AND OTHERS ... RESPONDENT (S)

J U D G M E N T

KURIAN, J.:

1. I wholly agree with the excellent exposition of law by my esteemed brother Rohinton Fali Nariman, J. I have nothing to add on the reference part. However, for appropriate guidance at the quarters concerned, I feel a few observations would be contextually relevant.

2. Legislature has thought it fit to allocate certain matters to be heard by a Single Judge and a few by a Bench of not less than two Judges, in common parlance what is known as Single Bench and

Division Bench. A matter is stipulated to be heard by a Division Bench on account of the seriousness of the subject matter and for enabling two or more heads to work together on the same. Sitting in Division Bench is not as if two Single Judges sit. In Division Bench or in a Bench of larger strength, there is a lot of discussion in-between, clarifications made, situations jointly analysed and positions in law getting evolved.

3. Under Section 98 of The Civil Procedure Code, 1908 (for short, 'the CPC'), when the Judges differ in opinion on a point of law, the matter is required to be placed for opinion of the third Judge or more of other Judges as the Chief Justice of the High Court deems fit and the point of law on which a difference has arisen is decided by the majority and the appeal is decided accordingly. It is to be seen that under the proviso to Section 98 (2) of the CPC, hearing by a third Judge or more Judges is only on the point of law on which the Division Bench could not concur. There is no hearing of the appeal by the third Judge or more Judges on any other aspect. Under Section 98 (2) of the CPC, in case an appeal is heard by a Division Bench of two or more Judges, and if there is no majority and if the proviso is not attracted, the opinion of that Judge or of the equally divided strength in the Bench which concurs in a judgment following or reversing the decree appealed from, such decree shall stand

confirmed.

4. Kerala High Court Act, 1958 has provided for the powers of a Bench of two Judges under Section 4. It is clarified thereunder that if the Judges in the Division Bench are of opinion that the decision involves a question of law, the Division Bench may order that the matter or question of law be referred to a Full Bench. Needless to say, it should be a question of law on which there is no binding precedent.

5. Under Section 23 of the Travancore-Cochin High Court Act, 1125, if the Division Bench disagrees either on law or facts, the Chief Justice is required to refer the matter or matters of disagreement for the opinion of another Judge and the case will be decided on the opinion of the majority hearing the case.

6. Under The Code of Criminal Procedure, 1973 (for short, 'the Cr.PC'), the position is slightly different. Section 392 reads as follows:

> "**392. Procedure when Judges of Court of Appeal are equally divided.**-When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:
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> Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench

of Judges.”

7. The emerging position is that there is no uniformity or clarity with regard to the Judge strength in the event of difference of opinion, and according to me, it has affected the purpose for which the matters are required to be heard by a strength of more than one Judge, be it a Division Bench or Full Bench (Larger Bench).

8. Under the Travancore-Cochin High Court Act, 1125, Section 23 enables the Chief Justice to refer for the opinion of another Judge, the matter or matters on which the Division Bench has disagreed either on law or on facts and the appeal will be ultimately decided on the view taken by that Judge sitting and hearing the appeal alone.

9. Under Section 392 of the Cr.PC, the situation again is different. In case, the Division Bench is divided in their opinion, the appeal with the opinions should be laid before another Judge of that Court and the appeal will be decided clearly on the basis of the opinion rendered by that Judge hearing the matter sitting alone. However, the proviso under Section 392 of the Cr.PC enables any one of the Judges of the Division Bench or the third Judge to order the appeal to be heard by a larger Bench of Judges.

10. The coram is not dealt with in the CPC or the Cr.PC. It is stipulated by the respective High Court Acts. When the High Court

Act provides for an appeal to be heard by a Division Bench in situations where Section 98 (2) without proviso operates, it virtually becomes a decision of the Single Judge since the differing view is only to be ignored. When the Judges hearing the appeal differ in opinion on a point of law, under the proviso, the said point of law has to be heard by one or more of other Judges and the appeal be decided according to the opinions of the majority of the Judges who have heard the appeal, including at the initial stage. In such situations also, unless the Chief Justice decides otherwise, the opinion on the point of law is formed only by one Judge, the third Judge. This position is actually against the very principle of reference on difference. Reference is always made to a larger coram. Not only that, when two judicial minds sitting together could not concur, that difficulty is to be resolved, ideally, if not on common sense, not by a third one, but by a Bench of larger coram.

11. In my humble view, if the purpose behind the requirement of a matter to be heard by a Bench of not less than two Judges is to be achieved, in the event of the two Judges being unable to agree either on facts or on law, the matters should be heard by a Bench of larger strength. Then only the members of the Bench of such larger strength would be able to exchange the views, discuss the law and together appreciate the various factual and legal positions. The

conspectus of the various provisions, in my view, calls for a comprehensive legislation for handling such situations of a Bench being equally divided in its opinion, either on law or on facts, while hearing a case which is otherwise required to be heard by a Bench of not less than two Judges, both civil and criminal. It is for the High Court and the Legislature of the State concerned to take further steps in that regard.

.....J.
(KURIAN JOSEPH)

New Delhi;
February 25, 2016.