

PANKAJAKSHI (DEAD) THROUGH LRS. AND ORS.

v.

CHANDRIKA AND ORS.

(Civil Appeal No. 201 of 2005)

NOVEMBER 8, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

s. 98(2) – *Decision by Division Bench of High Court – Difference of opinion between the two Judges comprising the Bench – Procedure to be adopted – Matter referred to larger Bench for consideration on the questions: (i) whether s. 23 of Travancore-Cochin High Court Act remains unaffected by the repealing provisions of s. 9 of Kerala High Court Act? If so, whether s. 23 is in the nature of a special provision vis-à-vis s. 98 (2) CPC? and (ii) whether the Supreme Court under Articles 136 and 142 of the Constitution can direct in an 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? – Travancore-Cochin High Court Act – s. 23 – Kerala High Court Act – s. 9 – Constitution of India, 1950 – Articles 136 and 142.*

The instant appeal was filed challenging the order passed by the Division Bench of the Kerala High Court dismissing an appeal against the decree passed by the trial court, as there was difference of opinion between the two Judges comprising the Bench, as regards genuineness of the will. It was contended for the appellant that since there was difference of opinion between the two Judges of the High Court, the appeal should have been referred to the Chief Justice for placing it before one or more other Judges.

A The Court noticed the decision of a two Judge Bench in *Tej Kaur** to the effect that in the case of difference of opinion between the two Judges in a Division Bench of the High Court hearing an appeal on a question of fact, the decree of the trial court must be confirmed in view of

B s. 98 (2) CPC. The Court also noticed the three Judge Bench decision in *P.V. Hemlatha*** wherein it was further held that while s. 23 of the Travancore-Cochin High Court Act was the general law, s. 98 (2) CPC was a special provision.

C Referring the matter to a larger Bench, the Court

HELD: 1.1. Section 23 of the Travancore-Cochin Act is in the nature of a special provision while s. 98 (2) CPC is in the nature of a general law. As between the two, the

D former would apply in preference to the latter. The decision of this Court in *P.V. Hemlatha*** to the extent it takes a contrary view, requires to be reconsidered. [para 8] [994-H; 995-A-B]

E **Tej Kaur and Anr vs Kirpal Singh and Anr.* [1995] SCR 385=1995 (5) SCC 119 and ** *P.V. Hemlatha vs Kattamkandi Puthiva Maliackal Saheeda and Anr* 2002 (3) SCR 1098 = AIR 2002 SC 2445 – referred to.

F 1.2. That apart, the question whether in an appeal arising out of an order passed by the High Court to which s. 98 (2) CPC applies, this Court can, in exercise of its power under Article 136 of the Constitution of India direct the matter to be placed before a third Judge to resolve the conflict arising from two differing judgments, has not

G been examined either in *P. V. Hemlatha* or *Tej Kaur*. This Court, therefore, considers it appropriate to refer to a larger Bench for consideration and an authoritative pronouncement, the following two questions:

H

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

(ii) 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? [para 9] [995-B-F]

Case Law Reference:

2002 (3) SCR 1098	referred to	para 5
[1995] SCR 385	referred to	para 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 201 of 2005.

From the Judgment & Order dated 20.8.2004 of the High Court of Kerala at Ernakulam in A.S. No. 686 of 1995 (C).

V. Giri, T.G. Narayanan Nair, Mohammed Sadique T.A., K.N. Madhusoodhanan for the Appellants.

Jayaprakash Sen, Malini Poduval, Babita Sant, M.T. George for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Heard learned counsel for the parties.

2. The facts of the case are that the respondent herein Chandrika filed a suit before the Sub Judge, Kottayam, Kerala, alleging that her father Raghavan died intestate on 18.06.1984. The plaintiff alleged that the defendants were relying on the will

A dated 14.06.1984 which was not a genuine will of Raghvan. On the other hand, the defendants alleged that the will was genuine. The Trial Court by its judgment dated 07.09.1994 held that the defendants failed to prove that the will in question was a true and genuine will of Raghavan.

B 3. Consequently, the trial court decreed the suit of Chandrika. The appellant herein challenged the judgment of the trial court in an appeal which came up before a Division Bench of the Kerala High Court. One of the Hon'ble Judges who heard the appeal was of the view that the will was genuine while the other held that it was not. Consequently the Division Bench by its judgment and order dated 20.08.2004 dismissed the appeal relying on Section 98 (2) CPC. It is this judgment and order which is challenged before us.

D 4. Learned counsel for the appellant submitted that since there was a difference of opinion between the two Hon'ble Judges of the High Court, the appeal should have been referred to the Hon'ble the Chief Justice for placing it before one or more other Judges. However, learned counsel for the respondent submitted that in view of the proviso to Section 98 (2) the reference to one or more other Judges can only be made when there is difference of opinion between the two Judges on a point of law. He submitted that since the difference of opinion was on a question of fact no reference could have been made to one or more other Judges, and the appeal should have been dismissed in view of the main part of Section 98 (2) CPC. Section 98 CPC reads as follows:-

G **"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.

H (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

^a[composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench] and the 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."

5. In *Tej Kaur and Another vs. Kirpal Singh and Another* 1995 (5) SCC 119, a two Judge Bench of this Court has held that when there is difference of opinion between the two High Court Judges in a Division Bench hearing an appeal on a question of fact, the decree of the trial court must be confirmed in view of the Section 98 (2) CPC. This Court observed:

....."It is true that in a case where there is difference of opinion among the Judges of the High Court, the power of this Court under Article 136 is wide enough to test the correctness of the conclusion reached by the differing learned Judges as pointed out by this Court in *Dr. Prem Chand Tandon* case. This proposition is unexceptionable but this Court had no occasion in that case to consider the scope of sub-section (2) of Section 98. The language employed in sub-section (2) is imperative and in mandatory terms. The object appears to be that on a question of fact

A when there is a difference of opinion, the view expressed
 by the court below, in the absence of a majority opinion,
 needs to be given primacy and confirmed. When such is
 the animation, this Court cannot enlarge the scope of the
 controversy by itself examining the correctness of the
 B finding of facts and decide which view of the two is correct.
 This would be in direct negation of the legislative mandate
 expressed in sub-section (2) of Section 98 of the CPC.”

6. The above view was followed by three Judge Bench
 C 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
 D 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:

“23. Reference by Chief Justice.—Where two Judges
 E 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
 F disagreement exists, and the decree, order or sentence
 shall follow the opinion of the Judges hearing the case.”

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:

G “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.”

H 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. Hemlatha's v. Kattamkandi Puthiya Maliackal Saheeda and Anr.* (Supra) to the extent it takes a contrary view, in our opinion, requires to be reconsidered.

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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. Hemlatha'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:

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D

(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.

E

(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.

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Let the papers of this case be placed before Hon'ble the Chief Justice for constituting a larger Bench.

R.P.

Matter adjourned.

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