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P.V. HEMALATHA

v.

KATTAMKANDI PUTHIYA MALIACKAL SAHEEDA AND ANR.

MAY 20, 2002

B

[D.P. MOHAPATRA, BRIJESH KUMAR AND D.M.
DHARMADHIKARI, JJ.]

C

Code of Civil Procedure, 1908—Sections 96 and Proviso to Section 98(2)—Suit—Dismissal of—Suit property situated in part of erstwhile State of Madras and new State of Kerala—Appeal under Section 96 before High Court of Kerala—Conflict of opinion between Judges of Division Bench of the High Court—Confirmation of order of subordinate Court in terms of proviso to Section 98(2) as difference was not found on point of law—Plea that matter was required to be referred to third Judge for majority opinion by taking

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recourse to Clause 36 of Letters Patent of Madras High Court, Section 23 of Travancore-Cochin Act and Section 98(3) CPC—Held, order of subordinate Court was rightly confirmed—Case not required to be referred to third Judge—Since clause 36 of Letters Patent of Madras High Court on 'Practice and Procedure' and 'Powers of Judges' is not applicable to any territory of State of Kerala—Since Section 23 of Travancore-Cochin Act is not applicable to

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appeals under Sections 96 to 98 CPC—And since Section 98(3) CPC is not applicable because High Court of Kerala has no Letters Patent as the same was not a Chartered High Court under British India—State Re-organisation Act, 1956—Sections 52, 54, 57 and 69—Travancore-Cochin Act, 1125 (Indian Calendar 1948-49)—Section 23—Kerala High Court Act, 1958—Section 9—

F

Code of Civil Procedure, 1908—Section 98(3)—Code of Civil Procedure, 1877—Section 577.

Constitution of India, 1950—Article 136—Special Leave to appeal—Grant of—Against judgment raising issue of fact wherein opinion of judges differed—Held, not permissible as it would be contrary to practice of Supreme Court and against the legislative intent of proviso to Section 98(2)—'Practice and Procedure'—Code of Civil Procedure, 1908—Proviso to Section 98(2).

G

Conflict of Law—General Law and Specific Law—Conflict between—Overriding effect of—Held, General law will override specific law.

H

Maxims

'Generalia specialibus non derogant' and 'Generalibus specialia derogant'—Applicability of. A

Words and Phrases—'Letters Patent'—Meaning of—Discussed.

The suits by plaintiff-petitioner claiming specific performance of a contract of sale of two cinema theatres, situated in Calicut were dismissed by Trial Court. Calicut was part of erstwhile Malabar District in State of Madras which now forms part of new State of Kerala. In appeal under Section 96 CPC before Division Bench of High Court of Kerala, the two Judges differed on all issues of fact and mixed issues of fact and law and passed separate judgments, one dismissing the appeals and the other allowing the appeal. However, by their common order, they confirmed the order of the Subordinate Court in terms of Section 98(2) CPC, since they had not identified difference on any point of law for reference of the same to third or more Judges. B C

In appeal to this Court appellant/plaintiff contended that Division Bench committed error of jurisdiction and procedure in relying on sub-section (2) of Section 98 CPC to confirm decree of Subordinate Court; and the difference of opinion on the points of facts and law were required to be referred to one or more other Judges by taking recourse to Clause 36 of Letters Patent of Madras High Court as the same was applicable in the case as it had been saved as procedure on 'jurisdiction' of the High Court by Section 52 of State Re-organisation Act, 1956 in relation to the territory earlier falling within the erstwhile Madras State which after re-organisation of States had become part of new State of Kerala; and by taking recourse of Section 23 of Travancore-Cochin Act, 1125 (Indian Calendar 1948-49) as the same was saved by Section 9 of Kerala High Court Act, 1958; and in view of Section 98(3) CPC. It was contended alternatively that if this Court did not find any ground to direct the High Court to refer the matter to one or more judges for resolving conflicting opinion the Court should grant special leave to appeal under Article 136 of the Constitution for examining the correctness of the conflicting judgment. D E F G

Dismissing the appeals, the Court

HELD: 1. Division Bench of Kerala High Court was right in holding that in view of conflicting judgments delivered by them the decree of the subordinate court has to be confirmed strictly in terms of sub section (2) of Section 98 CPC. [1120-D] H

A 2.1. Clause 36 of the Letters Patent of Madras High Court on 'Practice and Procedure' and 'Powers of Judges' is not applicable to any part of the new territory of State of Kerala and to the new High Court of State. Law with regard to the 'Practice, Procedure and Powers of Judges' as contained in the Kerala High Court Act, 1958 would be applicable uniformly to all the territories now forming part of new State of Kerala and the High Court established for it. [1118-F-G]

2.2. In the light of the Scheme contained in all the provisions under Part V of the States Re-organisation Act, 1956, Letters Patent of Madras High Court cannot be made applicable to the cases arising from Calicut as part of the territories of the new State of Kerala. [1115-F]

C 2.3. The expression 'other jurisdiction' used in Section 52, has to be understood as not including in it the law relating to 'practice and procedure of the High Court' and 'powers of Judges' which are subjects separately dealt with in Sections 54 and 57 of the State Re-organisation Act, 1956. [1114-F]

E 2.4. If the expression in Section 52 "other jurisdiction" associated with words 'original and appellate' is interpreted to include 'practice, procedure' and 'powers of Judges' of a High Court, a very incongruous result would ensue which can never have been intended by the Legislature which was enacting a transitory provision to lay down a uniform procedure for all the integrating territories of the High Court of a new State until suitable legislation on the subject is brought into force. [1114-G, H; 1115-A]

F 2.5. On wide meaning given to expression 'jurisdiction' under Section 52 of the State Re-organisation Act, Letters Patent of Madras High Court would apply to Malabar District which was part of the erstwhile State of Madras before its merger with new State of Kerala, whereas the Letters Patent of Madras High Court would not apply to other part of the territories included in the new State of Kerala. Thus, for the different territories which have merged into the new State of Kerala, different laws would apply. Such result is avoided by legislature in making suitable provisions on 'practice and procedure' in Section 54 and 'powers of Judges' in Section 57 of the State Re-organisation Act, 1956. [1115-B]

H 2.6. Travancore-Cochin Act was applicable to the new High Court of Kerala only between the period 1.11.1956 that is the 'appointed day', when the transitory provisions contained in Part V of State Reorganisation

Act, 1956 were in operation, to 9.3.1957 when Kerala High Court Act came into force dealing with jurisdiction and procedure of new High Court of Kerala. The new legislation of Kerala High Court Act had an overriding effect and operation from the date of enforcement of that Act i.e. 9.3.1957. This is the legal result of overriding effect of Section 69 of the State Reorganisation Act, 1956 which saves law applicable to 'corresponding State' only till legislation is brought in for the new State and its High Court. [1115-G, H; 1116-A]

3.1. Judges of the Division Bench of the High Court of Kerala could not have referred the matter to the Chief Justice for the opinion of third judge, taking recourse to Section 23 of the Travancore-Cochin Act as they had delivered two separate judgments. The law contained in the Travancore-Cochin Act and Kerala High Court Act regulating the practices, procedure and powers of 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 Code of Civil Procedure regulated by special law that is contained in Section 96 to 98 CPC. 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 of opinions to third Judge on Issues both on fact and law and the provisions contained in proviso of sub-section 2 of Section 98 CPC 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 Court's approach should be "to find out which of the two apparently conflicting provisions is more general one as to exclude the more specific". The principle is expressed in maxims *Generalia specialibus non derogant* (General things do not derogate from special things) and *Generalibus specialia 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. [1117-G, H; 1118-A-D]

3.2. Even if it is assumed that provisions of Section 23 of the Travancore-Cochin Act are saved by Section 9 of the Kerala High Court Act and are applicable to the High Court of new State of Kerala since provisions contained in Section 98 CPC 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 High Court Act, the 'special law' will prevail

A over the 'general law' and the provisions of Section 98 CPC in all its terms will have to be applied to civil appeals arising from civil suits which are regulated by CPC. [1118-E, F]

B 4.1. Sub-section (3) of Section 98 CPC also cannot be taken aid of by the petitioner for seeking resolution of difference of opinion between the two judges, by three or more judges of the High Court. Sub-section (3) of Section 98 CPC gives over-riding effect to Letters Patent of High Court and if in it there is a provision indicating the procedure for resolving conflict between judges constituting a Bench which is different from one provided in Sub-section 2 of Section 98 CPS. "[1119-A-B]

C 4.2. 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 State Reorganisation Act of 1956. High Court of Kerala, therefore, has no Letters Patent. The Travancore-Cochin Act and Kerala High Court Act are not Letters Patent of 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. 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 Travancore-Cochin Act 1125 (Indian Calendar 1948-49) and Kerala High Court 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 overriding effect alongwith Letters Patent of Chartered High Courts Act to other enactment dealing with formation of new High Courts for new States under the State Reorganisation Act of 1956 or any other laws. [1119-G, H; 1120-A, B]

Blackstone's Commentaries on the Laws of England Volume II pages 284-285; The Law and Custom of the Constitution by Sir William R. Anson Vol. II (The Crown Part.II), referred to.

G 5. As the issues of fact including one whether there was want of readiness and willingness on the part of the plaintiff to seek specific performance of the contract for sale of two theatres, arising between the parties in the suit and appeal were sufficient to decide the cases for or against the plaintiff, the cleavage of opinion between the two judges on the other mixed issues of law and fact is inconsequential. Their difference of opinion on mixed issues of law and fact even if it would have been

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referred for obtaining majority opinion of the Judges of the Court would not have changed the ultimate result of the appeals because the judges had also differed on issues of fact and decision of one of them was sufficient for decision of the cases in appeals. Thus as the opinion of one of the Judges on issues of fact was decisive of the appeal, it would not be in accordance with the established practice of this Court to interfere by grant of special leave to appeal. Grant of special leave to appeal against judgments raising issues of fact which were determinative would be against the legislative intent contained in provisions of sub-section (2) of Section 98 of the code.

[1120-G, H; 1121-B-D]

Tej Kaur v. Kirpal Singh, [1995] 5 SCC 119, relied on.

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C)
No. 5843-46 of 2001.

From the Judgment and Order dated 19.1.2001 of the Kerala High Court in A.S. No. 422/96, A.F.A. Nos. 99, 100 and 101 of 1994.

R.F. Nariman, L.N. Rao, T.P. Arvindaksha Menon, A. Raghunath and A. Anundan for the petitioner.

Shekhar Naphde, Krishanan Iyer, E.C. Agrawala, Rishi Agrawala, Mahesh Agrawala, Alok Agrawala, Manu Krishnan and P.N. Ramalingam for the Respondents.

The Judgment of the Court was delivered by

DHARMADHIKARI, J. These special leave petitions have been filed against the common judgment of the Division Bench of Kerala High Court dated 19.1.2001 which have arisen out of two suits seeking injunction and two other suits claiming decree of specific performance of the contract for sale of two cinema theaters viz., Sangam and Pushpa in Calicut. Calicut was part of erstwhile Malabar District in State of Madras and now forms part of new State Kerala.

1. An uncommon question of legal and procedural difficulty had arisen giving rise to these special leave petitions for appeal against the order of Division Bench of Kerala High Court. The subordinate Judge of Calicut dismissed the suit filed for specific performance of the agreement of sale of Sangam and Pushpa theaters by judgment dated 1.4.1978. The appeals preferred under Section 96 of the Code of Civil Procedure to the High Court

A of Kerala were decided by common judgment with the appeals arising from the injunction matters. The Two judges constituting the Division Bench sharply different on all issues of fact and mixed issues of fact and law. Justice P.K. Balasubramanyam dismissed the appeals holding that the plaintiff (petitioner herein) is not entitled to decree of specific performance. The other Judge, Justice K.A. Abdul Gafoor, differed and came to the conclusion that the plaintiff is entitled to decree of Specific Performance. He, therefore, allowed the appeals.

2. In the course of hearing, it is not disputed before us by the counsel appearing for the parties that the main issue arising on facts between the parties which was sufficient to dispose of the appeals was regarding the right of the plaintiff to claim decree of the specific performance. The other mixed issue of law and fact whether the property being *custodia legis* through the Receiver appointed by the Court the suit without obtaining leave of the Court was maintainable or not, was an additional ground to grant or refuse the decree of specific performance. The other related issues of fact which arose in the suit were regarding readiness and willingness of the plaintiff to obtain the sale in due time and the entitlement of the plaintiff to the grant of equitable relief of decree of specific performance.

3. The two Judges constituting the Division Bench delivered two separate judgments in which they have differed on almost all issues arising in the case. After delivering two separate judgments, the Judges then formulated the impugned order dated 19.1.2001 and came to the conclusion that since they have delivered two separate judgments and have not identified difference on any point of law, the decree of the court below passed by the court is liable to be confirmed in terms of Section 98(2) of the Code of Civil Procedure (For short "the Code").

4. Before discussing the contentions advanced by the learned counsel for the petitioners and the respondents—it is necessary to critically examine the provisions of Section 98 of the Code (which are reproduced below) and the order dated 19.1.2001 passed by the Division Bench resulting in confirmation of the decree of subordinate court:

"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: A

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 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. B C

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

5. The impugned order dated 19.1.2001 jointly by the two Judges reads thus:- D

"In these appeals different judgments have been rendered by the two Judges constituting the Bench. One of us has dismissed A.S. 422 of 1996 and partly allowed the appeals A.F.A. Nos. 99, 100 and 101 of 1994. The other has allowed the appeal A.S. 422 of 1996, and dismissed the appeals, A.F.A. Nos. 99, 100 and 101 of 1994. In this situation, Section 98 of the Code of Civil Procedure comes into play. Under Sub-section 2 of Section 98 of the code the decree appealed from would stand confirmed in such a situation, as no point of difference on law is stated by us to attract the application of the proviso thereto. The only question then is whether there is any provision in the Letters Patent, as far as we are concerned, the Kerala High Court Act which would keep out the operation of Section 98(2) of the Code in the light of Section 98(3) of the Code. E F

In a case where the Judges differ, there is no provision in the Kerala High Court Act 1958 governing the course to be adopted. There was a provision in section 23 of the Travancore-Cochin High Court Act and it can be argued in terms of Section 9 of the Kerala High Court Act, 1958 that the provision of Travancore-Cochin High Court Act 1125 in so far as they relate to matters not provided for in the High Court Act 1958, will continue to be in force. But the Travancore- G H

A Cochin High Court Act operates only regarding the area covered by the united States of Travancore-Cochin or the erstwhile princely States of Travancore-Cochin. The suit from out of which these appeals arise was filed in the concerned court in Calicut, part of the erstwhile Malabar District of the Kerala State before the re-organisation of States with effect from 1.11.1956. The territory was thus under the jurisdiction of the High Court of Judicature, Madras and in these appeals, the provision that has to be looked for is the letters patent for the High Court of Judicature, Madras. Therein, again, there is no provision corresponding to Section 23 of the Travancore-Cochin High Court Act conferring the power on the Chief Justice of the High Court in a situation like the present one, to refer the case to a third Judge. Clause 36 of the Letters Patent only provides that if 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 is a majority, but if the Judges should be equally divided, then 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. There is no provision in Letters Patent to cover a situation like the present one where different judgments have been rendered by the two Judges constituting the Bench. Therefore, even on the premise that the Letters Patent of the High Court of Judicature, Madras continues to govern matters, notwithstanding the enactment of the Kerala High Court Act, 1958, it has to be noted that there is no specific provision in the Letters Patent governing the present situation. It has, therefore, to be held that section 98(2) of the Code of Civil Procedure applies in all its rigour. Thus, in view of Section 98(2) of the Code of Civil Procedure it has to be ordered that all the decrees challenged in these appeals shall stand confirmed".

6. As quoted above Sub-section (1) Section 98 of the Code provides that 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, Sub-section (1) of Section 98 of the Code, therefore, provides that where the appeal is decided by two Judges and there is no unanimity in opinion, Sub-section (2) of the said Section would get attracted which states that where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall

be confirmed'.

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7. Proviso to Sub-section (2) of Section 98 of the Code, further, states 'that where the Bench is composed of two or other even number of judges and the Judges comprising the Bench *differ 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 Judges, and in that event 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.'

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8. Sub-section (3) of Section 98 of the Code gives overriding effect to the provisions of Letters Patent of High Court (if there be any) and contains procedure for resolving such a difference. Sub-section (3) thus saves the provision of Letters Patent of the concerned High Court if it contains a provision dealing with such difference of opinion different from the one contained in Sub-section (2) of Section 98 of the Code.

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9. The two Judges who have differed on all issues arising in the appeal and had delivered separate judgments, in their common order dated 19.1.2001 have confirmed the decree of the Sub-ordinate Court by stating in clear words that they have not formulated any point of law on which they have differed. To quote their words in the order, they say *under Sub-section (2) Section 98 of the code, the decree appealed from would stand confirmed in such a situation as no point of difference on law is stated by us to attract the application of the proviso thereto*".

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10. The other question that was considered by the Division Bench is whether there is any Letters Patent applicable to High court of Kerala which indicates a different procedure for resolving difference of opinion expressed by them in their two separate judgments. According to the opinion of the learned Judges, the provisions of travancore-cochin High Court Act 1125 (hereinafter referred to as Travancore - Cochin Act) in Section 23 empowered the Chief Justice to refer the case to the opinion of the third Judge for resolving the difference between the two Judges constituting the Division Bench but the said Travancore - Cochin Act was applicable only to the erstwhile Travancore - Cochin area which now forms part of the new State of Kerala and cannot be made applicable to the Malabar District forming part of erstwhile State of Madras which has now merged in to the territory of new State of Kerala. The two learned judges also considered the argument, which is now being advanced before us on behalf of the petitioner, that the letters patent of the High Court of Madras containing cause 36 could be invoked to

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A resolve the difference of opinion between two Judges both on question of fact and law by referring the case for the opinion of one or more judges of the same High Court for decision of the case on the basis of the opinion of the majority of the Judges who heard the case including those who first heard it and had differed.

B 11. The two learned judges of the Kerala High Court constituting the Bench even on an assumption that Letters Patent of Madras High Court could be availed of in relation to the territory falling in Malabar District of erstwhile Madras State and now forming new State of Kerala, came to the conclusion that clause 36 of Madras Letters Patent of High Court does not cover a
C situation as is obtaining in cases before them where the two Judges differed on all issues of fact and law, have delivered two different judgments and not found necessary to state any point of law on which they differed for reference of the same to third or more judges, It is on such understanding of the procedural provisions contained in the Code, Travancore-Cochin Act, and the Kerala Act read with Clause 36 of the Letters Patent of Madras High Court
D that the Judges forming the Division Bench came to the conclusion that there is no other option before them except to confirm the decree of the subordinate court in accordance with Sub-section (2) of section 98 of the Code.

E 12. Senior learned counsel Shri. R.F. Nariman very strenuously urged that the two learned judges in taking the above view and confirming the decree of the subordinate court committed a grievous mistake of law in holding that clause 36 of the letters patent did not cover a situation like the one before them. It is argued that even though the two judges have delivered separate Judgments, from their judgments it is clearly discernible that they had differed almost on every point or issue arising in the case and the point
F of law on which they differed even though it has not been stated by them separately can be culled out from the two separate opinions or they can be directed to state the point upon which they differed for making a reference of the case to one or more other judges of the High Court to resolve the conflict *inter se* between two judges and obtain a majority opinion of the
G High Court for decision of the case accordingly.

H 13. The learned senior counsel appearing for the petitioner took us through the various provisions of Travancore - Cochin Act, Kerala Act and the States Re-organisation Act (hereinafter referred to as S.R. Act of 1956) to support his submission that clause 36 of the Letters Patent of the Madras High Court was saved as a procedure on 'Jurisdiction' of the High Court at

least in relation to the territory earlier falling within the erstwhile Madras State which after re-organisation of States has become a part of territory of the new State of Kerala. Learned counsel contended that in the present case, clause 36 of the Letters Patent of Madras High Court clearly provides a solution for resolving the difference of opinion between the judges. Clause 36 is saved by virtue of provision in Sub-section (3) of Section 98 of the Code. The learned Judges of the Kerala High Court forming the Division Bench, it is argued, committed error of jurisdiction and procedure in relying on Sub-section. (2) of Section 98 of the Code to confirm the decree of subordinate court. Reliance is placed on the decision in cases of *Dadh Nathu Rajah (dead) by Lawyers v. Angha Nathu Jamal (dead) by Lawyers*, [1969] 3 SCC 813 and *Ittavira Mathai v. Varkey Varkey*, [1964] 1 SCR 495. In support of the contentions that clause 36 of the letters Patent of Madras High Court is applicable to Calicut being the territory of the erstwhile State of Madras and now forming part of High Court of Kerala, reliance is placed on to Section 52 of the S.R. Act of 1956 which reads as under:-

“52. *Jurisdiction of High Courts for new states*—The High Court for a new state shall have, in respect of any part of the territories included in that new State, *all such original, appellate and other jurisdiction* as under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Commissioner's court for an existing State.”

14. Learned counsel appearing for the petitioner argued that Section 52 of the S.R Act of 1956 saved *original appellate and other* jurisdiction of the erstwhile High Court for the territories which now form part of the new State and is within territorial jurisdiction of that High Court after re-organisation of States. Submission made is that the expression '*other Jurisdiction*' used in Section 52 preceded by such words '*original and appellate*' is an expression of wide import and would, therefore, include clause 36 of Letters Patent of Madras High Court which governs subject matter of power and jurisdiction of one or more Judges of that High Court in the event of difference of opinion between them. In support of the above last contention, reliance is placed on the decision in case of *M.L. Sethi v. R.P. Kapur*, [1973] 1 SCR 697. Attention of the court is particularly invited to the observation of the Supreme Court in which word '*jurisdiction*' is explained thus :- *The "Jurisdiction" is a verbal coat of many colours. Jurisdiction originally seems to have had the meaning which Lord Reid ascribed to it in Anisminic Ltd. v.*

- A *Foreign Compensation Commission, namely the entitlement "to enter upon the enquiry in question."* The learned counsel therefore, submitted that if clause 36 of the Letters Patent of Madras High Court was attracted to erstwhile Malabar State now forming new State of Kerala. From where the cases emanated, the differences of opinion both on points of fact and law were required to be referred to one or more other judges of that court for forming a majority opinion.
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15. Learned senior counsel Shri Shekhar Naphde appearing for the respondent very stoutly opposed and controverted all the contentions on procedural provisions submitted on behalf of the petitioner. The learned
- C counsel surveyed the historical background of the various enactments under which the Travancore - Cochin High Court was constituted and the territorial jurisdiction of which later on merged with the Kerala High Court. The main submission of learned counsel appearing for the respondent is that erstwhile Malabar District forming part of the erstwhile State of Madras did not fall within the territorial jurisdiction of Travancore - Cochin High Court and therefore, Travancore - Cochin Act was not at all attracted to that part of the territory of new State of Kerala. It is submitted that Travancore - Cochin Act is expressly repealed by Section 9 of the Kerala Act when the latter was brought into force with effect from 9.3.57 after formation of new State of Kerala under the S.R. Act of 1956. It is submitted on such repeal Travancore
- E cochin Act did not survive on matters on which provisions were made in the Kerala Act Section 4 of the Kerala Act empowered the Judges constituting the Bench to refer only a question of law on which they have not agreed, to the full Bench. Section 6 of Kerala Act also confers a power on the Chief Justice to make over any case or matter to be heard by a full Bench. It is submitted that Travancore - Cochin High Court had no Letters Patent. It was
- F not a Chartered High Court of British India. Neither provisions of Section 23 of the Travancore-Cochin Act nor Section 4 & 6 of Kerala Act could be relied on for seeking a reference to one or more Judges of Kerala High Court for resolving the disputes between the three judges. On behalf of the respondents, it is further contended that Sub-section (3) of Section 98 of the
- G Code makes inapplicable sub-section (2) of section 98 of the Code only if there is any different provision in the letters Patent of that High Court on procedure for resolving difference of opinion between judges constituting a Bench.

16. Admittedly, High Court of Kerala is a newly constituted Court for
- H the newly formed State of Kerala in 1956 and governed by Kerala Act. The

said High Court does not have any Letters Patent-it being not a Chartered High Court continuing from the British period. In such a situation, it is submitted that the learned Judges were perfectly justified in giving effect to the provision of Sub-section (2) of Section 98 of the Code and coming to the conclusion that because of the two different judgments passed by them the decree of the subordinate court was liable to be confirmed. On behalf of the respondent very strong reliance has been placed on two Judges Bench decision of this Court in the case of *Tej Kaur v. Kirpal Singh*, [1995] 5 SCC 119 in which a similar situation Supreme Court held that the provision of Sub-section (2) of Section 98 would be attracted and in view of the two conflicting judgments passed by two Judges who differed on issues of fact, the judgment of subordinate court is liable to be confirmed.

17. In the reply to the reliance placed on Section 52 of the S.R. Act of 1956 for invoking clause 36 of the Letters Patent of Madras High Court, the learned counsel on behalf of the respondents submitted that the question of resolving difference of opinion by reference to one or more judges of the court is a subject matter of 'procedure' and 'power' of Judges' separately dealt with under Section 54 and 57 of the S.R. Act of 1956 hence reliance on provision of Section 52 is misplaced. It is submitted that under Section 54 and 57 the procedure of the court and power of judges of the 'corresponding State' as defined in clause (d) of Section (2) of S.R. Act of 1956 meaning the State of Travancore-Cochin alone, would apply to the new State of Kerala. On such interpretation of the provisions of Section 54 and 57, it is submitted that since High Court of State of Travancore-Cochin did not have any Letters Patent, the Letters Patent of Madras High Court could not be invoked even in relation to that part of the territory which fell within the erstwhile State of Madras and now has been merged in the new State of Kerala. It is submitted that everywhere in Section 54, 55, 56 and 57 on the subject of "practice and procedure", "powers of Judges" and other Court 'processes and 'seal' of the High Court, the reference is made to 'corresponding State' which is defined in Section 2(e) for various new States including the new State of Kerala. The 'corresponding State' defined in clause 2 (e) in relation to State of Kerala is State of Travancore-Cochin. It is, therefore, submitted that nothing outside the procedural provisions of the High Court of Travancore-Cochin could be looked into for deciding the question of resolving difference of opinion between the Judges of the Division Bench. Letters Patent of Madras High Court, therefore, is not applicable as law on 'practice and procedure' or 'powers of judges' which can be said to have been saved under Section 54 and 57 of the S.R. Act of 1956. As has already been stated above, the stand

- A of the respondent is that as seeking resolution of the difference of opinion between two Judges by referring to one or more Judges of the High Court is a matter of 'practice and procedure' or 'power of Judges' specifically governed by Section 54 and 57 of the S.R. Act of 1956, Section 52 intended to save the law in relation to 'jurisdiction' applicable to a part of territory of the new State earlier governed by jurisdictional law of erstwhile High Court should
- B be given a restricted meaning and not a wide meaning as is sought to be assigned to it on behalf of the petitioner to include within the expression 'jurisdiction' not only pecuniary and territorial but also 'practice and procedure' as well as 'powers of the Judges' in the matter of resolving conflict of opinion between them. Learned counsel for the respondent tried
- C to distinguish the decision in *Dadh Nathu's* case (supra) which related to erstwhile Saurashtra State now forming part of new State of Gujarat and *M.L. Sethi's* case (supra). The learned counsel for the respondent thus supported the procedure adopted and the conclusion reached by the two learned Judges of the Division Bench who had differed on all points arising in the cases before them and had delivered two separate judgments without formulating
- D points of difference on any question of law.

18. Let us first consider the main submission advanced on behalf of the petitioner that clause 36 of the Letters Patent of Madras High Court should have been invoked by the two Judges of the Division Bench who had differed
- E on all issues arising in the appeal and had delivered two separate judgments. The subject matter on High Courts of the newly formed States under the S.R. Act of 1956 is to be found in Sections 49 to 69 in Part V of the S.R. Act of 1956. From the appointed day i.e. 1.11.56, in accordance with Sub-section 2 of Section 49 of the S.R. Act of 1956, a new High Court for the new State of Kerala has been established and in accordance with Sub-section 1 of
- F Section 50 from the appointed day, High Courts of all existing Part 'B' States which included the then existing High Court of Travancore-Cochin stood abolished.

19. Section 52 which is on the subject of 'jurisdiction' of High Courts of new States, Section 54 on the subject of 'practice and procedure', Section
- G 55 on 'custody of seal' of the High Court, Section 56 on 'forms of writs and other processes', Section 57 on 'powers of Judges' and all other succeeding Sections up to Section 69 of the S.R. Act of 1956 containing saving clause have all to be read in conjunction with each other to ascertain extent of their operation and legislative intent sought to be achieved thereby. Section 52
- H extends to the territories of the High Court of new State, 'original, appellate

and other jurisdiction' which was exercisable in respect of that part of the territories by any High Court or Judicial Commissioner's Court for an existing State :

20. Section 54 of the S.R. Act, 1956 makes applicable the 'practice and procedure' of the High Court of the "corresponding State" to the High Court of new State. Proviso below Section 54 saves practice and procedure of the High Court of the 'corresponding State' until varied or revoked by rules and orders made by the High Court of a new State. 'Corresponding State' has been defined in clause (e) of Section 2 to mean in relation to the new State of Kerala the then State of Travancore and Cochin which existed on the appointed day. Section 54 and clause (e) of Section 2 defining 'corresponding State' read as under-

"54. *Practice and procedure* - Subject to the provisions of this Part, the law in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, with necessary modifications, apply in relation to the High Court for a new State, and accordingly, the High Court for the new State shall have all such powers to make rules and orders with respect to practice and procedure as are, immediately before the appointed day, exercisable by the High Court for the corresponding State:

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, until varied or revoked by rules or orders made by the High Court for a new State, apply with the necessary modifications in relation to practice and procedure in the High Court for the new State as if made by that Court. "

"2 (e). "*Corresponding State*" means, in relation to the new States of Bombay, Madhya Pradesh, Mysore, Punjab or Rajasthan, the existing State with the same name, and *in relation to the new State of Kerala, the existing State of Travancore-Cochin.*"

21. Section 57 of the S.R. Act, 1956 provides that law relating to the powers of Chief Justice, single Judges and Division Courts of the High Court of the 'corresponding State' shall, with necessary modifications, apply to the High Court of the new State. Section 57 of the S.R. Act, 1956 reads thus:-

"57. *Powers of judges*—The law in force immediately before the

A appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court for the corresponding State and with respect to matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court for a new State.”

B 22. The other most relevant Section 69 captioned “savings” gives overriding effect to any Act of the Legislature in respect of the High Court of new State. On coming into force of such legislation, it states that ‘nothing in Part V of the S.R. Act of 1956 would, after coming into force of such legislation, apply to the High Court of the new State’. Section 69 of the S.R. Act of 1956 reads thus:-

C “69. Savings—Noting in this Part shall affect the application to the High Court for a new State of any provisions of the Constitution, and this Part shall have effect subject to any provision that may be made on or after the appointed day with respect to that High Court by any

D Legislature or other authority having power to make such provision”.

23. As we have noticed above, ‘practice and procedure’ of the High Court of new State is dealt with in Section 54 and ‘powers of Judges’ is a subject dealt with in Section 57. The scheme of the Act, as disclosed on a conjoint reading of Sections 52, 54 and 57, makes it manifest that subject

E ‘practice and procedure’ and ‘powers of Judges’ specifically covered by Sections 54 and 57 respectively are treated separately from ‘jurisdiction’ dealt with in Section 52 of the S.R. Act, 1956. The expression ‘jurisdiction’—original or appellate, in Section 52 has, therefore, to be assigned a restrictive meaning as not to include within it ‘practice and procedure’ of the High

F Court and ‘powers of Judges’ which are subjects separately dealt with in Section 54 and 57 respectively. The expression ‘other jurisdiction’ used in Section 52, therefore, has to be understood as not including in it the law relating to ‘practice and procedure’ of the High Court’ and ‘powers of Judges’ which are subjects separately dealt with in Section 54 and 57 of the S.R. Act, 1956.

G 24. There is another reason for taking such a view of the relevant provisions discussed above. If the expression in Section 52 “other jurisdiction” associated with word ‘original and appellate’ is interpreted to include “‘practice, procedure’ and ‘powers of Judges’ of a High Court, a very incongruous result would ensue which according to us can never have been intended by

H the Legislature which was enacting a transitory provision to lay down a

uniform procedure for all the integrating territories of the High Court of a new State until suitable legislation on the subject is brought into force. A

25. As contended on behalf of the petitioner on wide meaning given to expression 'jurisdiction' under Section 52 of the S.R. Act, Letters Patent of Madras High Court would apply to Malabar District which was part of the erstwhile State of Madras before its merger with new State of Kerala, whereas the Letters Patent of Madras High Court would not apply to other part of the territories included in the new State of Kerala. Thus, for the different territories which have merged into the new State of Kerala, different laws would apply. Such result is avoided by legislature in making suitable provisions on 'practice and procedure' in Section 54 'powers of Judges' in Section 57 of the S.R. Act 1956. Our reading of Section 54 of the S.R. Act 1956 is that the law in force of 'practice and procedure' applicable to High Court of 'corresponding State' (which in this case is Travancore-Cochin) would continue to apply to all the integrating territories of the new State and its new High Court until new rules are framed or a new legislation is brought into force to be made applicable uniformly to all such territories. Similarly in accordance with Section 57, the 'powers of Chief Justice, single Judges and Division Benches' applicable to the High Court of 'corresponding State' Travancore-Cochin would apply to all the territories of the new State of Kerala in which are included territories of erstwhile State of Travancore-Cochin and Madras. In this manner Sections 54 and 55 ensure application of one uniform law on 'jurisdiction', 'procedure' and 'powers of judges' to the new State and its High Court. Exception to the above is contained in proviso to Section 54 and Section 69 of the S.R. Act of 1956 which stipulate that if the new High Court makes its own rules and orders or the Legislature of the new State makes a law in that respect for the High Court such law would have overriding effect. In the light of the Scheme contained in all the provisions under Part V of the S.R. Act 1956, we do not find it possible to accept the argument advanced for the petitioner that Letters Patent of Madras High Court can be made applicable to the cases arising from Calicut as part of erstwhile Malabar District of erstwhile State of Madras which now forms part of the territories of the new State of Kerala. B C D E F G

26. Thus, the Travancore-Cochin Act was applicable to the new High Court of Kerala only between the period 1.11.1956 that is the 'appointed day', when the transitory provision contained in Part V of S.R. Act, 1956 were in operation, to 9.3.1957 when Kerala Act came into force dealing with jurisdiction and procedure of new High Court of Kerala. The new legislation H

A for Kerala Act had an overriding effect and operation from the date of enforcement of that Act i.e. 9.3.1957. This is the legal result of overriding effect of Section 69 of the S.R. Act, 1956 which saves law applicable to 'corresponding State' only till legislation is brought in for the new State and its High Court.

B 27. One more argument advanced on behalf of the petitioner at this stage is required to be considered. Our attention is invited to the provisions of section 23 of the Travancore - Cochin Act which according to the learned counsel appearing for the petitioner is a provision different from provisions contained in Sub - section 2 of section 98 of the Code of Civil Procedure and the proviso thereunder. Section 23 of the Travancore - Cochin Act reads as under :-

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D "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."

E 28. The above provision in section 23 of the Travancore - Cochin act enables judges forming a Division Bench who had differed and delivered separate judgments to refer the matter to the Chief justice for resolving their difference of opinion both on question of fact and law. It is a provision different from proviso below Sub - section 2 of Section 98 which enables reference by the judges only on a stated point of law on which they had differed.

F 29. On behalf of the petitioner recourse is sought to be taken to Section 23 of the Travancore - Cochin Act stating that the Kerala High Court Act of 1958 by section 9 repeals travancore- Cochin act only in relation to matters provided in the Kerala Act. It is pointed out that under Section 4 of Kerala Act difference between Judges constituting a Bench of even number is required to be resolved by reference to a full Bench only if the difference is on question of law. Section 4 of Kerala Act reads thus

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H "4. *Powers of a Bench of two Judges* - The power of all the High Court in relation to the following matters may be exercised by bench of two judges provided that if both the judges agrees that the decision involves a question of law they may order that the matter or question

of law may be referred to a full Bench:

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(1) any matter in respect of which the power 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 S.3.,

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(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 .

C

(c) A reference-

(a) under S.13 of the Code of Civil Procedure, 1908.

(b) under s.307, s.374 or S.432 of the code of Criminal Procedure, 1898.

D

.....”

Reliance is placed on Section 9 of the Kerala Act which according to the learned counsel appearing for the petitioner, repeals provisions of the Travancore - Cochin Act only 'in so far as they relate to matters provided in the Kerala Act, and not all. Section 9 of Kerala Act reads thus:-

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“9. *Repeal* - The provisions of the Travancore - Cochin high Court Act, 1125 (V of 1125), in so far as they relate to matters provided in this Act, shall stand repealed.”

30. 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 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.

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31. The above argument advanced is attractive but cannot be accepted for another reason. In our view, the law contained in the Travancore - Cochin

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- A Act and Kerala Act regulating the practices, procedure and powers of 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 Code of Civil Procedure regulated by *special law* that is contained in section 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 any differing judges who have delivered separate Judgments opinions to 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 maxims *Generalia specialibus non derogant* [general things do not derogate from special things] and *Generalibus specialia 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- Seventh Edition, 1999 by Justice G.P Singh Page 113-114*)
- B
- C
- D

- E 32. 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 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.
- F

- G 33. We have reached the conclusion as stated above that clause 36 of the Letters Patent of Madras High Court on 'practice and procedure,' and 'powers of judges' is not applicable to any part of the new territory of State of Kerala and to the new High court of that State, Law with regard to the 'practice, procedure and powers of judges' as contained in the Kerala Act, would be applicable uniformly to all the territories now forming part of new State of Kerala and the High Court established for it. We have also held even on assumption that Section 23 of the Travancore - Cochin Act is saved under Section 9 of the Kerala Act that since the said Kerala Act is a *'general*
- H

law', it has to give place to Section 98 of the Code of Civil Procedure which is a 'special law', applicable to Civil Appeals arising from Civil Suits. A

34. In our considered view Sub-section (3) of Section 98 of the code of Civil Procedure also cannot be taken aid of by the petitioner for seeking resolution of difference of opinion between two judges by third or more judges of the High Court. As has been seen above sub-section (3) of section 98 of the Code gives over-riding effect to Letters patent of any High Court and if in it there is a provision indicating a procedure for resolving conflict between judges of a bench different from one provided in sub-section (2) of Section 98 of the Code, the provisions of Letters Patent of High Court shall prevail. Letters Patent is a word of definite legal meaning. It is derived from Latin word 'literate patents' the letters patent are so called because they are open letters, they are not sealed up, but exposed to view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letter of the king, sealed also with the great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection are closed up and sealed on the outside, and are thereupon called writs close literate clause, and are recorded in the close - rolls, in the same manner as the others are in the patent - rolls" (See Blackstones' Commentaries on the Laws of England volume II pages 284-285). B C D

35. Different Letters patents have been handed own by the sovereign in British India to chartered High Courts which included only Judicature for Bengal, Madras, Bombay, North-West Provinces (Allahabad) and others like Patna (1916) Lahore (1919), Rangoon (1922). The history of these courts is that the sovereign established them as superior courts in British India Under the Indian High Courts Act of 1861 and powers and jurisdiction of courts including judges of these courts were laid down in Letters Patent. [See the Law and Custom of the Constitution by Sir William R. Anson Vol. II (the Crown Part. II) pages 317 - 318 under the Headings' "Irish, Indian and Overseas Courts"] E F

36. Undisputedly, 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 S.R. Act of 1956. High Court of Kerala, therefore, has no Letters Patent The Travancore-Cochin Act and Kerala Act are not Letters Patent of High Court and therefore they cannot be held to have been saved under the provisions of Sub-section (3) of G H

A 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 Travancore - Cochin Act 1125 (Indian calendar 1948-49) and 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 overriding effect along with Letters Patents Chartered High Courts Act to other enactments dealing with formation of new High Courts for new states under the S.R. Act of 1956 in any other laws.

C 37. In this legal situation and in view of our conclusion that Letters patent of state of Madras is not applicable to any territory now within the territorial jurisdiction of High Court of Kerala, Sub-section (3) of Section 98 of the Code is of no assistance to the petitioner to claim reference of difference of opinion between the two judges to one or more judges of the High Court. The learned judges of the Division Bench of Kerala High Court were right in holding that in view of conflicting judgments delivered by them the decree of the subordinate court has to be confirmed strictly in terms of Section (2) of Section 98 of the Code. Sub-section (2) of Section 98 of the Code has a definite benevolent purpose. Where even number of judges constituting a bench are decided in their opinion and there is no question of law which they consider necessary for reference to one or other judges for obtaining majority opinion, the judgment and decree of the subordinate court should be confirmed to put an end to the litigation. The law does not favour litigation to proceed further where the opinion of the judges in appeal is divided only on issues of fact.

F 38. Now the last alternative submission made on behalf of the petitioner needs to be considered. It is submitted that if this court does not find any ground to direct the High Court to refer the matter to one or more Judges of the High Court for resolving conflicting opinion in their judgments this Court should grant special leave to appeal to this Court under Article 136 of the constitution of India so that the correctness of the two conflicting judgments of the Division Bench may be examined.

H 39. In the course of arguments learned counsel appearing for the parties did not dispute that amongst several issues of fact arising in the cases, on the decision of the issues purely of fact such as want of readiness and willingness in the part of the plaintiff to seek Specific Performance of the Contract for

sale of two theatres the suit was liable to be dismissed in accordance with the opinion of one of the Judges constituting the bench. The appeals, therefore, could be decided finally in favour or against the plaintiff on issues of fact alone without requiring the Judges to express opinion on the other mixed issues of law and fact such as whether the properties in suit being in *custodia legis* through the Receiver appointed by the court the suits could not have been filed without obtaining leave of the Court. As we have found that the issues of facts arising between the parties in the suit and appeal were sufficient to decide the cases for or against the plaintiff, the cleavage of opinion between the two judges on the other mixed issues of law and fact is inconsequential. Their difference of opinion on mixed issues of law and fact even if it would have been referred for obtaining majority opinion of the Judges of the Court would not have changed the ultimate result of the appeals because the Judges had also differed on issues of fact and decision of one of them was sufficient for decision of the cases in appeals. Thus as the opinion of one of the Judges on issues of fact was decisive of the appeal, it would not be in accordance with the established practice of this Court to interfere by grant of special leave to appeal. Grant of special leave to appeal against judgments raising issues of fact which were determinative would be against the legislative intent contained in provisions of sub-section (2) of Section 98 of the Code. We find some support for our conclusion from the decision of this Court in *Tej Kaur v. Kirpal Singh*, [1995] 5 SCC 119 in which full effect was given to the legislative mandate contained in sub-section (2) of Section 98 of the Code by confirming the decree of the Sub-ordinate Court in view of conflict of opinion between the two Judges who had delivered separate judgments but not referred any question of law for opinion of other Judges of the High Court. In that case, it was observed that "while exercising power under Article 136 the Court should not do any thing which would violate legislative mandate."

40. In the result, we find no ground to grant special leave to appeal against the impugned common judgment of the Division Bench of the High Court of Kerala in all the cases before us. The Special Leave Petitions are therefore rejected but without any orders as to costs.

K.K.T.

Petitions dismissed.