Kulwant Kaur & Ors vs Gurdial Singh Mann (Dead) By Lrs & Ors on 21 March, 2001

Equivalent citations: AIR 2001 SUPREME COURT 1273, 2001 (4) SCC 262, 2001 AIR SCW 1184, 2001 (2) LRI 678, (2001) 4 JT 158 (SC), 2001 (2) SCALE 634, 2001 (6) SRJ 400, (2001) 2 LANDLR 41, (2001) 2 MARRILJ 195, 2001 (2) MARR LJ 195, (2001) 2 PUN LR 492, (2001) 2 SCJ 429, (2001) 2 SUPREME 556, (2001) 2 RECCIVR 277, (2001) 2 ICC 1, (2001) 2 SCALE 634, (2001) WLC(SC)CVL 337, (2001) 2 CURLJ(CCR) 122

Bench: A.P. Misra, Umesh C. Banerjee

CASE NO.:
Appeal (civil) 1287 of 1990

PETITIONER:
KULWANT KAUR & ORS.

Vs.

RESPONDENT:
GURDIAL SINGH MANN (DEAD) BY LRS & ORS.

DATE OF JUDGMENT: 21/03/2001

BENCH:
A.P. Misra & Umesh C. Banerjee

JUDGMENT:

WITH CIVIL APPEAL NO.1288 OF 1990 JUDGMENT L...I...T.....T.....T.....T.....T.....T.....T..J BANERJEE, J.

The core issue in these appeals centres round the applicability of Section 100 vis-à-vis Section 41 of the Punjab Courts Act 1918. This Court in Banarsi Dass v. Brig. Maharaja Sukhjit Singh & Another (1998 (2) SCC 81) was faced with an identical situation and answered the same that there is no impediment in the matter of exercise of jurisdiction of the High Court in entertaining the second appeal in view of clause (c) of sub-section (1) of Section 41 of the Punjab Act. The situation would have been rather easier for us in view of the pronouncement of this Court in Benarasi Das (supra), but Mr. Mehta appearing in support of the Appeal drew our attention to the observations of this Court in paragraph 13 of the Report to the effect that the decision of this Court in its entirety

proceeded on the basis of a concession that the second appeal under section 41 of the Punjab Courts Act was maintainable and the objection pertaining to the amended Section 100 of the Code was not pressed and it is on this count that the learned Advocate in support of the appeal very strongly contended that applicability of Section 41 of the Punjab Act on the wake of the amendment to the Code of Civil Procedure, and in particular, Section 100 thereof was not considered neither the decision of this Court in Banarsi Dass (supra) can be ascribed to be an authority therefor. Having regard to the concession and for proper appreciation, paragraph 13 is set out herein below:

> 13. Mr. Bhagat conceded that the second appeal under Section 41 of the Punjab Courts Act was maintainable and he did not press his objection based on the amended Section 100 of the Code. We, therefore, need not examine the question if Section 4 of the Code would save the applicability of Section 41 of the Punjab Courts Act in view of Section 101 of the Code which says that no second appeal shall lie except on the grounds mentioned in Section 100 and Entry 13 of List III (Concurrent List) of Seventh Schedule of the Constitution which reads:
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> 13. Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

The concession thus recorded in Banarsi Dasss case as noticed above obviously renders the submissions of Mr. Mehta of some substance. Concession, if made and in the event the Court proceeds on the basis of such a concession, the decision cannot by any stretch be termed to be a binding precedent and as such the previous decision (1998 (2) SCC

81) does not and cannot have the sanctity and solemnity of a binding precedent. On the wake of the aforesaid, Mr. Mehta in support of the Appeal, contended that the High Court was clearly in error in entertaining the second appeal without any substantial question of law being involved therein and in any event, the second Appeal was entertained in violation of the procedure prescribed under Section 100 of the Code of Civil Procedure. It is at this juncture Section 100 as was existing prior to the Amendment Act, 1976, ought to be noticed.

Section 100 read as below:

> 100. (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 to the High Court from every decree passed in appeal by any court subordinate to the High Court on any of the following grounds, namely:
>
> (a) the decision being contrary to law or to some usage having the force of law;
>
> (b) the decision having failed to determine some material issue of law or usage having the force of law;

> (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.

Section 100 of the Code as stands amended by the Amendment Act and as is presently prevalent ought also to be noticed presently and the same reads as below:

> 100.(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court, from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.
>
> Mr. Swaroop for the Respondent on the other hand contended rather emphatically that by reason of the provisions of Section 41 of the Punjab Courts Act, 1918, there is neither any requirement nor any scope for framing of any substantial question of law. The Respondents contended that compliance and adaptation of the procedure as prescribed under Section 100 of the Code of Civil Procedure as is in the Code presently, can not by any stretch be said or termed to be a requirement having regard to Section 41 of the Punjab Courts Act which reads as below:
>
> 41. Second appeals- (1) an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court on any of the following grounds, namely:
>
> (a) The decision being contrary to law or to some custom or usage having the force of law;

> (b) The decision having failed to determine some material issue of law or custom or usage having the force of law;
>
> (c) A substantial error or defect in the procedure provided by the Code of Civil Procedure, 1908 (V of 1908) or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

Explanation - A question relating to the existence or validity of a custom or usage shall be deemed to be a question of law within the meaning of this section.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

Admittedly the above noted three provisions, as in Section 41 (a), (b) & (c) (as above) stand in pari materia with Section 100 prior to the amendment, though however, substantially different from the existing Section 100 which stands engrafted in the statute book by the Amendment Act, 1976. The applicability of Section 41 of the Punjab Act in the State of Punjab as of date and even after the introduction of the Amendment Act as stated by Mr. Swaroop stands affirmed by a full Bench judgment of the Punjab & Haryana High Court in the case of Ganpat v. Shri Ram Devi & Others (AIR 1978 P & H 137) wherein the High Court has categorically recorded a finding that a reading of Sections 4(1) and 100 (1) of the Code together leads to an irresistible conclusion that the legislature wished to save and leave all special or local laws as also any other law for the time being in force on the subject of second appeals. The High Court further stated that Section 41 of the Punjab Courts Act which clearly falls in such a category would thus not be, in any way stands affected by the provisions of Section 100 even on a plain construction of these statutory provisions. In paragraph 15 of the report, the High Court stated the situation as below:

> 15. Even excluding out of consideration the specific provisions of Section 4(1) and 100 of the Code the same result would seem to follow upon larger principles as well.

There can hardly be any doubt that the Civil P.C. is the general law of the land on the subject. On the contrary the Punjab Courts Act operates in a narrow and limited field both as regards the area to which it applies and the subject matter with which it deals. It is a settled law that a special provision or a special power would normally override a general one. On this general principle, the particular provisions of section 41 of the Punjab Courts Act are entitled to exclude the general provisions of S. 100 of the Code in the same field. If authority was at all necessary for so established a proposition, reference may be made to the recent Full Bench decision reported in 78 Punjab LR 726:

> (AIR 1976 Punjab 310) (FB) Chanan Singh v. Smt. Majo.
>
> The Full Bench decision of the High Court, in fact, however, placed a far too literal a meaning and interpretation of Section 4 of the Civil Procedure Code and it is on this statutory interpretation, the High Court in paragraph 9 of the report stated as below:

> 9. It is manifest from the above that the saving clause aforesaid has been couched in terms of widest amplitude.

The plain intention of the legislature appears to be that unless there is specific provision to the contrary, the Code shall not affect any special or local law or any special jurisdiction or power conferred by any other law. At the very outset we may point out that no specific provision to the contrary in this context has been or could have even remotely pointed out. It is equally plain, and indeed it was not disputed before us, that the Punjab Courts Act would squarely fall within the terminology of any special or local law. This being so it is unnecessary to dissert at any great length on the true nuance to be attached to the terms special law or local law in this context. On this admitted position, therefore, it follows that by virtue of Section 4(1) the provisions of the Punjab Courts Act are in no way limited or otherwise affected by the provisions contained in the Code. A fortiori the provisions of Section 100 of the Code, therefore, do not affect the corresponding provisions of Section 41 of the Punjab Courts Act either.

The High Court further observed that Section 41 of the Punjab Courts Act equally provides a special jurisdiction to the High Court as regards the Second Appeal and cannot but be said to be thus saved from being affected by the Code and, in fine, came to a conclusion that Section 4(1) of the Code has otherwise saved Section 41 of the Punjab Act from being in any way overridden or affected by the provisions of the Code even after introduction of the Amendment Act, 1976 in the Statute Book and Section 100 in particular.

The entire submission of Mr. Swaroop as regards the applicability of Section 41 being saved of the rigours of Section 100, admittedly, stands corroborated by the Full Bench Judgment. Let us however, analyse the situation in slightly more greater detail and consider the true perspective of Section 4(1) having regard to Section 97 of the Code of Civil Procedure (Amendment) Act, 1976. Section 97 (1) of the Amendment Act reads as below:

> 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 in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.
>
> On the score as above, we may profitably quote the decision of this Court in Ganpat Giri v. Second Additional District Judge, Ballia and Others (1986 (1) SCC 615). Paragraph 3 of the decision noticed above reads as below:
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> 3. The above provision is however subject to sub-

section (2) of Section 97 of the Amending Act which provides that notwithstanding that the provisions of the Amending Act have come into force or the repeal under sub-section (1) of Section 97 of the Amending Act has taken effect, and without prejudice to the generality of the provisions of Section 6 of the general Clauses Act, 1897, the provisions in clauses

(a) to (zb) of that sub-section would prevail. Sub-section (3) of Section 97 of the Amending Act provides that save as otherwise provided in sub-section (2), the provisions of the principal Act, as amended by the Amending Act, shall apply to every suit, proceeding, appeal or application pending at the commencement of the Amending Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement.

Section 97 (1) thus has an overriding effect as against any amendment or provision being inconsistent with the provisions of the principal Act and the principal Act referred to in Section 97 is the Code of Civil Procedure. It is on this score that Article 254 of the Constitution of India also have a bearing and as such the same is noted hereinbelow for its field of operation and scope.

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States. (1) If any provision of a law made by the Legislature of a State is repugnant to any provisions of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.
>
> Article 254 thus maintains Parliamentary supremacy in matters under List I and List III (List I Union List and List III Concurrent List). And It is on this score that Mr. Mehta was very eloquent that doctrine of implied repeal will have its true impact on the situation and thus resultantly negatived the effect of Section 41 of the Punjab courts Act. Mr. Mehta contended that Section 100 of the Code and Section 41 of the Punjab Act without any pale of controversy have a common objective viz. authority and jurisdiction to hear Second Appeals and thus both operate on the same field and by reason of the factum of the Punjab Act being non-complimentary to Section 100 of the Code, it cannot but be said to be repugnant and hence the doctrine of repugnancy will have its full play in the matter of declaration of the Punjab Act being void.
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> On the doctrine of implied repeal, Mr. Mehta contended that procedural law must be having a meaningful existence without being in conflict with a parliamentary

legislation. Undoubtedly, the doctrine of implied repeal is not to be favoured but where a particular provision cannot co-exist or intended to subsist in the event of there being the repugnancy between central and State Legislature the courts cannot but declare it to be so on the ground of repeal by implication. Uniformity of law, being the basic characteristics of Indian jurisprudence cannot be termed to be at sufferance by reason of a State Legislation which runs counter to the Central Legislation. It is not necessary that one legislation should be on the positive side whereas the other one in the negative: Such a stringent requirement is not the requirement in order to bring home the issue of repugnancy, but all the same it might result when both the legislations cover the same field. This observation find support from the decision of this Court in Zaverbhai Amaidas v. The State of Bombay [1955 (1) SCR 799] wherein this Court observed:

It is true, as already pointed out, that on a question under Article 254 (1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together; then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254 (2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. We must accordingly hold that section 2 of Bombay Act NO.XXXVI of 1947 cannot prevail as against section 7 of the Essential Supplies (Temporary Powers) Act No.XXIV of 1946 as amended by Act No.LII of 1950. (vide page 809) In Zaverbhais case (supra) this Court in no uncertain terms laid down that the important thing to consider is whether the legislation is in respect of the same matter and it is on this score true effect of Article 254 (2) has been said to the effect that if both the Centre and the State though competent to enact the same, the law of the Centre should prevail over that of the State. There cannot be any divergence of views on this score having regard the language of the Article 254 and this is irrespective of the factum that constitutionality of a statute being always presumed in affirmative rather than in the negative. It is in this context that a Constitution Bench of this Court in the decision in Karunanidhi [M. Karunanidhi v. Union of India & Anr. (1979) 3 SCC 431] stated that before any repugnancy can arise the following conditions must be satisfied:

(a) That there is clear and direct inconsistency between the Central Act and the State Act;

(b) That such an inconsistency is absolutely irreconcilable;

(c) That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

The requirement is thus a clear and direct irreconcilable inconsistency between the Central Act and the State Act and the inconsistency would be of such an extent that it would be otherwise impossible to obey the one without disobeying the other. Needless to record here that prior to the Amendment Act of 1976, through which the amendment to Section 100 was brought in the statute book, the question of Section 100 being inconsistent with Section 41 of the Punjab Act did not arise, since the Punjab Act is in consonance with unamended Section 100 without there being any differentiation and are compatable to each other being pari materia. Since the relevant statutory provisions have already been noticed herein before in this judgment, we need not recapitulate the same, and suffice however, to notice what stands noticed already. The situation, however, stands differently on the incorporation of the amendment to Section

100. With the amendment, the power to entertain a Second Appeal by the High Court stands restricted only on such occasions when the High Court is otherwise satisfied about the involvement of a substantial question of law. The addition of this new concept of substantial question was not available in the Code of Civil Procedure prior to the amendment or in the Punjab Act. What however is a substantial question we need not go into the same neither we are called upon to note in extenso the true purport of the expression. The issue stands concluded since the decision in Chunilals case [Sir Chunilal V. Mehta & Sons Ltd. vs. Century Spinning and Manufacturing Co. Ltd. :AIR 1962 SC 1314] and subsequently in the decision of this Court in Pankaj Bhargavas case [Pankaj Bhargava & Anr. V. Mohinder Nath & Anr. : (1991) 1 SCC 556] We are concerned with a much narrower issue as to whether the two acts can be termed to be inconsistent with each other as stated by the Punjab Full Bench (supra). The learned Advocate for the Respondents responded in the negative by placing reliance upon amended Section 100 and in particular the saving part of Section 100(1) which according to the submission saves the Punjab statute. The same however, needs to be delved into some detail. With reference to this submission, i.e. the saving provision, intention of the legislature seems to be that any other law for the time being in force (e.g. Punjab Act) shall stand saved This in short is the case made out for the respondents. As a matter of fact the respondents reiterated the reasonings as adopted by the Punjab Full Bench and contended that by reason of the express saving, question of Punjab Act being declared repugnant to the Section 100 does not and cannot arise. The respondents contended that the manifestation in the earlier Section 100 so far as protection of State Law is concerned is still maintained and there is identity with such manifestation in the pre amended and post amended Section 100 of the Code of Civil Procedure and in this context reference to Section 4 of the Code under which special or local law even special form of procedural law stands saved. A look at section 4 of the Code would thus be relevant and the same reads as below:- 4. (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.

The submission for the Respondent further proceeded to the effect that on a plain reading of this Section it depicts that in the event of there being any inconsistency, the special or local laws will have the precedence over the Code but in the event, there is no inconsistency between the two, the Code will prevail rather an attractive submission but on a closer scrutiny the same pales into insignificance. As aforesaid the special or local law as contained in Section 41 of the Punjab Code was in pari materia with unamended Section 100 so then there was no inconsistency. It is only after the amendment could be said to an inconsistency have developed between the two provisions, which is submitted to be saved by the aforesaid Section 4. While it is true, on its plain reading at the first glance local law seems to have been saved but we have to examine this in the light of Article 254 of the Constitution of India and the doctrine of repugnancy read with Section 97 of the Amending Act as noticed in the earlier part of this judgment. Incorporation of the Civil Procedure Code Amendment Act in the statute book is by virtue of conferment of power under Entry 13 of List III of the Seventh Schedule of the Constitution. The Constitution is the parent document and is supreme which has a binding effect on all and by virtue of the provisions of the Constitution, parliamentary supremacy in regard to the adaptation of laws if within the area of operation as provided under List I or List III is recognised.

Article 254 makes it unequivocal of the supremacy of the Parliament in the matter of repugnancy of any matter falling under List I or List III. There is one exception carved under Clause (2) to a matter falling under the Concurrent List III. This supremacy is further reinforced by the proviso of this Clause (2), which records;

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. (Noticed again for convenience).

Thus even in cases falling under Clause (2), where State law prevail, such law could be amended, varied or repealed by the Parliament by enacting law subsequently both by virtue of Clause (1) or proviso to Clause (2).

It is in this context a decision of this Court (I.T.C. & Ors. v. State of Karnataka & Ors :1985 (Suppl) SCC 476) may also be noted, wherein this Court in paragraph 18 of the judgment (see page 496) had the following to state:

> Thus, in my opinion, the five principles have to be read and construed together and not in isolation where however, the Central and the State legislation cover the same field then the Central legislation would prevail. It is also well settled that where two Acts, one passed by the Parliament and the other by a State Legislature, collide and there is no question of harmonising them, then the Central legislation must prevail.
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> Needless to record that since the decision in Tullochs case [State of Orissa v. MA Tulloch & Co. :1964 (4) SCR 461] the law seems to be rather firmly settled viz.a.viz. the Central and the State Act. In the decision last noted it has been stated that if the Central and the State Acts collide with each other the inevitable consequence would

have to be that the Central Act will prevail over the State Act and the latter will have to yield. This Court further went on to observe:

Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other.. the test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent Legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other Legislature whether passed before or after would be overborne on the ground of repugnance.

(Emphasis supplied) Subsequent to the decision as noticed herein before there is another decision of this Court in Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta & Ors [1969 (1) SCR 108] wherein Shah, J. observed:

Exclusive power to legislate conferred upon Parliament is exercisable, notwithstanding anything contained in clauses (2) & (3), that is made more emphatic by providing in clause (3) that the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule, but subject to clauses (1) and (2). Exclusive power of the State Legislature has therefore to be exercised subject to clause (1) i.e. the exclusive power which the Parliament has in respect of the matters enumerated in List I. Assuming that there is a conflict between Entry 86 List I and Entry 49 List II, which is not capable of reconciliation, the power of Parliament to legislate in respect of a matter which is exclusively entrusted to it must supersede pro tanto the exercise of power of the State Legislature.

Let us examine to what extent Section 4 or language of Section 100 saves the special or local law after coming into force of the aforesaid 1976 amendment. Section 4(1) of the Code records:

In the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force By this, special or local laws are protected and thus not to be effective in the absence of any specific provision to the contrary. In other words, special or local laws would be functional till any specific provision to the contrary stands engrafted. Since Section 100 CPC unamended was in pari materia with Section 41 of the Punjab Act, there was no conflict and Section 41 continued in its field unaffected. This is reinforced by the language of unamended Section 100 C.P.Code viz:

Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force..

> Thus the wording of this Section 100 qualified Section 41 Punjab Act to be the other law for the time being in force, as its Section 41 expressly provided second appeal as Section 100 provides. So, thus for Section 41 of Punjab Act held its field.

Now we proceed to examine Section 97 (1) of the Amending Act and the amendment of Section 100 CPC by the said 1976 Act. Through this amendment right to Second Appeal 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 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 makes such special or local law applicable. We may examine now the submission for the respondent based on language of Section 100 (1) CPC even after the said amendment. The reliance is on the following words:

> ..Save as otherwise expressly providedby any other law for the time being in force These words existed even prior to the amendment and is 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 Amending Act, which reads:
>
> any amendment made, or any provision inserted in the principal Act by a State Legislature before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provision of the principal Act as amended by this Act, stands repealed.(Noticed again for convenience).
>
> This clearly reveals true intend of the legislature viz., any provision of the State legislature existing prior to the amending Act which becomes in consistence to this amending Act is in consonance with both sub-clause (1) and proviso to sub-clause (2) of Article 254 of the Constitution of India. Thus language of Section 97(1) of the Amending Act clearly spells out that any local law in consistent goes but what is not in consistence, it could be said the local would still continue to occupy its field.
>
> But so far the present case Section 41 of the Punjab Act, it is expressly in conflict with the amending law, viz., Section 100 amended which would be deemed to have been repealed. Thus we have no hesitation to hold the law declared by the Full Bench of the High Court in the case of Ganpat (supra) cannot be sustained and is overruled.
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> Having discussed the law on the subject in the manner as herein before and turning attention on to the factual matrix of the matter, it appears that the plaintiffs in the suit prayed for partition and rendition of accounts against the defendants, which stands decreed by the lower Appellate Court. In the second appeal the High Court allowed the appeal and set aside the decree of the lower appellate Court. Interestingly, the subject matter of the suit centres round the two several wills of one Saheb Singh Mann since deceased. Whereas the will dated 30th March, 1968 has

been said to be shredded with suspicious circumstances, the plaintiffs claimed the will dated 2nd February, 1972, being the last will and testament of the above noted Saheb Singh Mann. It is significant to record that the will dated 30th March,1968 was executed in favour of the defendants excluding the plaintiffs. The High Court while dealing with the issue has probed deep in the matter dealing with all necessary evidence concerning both the wills noticed above, and in fine the learned Judge, dealing with the second appeal analysed the factual aspect regarding the genuineness of the will to the following effect:-

(a) An attempt has been made by the testator to ensure that nobody stakes claim to the property transferred to the daughters-in-law;

(b) Admittedly, the deceased lived for more than six years after the execution of the will;

(c) No reference was made to the will in a subsequent alleged will having been executed in favour of the plaintiffs;

(d) Testator wanted to keep secret from his daughters, bequeathed the property to the sons alone;

(e) There is nothing abnormal in this part of the country to deprive the daughters of the ancestral property and the wills are generally executed in order to keep the estate of the family amongst the male descendants;

(f) No son has been deprived of his equal share to the property though two of them were not even present in the village or near about. It is on the considerations above and examination of totality of the circumstances the learned Single Judge came to the conclusion that the will dated 30th March, 1968 has duly been executed by a sound disposing mind and there were existing no reasonable grounds to decline to act on it. The learned Judge, thus set aside the lower Appellate Courts judgment and decreed as regards the will dated 30th March, 1968. The appellants herein by reason of the reversal of the judgment, are before this Court in appeal by the grant of special leave. On the validity of the will Mr. Mehta strongly contended that the will dated 30th March, 1968 recites that Rs.5,000/- shall be paid to each of the daughters of Saheb Singh Mann. Such recital is itself suggestive of suspicious circumstances by reason of the largeness of the estate of Saheb Singh Mann, since deceased. Since the daughters are also very well-to-do and the testamentary disposition of Rs.5,000/- by the will cannot but be ascribed to be totally illusory.

Though this Court is not really concerned with the details of the circumstances under which the will can be said to be otherwise an invalid piece of document but strenuous submissions with factual details have been made by both the parties in order to bring home the point of justification or otherwise for such a finding of the learned Single Judge and it is by reason therefore these factual

details are being introduced though not very significant in the present context. Be that as it may another aspect on the factual score stands highlighted by Mr. Mehta, that only two witnesses out of three attesting witnesses have been examined and an independent witness, namely, Shri GS Banga, Advocate, has not been examined who, however, happened to be one of the attesting witnesses to the will.

Referring to the above conspectus of the matter, Mr. Mehta contended that the High Court could not, in the absence of a substantial question of law interfere with the findings of the lower Appellate Court which has otherwise the authority and jurisdiction to scrutinise and appraise the evidence. Mr. Mehta contended that suspicious features of the will, are mere questions of fact which can be gone into upto the stage of first appellate court only and not beyond and the High Court in the absence of a substantial question of law framed by the parties or if not so framed by the Court itself, had no jurisdiction to entertain the appeal far less allowing it and it is an interference which is totally unauthorised or in excess of jurisdiction or having no jurisdiction whatsoever. We are however not in a position to lend concurrence to such a broad proposition as enunciated by Mr. Mehta. Judicial approach being justice oriented, exclusion of jurisdiction of the High Court under the circumstances as contended by Mr. Mehta, would lead to an incongruous situation being opposed to the concept of justice. Technicality alone by itself ought not to permit the High Court to decide the issue since justice oriented approach, is the call of the day presently. The learned Single Judge in the matter under consideration has delved into the issue as to whether in fact the evidence on record warrant such a conclusion whether the High Court was right in such appreciation or not - that is entirely a different issue. But the fact remains that scrutiny of evidence will be totally prohibited in the matter of exercise of jurisdiction in second appeal would be too broad a proposition and too rigid an interpretation of law not worthy of acceptance. If the concept of justice so warrant, we do not see any reason why such an exercise would be depricated. This is however, without expression of any opinion pertaining to Section 100 of the Civil Procedure Code.

Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure Amendment Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact even if erroneous will generally not be disturbed but where it is found that the findings stands vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to dealt with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the Concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:

> 103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal-

(a) which has not been determined by the lower Appellate Court or by both the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or

(c) Courts by reason of a decision on such question of law as is referred to in the Section 100.

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, but there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with.

The learned Single Judge of the High Court obviously had the Punjab Full Bench judgment in mind and having regard to Section 41 and without any reference to Section 100 dealt the issue. The mandatory requirement of Section 100 cannot be obliterated by reason of a State legislature where the requirement is not such.

On the wake of the aforesaid we do find ourselves in agreement with the contention of Mr. Mehta that Section 41 of the Punjab Act cannot but be termed to be repugnant to Section100 and as such cannot have its effect, since parliamentary supremacy renders Section 41 the Punjab Act devoid of any effect. Neither the saving clause in Section 100 (1) or Section 4 of the Code can come into the rescue of the respondents in view of Section97(1) of the amending Act.

More so by reason of the clarification rendered by the legislature in Section 101 of the Code which provides that no second appeal shall lie except on the ground mentioned in Section 100 indicating thereby the further reinforcement to the legislative intent to be obtained from Section 101 as regards the issue of substantial question of law. This refers to substantial question of law having regard to the language of Section 103 cannot however be said to even imply a contra note apart from what is stated herein before. This is so however by reason of the provisions of Section 97 of the Amending Act.

By reason of the aforesaid these appeals succeed, the order of the High Court in Second Appeal No.762 of 1986 stands set aside and that of the lower Appellate Court restored. Each party however to pay and bear its own costs.