

A KIRODI (SINCE DECEASED) THROUGH HIS LR.

v.

RAM PARKASH & ORS.

(Civil Appeal No. 4988 of 2019)

B MAY 10, 2019

**[SANJAY KISHAN KAUL AND INDIRA BANERJEE, JJ.]**

*Appeal: Regular second appeal – Maintainability of – Non-framing of question of law – Plea of appellant that the regular second appeal was decided without framing a question of law – In support of the said plea, the appellant relied upon decisions emanating from the Punjab and Haryana High Court – Held: By virtue of s.97 of the Code of Civil Procedure (Amendment) Act, 1976 (Amendment Act), s.100 CPC was amended requiring the second appeal to mandatorily contain a substantial question of law – However, in Punjab and Haryana, a different legal position prevails in view of Constitution Bench judgment in \*Pankajakshi case – In \*Pankajakshi case, it was opined that s.97 of the Amendment Act prohibited amendments made in the Principal Act which were repugnant to the same and, therefore, if any state amendment to CPC was enacted by the state legislature or a rule was made by the High Court of State in respect of the provisions of CPC which ran counter to it, that would be hit by the provisions of the savings clause of the Amendment Act – The caveat, however, was that the legislation in question being the Punjab Act is a pre-Constitution Act and hence is not a legislation hit by the provisions of Art.254 of the Constitution of India which holds state enactments to be repugnant to the enactments when they run counter to the laws enacted by the centre through the concurrent list – The legislation was saved by Art.372(1) of the Constitution of India being a pre-Constitutional enactment which was to continue to be in force until altered or repealed or amended by a competent legislature – No such repeal took place, hence, the legislation continues to operate – The effect of the judgment of the Constitution Bench is that insofar as the State of Punjab is concerned, a second appeal does not require formulation of a substantial question of law since the Punjab Act was applicable for the State – Thus, s.100 CPC would not hold*

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KIRODI (SINCE DECEASED) THROUGH HIS LR. v. RAM 969  
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*the field having supervening effect – Code of Civil Procedure, 1908 A*  
– s.100 – Code of Civil Procedure (Amendment) Act, 1976 – s.97 –  
*Constitution of India – Art.254 and 372(1).*

*Pankajakshi (Dead) through L.Rs & Ors. v. Chandrika*  
*& Ors. (2016) 6 SCC 157 : [2016] 3 SCR 1018*  
– followed. B

*Chand Kaur (D) through Lrs. v. Mehar Kaur (D)*  
*through Lrs. 2019 (5) SCALE 397 ; Surat Singh (Dead)*  
*v. Siri Bhagwan & Ors. 2018 (4) SCC 562 : [2018] 1*  
*SCR 1063 – not correct law.*

*Kulwant Kaur & Ors. v. Gurdial Singh Mann (Dead)* C  
*by Lrs. Ors. (2001) 4 SCC 262 : [2001] 2 SCR 525*  
– referred to

#### Case Law Reference

2019 (5) SCALE 397	not correct law	Para 3	D
[2018] 1 SCR 1063	not correct law	Para 3	
[2016] 3 SCR 1018	followed	Para 4	
[2001] 2 SCR 525	referred to	Para 8	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4988 E  
of 2019.

From the Judgment and Order dated 30.10.2018 of the High  
Court of Punjab and Haryana at Chandigarh in Regular Second Appeal,  
RSA No. 1393 of 2012.

Rajesh Gupta, Rahul V. Singh, Bankey Bihari, Advs. for the F  
Appellants.

The following Order of the Court was passed

#### **ORDER**

1. Leave granted. G

2. The sole contention advanced is that the regular second appeal  
has been decided without framing a question of law.

3. In order to support the aforesaid plea, learned counsel for the  
appellant(s) has relied upon the judgments in Civil Appeals No.3276- H

- A 3281 of 2019 titled as Chand Kaur(D) through Lrs. Vs. Mehar Kaur (D) through Lrs. and in Civil Appeal Nos.9118-9119 of 2010 titled as Surat Singh (Dead) Vs. Siri Bhagwan & Ors. both emanating from the Punjab and Haryana High Court. He also relies upon two other judgments i.e Civil Appeal No.4451 of 2009 titled as Shrikant Vs. Narayan Singh (d) through Lrs. & Ors. and Civil Appeal No.1117 of 2001 titled as Santosh Hazari Vs. Purushottam Tiwari (D) by Lrs. both emanating from the Madhya Pradesh High Court to canvass the aforesaid proposition.

- C 4. On the last date of hearing, we had pointed out to learned counsel for the appellant(s) that insofar as Punjab and Haryana High Court is concerned, a different legal position will prevail in view of the Constitution Bench Judgment of this Court in Civil Appeal No.201 of 2005 titled as Pankajakshi (Dead) through L.Rs. & Ors. Vs. Chandrika & Ors.<sup>1</sup>

- D 5. Unfortunately, in respect of both the first two judgments, emanating from second appeal in Punjab and Haryana High Court, the Constitution Bench decision has not been brought to the notice of the Bench deciding the matters.

- E 6. We are elucidating the position which emerges from the Constitution Bench Judgment to put the controversy at rest.

- F 7. It is no doubt true that by virtue of Section 97 of the Code of Civil Procedure (Amendment) Act, 1976 (hereinafter referred to as the 'Amendment Act') and Section 100 of the Code of Civil Procedure, 1976 (hereinafter referred to as the 'Code') was amended requiring the second appeal to mandatorily contain a substantial question of law considering the same.

- G 8. It was initially held in Kulwant Kaur & Ors. Vs. Gurdial Singh Mann (Dead) by Lrs. Ors.<sup>2</sup> case that Section 100 of the Code would take precedence over Section 41 of the Punjab Courts Act, 1918 (hereinafter referred to as the 'Punjab Act') which conspicuously does not require the framing of such a substantial question of law. It was held that Section 41 of the Punjab Courts Act being repugnant to the amended provisions of Section 100 of the Code and Section 97 of the Amendment Act containing a saving clause, Section 41 of the Punjab Act would no

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<sup>1</sup> (2016) 6 SCC 157

H <sup>2</sup> (2001) 4 SCC 262

longer hold the field and substantial question of law will be required to be framed. Section 41 of the Punjab Courts Act reads as under: A

“Section 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 : B

(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

(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:

1 [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:] D

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

(3) [Repealed by Section 2B of Punjab Act 6 of 1941] E

9. A Constitution Bench of this Court however in Pankajakshi (Dead) through L.Rs. & Ors. (*supra*) opined that Section 97 of the Amendment Act prohibited amendments made in the principal Act which were repugnant to the same and, therefore, if any state amendment to the Code was enacted by the state legislature or a rule was made by the High Court of State in respect of the provisions of the Code which ran counter to the Code, it would be hit by the provisions of the savings clause of the Amendment Act. The caveat, however, was that the legislation in question being the Punjab Act is a pre-Constitution Act and hence is not a legislation hit by the provisions of Article 254 of the Constitution of India which holds state enactments to be repugnant to the enactments when they run counter to the laws enacted by the centre through the concurrent list. The legislation was saved by Article 372(1) of the Constitution of India being a pre-Constitutional enactment which was to continue in to be force until altered or repealed or amended by a F  
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- A competent legislature. No such repeal took place, hence, the legislation continues to operate.

10. The effect of the judgment of the Constitution Bench is that insofar as the State of Punjab is concerned, a second appeal does not require formulation of a substantial question of law since the Punjab Act would be applicable for the State. Hence, Section 100 of the Code would not hold the field having supervening effect.

11. The discussion of the Constitution Bench is as under:

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

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

- This Court concluded that Section 41 of the Punjab Courts Act was repealed because it would amount to an amendment made or provision inserted in the principal Act by a State Legislature. This Court further held that, in any event, Section 41 of the Punjab Courts Act being a law made by the Legislature of a State is repugnant to a later law made by Parliament, namely, Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976, and that therefore, by virtue of the operation of Article 254 of the Constitution of India, the said provision is in any case overridden. In arriving at the aforesaid two conclusions, this Court held: (SCC p.276, paras 27-29)

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“27. Now we proceed to examine Section 97(1) of the Amendment Act and the amendment of Section 100 CPC by the said 1976 Act. Through this amendment, right to second appeal stands further restricted only to lie where, ‘the case involves a substantial question of law.’ This introduction definitely is in conflict with Section 41 of the Punjab Act which was in pari materia with unamended Section 100 CPC. Thus, so long there was no specific provision to the contrary in this Code, Section 4 CPC saved special or local law. But after it comes in conflict, Section 4 CPC would not save, on the contrary its language implied would make such special or local law inapplicable. We may examine now the submission for the respondent based on the language of Section 100(1) CPC even after the said amendment. The reliance is on the following words:

‘100. *Second appeal* - (1) Save as otherwise expressly provided ...by any other law for the time being in force....’

These words existed even prior to the amendment and are unaffected by the amendment. Thus so far it could legitimately be submitted that, reading this part of the section in isolation it saves the local law. But this has to be read with Section 97(1) of the Amendment Act, which reads:

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

28. Thus, language of Section 97(1) of the Amendment Act clearly spells out that any local law which can be termed to be inconsistent perishes, but if it is not so, the local law would continue to occupy its field.

29. Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat cannot be sustained and is thus overruled.”

A [at paras 27 – 29]

25. We are afraid that this judgment in Kulwant Kaur case does not state the law correctly on both propositions. First and foremost, when Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 speaks of any amendment made or any provision inserted in the principal Act by virtue of a State Legislature or a High Court, the said Section refers only to amendments made and/or provisions inserted in the Code of Civil Procedure itself and not elsewhere. This is clear from the expression “principal Act” occurring in Section 97(1). What Section 97(1) really does is to state that where a State Legislature makes an amendment in the Code of Civil Procedure, which amendment will apply only within the four corners of the State, being made under Schedule VII List III Entry 13 to the Constitution of India, such amendment shall stand repealed if it is inconsistent with the provisions of the principal Act as amended by the Parliamentary enactment contained in the 1976 amendment to the Code of Civil Procedure. This is further made clear by the reference in Section 97(1) to a High Court. The expression “any provision inserted in the principal Act” by a High Court has reference to Section 122 of the Code of Civil Procedure by which High Courts may make rules regulating their own procedure, and the procedure of civil courts subject to their superintendence, and may by such rules annul, alter, or add to any of the rules contained in the first schedule to the Code of Civil Procedure.

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

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision in Kulwant Kaur case. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article

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

12. In view of the legal position enunciated above, the judgments D  
of this court in Chand Kaur(D) through Lrs.'s case (*supra*) and Surat  
Singh (Dead)'s case (*supra*) being contrary to the Constitution Bench of  
this Court in Pankajakshi (Dead) through L.Rs. & Ors. (*supra*) and the  
Constitution Bench's decision not being brought to the notice of the Bench  
of this Court deciding the matters, they would not hold the field. E

13. The appeal is accordingly dismissed.