Reliance Industries Ltd vs Pravinbhai Jasbhai Patel & Ors on 29 August, 1997

Equivalent citations: AIR 1997 SUPREME COURT 3892, 1997 (7) SCC 300, 1997 AIR SCW 3819, (1997) 7 JT 618 (SC), 1997 (7) JT 618, 1997 (5) SCALE 633, (1997) 4 RECCIVR 120, (1997) 5 SCALE 633, (1997) 2 GUJ LH 590, (1997) 3 CURCC 241, (1997) 8 SUPREME 52, (1997) WRITLR 792, (1999) 1 GUJ LR 244, AIRONLINE 1997 SC 650

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Bench: S. B. Majmudar, S. Saghir Ahmad

PETITIONER:
RELIANCE INDUSTRIES LTD.

Vs.

RESPONDENT:
PRAVINBHAI JASBHAI PATEL & ORS.

DATE OF JUDGMENT: 29/08/1997

BENCH:
S. B. MAJMUDAR, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T S.B. Majmudar, J.

Leave granted in Special Leave Petitions challenging the judgment and order dated 24th and 25th October 1996 passed by the Division Bench of the High Court of Gujarat in Miscellaneous (Civil) Application No. 1939 of 1995.

By consent of learned advocates of parties the appeals were taken up for final hearing. In these appeals by special leave the appellant-company has brought in challenge the judgment and order dated 24th and 25th October 1996 passed by the Division Bench of the High Court of Gujarat in Miscellaneous Civil Application No.1939 of 1995 arising from Special Civil Application No.770 of 1995. Apart from the merits of the controversy raised by the appellant-company against the aforesaid judgment, it is necessary to note at the outset one important procedural question which arises for consideration in these appeals. It runs as under :

> `When in review proceedings arising out of the decision of the Division Bench of two learned Judges of the High Court rendered in a writ petition under Article 226 of the Constitution of India which is in the nature of original proceedings, the two learned Judges deciding the review petition differ on questions of fact or law, whether a reference to a third learned Judge is required to be made for disposal of the review petition as per the majority opinion of the three learned Judges or whether on difference of opinion between them on these questions, the petition is required to be dismissed under Order XLVII Rule 6, Code of Civil Procedure, 1908 (`CPC' for short), keeping the order, sought to be reviewed untouched.' As the aforesaid question goes to the root of the matter we thought it fit to hear the learned counsel for the respective parties on this question at the outset.

Before coming to the grips of the said question it is necessary to note a few introductory facts leading to the present proceedings.

A public interest litigation petition was moved i n the High Court of Gujarat by the two writ petitioners who were agriculturists having agricultural lands in kheda district of Gujarat state. Said petition was moved under Article 226 of the Constitution of India. It was alleged that the industries which had been set up in the industrial estates at Naroda, Vata and Odhav on the periphery of Ahmedabad city, were discharging their polluted effluents into Kharicut canal which, in turn, leads to Khari river. It was further alleged that there are about 11 villages in kheda district whose only source of water for the purpose of agriculture is from khari river. Due to the water pollution caused by the said industries the water in the khari river was no longer suitable for agriculture. It addition thereto the agricultural lands in these villages had lost their fertility and the water drawn from the wells was having reddish colour even when it was from the depth of about 300 ft. Various other allegations were made in the writ petition which tried to cover in its sweep of attack about 756 industrial units situated in the industrial estates of Gujarat Industrial Development Corporation, sited at Naroda, Vata and Odhav and also some of the textiles units and processing units situated in or hereby Ahemdabad. In the said writ petition the present appellant was also one of the contesting respondents. After hearing the parties concerned the Division Bench consisting of B.N. Kirpal, CJ. (as he then was), and H.L. Gokhale, J., by its order dated 5th/7th August 1995 allowed the writ petition and issued various directions against the polluting industries concerned as detailed in the same judgment. It is not in dispute between the parties that some of the

industries covered by the said judgment came to this Court by way of Special Leave Petitions which were dismissed by this Court. So far as the appellant is concerned it also challenged the very same judgment of the High Court by filing Special Leave Petition (C) No.24916 of 1995. A Bench of two learned Judges of this Court consisting of Hon'ble K. Ramaswamy and B.L. Hansaria, JJ. passed the following order on 17th November 1995 in the Special Leave Petition of the appellant :

"The petitioner's specific case set up in this Court is that is that it has already set up the affluent treatment plant as early as in 1985 at a cost of Rs. 1.5 crore and that its case was mixed up with other cases. it not discharging any affluent polluted waters into the canal. If that be so, it would be open to the petitioner to make an application in the High Court for appropriate review of the order concerning the petitioner only. Counsel for the petitioner seeks for and granted two months time."

Pursuant to the aforesaid order of this Court the appellant moved a review petition being Miscellaneous (Civil) Application No. 1939 of 1995 in the Gujarat High Court seeking to get reviewed the main decision in the Special Civil Application No. 770 of 1995 on the grounds raised in the review petition. This review petition was heard by another Division Bench of the High Court consisting of H.L. Gokhale and M.S. Shah, JJ., as in the meantime B.N. Kirpal, CJ., was elevated as Judge of this Court. The said review petition was heard on merits by the aforesaid Division Bench of the High Court. During the pendency of the review petition additional evidence was also considered by the Bench as tendered by the contesting respondents. Ultimately by an order dated 24th October 1996 Gokhale, J., came to the conclusion the appellant-company was not covered by the impugned directions contained in the judgment in the writ petition. Said decision was rendered by Gokahle, J. on various reasons mentioned therein. So far as the other learned Judge M.s. Shah, J., was concerned, he took a August 1995. Consequently the Special Leave Petition (C) No.24916 of 1995 challenging the said order was permitted to be withdrawn by this Court on 20th December 1996.

In view of the aforesaid developments, therefore, the main controversy which survives in these appeals centers round the legality of the order f the Division Bench of the High Court which dismissed the Miscellaneous (Civil) Application No.1939 of 1995. These appeals, therefore, will have to be decided only with reference to the controversy centering round the decision in the review petition moved by the appellant before the High Court.

So far as the challenge to the impugned decision in the review petition is concerned it consists of two questions :

1. Whether the Division Bench of the High Court on a difference of opinion between the two learned Judges was justified in dismissing the review petition under O.XLVII R. 6, CPC.

2. If yes, whether on merits the review petition was required to be allowed.

It is obvious that if it is held that on a difference of opinion between the learned Judges constituting the Division Bench reference to third learned Judge was required to be made then the second question would not service for our consideration at this stage. That would service only if it is held that the review petition was liable to be dismissed under O.XLVI R.6 CPC as has been done by the Division Bench in the impugned judgment. We therefore, now address ourselves to the consideration of the aforesaid procedural question.

Shri Kapil Sibal, learned senior counsel appearing for the appellant submitted that when the hearing of the review petition resulted in difference of opinion between the two learned Judges constituting the Review Bench, reference to third learned Judge should have been made as per clause 36 of the Letters Patent applicable to the High Court of Gujarat . In this connection it was also submitted that even though rules were framed by the High Court of Gujarat as per Clause 37 of Letters patent the said rules especially Rule 186 thereof did not contra-indicate the said procedural position. In this connection he submitted that as per Rule 186 of the Rules framed by the High Court, the procedure of Section 98 of the CPC got attracted for resolving this controversy. But even in such a case looking at the conflicting decisions rendered by the two learned Judges in the review petition proviso to sub-Section (2) of Section 98, CPC required reference of the question of law, on which there was difference of opinion, for decision of the third learned Judge. It was alternatively contended By Shri Sibal that in any case all questions of law and fact flowing from the difference of opinion between the two learned Judges are required to be referred to the third learned Judge for resolution of said difference of opinion as per Section 98 sub-Section (3) of the CPC read with Clause 36 of the Letters Patent. That is no case the Division Bench was justified the dismissing the review petition despite this conflict of opinions between the two learned Judges, following the provisions of O.XLVII R.6, CPC. It was, therefore, contended that the ultimate decision rendered by the Division Bench of the High Court on 24th and 25th October 1996 dismissing the review petition us required to be set aside and the controversy, centering round the question on which the two learned Judges had difference of opinion, is required to be resolved by reference to third learned Judge for being decided as per the majority decision in the light of the opinion of the third learned Judge.

On the other had learned Solicitor General shri T.R. Andhyarujina, appearing for respondent no.4, Gujarat Pollution Control Board and Shri Soli J. Sorabjee, learned senior counsel appearing for respondent no.6, Commissioner of Ahmedabad Municipal Corporation contended that the procedure adopted by the Division Bench dismissing the review petition was the Section 98, CPC could not be pressed in service on the facts of the present case for the simple reason that both the learned Judges had not disagreed on question of law but had disagreed purely on question of facts, namely, whether the appellant-industry was covered by the sweep of the main decision in Special Civil Application No.770 of 1995 or not and whether the appellant was a polluting industry or not. It was next contended that sub- Section (3) of Section 98, CPC cannot apply to the facts of the present case as Rule 186 of the Gujarat High Court Rules clearly indicated the procedure to be followed in such an eventuality and as that procedure was provided by Section 98 sub-Section (2), CPC which was a complete Code in itself, the said question could not be resolved by recourse to sub- Section (3) of Section 98, CPC as that would render the operation of Rule 186 of the Gujarat High Court Rules options. It was next contended that even assuming Section 98 sub-Section (3), CPC applied to the facts of the present case, and consequently Clause 36 of the Letters patent got attracted even then

the said clause on its own terminology could not cover the facts of the present case as the decision rendered in the review proceedings by the Division Bench could not be said to be a decision rendered in exercise of original jurisdiction of the High Court and it was admittedly not a decision rendered in exercise of appellants jurisdiction of the High Court. That Clause 36 only covered those decisions which were rendered by the Division Bench of the High Court either in exercise of original jurisdiction or in exercise of appellate jurisdiction. That review jurisdiction is an independent jurisdiction which is different from the aforesaid two jurisdiction and consequently such a decision was not at all covered by the sweep of Clause 36 of the Letters Patent and even on that ground only Section 98 sub-Section (2), CPC applied and as the proviso to the said sub-Section (2) could not be invoked for resolving the factual controversy which has resulted in two divergent opinions of two learned Judges of the Division Bench, hearing the review petition, the only course open to the High Court was to dismiss the review petition as enjoined by O.XLVII R.6, CPC. Consequently not fault could be found with the decision of the High Court following the said course.

In the light of the aforesaid rival contentions we now proceed to consider this moot question posed for our consideration. It is not is dispute between the parties that the High Court of Gujarat is governed by the Letters Patent which earlier applied to the parent High Court of Bombay and on bifurcation on 1st May 1960 the said Letters Patent continued to apply to the Gujarat High Court as a successor High Court to the erstwhile High Court of Bombay. Letters patent, therefore, are the charter which would govern the proceedings in the High Court and the procedure to be followed by it for deciding matters falling within its jurisdiction. It is also not in dispute between the parties that the original writ petition moved in the High Court by way of public interest litigation was under Article 226 of the Constitution of India invoking original jurisdiction of the High Court. It is that writ petition which got disposed of by the order dated 5th and 7th August 1995 passed by the Division Bench of the High Court. The review petition moved by the appellant-company stems from the aforesaid decision in the writ petition. This review petition was placed for final disposal before a Bench of two learned Judges consisting of H.L. Gokhale and M.S. Shah, JJ., as noted earlier. These two learned Judges of the High Court were, therefore, constituting a Division Bench which was entrusted with the task of deciding about apparent error, it any, discernible from the judgment of the earlier Division Bench passed in exercise of original jurisdiction of the High Court. Consequently if any difference of opinion arose between the two learned Judges regarding the merits of the review petition, ex facie, Clause 36 of the Letters Patent got attracted. The said clause reads as under :

> "36 Single Judges and Divisional Courts. And we do hereby declare that any function, which is hereby directed to be performed by the said High Court of Judicature at Bombay in the exercise of its original or appellate jurisdiction, may be performed by any Judge or any Division Court thereof, appointed or constituted for such purpose, in pursuance of section One hundred and eight of the Government of India Act, 1915, and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the

majority of the Judges, who have heard the case including those first heard it."

It is not possible to agree with the contention of learned senior counsel Shri Sorabjee for respondent no.6 that even if Clause 36 applied it could not cover review proceedings arising out of decisions in writ petitions under Article 226 of the Constitution of India invoking original jurisdiction of the High Court. It is true that the aforesaid clause of Letters Patent deals with the decisions of Division Benches exercising original or appellate jurisdiction. Question of exercise of appellate jurisdiction does not arise in the present case. Therefore, the short question is whether he decision rendered by the Division Bench of the High Court in Special Civil Application No.770 of 1995 allowing it as a public interest litigation petition in exercise of original jurisdiction of the High Court under Article 226 of the Constitution of India would not lend colour of the very same original jurisdiction to review proceedings arising out of that very judgment? It has to be kept in view, that review petitions are not by way of appeals before the superior Court but they are by way of requests to the same Court which decided the matter, for persuding it to recall or reconsider its own decision on grounds which are legally permissible for reviewing such orders. As laid down by O.XLVII R.5, CPC as far as possible the same two learned Judges or more Judges who decided the original proceedings have to hear the review petition arising from their won judgment. Thus in substance a review amounts to reconsideration of its own decision by the very same Court. When the Court sits to review its own order, it obviously is not sitting in appeal over its judgment but is seeking to have a fresh look at its own judgment of course within the limits of review powers, but still invoking for that limited purpose the very same jurisdiction which it exercised earlier. it is axiomatic that if a Division Bench of two learned Judges deciding the appeal had exercised appellate powers and when its decision is sought to be reviewed it can be said to be required to reconsider its own decision within the limits of review jurisdiction but still in exercise of the same appellate jurisdiction which it earlier exercised. Similarly when a decision rendered in exercise of original jurisdiction by a Bench of two learned Judges is sought to be reviewed the learned Judges exercising review jurisdiction subject to the limitations inhering in such an exercise, can be said to be called upon to reconsider their decision earlier rendered in exercise of the very same original jurisdiction. In that review jurisdiction takes colour from the nature of the jurisdiction exercised by the Court at the time when the main judgment, sought to be reviewed, was rendered. Review jurisdiction, therefore, cannot be said to be same independent jurisdiction sought to be exercised by the Court the nature of the jurisdiction exercised by it when the judgment sought to be reviewed was rendered by it. As the decision sought to be reviewed in the present proceedings was rendered by the Division Bench in exercise of its original jurisdiction the review proceedings emanating from the very same judgment would partake the character of the very same exercise of original jurisdiction. It remained in the domain of original jurisdiction which could be said to have been invoked by the appellant when it requested the Court to review its earlier decision rendered in exercise of original jurisdiction. It is, therefore, not possible to agree with the contention of learned senior counsel Shri Sorabjee for respondent no.6 that the review proceeding in the present case which was arising out of the decision of the High Court rendered in exercise of its original jurisdiction under Article 226 of the Constitution of India sought to invoke an independent and separate jurisdiction of the High Court which was neither original not appellate. it must be held that both the learned Judges who heard the review petition arising out of decision rendered by the High Court in exercise of its original jurisdiction under Article 226 of the Constitution of India were also called upon to exercise the very same original jurisdiction at the

second stage, and for the second time when they were to reconsider the legality of the very same decision subject of course to the limitations of review power as enjoined by the well settled fetters and parameters for exercise of such review jurisdiction. Once that conclusion is reached it becomes obvious that fetters of O.XLVII R.6, CPC could not get attracted to the said review proceedings as the wide sweep of the provisions of Clause 36 of the Letters Patent being the paramount charter applicable to the High Court of Gujarat could not be whittled down by the provisions of Code of Civil Procedure if they were in any way inconsistent with Clause 36 of the Letters Patent.

As laid down by Section 4 sub-Section (1), CPC itself 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 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. It cannot be disputed that Letters Patent as applicable to High Court of Gujarat is a special law in force which confers special jurisdiction or power and lays down special form of procedure prescribed therein for governing the cases where the two learned Judges forming the Division Bench of the High Court differed on a question of law or fact. Under such circumstances Clause 36 of the Letters Patent laying down the special procedure for meeting such a contingency was required to be followed without in any way being impeded or restricted or being cut across by the procedural requirements laid down by O.XLVII R.6, CPC. The said provision on its own would apply to those courts which were governed strictly by the procedure of Code of Civil Procedure and had no provision of Letters Patent Charter to fall back upon. In other words charter High Courts governed by the Letters Patent which were original charter High Courts or which were the successor High Courts like Gujarat High Court, would be governed by the special procedure laid down by Clause 36 of the Letters Patent and that would remain saved by the operation of Section 4 sub- Section (1), CPC noted above. It is, therefore, not possible to agree with the reasoning of the High Court in the impugned judgment to the effect that Clause 36 of the letters Patent does not deal with a situation where there is conflict of decisions between the two learned Judges of the Bench sitting in review against the earlier judgment of the Division Bench of the High Court.

However learned senior counsel for the respondents vehemently contended that Clause 37 of the same Letters patent directs that the High Court will be guided by the Civil Procedure Code in such contingencies and in exercise of the said power available to the High Court under Clause 37 of the Letters Patent read with Sections 122 and 129 of CPC Gujarat High Court had framed rules which would govern the present controversy. Clause 37 of the Letters Patent reads as under :

> "37. Regulation of Proceedings.- And we do further ordain that it shall be lawful for the said to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, intestate, and matrimonial jurisdiction respective : Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council, and being Act No.VIII of 1859, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India."

It is true that in exercise of the powers vested in the High Court under Clause 37 rules have been framed by the High Court for governing the procedure in matters dealt with by the High Court in exercise of its diverse jurisdiction. Said rule making power also flows from the provisions of Sections 122 and 129 of CPC. However a mere look at Section 129, CPC shows that the rules framed by the High Court cannot be inconsistent with the Letters Patent. Said Section 129 reads as under :

> "129. Power of High Courts to make rules as to their original civil procedure.- Notwithstanding anything in this Code, any High Court, not being the Court of a Judicial Commissioner, may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

Keeping in view the aforesaid statutory scheme we have to consider the scope and ambit of Rule 186 framed by the High Court in this connection and on which strong reliance was placed by learned senior counsel for the respondents. Rule 186 reads as under :

> "186. Procedure in case of Difference of Opinion between Judges.- In case of difference of opinion between the Judges composing the Division Bench the point of difference shall be decided in accordance with the procedure referred to in Section 98 of the Civil Procedure Code."

A more look at the said rule shows that, amongst others, in the petitions under Article 226 decided by a Division Bench of two learned Judges of the High Court if a difference of opinion arises between them the procedure laid down by Section 98, CPC has to be followed. We may, therefore, turn to Section 98, CPC. it reads as under :

> "98. Decision where appeal heard by two or more Judges.-(1) where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges. (2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:
>
> Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench and 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 be 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.
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> (3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court."

A conjoint reading of Rule 186 of the Gujarat High Court Rules and Section 98 of the CPC shows that is the procedure of Section 98, CPC which gets telescoped into Rule 186 of the Gujarat High Court Rules for deciding as to how the decisions of a Bench of two or more learned Judges disposing of the writ petitions covered by the sweep of these provisions have to be processed. Shri Sorabjee, learned senior counsel for respondent no.6 was right when he contended that Rules 186 refers to the procedure of Section 98, CPC and does not import the provision thereof. Ipsissimis verbis. Let us, therefore, turn to the procedural scheme envisaged by Section 98, CPC. Section 98 (1) of CPC read with Rule 186 of the Gujarat High Court Rules framed by the High discussed earlier, would include review petition arising therefrom, is head by a Bench of two or more Judges the said petition has to be decided in accordance with the opinion of such Judges or the majority thereof. Upto this stage, Section 98 (1) does not conflict with any other provision of Letters Patent. Then follows sub-Section (2) of Section 98, CPC with lays down that where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed. By its very language sub-Section (2) of Section 98, CPC cannot apply to the decision rendered by a Division Bench of the High Courts in exercise of its original civil jurisdiction as is the present case. Reason is obvious. There is no question of confirming decree of the lower court when the Division Bench of the High Court decides original proceedings under Article 226 of the Constitution. Its decision in the writ petition partakes the character of the decision of the Court of first instance. Thereby the High Court decides for the first time the questions in controversy between the parties and adjudicates upon them as a Court of first instance. Consequently on the very language of sub-Section (2) of Section 98, CPC the said provision cannot get attracted to cases where a Division Bench of the High Court decides writ petition under Article 226 of the Constitution of India in exercise of its original civil jurisdiction or for that matter review petition invoking the exercise of the very same original jurisdiction as seen earlier. Consequently the proviso to sub-Section (2) of Section 98, CPC also would remain out of picture in such cases. Under these circumstances there would remain only the residuary provision of sub-Section (3) of Section 98, CPC which clearly enjoins that nothing in the said Sections shall be deemed to alter or otherwise affect any provision of Letters Patent of any High Court. This would necessarily lead to a back reference to Clause 36 of the Letters Patent which would remain the solitary provision applicable in the field for resolving the procedural controversy in such a case. In short when an application to get reviewed the decision of a Division Bench of the High Court rendered in exercise of its original civil jurisdiction in a petition under Article 226 of the Constitution of India, is moved in the High Court and if there is conflict of decisions between the two Judges constituting the Review Bench, it is only Clause 36 of the Letters Patent which would govern the said controversy. Neither O.XLVII R.6, CPC nor Section 98 (2), CPC would apply to such eventualities arising in these review proceedings. Under these circumstances it has to be held even in the light of Rule 186 read with Section 98 of the CPC that if the Division Bench of two learned Judges hearing the review petition arising out of proceedings earlier decided under Article 226 of the Constitution of India, differ and do not come to an agreed conclusion the procedure laid down by Clause 36 of the Letters patent which would govern the said controversy. Neither O.XlVII R.6, CPC nor Section 98(2), CPC would apply to such eventualities arising in these review proceedings. Under these circumstance it has to be held even in the light of Rule 186 read with Section 98 of the CPC that if the Division Bench of two learned Judges hearing the review petition arising out of proceedings earlier decided under Article 226 of the Constitution of India, differ and do not come to an agreed conclusion the procedure laid down by Clause 36 of the Letters Patent would be the only

procedure that has to be followed and it cannot be whittled down or cut short by any other provision to the contrary as found in the CPC. We have already seen earlier that there is no such contrary procedure laid down by the CPC but even if it were so such contrary procedure seeking to whittle down at the wide sweep of Clause 36 of the Letters Patent has to give way to the provisions of the charter in view of the express saving provision of Section 4(1) of CPC read with Section 129 thereof. In this connection we may profitably refer to a decision of the Privy Council in these case of Bhaidas Shivdas V. Bai Gulba and another AIR 1921 Privy Council 6. The question before the privy Council was whether Clause 36 of the Letters Patent of Bombay could be said to be controlled by Section 98 of the CPC. In 1921 when Their Lordships of the Privy Council were considering the question, Clause 36 of the Letters Patent applicable to the Bombay High Court made a special provision regarding the procedure to be followed in case the Bench hearing the appeal was composed of two or more Judges and the Judges were divided in opinion as to the decision to be given on any point. In such a case the decision was to be rendered in the light of the opinion of the majority of the Judges. But if the Judges were equally divided, opinion of the senior Judge was to prevail. Now that clause was directly in conflict with the provisions of Section 98, CPC, as it then was on the Statute Book, which, contemplated that in case of such a difference of opinion between the two learned Judges constituting the Bench the point of law was to be stated arising from such difference of opinion for decision of the third learned Judge. Their Lordships of the Privy Council placing reliance on Section 4 sub-Section (1), CPC held that Clause 36 of the Letters Patent was not controlled by Section 98 of the CPC and, therefore, it was the clause in the Letters Patent which would govern the procedure to be followed in such a case and not the procedure laid down by Section 98, CPC. It is of course true that rule analogous to Rule 186 of the Rules framed by the High Court of Gujarat was not on the anvil of consideration of the Privy Council. But the Privy Council considered Section 44 of the Letters Patent making an express provision that the Letters patent would be subject to legislative powers of Governor General in Council. Despite that provision the aforesaid decision was rendered by the Privy Council. It will be profitable to extract the observation of Lord Buckmaster who gave unanimous opinion on behalf of the Privy Council in the following terms :

> "That contention depends upon the construction of the Letters Patent of Bombay, under which the Court was constituted, and the Code of Civil Procedure, 1908. By Section 36 of the Letters Patent it is provided that if the High Court is sitting in a division composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, the decision shall agree with the opinion of the majority of the Judges: but if the Judges are equally divided, the opinion of the senior Judge shall prevail.
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> In this case it is quite clear. There were two Judges sitting: the senior Judge was the Chief Justice: there was an equal division of opinion; and under Section 36, in consequence, the plaintiff was entitled to a decree in this favor.
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> It is, however, urged on behalf of the respondents that the procedure in Section 36 is modified by the Code of Civil Procedure, of the Letters Patent there is an express subject to the legislative powers of the Governor-General in Council.

There are two sections in the Code of Civil Procedure which are relevant to this dispute. The one is section 4 and the other is section 98. Section 98 appears to have been the section under which the Judges acted. That section provides:-

`That where the Bench hearing the appeal is composed to two Judges belonging to a Court consisting of more than two Judges, 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.' It is quite plain that those provisions create a totally distinct method of procedure in the event of difference between two judges from that which was laid down by section 36. Under section 36 of the Letters Patent the judgment of the Judge who was the senior Judge would be the judgment which the parties before the Court would have a right to obtain; under section 98, the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal; and this case shows that those two provisions might produce a totally different result. If, therefore, section 98 controls section 36 that the proper procedure had been followed, and that the appellant head no cause of complaint. But by section 4 of the Code of Civil Procedure it is also provided that:-

`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 from of procedure prescribed by or under any other law for the time being in force.' There is no specific provision in section 98, and there is a special form of procedure which was already prescribed. That form of procedure section 98 does not, in their Lordships' opinion, affect....."

Moreover the fact remains that by the enactment of Section 98(3), CPC whatever doubt earlier remained in connection with this controversy was put at rest by the Legislature and the view propounded by the Privy Council got statutory recognition by the amendment of Section 98 and the insertion of sub-Section (3) thereof.

One contention of learned Solicitor General appearing for respondent no.4 in connection with the applicability of Rule 186 of the Gujarat High Court Rules is required to be noted at this stage. He submitted that by the express language of Rule 186 of the Gujarat High Court Rules the procedural gamut on difference of opinion between two learned Judges composing the Division Bench is required to be the same as referred to in Section 98 of CPC which is a complete Code in itself and consequently the procedure laid down under Clause 36 of the Letters Patent would get excluded and if again the same procedure under Clause 36 is to be pressed in service via Section 98 sub-Section (3), CPC the very Rule 186 would be rendered options or at least a situation conundrum we would be moving in a circle. It is not possible to agree with this contention. The reason is obvious. Rule 186 is found in Chapter XVII of the Gujarat High Court Rules which deals with `Application under Article 226, 227 and 228 of the Constitution and Rules for issue of writs and Orders under the said

Articles'- So far as proceedings under Article 226 of the Constitution of India are concerned they are original in nature. As we have seen earlier qua them Section 98(2), CPC would on its own language Article, the decisions rendered by subordinate Tribunals. In these petitions if the Division Bench of the High Court by majority does not concur in varying or reversing the subordinate Tribunal's judgment and order which is brought in challenge, then Section 98(2), CPC may get attracted for confirming such judgment of the lower Tribunal and in such a situation if the learned Judges composing the Bench are equally divided on a point of law then the procedure laid down by the proviso to sub-Section (2) of Section 98, CPC can be followed. It is well settled that proceedings under Article 227 are not by way of appeal before the High Court and, therefore, the High Court under Article 227 of the Constitution can interfere only on questions of law and that too involving patent errors of law. When there is a difference of opinion between the two learned Judges of the Division Bench hearing the petition under Article 227 on such patent questions of law, then they can refer the points of law on which they differ for consideration of the third learned Judges as laid down by the proviso to sub-Section (2) of Section 98, CPC. Consequently it cannot be said that Rule 186 would be rendered totally nugatory or options if it is held that procedure laid down by Section 98 sub-Section (2), CPC cannot be pressed in service in proceedings emanating from petition under Article 226 of the Constitution of India which are original in nature and wherein no order of subordinate authority is brought in challenge. But even that apart, mandate of Rule 186 itself contemplates applicability of procedure of Section 98, CPC which enables invocation of the procedure of Clause 36 of the Letters Patent via Section 98(3), CPC itself in cases where Section 98(2) does not apply as in the present case. Section 98(3), CPC, as seen earlier, clearly indicates that Section 98 will not affect the substantive provisions of the Letters Patent. Clause 36 of the Letters Patent is a substantive provision laying down the procedure to be followed in contingencies contemplated by the said Clause. That being the paramount clause will necessarily apply to all the proceeding decided by the High Court. As observed by us earlier the said result will follow apart from the operation of Section 98 sub-Section (3), CPC also from the combined operation of the saving clause of Section 4(1), CPC and Section 129 thereof.

Consequently it is not possible to agree with the conclusion to which the High Court reached that because the two learned Judges of the High Court deciding the review petition did not agree and gave contradictory opinion regarding the merits of the review petition the decision of the review petition had to be as laid down by O.XLVI R.6, CPC. Consequently, the said decision of the High Court dismissing the Miscellaneous Civil Application No.1939 of 1995, rendered on 25th October 1996 cannot be sustained and will have to be set aside. As a logical corollary to this decision of ours Miscellaneous Civil Application No.1939 of 1995 is directed to be restored to the file of the High Court of Gujarat with a direction that in view of the conflicting opinions expressed by the Bench of the High Court consisting of H.L. Gokhale and M.S. Shah, JJ., who earlier heard the review petition, the questions arising for decision in the review proceedings on which the aforesaid two learned Judges either differed in their opinions or did not concur will have to be referred for opinion of the third learned Judge of the High Court as per Clause 36 of the Letters Patent. For that purpose the remanded review petition will have to be placed before the Bench of H.L. Gokhale and M.S. Shah, JJ. to enable them to state the points of their difference as per Clause 36 of the Letters patent for being placed for consideration of the third learned Judge. The Hon'ble Chief Justice of the High Court is requested to assign the review petition to the appropriate Bench and thereafter to the third

learned Single Judge for deciding these remanded proceedings as per Clause 36 of the Letters Patent at the earliest. it is obvious that the third learned Judge will be entitled to consider all the aforesaid questions arising out of the difference of opinion between the two learned Judges, whether they are questions of fact or questions of law, and the review petition ultimately will be decided in the light of the decision of the third learned Judge, as per the procedure laid down by Clause 36 of the Letters Patent. It is obvious that if the ultimate decision in the review proceedings, as remanded as per this order of ours, goes against the appellant it will be open to the appellant to challenge the said final decision in accordance with law.

We may also mention at this stage one development which took place during the pendency of these proceedings in this Court. By an order dated 17th June 1997 a Division Bench of the High Court consisting of B.C. Patel and M.S. Shah, JJ. passed an order in Miscellaneous Civil Application No.178 of 1997 in Special Civil Application No.770 of 1995. That decision is based on the main judgment in Special Civil Application No.770 of 1995 which is its turn is sought to be got reviewed by the appellant in the present proceedings which are now directed by us to be remanded to the High Court for a fresh decision. Consequently the observations made by the aforesaid Bench of the High Court in its order dated 17th June 1997 against the appellant will obviously abide by the final decision in the review petition to be rendered pursuant to the present order of ours by the High Court and if the remanded review proceedings get decided against the appellant the appellant will also be at liberty to challenge along with the said decision in the review proceedings, also the decision rendered against the appellant by the High Court by its order dated 17th June 1997. It goes without saying that if and when June future challenges are levelled by the appellant against any adverse decision in the remanded review proceedings also against the order of the High Court dated 17th June 1997 the said challenges will have to be processed and decided in accordance with law. We make to clear that we make no observations on the merits of the controversy between the parties, emanating from these proceedings and all the contentions raised by the contesting parties before us in the present proceedings on merits of the controversy are kept open. They will remain untouched one way or the other by the present order of remand.

So far as the delinked SLP arising out of the main judgment of the High Court dated 5th and 7th August 1995 in Special Civil Application No.770 of 1995 is concerned, the only question which would survive for consideration as submitted by learned senior counsel for the appellant pertains to the liability of the appellant-company to contribute pro rata towards the expenses to be incurred by the State of Gujarat, G.I.D.C. and A.M.C. in laying separate/necessary pipelines and/or drains to carry the treated industrial effluent to Pirana for mixing the same with the treated sewage before discharge into the river. The said direction issued in general is found in paragraph 135(B) (ii) of the judgment. It was submitted that the said question will remain a solitary question for consideration of this Court in the SLP against the main judgment which has to await the decision in the remanded review proceedings. If the remanded review proceedings ultimately result in favour of the appellant and it is held by majority of the learned Judges deciding the remanded review petition that the appellant is not a polluting unit at all then the aforesaid solitary question in appellant's SLP may not survive for consideration of this Court. But if on the other hand the remanded review petition gets dismissed by the majority decision subject to the appellant challenging the said decision before this Court the aforesaid solitary question will arise for consideration in the delinked SLP of the appellant

against the main judgment.

The learned senior counsel for the respondents on the other hand contended that if the ultimate decision in the remanded review petition is against the appellant, the aforesaid solitary question would not survive for consideration for two reasons - (1) the SLP against the main judgment which was filed by the appellant earlier is already withdraw by the appellant; and (ii) in the said withdrawn SLP at an earlier stage this Court relegated the appellant for redressing its grievances, if any, by filing appropriate review petition and when the appellant filed the review petition it confined its challenge to two directions as found in the main judgment, namely, paragraphs 135 (C) (xii) and 135 (A) (I) (v) of the operative part of the said judgment as mentioned in paragraph 22 to 25 of the review petition moved before the High Court pursuant to the liberty given by this Court in the aforesaid SLP (C) No.24916 of 1995 by its order dated 17th November 1995. It was, therefore, contended by the learned senior counsel for the respondents that the appellant in its wisdom confined its attack against the impugned common main judgment only on the basis of the aforesaid two contentions. It has, therefore, to be held that by necessary implication it gave up its earlier challenge to the directions contained in paragraph 135(B) (ii) of the main judgment which deals with the pro rata contribution by the polluting units towards the cost of laying the pipelines and consequently the fresh SLP raising the very same challenge against the main judgment in Special Civil Application No.770 of 1995 does not survive and, therefore, the delinked SLP should be summarily rejected.

Learned senior counsel for the appellant on the other hand contended that even if remanded review petition is rejected this solitary contention will survive for consideration as according to the appellant directions contained in the main judgment at paragraph 135(B) will not apply and similarly directions contained in paragraph 135(A) (I) (ii) will also not apply as the appellant discharge more than 25000 litres of water per day but they have already got primary and secondary treatment plants since long. As we have remanded the review proceedings for a fresh consideration by the third learned Judge of the High Court, in our view, it will be too premature to consider the delinked SLP on the aforesaid solitary contention which remains to be considered in the SLP against the main judgment at this stage. Hence keeping all the contentions of the contesting parties open, centering round the aforesaid solitary contention on which the said SLP against the main judgment is sought to be pressed by the appellant at a later stage, we have thought it fit to be delink the said SLP awaiting the decision in the remanded proceedings.

As the remanded review petition pertains to proceedings decided in 1995 and as the SLP filed by the appellant against the said judgment is kept pending by us awaiting the decision in the remanded review proceedings, we request the High Court to dispose review proceedings, we request the High Court to dispose of the remanded review proceedings at is earliest convenience and preferably within a period of eight weeks from the receipt of a copy of this order at its end.

Before parting with these appeals we may note that on the suggestion of the Court, the appellant's counsel on instructions agreed to deposit with respondents concerned Rs.50 lakhs without prejudice to appellant's rights and contentions in the delinked SLP and also the remanded review proceedings. This good gesture was made with a view to seeing that proper pipelines are laid in the surrounding

area of the industrial estate where other admitted polluting industries are operating. This deposits will be considered to be a benevolent act on the part of the appellant, if it ultimately succeeds in these litigations. We note this fair stand of the appellant and direct it to deposit Rs.50 lakhs as agreed to before us, with respondents concerned for being utilised for the purposes indicated in the main judgment in Special Civil Application No.770 of 1995.

In the result these appeals are allowed to the aforesaid extent. In the facts and circumstances of the case there will be no order as to costs.