(2002) 05 KL CK 0030

High Court Of Kerala

Case No: S.A. No. 362 of 1990 and O.P. No. 14175 of 1998

Aboobacker Babu Haji		APPELLANT
	Vs	
Pathummakutty Umma		RESPONDENT

Date of Decision: May 28, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 122
- Constitution of India, 1950 - Article 254
- Transfer of Property Act, 1882 - Section 60

Citation: AIR 2002 Ker 313 : (2002) 2 ILR (Ker) 583

Hon'ble Judges: S. Sankarasubban, J; R. Bhaskaran, J

Bench: Division Bench

Advocate: S.V. Balakrishna Iyer and P.B. Krishnan, for the Appellant; P. Jayashankar, Government Pleader, K.K. John, A.P. Chandrasekharan and Prabha R. Menon, for the Respondent

Judgement

S. Sankarasubban, J.

S.A. No. 362 of 1990 has come before us on a reference by one of us, Bhaskaran. J., by order dated 21st December, 2001. Suit, O.S. No. 233 of 1980 was filed for redemption of mortgage. Two questions of law raised in the Second Appeal, which are as follows:

(1) Can a composite decree for redemption of mortgage, drawn in Form 7D under Order 34 Rule 4 of the CPC as provided by notification dated 10.12.1973 issued by the High Court of Kerala, be drawn up after the CPC Amendment Act 104of 1976?

(2) Is not the decree now granted irregular and improper, inasmuch as, it is not in conformity with Order 34 of the Code of Civil Procedure, 1908, as amended by the CPC Amendment Act 104 of 1976?

The suit out of which, the present Second Appeal is filed is O.S. No. 233 of 1980. The suit was filed for redemption of mortgage evidenced by document dated 11.12.1951.

2. The suit was dismissed by the trial court on 28.5.1984. Against that decree, an appeal was preferred by the plaintiff. The Appellate Court granted a decree to redeem the mortgage on 14.12.1989. According to the appellant, on 15.1.1974, u/s 122 of the CPC (hereinafter referred to as ''the CPC''), the High Court of Kerala recommended changes in Order 34 of the CPC. This, was accepted by the Government and the Government issued notification. The main feature of this amendment is that in a suit for redemption, only one decree was contemplated as against preliminary and final decrees. In 1976, the CPC was amended. The suit was filed on 10.1.1980. As already stated, the suit was dismissed. According to the appellants, by the coming into force of the amended CPC 1976 on 1.2.1977, as per Section97(1), Order 34 as stood in Kerala was repealed. On 14.12.1989, the lower Appellate Court granted a composite decree instead of passing a preliminary decree. On 20.11.1990, the High Court of Kerala again substituted Order 34 to its original position that was available in 1973. Thus, by notification dated 20.11.1990, need for passing a preliminary decree in a suit for redemption, was dispensed with. According to the appellants, a decision of this Court reported in State Bank of Travancore v. Balakrishnan, 1990 (1) KLT 391 held that after the 1977 amendment, Order 34 of the CPC enacted in the State of Kerala was repealed and hence, two decrees are to be passed instead of a composite decree. Since the lower Appellate Court passed only a composite decree, learned counsel for the appellant submitted that procedure is wrong. It appears that this is one of the contentions in the Second Appeal and this contention was taken up and the matter was referred to the Division Bench.

3. When the matter came before the Division Bench, learned counsel for the appellant submitted that O.P. No. 14175 of 1998 had been filed by the petitioner on behalf of another client challenging the amendment by Ext. P2, Hence, that petition was also called and heard along with the Second Appeal. In O.P. No. 14175 of 1998, the High Court of Kerala is the third respondent. Notice was taken by the Registrar and a statement was filed on behalf of the High Court. With regard to the amendment made to Order 34 of the CPC, the prayer in the Original Petition is to issue a writ of certiorari or other appropriate writ or order quashing Ext. P1 notification dated 20.11.1990 by which Order 34 was amended. Another prayer is to declare that Order 34 of the CPC as amended by the Amendment Act 104 of 1976 will govern all suits for foreclosure, sale or redemption of mortgage in the State of Kerala and to declare that Order 34 of the CPC introduced by Ext. P1 notification is repugnant to Order 34 of the CPC as amended in 1976 and therefore void and inoperative.

4. It appears that the petitioner in the Original Petition was a defendant in a suit for recovery of amount on the basis of a mortgage, viz., O.S. No. 97 of 1990, which was filed on 15.10.1990. The trial court passed a preliminary decree. Thereafter, the plaintiff filed an application for amendment of the decree on the ground that as per the existing Order 34 of the CPC available in the State of Kerala, there is no scope for passing a preliminary decree. Composite decree was enough. This was allowed by the Court. Against that the present petitioner filed Civil Revision Petition before this Court. The Civil Revision Petition was disposed of reserving the right of the petitioner to challenge the vires of Ext. P1 notification in a separate proceeding and that was why the Original Petition was filed.

5. We shall first consider the grounds raised in the Original Petition. According to the petitioner, the CPC was enacted on 21.3.1908 to consolidate and amend the laws relating to the procedure of the courts of civil judicature of the country. The High Court of Kerala issued notification dated 15.4.1974 in exercise of the power u/s 122 of the CPC by which amendments were introduced under Order 34 of the CPC. It is not necessary for us to presently deal with this. Thereafter, on 15.1.1974 by notification dated 10.12.1973 certain amendments were introduced in Order 34 of the CPC. In fact, a new Order 34 was substituted. The salient feature of this substitution is passing of a composite decree in the place of preliminary decree and final decree in a suit for redemption. While so, the CPC was amended by Act 104 of 1976. This introduces changes in the Order 34, which is available under the Central Act. Amendment was made to Rule 6. A Proviso was added to Rule 10. Rule 10A was introduced. Section 97 of the Amendment Act dealt with repeal and savings. Section 97(1) states that 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 concerned with the provisions of the principal Act as amended by this Act, stand repealed. On the basis of this, this Court held in the decision reported in State Bank of Travancore v. Balakrishnan, 1990 (1) KLT 391, that Order 34 introduced by the High Court of Kerala by notification in 1974 is inconsistent with Order 34 of the Central Code and hence held that Order 34 substituted by the High Court stands repealed. Thereafter, the High Court of Kerala issued a fresh notification dated 16, 12, 1989 which was published in the Kerala Gazette on 20.11.1990. By notification dated 10.11.1990, the Original Order 34, which was introduced by notification in 1974 was substituted in the place of Order 34 which was available after the amendment of the Act by Act 104 of 1976. In the explanatory note of the notification dated 16.12.1989, it is stated as follows:

"O. 34 of the CPC stipulates separate preliminary and final decrees in mortgage actions. This is notwithstanding the recommendation of the Law Commission in its 54th report to dispense with the need for two such decrees. High Court is of the opinion that for an offensive and expedient disposal of mortgage actions the Order 34 of the CPC should be amended so as to dispense with the need for two separate decrees. Hence the amendment".

Learned counsel for the petitioner made submissions on various grounds. Firstly he contended that there is inconsistency between the proceedings of Order 34 as amended by the State of Kerala and those enacted by the Parliament. While Order 34 enables a court to pass a preliminary and final decrees in a suit for redemption, sale or foreclosure, the Kerala Order 34 enables a court to pass a composite decree. The right of accounting under the provisions of the Transfer of Property Act is lost. The Parliamentary intent to give the debtor maximum time to pay off the debt and save his property is nullified. Order 34 Rule 11(a)(iii) of the Central Code directs that interest payable shall not exceed 6%. This provision is absent in the Kerala Order 34 which enables the courts in Kerala to grant higher rates of interest. The substantial rights of parties are seriously affected as debtors in Kerala alone have to pay a higher rate of interest. Order34 Rule5 of the Central Code enables a mortgagor to pay the amounts and redeem the mortgage upto the confirmation of the sale. In other words the redemption can be even after sale. This is consistent with Section 60 of the Transfer of Property Act: This is a statutory right that has always existed in law. Such a right is wiped out by the Kerala Order 34. There is no provision in the Kerala Code corresponding to Order 34 Rule 5 of the Central Code, introduced by the Transfer of Property (Amendment) Act (21 of 1929). The result is that the right to redeem in Kerala is available only prior to the sale. The legislative intent is to enable a mortgagor to save his property till the last moment as available under the repealed provisions of the Transfer of Property Act. This is nullified in Kerala. The forms by which the right of parties are extinguished in Appendix D are different. The relationship of mortgagor and mortgagee can be terminated only by a decree drawn in proper form.

6. The next contention raised by the learned counsel for the appellant is that the amending Act repeals all inconsistent amendments introduced by Legislatures or High Court. The intention is to have a uniform Civil Procedure throughout the country. It has been held in the decision reported in State Bank of Travancore v. Balakrishnan, 1990 (1) KLT 391 that Order 34 of the CPC introduced by the High Court of Kerala is inconsistent with the Central Code and as such stands repealed by Section 97(1) of the Amendment Act. The impugned amendment, reintroduced by the High Court, in effect repeals the repeal made by Parliament and retains an earlier law. Such a course is an affront to Parliamentary supremacy which is a basic structure of the Constitution. Section 97(1) and Article 254 of the Constitution operate in a similar manner and are intended ,to preserve Parliamentary supremacy. The Supreme Court has conclusively held that any inconsistent amendment made by a State Legislature or High Court after 1.2.1977 will require Presidential assent under Article 254(2). Article 254 will apply in cases where there is an existing Parliamentary law occupying the field and this is attempted to be replaced by a State law. Here is a case where there is an existing Parliamentary law enacted by expressly repealing inconsistent State laws. That express repeal cannot be nullified without following the procedure prescribed in Article 254(2). It has been

held in Pt. Rishikesh and Another Vs. Salma Begum (Smt), that Presidential assent can be sought for even in a case where law is sought to be made u/s 122 of the CPC. The High Court is a delegate of the State Legislature. Sections 126 and 127 of the CPC provide for territoriality of operation of the law and the prior sanction of the State Government being required as pre-conditions for exercise of power u/s 122 of the CPC. Learned counsel submits that this power is a form of delegated legislation intended to make minor changes to suit local conditions. The Constitution confers power on Parliament and Legislatures to make law. Civil Procedure is included as Entry 13 in List III and as such either body may make law. None else is constitutionally permitted to make law on this subject. The supremacy of the Constitution and the separation of powers between the Legislature, the Executive and the Judiciary is part of the basic structure of the Constitution. The practice of delegation of power to the Judiciary is prevalent in England also. The power is always subject to a limitation that the rule framed by the delegate cannot over ride a rule placed before Parliament. De hors the power delegated u/s 122 of the CPC the High Court has no inherent power to amend the CPC or deal with a matter covered by Entry 13 of List III of the Constitution. The powers of a delegate are limited. Incase of conflict between the order of a delegate and Parliament the law made by Parliament has to prevail. Section 122 of the CPC is subject to Section 128 in as much as the matters on which the High Court can make rules is specifically enumerated. A perusal of Section 128 would indicate the scope of the rule making power u/s 122. Such fundamental changes are not contemplated. The High Court appears to have accepted the recommendations made by the 54th Law Commission while introducing this amendment. It is to be noted that the report of the Law Commission is of an advisory nature. Parliament has not found it acceptable, in so far as changes to Order 34 are concerned. The bill proposing the 1976 amendment included the changes proposed by the Law Commission. However, this did not become law clearly indicating that the matter had been considered and rejected by Parliament. In such circumstances it is not proper for a delegate to accept the recommendation and nullify the will of Parliament. The Kerala Order 34 attempts to substitute a new scheme for the disposal of suits relating to mortgage of immovable property. There is nullification of rules that have been approved by Parliament after repealing the self same Kerala Order 34.

7. As already stated, the Govt. and the High Court of Kerala have filed statements. In the statement filed, the following facts are revealed. Article 254 of the Constitution refers to law made by the Legislature of a State. Order 34 as contained in Ext. Pi is not a law made by the Legislature of the State and therefore Article 254 of the. Constitution is not attracted. Preamble to Act 5 of 1908 would show that it is an act to consolidate and amend the laws relating to the procedure of the courts of civil judicature. The Code is mainly treated into two parts; Sections and Orders. While the main principles of law are contained in the Sections, the detailed procedure with regard to the matters dealt with in the Sections are specified in the Orders u/s 122,

the High Court has power to amend by rules the procedure laid down in the orders. This is clear from the statement of objects and reasons of the amending Act 104 of 1976. Section 2(1) of the CPC states that Code includes Rules. The entire Code, apart from the Rules appearing in the Schedule is fundamental and unalterable except by way of amendment of the CPC. The Rules shall serve the body of the entire Code. The Code envisages the aspects of jurisdiction while the rules enacted indicate the manner in which the jurisdiction has to be exercised. Section 122 in Part 10 of the Code invest the High Court with power to make Rules regulating their own procedure and the procedure of the civil Courts subject to their superintendence. This Section further empowers the High Court to make Rules and by such Rules, annul, alter or add to all or any of the Rules in the first Schedule. Therefore, it is clear that the High Court is given over riding power to annul, alter or add or any of the Rules in the first Schedule. Order34 is in the first Schedule. Therefore, the Parliament by enacting Section 122 has conferred the High Court with over riding powers to annul, alter or add any of the Rules in the first Schedule. Ext. P1 conforms to Section 122 and therefore does not attract the application of Article 254 of the Constitution. When the power is given by the Parliament u/s 122 to the High Court to annul, alter or add all or any of the Rules in the first Schedule, question of a rule becoming repugnant to the Parliamentary legislation does not arise at all. Section 123 refers to Constitution of Rule Committee in the State. Section 124 states that the Rule Committee shall make a report to the High Court on any proposal to annul, alter or add to the Rules in the first Schedule or to make new Rules and before making any Rule u/s 122, the High Court shall take such report into consideration. Section 126 provides that the Rules made under the provisions shall be subject to the previous approval of the Government of the State. Section 127 provides publication of Rules in the official gazette. It shall come into effect either from the date of publication or from such other date as may be. specified. It also makes it clear that from the date of publication of Ext. P1, it has same force and effect as contained under Order 34. Ext. P1 is not a State Legislature. Section 122 is not a delegation of power of the Stale Legislature. There is no bar under Article 254. The High Court cannot act as a delegate of the Legislature. It is against the fundamental principles and percepts and basic structure of Constitution. Kerala Order 34 not being a law made by the Legislature need not be reserved for consideration and assent of the President. The provisions of Kerala Order 34 are not void by operation of Article 254 of the Constitution. The various provisions under Order 34 cannot be compared to come to the conclusion that the Kerala Order is repugnant to Central Order 34. The Rules made by the Kerala High Court are valid. Order 34 is one of the procedures as could be seen from the provisions of the CPC itself. The provisions regarding time for payment of mortgage debt, opportunity for accounting, rate of interest, etc. are not matters to be gone into or are relevant in the context of a challenge against Kerala Order 34. There is no violation of the fundamental right of the petitioner.

8. Paragraph 11 of the Statement describes how the matter was brought to the notice of the High Court by the District Judge, Ernakulam on 24.5.1985 requesting to consider whether Rules under Order 34 of the CPC as it is in force at present in the State be amended once again as was done earlier in 1973 in order to do away with separate preliminary and final decree in mortgage action. This letter was placed before the Rule Committee of the High Court as to consider the question of amendment of Rules under Order 34. The Rule Committee in the meeting held on 23rd, 30th June, 1st, 2nd, 14th and 15th of July, 1987 resolved that the amendments effected to Order 34 of CPC 1908 as per notification dated 10.12.1973 should be reinstated or reintroduced and it was further resolved to suggest to the High Court to substitute Order 34 of the CPC with Order 34 as introduced by the notification dated 10.12.1973 of the High Court of Kerala. In the meeting of the Hon''ble Judges of the High Court of Kerala on 3.12.1987 it was unanimously resolved that the recommendations of the Rule Committee be accepted and action taken accordingly. It is further stated that the Kerala Order 34 and the provisions contained therein were made to avoid a delay injustice, protraction and multiplicity of proceedings and also to avoid delaying tactics that would be adopted by the debtors, the proceedings leading to amendment of 1973 would show that opinions of various District Judges were obtained and the Rule Committee as well as the Full Court considered the feasibility of having only one composite decree and after deliberations and considerations it was accepted. Kerala Order 34 and the provisions contained therein are not inconsistent with the provisions of the object of the Code. The prayers in the Original Petition are not liable to be granted. Hence, it was prayed that the Original Petition may be dismissed.

9. Let us first examine the power of the High Court to issue Ext. PI notification. Ext. P1 notification is dated 16th December, 1989 and it was published in the Kerala Gazette on 20.11.1990. It states as follows: "In exercise of the powers vested in the High Court u/s 122 of the Code of Civil Procedure, 1908 (Central Act 5 of 1909), the High Court of Kerala after previous publication in the Kerala Gazette and with the previous approval of the Government of Kerala conveyed in G.Q. Rt. 1814/89/Home, dated Trivandrum, 15th April, 1989 makes the following amendments to the first Schedule to the Code of Civil Procedure, 1908". The amendments are stated. The forms for decree are also given in Ext. P1. There is an explanatory statement. It says that the amendment has been made taking into consideration the report of the Law Commission to do away with two decrees and to pay the composite decree.

10. Part X of the CPC deals with Rules. Section 121 says that the Rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part. Section 122 says that the High Courts not being the court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the first Schedule. Section 123 contemplates

the Constitution of Rule Committee. The Committee is to consist of three Judges of the High Court, two legal practitioners enrolled in that court and a Judge of a civil court subordinate to the High Court, lue Rule Committee shall make a report to the High Court on any proposal to annul, alter or add to the Rules in the First Schedule or to make new Rules and before making any Rules u/s 122, the High Court shall take such report into consideration. Section 126 states that the Rules made under the forgoing provisions shall be subject to the previous approval of the Government of the State in which the Court whose procedure to Rules regulate is situate or if that Court is not situate in any State, to the previous approval of the Central Government. Section 128 deals with matter for which Rules may provide. It says that such Rules shall be not inconsistent with the provisions in the body of this Code, but subject, thereto, may provide for any matters relating to the procedure of Civil Courts. Thus, we find from Section 122 of the CPC that power is given to the High Court to annul, alter or modify the Rules in the First Schedule. This has to be recommended by the Rule Committee and approved by the Government. Thus going by Section 122 of the CPC, power is given absolutely to the High Court to amend the Rules in the First Schedule. Section 128 particularly says that such Rules should not be inconsistent with the body of the Code meaning thereby, it should not be against the Sections of the CPC. Mulla on CPC, Vol. I, Fourteenth Edition at page 703 says that Sections 122 to 128 excepting S: 125 provides for Rules to be made by the High Court for regulating their own procedure and the procedure of the Civil Courts subject to their superintendence. The Sections in the Code which constitute the body of the Code are jurisdictional provisions giving substantive rights which can only be withdrawn or altered by the Legislature. This Section therefore does not authorise, as is made clear by Section 128, the High Courts to make Rules which are inconsistent with the body of the Code. But the Section does not authorise the High Courts to make Rules regulating their procedure as also the procedure of the Civil Courts subject to their superintendence and also by such Rules to annul, alter or add to all or any of the Rules in the First Schedule. These Rules are of course subject to the previous approval of the authorities mentioned in Section 126. At page 704, the Author states as follows: "None of the Courts empowered under this Section to frame Rules has power by any Rule which it may make to alter the period of limitation prescribed by the Indian Limitation Act". That Section applies on its own terms to any other application to which it might be made applicable by or under any enactment."

11. In Govardhanbhai Somabhai Patel Vs. Parshottam Urnedbhai and Another, it was held that the Rules so made have the force of law. But in making them the formalities prescribed by the Code should be complied with. In Promode Kumar Roy v. S.M. Shephalika Dutta, ILR 57 Cal 676 , it was stated that the object of the section is to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation. A Full Bench of the Allahabad High Court in Shakir Husain Vs. Chandoo Lal and Others , held that u/s 122, the High

Court has power to amend, alter or add to any of the Rules in the First Schedule to the Code. If a new rule that has been made is to some extent in conflict with the previous existing Rule it must, by implication be deemed to have annulled or altered the old Rule. In (Chaudhri) Pahunchi Lal Vs. Bhup Singh and Others, , it was held that the basis of the power of the High Court to frame Rules is the power the High Court to do all things that may be necessary to do, in order to carry out the provisions of the Letters Patent and the C.P. Code. That being the case and it being only a subordinate body in the matter of framing Rules, it has no power to frame Rules so as to override either the provisions of the C.P. Code or the Letters Patent. Similarly it was held in Dr. Krishna Singh v. Bachan Singh, AIR 1942 Lah. 201, thus: "It is essential for the validity of every rule framed by High Court to satisfy the following conditions: (i) The delegated power of legislation conferred on High Court in Part X of the Code is limited to annulling or altering or adding to the rules in Schedule I of the Code (ii) the rules framed must relate to the matters regulating the procedure of the High Court or subordinate Courts and (iii) such rules must not be inconsistent with any provision in the body of the Code. Thus, going by Section 122 of the CPC, it cannot be said that Ext. P1 is without any authority.

12. Section 97(1) of the CPC (Amendment) Act, 1976 states as follows: "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 inconsistent with the provisions of the principal Act as amended by this Act, stand repealed". The scope of this Section was considered by the Supreme Court in Ganpat v. IInd Addl. Dist. Judge, Balia, AIR 1986 Supreme Court 589. The Supreme Court in paragraph 3 of the above decision, held as follows:

"The principal Act referred to in Section 97 is the Code. By the Amending Act several amendments were carried out to the Code on the basis of the recommendations of the Indian Law Commission which had considered extensively the provisions of the Code before it submitted its 54th Report in 1973. By the time the Law Commission took up for consideration the revision of the Code, there were in force in different parts of India several amendments to the Code which had been effected by the State Legislatures or by the High Courts. The subject of Civil Procedure being in Entry 13 of List III of the Seventh Schedule to the Constitution, it is open to a State Legislature to amend the Code insofar as its State is concerned in the same way in which it-can make a law which is in the Concurrent List. Section 122 of the Code empowers the High Court to make rules regulating the procedure of civil courts subject to their superintendence as well as rules regulating their own procedure. These rules no doubt must not be inconsistent with the body of the Code. But they can amend or add to rules in the First Schedule to the Code. Section 129 of the Code which is overlapping on Section 122 of the Code to some extent confers power on the Chartered High Courts to make rules as to their original civil procedure. As mentioned earlier, before the Amending Act came into force on Feb. 1, 1977 many

of the provisions of the Code and the First Schedule had been amended by the State Legislatures or the High Courts as the case may be and such amended provisions had been brought into force in the areas over which they had jurisdiction. When the Amending Act was enacted making several changes in the Code Parliament also enacted Section 97 providing for repeals and savings and the effect of the changes on pending proceedings."

In paragraph 4 of the above decision, it was stated thus:

"The object of Section 97 of the Amending Act appears to be that on, and after Feb. 1, 1977 throughout India wherever the Code was in force there should be some procedural law in operation mall the civil courts subject of course to any future local amendment that may be made either by the State Legislature or by the High Court, as the case may be, in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should govern the procedure in civil courts which are governed by the Code".

In that case, the Supreme Court further held that even if no amendment was made to an existing provision in the CPC by the Amendment Act, 1976 and the amendment made by the State or the High Court was inconsistent with the Code, then the amendment of the State will stand repealed. It was relying on this decision that Radhakrishna Menon, J. held that the original notification of 1973 amending Order34 ceased to have any effect after 1976 Act in the decision reported in State Bank of Travancore v. Balakrishnan, 1990 (1) KLT 391 . In paragraph 4 of the above decision, it was observed thus: "The question arising for consideration thus is: Can the bank contend for the position that in a suit for sale of the mortgaged properties a composite decree, as provided for under Order 34 CPC as amended by the High Court alone can be passed even after the amendment of Order 34 by Act 104 of 1976? The answer to this question depends upon the construction of Section 91 of Act 104 of 1976". The above decision relied on the decision in Ganpat Giri Vs. Second Additional District Judge, Ballia and Others, *and further held as follows: "It can be gathered from the above statement of law that on the introduction of the new Order 34 by Act 104 of 1976, the old one, whether in its original form or as amended by the State Legislature or the High Court would not be available to be pressed into service by a party to the litigation. In other words the Code as amended by Act 104 of 1976, subject to some future amendment that may be made either by the State Legislature or the High Court would govern the proceedings before Civil Courts. The decision considered the question whether Kerala Order 34 was inconsistent with Order 34 of the similar Code. The learned Judge held that there was inconsistent. Thus, it can be seen that on the basis of the decision of the Supreme Court in Ganpat Giri Vs. Second Additional District Judge, Ballia and Others, and the decision in State Bank of Travancore v. Balakrishnan, 1990 (1) KLT 391, the provisions of Kerala Order 34 introduced by the new notification dated 15.4.1989 stood repealed. Thus from 1.12.1977 when the amended CPC came into force, it was Order 34 of the

Central Code that was applicable till amendment was made by the notification of the Kerala High Court.

13. It was next contended that the amendment was existing when the Act came into force. Since the amendment is inconsistent with the Code, the amendment cannot continue in force. Section 97 did not say anything about the future amendments that can be made by the State Legislature or by the High Court. Since, here we are concerned with the power exercised u/s 122, Section 97(1) does not expressly prescribe any future amendment. In this context, it is worthwhile to note that there was no challenge with regard to the power granted to the High Court u/s 122 of the CPC. Learned Counsel for the appellant on the basis of certain observations of the Supreme Court tried to argue that the power exercised by the High Court u/s 122 of the CPC is a legislative power and that it should stand the test of Article 254 of the Constitution of India. It is very difficult to accept this contention, because it is not a legislative power that is exercised by the High Court u/s 122 of the CPC. The High Court is given power u/s 122 of the CPC by the Parliament itself to suitably amend the provision to the First Schedule. The only requirement that is necessary is that it should be investigated by a Rule Committee approved by the High Court and sanctioned by the Government. It is not an Act requiring the consent of the Governor for coming into operation. It can be said to be a delegated power given to the High Court. Article 254 of the Constitution of India states thus:
"If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any 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".

What is contemplated under Article 254 of the Constitution of India is the law made by the Parliament and the law made by the State Legislature. Here the substitution of Order 34 comes neither first nor second. It is the Rule made by the High Court in exercise of the power granted by the Parliament. Hence, prima facie. Article 254(2) of the Constitution of India does not apply to the facts of this case. Of course, in the case of the delegated legislation, what can be said is that it can be exercised by the authorities. But as stated, Section 122 of the CPC gives power to the High Court to vary and alter the Schedule. Hence, it cannot be said that the power exercised

exceeds the power granted to it u/s 122 of the CPC. Learned counsel then referred to certain decisions of the Supreme Court and tried to contend that the test laid down under Article 254 of the Constitution of India has to be considered.

14. He referred to the decision in Pt. Rishikesh and Another Vs. Salma Begum (Smt), New Kenilworth Hotels (P) Ltd. Vs. Ashoka Industries Ltd. and Others, and Thirumuruga Kirupananda Variyarthavathiru Sundara Swamigalme Vs. State of Tamil Nadu and Others, . The case referred to by the learned counsel for the petitioner to drive home his point is that even though the power is exercised by the High Court u/s 122 of the CPC and that is inconsistent with the provisions of the Central Code, the matter has to be considered. Unless the assent of the President is obtained, the Central Code will prevail. In the case, Pt. Rishikesh and Another Vs. Salma Begum (Smt), , the Court was considering Order 15 of the CPC, which deals with disposal of the suit at the first hearing. The Central Code contains only four Rules under this Order. It appears that by U.P. Act 37 of 1972, Section 4 of the Provincial Small Cause Court Act was amended empowering the Court of Small Cause to decree suit for possession of immovable property and for recovery of arrears of rent or interest in such property. By the same Act, Rule 5 Order 15 was inserted, which states as follows:

"Striking off defence on failure to deposit admitted rent, etc.- (1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per centum per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making, the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the court may subject to the provisions of Sub-rule (2), strike off his defence."

Sub-r. (2) enables the court to consider representation by the defendant before striking off the defence. Under 1976 amendment, the U.P. Civil Laws amended Order Rule 15, Rule5 by bringing three explanations to Sub-rule (1). This was attacked. According to the contentions, as per the decision in Ganpat Giri Vs. Second Additional District Judge, Ballia and Others, , the object of the Central Act was that Parliament intended that CPC should be uniform throughout India. The U.P. Act came into force prior to the Central Act was brought into force on 1.2.1977. The State Act or a provision made by a High Court to the order previously made be consistent with the provisions of the Code as amended by the Central Act which alone remain valid. All the pre-existing amendments made by the appropriate State Legislature or a High Court stand repealed. Order 15, Rule 5 is one such prior amendment made by the State Legislature which is inconsistent with the Central Act

from the date of its commencement. By operation of Clause (1) of Article 254, the State Act became void. The striking of the defence, therefore, is contrary to law. It was contended that the State Amendment violates Article 14. An honest litigant who admits of arrears is made to suffer the onslaught of Order 15, Rule 5, while dishonest tenant who denies rent is permitted to defend the suit by adduction of evidence. Before the High Court, two questions of law were raised. One was whether Rule 5 inserted in Order 15 by the U.P. Civil Laws (Amendment) Act, 1972 and substituted by new Rule 5 of the U.P. Civil Laws (Reforms and Amendment) Act, 1976 is consistent with the provisions of the principal Act as amended by the CPC (Amendment) Act, 1976 and stands repealed? The other was whether Section 97(1) and (3) and of the CPC (Amendment) Act, 1976 are retrospective and the orders passed before 1.2.1977 striking off the defence for non-compliance of Rule 5 are to be set aside? The question that arose for consideration before the Supreme Court was whether Rule 5, Order 15 is inconsistent with the Central Act and thereby became void under Article 254(1) of the Constitution of India? After dealing with various contentions in paragraph 21 of the above decision, it is stated thus:

"The condition precedent to bring about repugnancy should be that there must be an amendment made to the principal Act under the Central Act and the previous amendment made by a State Legislature or a provision made by a High Court must occupy the same field and operate inacollision course. Since the State Act as in corporated by Act 37 of 1972 and the Explanations to Rule 5 by Act 57 of 1976, Rule 5 was not occupied by the Central Act in relation to the State of U.P., they remain to be a valid law. We may clarify at once that if the Central Law and the State law or a provision made by the High Court occupy the same field and operate in collision course, the State Act or the provision made in the Order by a High Court being inconsistent with or in other words being incompatible with the Central Act, it becomes void unless it is re-enacted, reserved for consideration and receives the assent of the President after the Central Act was made by Parliament i.e., 10.9.1976."

Learned counsel on the basis of the last sentence submitted that it has no validity. According to us, reservation for the assent of the President only deals with the State Enactment. No doubt, the Supreme Court says that even if a provision is made it may be re-enacted. But so far as the State Legislature is concerned, that law should be in accordance with Article 254 of the Constitution of India, unless there is assent of the President. But so far as the power exercised under Article 122 is concerned, it cannot be said that the law requires assent of the President.

15. The next decision cited by the learned counsel is the decision reported in Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., . That is a case regarding the validity of Section 41 of the Punjab Courts Act, 1918, u/s 41 of the above Act, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, viz., (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; and (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 the merits. After coming into force of 1974 amendment, u/s 100, a Second Appeal will lie only on substantial questions of law. The question arose as to whether Section 41 applies after CPC (Amendment) Act, 1976. Dealing with the above question, the Supreme Court, in paragraph 13 held thus:

"Article 254 thus maintains Parliamentary supremacy in matters under List I and List III. And it is on this score that Mr. Mehta was very eloquent that doctrine of implied repeal will have its true impact-on1 the situation and thus resullantly 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 Pubjab 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". .

In paragraph 29 of the above decision, the Court held thus: "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". Thus, we find that these two decisions, which are relied on by the counsel for the petitioner are decisions where the provisions of State law was found to be repugnant to the Central Act. It is not a case where a provision of law in exercise of power u/s 122 came for consideration. As already stated, learned counsel for the petitioner relied on the observations of Ramaswamy, J. in Pt. Rishikesh and Another Vs. Salma Begum (Smt), According to us, since the Rules are made as per Section 122 of the CPC, the question of repugnancy as contemplated under Article 254 of the Constitution of India does not arise. In the case before the Supreme Court the attack was on the Punjab Act and not on the basis of the rules framed u/s 122 of the CPC. Learned counsel for the petitioners in the O.P. contended that the Rule framed u/s 122 cannot have the force of law, since it has not received the assent of the President.

16. The next question for consideration is whether since there is certain difference in the provisions of Order 34 enacted by the High Court of Kerala, they would affect the litigants in Kerala. First contention/raised is that the Central Code prescribes two decrees; preliminary decree and final decree, whereas the Kerala Code prescribes only one decree. We don''t think any prejudice will be caused to the party by having one decree or two decrees. So far as the question of redemption of mortgage or sale is concerned, if the amounts are determined as per the mortgage, then there

should not be any prejudice to the party. Learned counsel contended that because the final decree is passed, the mortgagor will get some time for paying the amount. Further, there is no provision in the Transfer of Property Act or any other Act to have two decrees. If that be so, the Rules framed u/s 122 of the CPC cannot be said to be a valid law. In N.M. Veerappa Vs. Canara Bank and Others, it was held that during the pendency of mortgage suits the amount of interest should not be more than 6%. According to the learned counsel, so far as the Kerala Code is concerned, such restriction is not there. This argument cannot be accepted for reasons already stated. Further in the decision in N.M. Veerappa v. Canara Bank, AIR 1998 Supreme Court 1101, sufficient reliance has been given as to how interest can be granted during the pendency of the suits. Learned counsel relied on the decision in V.K. Palaniappa Chettiar (Dead) By Lrs. Vs. Ramasami Gounder and Another, . Learned counsel also brought to our notice a Division Bench decision of our Court in Rajendra Prasad v. South Indian Bank, 1997 (2) KLT 458, where this Court held that after the amendment of Order 34 by the Kerala Code, a mortgagor does not get the right to deposit the amount after sale. In that decision, this Court held that it is not the right available to a mortgage u/s 60 of the Transfer of Property Act that is being enforced by the mortgagor when he seeks to act under Order 34, Rule 5 of the CPC but only the right conferred on him by Order 34 of the CPC itself. Learned counsel contended that u/s 60 of the Transfer of Property Act a mortgagor has not a right to pay the amount before confirmation of the sale. Learned counsel even challenged the correctness of the decision in Rajendra Prasad v. South Indian Bank, 1997 (2) KLT 458. Order 34, Rule 5 of the Kerala Code only states that the Code may, upon good cause shown and upon such terms, if any, as it thinks, fit, postpone the date fixed for payment under this Order from time to time. According to us, the question whether it is in conflict with Section 60 of the Transfer of Property Act does not arise for consideration in this case. We have held that Section 122 enables the High Court to make, add or alter the all or any of the Rules in the First Schedule. It does not enable the High Court to amend any other law. Thus, if as a matter of fact, u/s 60 of the Transfer of Property Act, a right is given for depositing the amount before confirmation of the sale, that right cannot be taken away by the amendment to Order 34. Thus, we don''t find any merit in the contention regarding the challenge of constitutional validity of Order 34 which has substituted by Ext. P1 notification in the Kerala Code. Hence, we hold that Ext. P1 in the Original Petition is valid.

17. The next point we have to consider is the contention in the Second Appeal. The suit was filed for redemption. According to the plaintiff, the suit property belonged to the father of the plaintiff and his brother Ahmmedkutty Haji. After their death, as per partition deed dated 12.1.1951, the suit property was allotted to the share of the plaintiff and her sisters Kadiyumma and Ithachukutty Umma. The suit property was mortgaged in favour of Ayamu, the father of defendants 1 to 4 and the husband of the fifth defendant for Rs. 300/-. The purpose for which the mortgage was executed was for obtaining funds for repairing the building standing in the suit property.

Incorporating the conditions of the mortgage, a registered possessory mortgage deed was executed in favour of the said Ayamu by the plaintiff and her sisters on 11.12.1951. The suit property was thus in possession of Ayamu, as a mortgagee and after his death, it was in the possession of the defendants as mortgagees. The rights of the plaintiff''s sisters Kodiyumma and Ithachukutty Umma were assigned to the plaintiff on 24.1.1979. Despite several demands, the defendants did not allow the mortgage to be redeemed.

To the notice sent by the plaintiff, a reply was sent arising false and vexatious contentions. To the notice sent by the plaintiff, a reply was sent rising false contentions that the suit property was orally let out 10 years back, that the building was constructed by Ayamu, that the possession of the defendants was in the capacity of tenants and that the defendants have made improvements and structures in the property for more than Rs. 50,000/-. Hence the suit was filed for redemption of mortgage.

18. In the written statement filed by the defendants, it was contended that neither the plaintiff nor her sister was in possession of the. suit property. It was taken by Ayumu on an oral lease for a rent of Rs. 2/-. At that time, the property was a vacant spot and Ayamu constructed buildings in the suit property and began to conduct trade therein. After the death of Ayamu, these defendants were holding the property as his heirs. The possession of the defendants was not as mortgagees. On the other hand, they are tenants of the property entitled to fixity of tenure. The mortgage deed mentioned in the plaint was executed only for the purpose of creating some documents. The said document was not a mortgage, but it was only a lease deed. The defendants and their predecessors in interest have effected improvements and structures in the property worth more than Rs. 50,000/-.

19. On the basis of the above pleadings, the trial court raised as many as 11 issues. The question of tenancy was referred to the Land Tribunal. The Land Tribunal by its order dated 31.3.1984 in O.A. 30/82 held that the oral lease set up by the defendants is true. So far as the question whether the transaction evidenced by the document dated 11.12.1951 is a mortgage or lease, the Land Tribunal held that no evidence was adduced and hence did not consider the question. Hence, the other issues were not considered. Thus, the suit was dismissed. Against the judgment and decree, the plaintiff preferred an appeal before the Appellate Court. The Appellate Court found that the question of oral lease set up by the defendants have not been proved. It did not believe the evidence given by DWs 1 and 2. So far as the question whether the document dated 11.12.1951 is a mortgage or lease, the court was of the view that the document was for securing a loan and held that it was a mortgage. The appeal was allowed. It is against that the present appeal is filed.

20. In the present appeal, a number of questions of law has been raised. But we find that apart from the question of validity of passing composite decree, the only other substantial question that is raised for consideration is that whether Ext. A3

document is mortgage or lease. The question whether there is oral lease or not, according to us do not raise the substantial question of law and it is on the basis of that the lower Appellate Court held that there was no oral lease. So far as the question whether Ext. A3 is a lease or mortgage, we went through the documents. Learned counsel for the appellants argued that Ext. A3 amounts to a lease and not a mortgage. The document shows that there was already a building in the property and that property was given as a possessory mortgage. The mortgage amount is Rs. 300/-. It is also stated that if the amount is not given, the amount to be treated as charge on the property and other properties of the mortgagor. The mortgagee is liable for any waste committed in the property. According to us, mere payment of amount does not make the document a lease if it is otherwise a mortgage. A reading of the whole document shows that the property was given as security for the purpose of loan given to the mortgagor. A charge is also created in the mortgage. As rightly held by the court below, Ext. A3 document is a mortgage and not a lease. Learned counsel then argued that because the Land Tribunal held that the appellant was a tenant some of the other issues were not considered, viz., value of improvements. No doubt, no evidence has been adduced by the defendants in the court below regarding improvements. But since this issue was raised, an opportunity should be given to the defendants to adduce evidence.

21. In the above view of the matter, we set aside the judgment and decree of the lower Appellate Court and remand the case to the trial court to give a finding on the issue, viz., issue No. 9 regarding value of improvements, after giving an opportunity to the defendants to adduce evidence regarding this.

Second Appeal and Original Petition are disposed of as above. Parties shall appear in the court below on 26.6.2002 and the suit shall be disposed of within six months from that date.