

(2006) 03 KL CK 0072

In the High Court Of Kerala

Case No : Writ Petition (C) No. 7115 of 2006-V

Celin and Another

APPELLANT

Vs

Thomas Johnson and Others

RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : AIR 2006 Ker 297 : (2006) 2 CivCC 647 : (2006) 2 ILR (Ker) 76 :
(2006) 1 KLJ 859 : (2006) 2 KLT 141

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : V.L. Shenoy and Yeshwanth, for the Appellant;

Judgement

R. Basant, J.—The petitioners are the plaintiffs in a suit filed by them against respondents 1 and 2. The suit is one for permanent prohibitory injunction. An application for temporary injunction was filed. The said application was allowed and confirmed after hearing the parties. The respondents 3 and 4 later got themselves impleaded on the allegation that the petitioners plaintiffs had filed the suit without showing them on the array of parties. They contended that they were essential and necessary parties considering the nature of the relief claimed. That petition was considered and the court allowed their impleadment. Thereafter, respondents 3 and 4 filed an application under Order 39 Rule 4 read with Sec. 151 of the C.P.C. to modify/vary/set aside the order passed earlier - at a time when they had not come on record, against respondents 1 and 2. The court below considered the said petition and by the impugned order produced as Ext. P9 invoking the powers under Order 39 Rule 4 of the CPC allowed the said application and vacated the earlier order passed. The petitioners have/rushed to this Court with this writ petition. The learned counsel for the petitioners was requested to explain how and why the petitioners are coming to this Court with this writ petition without and before exhausting the remedy available to them under Order 43 Rule 1(r). The order passed under Order 39 Rule 4 is made appealable under that provision.

2. The learned counsel for the petitioners submits that the impugned order cannot be held to be one passed under Order 39 Rule 4. It is passed only under Sec. 151 of the CPC notwithstanding the fact that the petition shows Order 39 Rule 4 also as an enabling provision.

3. How and why is the impugned order not an order passed under Order 39 Rule 4? The only response of the learned counsel for the petitioners is that under Order 39 Rule 4 of the CPC, powers can be invoked only at the instance of "any party dissatisfied with such order". The learned counsel for the petitioners submits that such party dissatisfied with the order at whose instance the powers under Order 39 Rule 4 can be invoked must be a party who was a party to the suit on the date when the impugned order was passed. A perusal of Order 39 Rule 4 appears to be necessary. I extract the same below:

4. Order for injunction may be discharged, varied or set aside.- Any order for any an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

4. I find that interpretation of the expression "any party dissatisfied with such order" canvassed by counsel for the petitioners to be totally unacceptable. The expression "any party" in Order 39 Rule 4 must, according to me, reasonably and considering the purport, purpose and object include any party who had subsequently come on record as a party. The insistence that such a subsequently impleaded necessary and vital party cannot seek the invocation of the powers under Order 39 Rule 4 would, according to me, be counter productive and defeat the interests of justice. A plaintiff acting without bona fide will in such event be entitled to file a suit without the essential and necessary party on the array and secure interim orders and successfully resist the attempt of such an essential and necessary party to get the order set aside, vacated or modified when he later comes on record as permitted by the court. That cannot obviously be the law. Such an interpretation would negate the interests of justice. There is nothing in Order 39 Rule 4 which would permit this Court to adopt such restricted and limited interpretation of the expression "any party". No principle or precedent is

pressed into service in support that contention. I take note of the fact that the impleadment of respondents 3 and 4 is not challenged at all.

5. In these circumstances. I am satisfied that this writ petition is not maintainable as the petitioners have an effective efficacious and reasonable remedy under the Code to file an appeal under Order 43 Rule 1(r). The learned counsel for the petitioners prays that there may be a direction, at least to maintain status quo until an appeal is filed. Having held hat this writ petition is not maintainable, I do not think it necessary to venture to pass any direction. If there be waste committed in the property, needless to say, the petitioner can seek orders from the trial court or from the appellate court when the appeal is presented under Order 43 Rule 1(r).