
(1985) 11 KL CK 0036

In the High Court Of Kerala

Case No : R.P. 139 of 1985 in Q.P. 3743/85 and R.P. No. 151 of 1985 in O.P. 8025/82

K. Krishnan and Others

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 20-11-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 2, Order 47 Rule 5, 141
Constitution of India, 1950 — Article 226

Citation : (1985) KLJ 995

Hon'ble Judges : V. Bhaskaran Nambiar, J

Bench : Single Bench

Advocate : V.P. Mohan Kumar and V I. Joseph, for the Appellant; M.M. Abdul Aziz, T.P. Kelu Nambiar, T.R. Govinda and Warriar and V.M. Nayanar amicus curiae, for the Respondent

Judgement

V. Bhaskaran Nambiar, J.

1. Chief Justice Shri. K. Bhaskaran and myself disposed of these two writ petitions. Two applications for review of these judgments are now filed. Chief justice Shri K. Bhaskaran is no longer available to hear the applications. The question is whether the review petitions should not still be heard by a Division Bench or whether it can be heard only by me sitting singly. Order XLVII Rule 5 of the CPC is pressed into service for the contention that the review petitions has to be heard only by one of the Judges who heard the case earlier, when the other Judge is not available and no other bench can hear and dispose of the applications. Order XLVII Rule 5 C.P.C. reads thus:-

5. Application for review in Court consisting of two more Judges - Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented and is not or are

not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

2. However, Section 141 of the Code which insists that "the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceeding in any Court of civil jurisdiction" excluded by the explanation inserted by the Amendment Act of 1976, "proceeding under Article 226 of the constitution.

3. Thus Order XLVII Rule 5 of the Code cannot apply to review applications filed in proceedings under Article 226 of the Constitution.

4. But, when it is contended that order XLVII Rule 5 only embodies a cardinal principle that a right of review is a right granted to the same court and to the same Judges and not a different or superior court and that it is different and distinct from an appellate or even revisional power. Thus these principles should apply to proceedings under Article 226, de hors order XLVII Rule 5. So the contention runs.

5. It is Order XLVII Rule 1 C.P.C. which prescribes that any aggrieved person may apply for review of judgment to the court which passed the decree or made the order, though of course, review can be heard only on certain specified grounds. After stating that it is to that court that the review application should be filed, Rule 2 stated that an application for review on any ground other than discovery of new and important matter or evidence or the existence of clerical or arithmetical mistake shall be made only to the Judges who passed the decree or made the order sought to be reviewed. Separate provision had therefore to be made when more than one Judge passed the decree or made the order sought to be reviewed. This is provided in Rule 5. It has, however, to be noted that rule 2 expressly excluded from its purview the High Court. Thus, though in the High Court, it may be advisable and proper to post the review petition before the same Judge who passed the earlier order, the statutory inhibition of rule 2 was not attracted. The High Court was expressly excluded from the operation of rule 2 and the object intended under rule 1 for a decision by the same court is achieved when the application is made to the High Court.

6. Now rule 2 itself has been omitted by the 1976 amendment and the notes on clauses for this omission read thus : -

Clause 16 (10).-When the presiding officer of a court is transferred, rule 2 of order XLVII imposed certain restrictions on the powers of his successor in the matter of hearing review applications. This causes certain difficulties. It is proposed to give the successor all the powers of review which his predecessor had. Rule 2 has therefore been omitted and the other amendment is merely consequential.

7. When rule 2 was omitted, naturally, rule 5 could also have been omitted. It has, however, not been done. But, so far as the High Court is concerned, rule 5 is excluded by the explanation added to section 141 under which it was not mandatory to follow the procedure under the Code in any proceeding under Article 226. The legislative history indicates that it was never the intention that proceedings under Article 226, disposed of by a Division Bench, should be reviewed by a single Judge, when one of the Judges is not available.

8. The decision of a Division Bench is still a decision of the High Court. It is the Chief Justice who constitutes the Division Benches for disposal of cases as all the Judges cannot be expected to sit together and hear and dispose of every case. One Division Bench is not different from any other and is not a separate or distinct court by itself. No general principle of review is violated when another Division Bench hears the review application in the absence of one of the Judges who constituted the earlier Bench.

9. There is yet another aspect. These two writ petitions were referred to a Division Bench u/s 3 of the High Court Act. The Division Bench alone could hear the case, and it was a Division Bench which disposed of the matter also. As the entire case has been brought before a Division Bench, a Division Bench alone can deal with the matter, at any stage of the proceeding.

10. The High Court Act is a special enactment governing the jurisdiction and procedure to hear and dispose of cases before the High Court. These special provisions have to prevail over the general procedure prescribed under the Civil Procedure Code. The power of a Division Bench cannot thus be curtailed by the provision in the Code of Civil Procedure.

11. Moreover, the decision now rendered by a Division Bench cannot be changed and reviewed by a single Judge and the decision of the single Judge on review cannot be treated as a decision of a Division Bench of two judges. There is no warrant to import any statutory fiction; even if there is any, to treat the decision of a single Bench as that of a Division Bench when a review of a decision rendered earlier by two judges is allowed by the Judge sitting singly

12. The practice of this court has also been to hear review petitions by a Division Bench in writ matters disposed of by a Division Bench.

13. Shri T.P. Kelu Nambiar, Shri T.R.G. Warriyar and Shri. V.M. Nayanar were requested to assist the court as *amicus curiae*. They have cited certain decisions where order XLVII Rule 5 was applied in civil matters. I doubt whether those decisions would apply to proceedings under Article 226 of the Constitution in view of the amendment to section 141 and the deletion of rule 2 in order XLVII C.P.C.

14. In one of the earliest Privy Council decisions, on appeal from the East Indies, in *Maharajah Moheswr Sing v. The Bengal Government* (M.I.A. VII - Moores Indian Appeals - 283 (1857 - 1860) it was observed thus:-

It must be borne in mind that a review is perfectly distinct from an appeal; it is quite clear from the Regulations, that the primary intention of granting a review was a reconsideration of the same subject by the same Judge, as contradistinguished to an appeal, which is a hearing before another Tribunal. We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected and unavoidable case might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only ex necessitate.

15. The principle of "ex necessitate" highlighted by the Privy Council also applies as the matter is governed by the High Court Act and by necessary implication, a Division Bench can alone hear the review application

16. The decision in *Chhailu Rom v. Neki* (AIR 1922 Privy Council 112) was with specific reference to Rule 5 of order XLVII which has been expressly excluded from the provision of writ jurisdiction. On the same reasoning the decision of the Travancore-Cochin High Court in *Sirkar v. Velayudhan* (AIR 1953 T.C.I) also cannot be of any assistance in this matter. Similarly the decision in *Veerakumar v. Tvm. Permanent Bank Ltd.* (1972 KLT 347) cannot also be of help on the same reasoning. But it has to be noted that in this decision it was directed that the application of review would be posted before a Division Bench when one of the learned Judges, Mr. Justice Unnikrishna Kurup returned from leave and the Chief Justice did not proceed to hear and dispose of the petition sitting singly.

In the result, I hold that these two review petitions cannot be heard by a single Bench and will have to be heard only by a Division Bench. Place the papers before the Hon"ble Chief Justice for appropriate orders.