

(2004) 07 KL CK 0010

In the High Court Of Kerala

Case No : Writ Petition (C) No. 18096 of 2004-D

N. Ramachandran Potti

APPELLANT

Vs

Kumari Thankam K.K. and Others

RESPONDENT

Date of Decision : 15-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 41 Rule 11, 96, 96(1)
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 5, 5

Citation : AIR 2004 Ker 323 : (2004) 3 CivCC 534 : (2004) 2 KLJ 429 : (2004) 3 KLT 183 : (2005) 1 RCR(Civil) 159

Hon'ble Judges : K. Padmanabhan Nair, J

Bench : Division Bench

Advocate : K. Ramakumar and Sarath Chandran K, for the Appellant; T.C. Mohandas, T.M. Sunil, A.R. Gangadas, Sujith Mathew Philip T. Varghese and Thomas T. Varghese, for the Respondent

Judgement

K. Padmanabhan Nair, J.—The first respondent in an unnumbered appeal presented before the District Court, Kottayam is the petitioner in this writ petition. The appeal was filed against the decree passed in O.S. 291 of 1996 filed by the petitioner on the file of Principal Subordinate Judge's Court, Kottayam. The first respondent filed O.S. 291 of 1996 against the Kaliyammanada Kshethra Bharana Samithy, represented by its President, Secretary and also against his own brother. A compromise decree was passed in the suit in 18-7-1997. The respondents 1 to 4 filed I.A. 257 of 2004 u/s 96(1) of the CPC seeking leave to file appeal and I.A. 258 of 2004 u/s 5 of the Limitation Act for condoning the delay of 2417 days in filing the appeal. The learned District Judge heard both these applications together and allowed by a common order. The plaintiff-first respondent in the unnumbered appeal has filed this petition under Article 227 of the Constitution of India challenging the orders passed by the learned District Judge granting leave as well as condoning the delay.

2. The learned counsel appearing for the petitioner has strenuously argued

before me that while dealing with the Special Leave Application the lower appellate Court has virtually allowed the appeal itself. It is argued that the Court below allowed both the applications holding that the decree passed in the suit was one filed in a representative capacity with due publication of the notice under Order 1 Rule 8 of the Code of Civil Procedure. It is argued that the respondents 1 to 4 were fully aware of the existence of the decree from 1997 onwards and the trial Court has not committed any illegality and acted with jurisdiction while decreeing the suit. It is argued that the Court below has not considered the Special Leave Application in its real perspective.

3. The learned counsel appearing for respondents 1 to 6 has argued that the decree happened to be passed due to the collusion between the plaintiff and the defendants in the suit and the decree was passed in violation of the mandatory provisions of law. It is argued that the order passed by the learned District Judge granting Special Leave is perfectly correct and does not call for any interference.

4. The suit was one for declaration of Karaima right claimed by the petitioner-plaintiff. The first defendant was the Managing Committee of Sree Kaliyammanada Kshethra Bharana Samithy, represented by its President. The second defendant was one Sukumaran Nair, the Secretary of the Samithy. The third defendant was the brother of the plaintiff himself. The defendants were impleaded in a representative capacity by invoking the provisions under Order 1 Rule 8 of the Code of Civil Procedure. The copy of the decree produced along with the counter affidavit filed by respondents 1 to 4 in this writ petition shows that the suit was settled out of Court and a compromise decree was passed on 18-07-1997.

5. The first three petitioners in the leave petition are ladies. There is absolutely nothing on record to show that they appeared and contested O.S. 291 of 1996. The 4th petitioner also did not appear and contested the former suit. The address given in the petition shows that these four persons are members of an Association formed for the purpose of managing the affairs of the Kaliyammanada Kshethram. Their case is that they are highly aggrieved by the decree passed in the suit. According to the respondents 1 to 4 the decree happened to be passed on account of collusion between the parties to the suit. It was also averred that there was no publication of the notice under Order 1 Rule 8. It is also contended that there was no publication of the notice at the time of filing compromise. It was also contended that the decree passed is detrimental to the devotees of the temple. The contention of the first respondent was that the notice under Order 1 Rule 8 was published on 4.4.1992 and the suit was compromised only on 18-7-1997. It was also contended that since there was no sufficient income to pay salary, it was agreed to give 65% of the entire offering to the priest as remuneration. It was contended that the plaintiff has a right by birth to perform the poojas in the temple and hence for declaration of the Karaima right was also correct. It was also contended that the case of the petitioners that they came to know about the decree only on 22-02-2004 is not

true and they were set up by the defendants in O.S. 291 of 1996.

6. The 3rd defendants 3rd respondent in the SLP also filed counter raising contentions similar to that raised by the plaintiff-first respondent.

7. Section 96 of the CPC provides for an appeal from the original decree. The word "appeal" is not defined in the Code of Civil Procedure. The wording of Section 96 of the CPC is relevant. It reads as follows:-

S.96. Appeal from original decrees.- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction of the Court authorized to hear appeal from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties."

(4) xx xx xx.

A reading of Section 96 of the CPC shows that the Section does not enumerate the persons who can file an appeal under that Section. A party to a decree can straight away file an appeal challenging the decree in such appeals also the respondent can raise a question of maintainability of the appeal. A reading of Section 96(1) of the CPC shows that in order to maintain an appeal against the decree, the person must be aggrieved by the decree passed in that case. If a party can successfully show that he will be benefited from the change in the judgment or decree, it can be said that he is having an appealable interest; but that interest must be substantial, immediate and pecuniary. The aggrieved person must have a legal grievance also.

8. As I already stated, the normal rule is that a person who is a party to the suit or his legal representatives can file an appeal. A person who is not a party to the suit may also file an appeal with leave of the appellate Court. The English practice is that "a person who is not a party and who has not been served with a notice of the judgment or order may not appeal without leave, but a person who might properly have been made a party may obtain leave to appeal" (Halsbury's Laws of England IV Edn. Volume 37, Page 520).

9. In *In re Securities Insurance Company* (1894) 2 Ch. 410, it was held as follows:-

Now what was the practice of the Court of Chancery before 1862, and what has it been since? In understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be

aggrieved by an order can make out even a prima facie case why he should have leave he will get it; but without leave he is not entitled to appeal.

This practice has been adopted in our Courts also. In *The Province of Bombay Vs. Western India Automobile Association*, , it was held that ordinarily only a party to the suit has a right of appeal; and a person not a party to the suit has a right of appeal; and a person not a party to the suit has no right to appeal, but the appellate Court may in its discretion allow him to appeal.

10. The above stated principle was followed in *K. Ponnalagu Ammal Vs. The State of Madras and Others*, . It was held as follows:-

The provisions as regards appeal in England are not materially different from those contained in the CPC or Letters Patent. In neither of them is there any express mention of persons who could appeal. In our opinion the practice consistently followed by the English Courts is a just and equitable practice and is in no way inconsistent with the doctrine that a right of appeal can only be created by statute.

In *Executive Officer, Sri Padmanabhaswamy Temple Vs. Raghavan Pillai and Another*, a Division Bench of this Court considered who are all entitled to file an appeal. It was held as follows:-

Thus the rule seems to be well settled that while a party to a suit against whom the judgment is given can appeal against it as of right, a person who is not on the party array but who is bound by the decree or whose interest are prejudicially affected by it may appeal with the leave of the appellate Court.

The question whether an intervener is entitled to challenge the decree arose for consideration in *Fakir Mohamed Abdul Razak Vs. The Charity Commissioner, Bombay and Others*, . It was held as follows:-

If at all it is further necessary that leave be granted, we would hold that for the ends of justice and having regard to the nature of the suit, we would grant the leave to the appellant to file the appeal as he claims to be a devotee or a person interested in the proper management of the Haji Malang Dargah, and he has submitted before the lower Court and it is submitted even before us that he opposes the appointment of the defendant Ketkar as one of the Trustees as Ketkar has been acting in a manner prejudicial to the best interests of the Trust from 1946 till now.

In *Smt. Jatan Kumar Golcha Vs. Golcha Properties (P) Ltd.*, , the Supreme Court had occasion to consider the right of a person who is not a party to the proceedings in the Court below to file appeal u/s 96 of the Code of Civil Procedure. It was held:

It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate Court and such leave should be granted if he would be prejudicially affected by the judgment.

11. In State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another, the apex Court held as follows:-

Under such circumstances, a person who is not a party may prefer an appeal with the leave of the appellate court "if he would be prejudicially affected by the judgment and if it would be binding on him as *res judicata* under Explanation 6 to Section 11.

It was further held:

.....there is a catena of authorities which, following the doctrine of Lindley, L.J., in *re Securities Insurance Co.*, (1894) 2 Ch 410 have laid down the rule that a person who is not a party to a decree or order may with the leave of the Court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it. As a rule, leave to appeal will not be refused to a person who might have been made *ex nomine* a party.

12. So, the general principles settled by the long chain of authorities are that if a person who is not a party to the decree or order wants to challenge the decree/order, he can maintain an appeal with leave of the appellate Court. If he is able to *prima facie* show that he is either bound by the order or is aggrieved by it or is prejudicially affected by it, the appellate Court shall grant the leave sought for. So, the position is clear that in order to get special leave the person who files such a petition need only show *prima facie* that he is aggrieved by the judgment and decree and he is having an appealable interest.

13. The next question arising for consideration is whether the Court had focussed itself to that point while deciding the petition. The learned Counsel for the petitioner has argued that the lower appellate court allowed the petition seeking special leave and also condoned the delay solely on the ground that the decree passed in the suit is a void one. The learned counsel for the respondents submits that the respondents 1 to 4, who are worshippers of the Deity in that temple, are aggrieved by the decree passed in this case. It is argued that though the plaintiff in that suit prayed for a declaration that the members of his family alone are entitled to perform poojas in the temple, the deity was not impleaded in the suit. It was argued that there was no publication of notice under Order 1 Rule 8 in the suit. It is also submitted that the compromise was recorded in violation of the mandatory provisions contained in Order XXIII Rule 3 of the Code of Civil Procedure. It is argued that even though in the plaint the only relief sought was for a declaration that the plaintiff's family alone has got a *Karaima* right to perform "*santhi*" in the temple, the decree passed in the case will show that the defendants in the suit had agreed that the plaintiff's family is entitled to 65% of the money value of the offerings of the devotees to the deity. It is argued that the Committee is not a statutory body and is not authorised to make any concession for and on behalf of the Deity and the entire offerings should go to the deity alone. Since the suit is stated to have been filed in a representative

capacity, the decree is binding on all persons in the locality, including respondents 1 to 4. Going by the terms of the decree, 65% of money value of the offerings if any made by the respondents 1 to 4 will go to the petitioner if the same is allowed to stand. So, they are aggrieved by the decree, since the same prejudicially affect their rights also. It is pointed out that the original poojari who was conducting poojas deputed the 7th respondent to conduct poojas and that person misbehaved towards woman devotees which resulted in protest by the devotees. It is submitted that at that stage the person who was performing the poojas surrendered the keys to the Thanthri after closing the temple and went away. It is submitted that he did not open the temple for performing the poojas, thereby the right of worship of the devotees itself was affected. It is also argued that the plaintiff is a Government servant working as Process Server in the Munsiff's Court, Vaikom and his claim that he is performing the poojas is against the Government Servants' Conduct Rules. It is argued that after obtaining such a decree, the plaintiff and the members of his family initiated various proceedings and then only the existence of a decree was revealed. So, it is argued that the petitioners, who are worshippers of the deity in the temple, have got every right to file an appeal challenging the decree, though the same is couched as a compromise decree.

14. The facts and circumstances discussed above shows that the respondents 1 to 4 who are the devotees and worshippers of the deity in the temple are able to prima facie show that they will be prejudicially affected by the decree passed in O.S. 291 of 1996 and unless it is set aside by the competent Court. They are having a substantial interest and a legal grievance. So, the respondents 1 to 4 are having an appealable interest. In fact in W.P.(C) No. 6439 of 2004 filed by the devotees the main contention raised by the present petitioner was that the petitioners in that writ petition were also bound by the decree passed in O.S. 291 of 1996. This Court took note of the pendency of the petition seeking leave and the petition to condone the delay and directed the lower appellate Court to dispose of the petitions as expeditiously as possible. The finding of the Court below that the petitioners are entitled to challenge the decree passed in O.S. 291 of 1996 is perfectly correct. I do not find any reason to interfere with that part of the order and confirm the order passed by the Court below granting leave to respondents 1 to 4 to file appeal against the decree passed in O.S. 291 of 1996.

15. The learned counsel appearing for the petitioner attacked the order passed by the learned District Judge condoning the delay in filing the appeal. It is argued that the averments in the affidavit filed in support of the petition for condoning the delay are vague and respondents 1 to 4 have not even stated the date on which they came to know about the decree. It is argued that the only averment in the affidavit filed in support of the petition is that they came to know of the decree recently. I am afraid, that statement is not true. In the impugned order itself while extracting the contents of the petition it is stated that the case of the respondents 1 to 4 was that they came to know about the decree only on 22.2.2004. The learned counsel appearing for respondents 1 to 4 submitted that

though a decree was obtained in paper, it was never made known to the people in the locality and these facts came out only after the filing of W.P.(C) 8504 of 2004 by two devotees before this Court. The learned counsel appearing for the petitioner pointed out that the petitioner has filed a very detailed objection to the petition to condone the delay and there is absolutely no discussion in the order regarding any of the objections raised by the petitioner. It is argued that the reasoning adopted by the Court below for condoning the delay is also the validity of the decree and the Court below has not ventured to discuss whether the respondents have established sufficient cause for condoning the delay.

16. After the writ petition was heard and reserved for judgment, the petitioner has filed I.A. 8292 of 2004 along with five documents. He wants to rely on three documents to show that the contention of the respondents 1 to 4 that they came to know about the impugned judgment only on 22-02-2004 is false. One is a copy of the order of status-quo served on the defendants in O.S. 22 of 2002 and the second is copy of the summons served on the defendants in O.S. 7 of 2004. It is contended that in O.S. 22 of 2002 the first respondent accepted the notice issued to her husband is relied upon to argue that respondents 1 and 3 accepted the summons issued to the defendants 2 and 3 in O.S. 7 of 2004. These documents were not produced before the Court below. I do not think it is just and proper to place any reliance on those documents in this writ petition without giving an opportunity to the respondents to explain the position. There is nothing on record to show that respondents 2 to 4 had any knowledge about any of the above stated cases. Even regarding respondents 1 and 3 how far the acceptance of notice issued to their husbands in O.S. No.22 of 2002 and 7 of 2004 are sufficient to hold that they had knowledge about the impugned judgment is a matter to be considered.

17. The learned District Judge disposed of both these applications by a common order. It would have been more appropriate had he considered the petition for leave first and then dealt with the petition to condone the delay. The scope of enquiry in a petition for Special Leave is whether the person who seeks Special Leave is aggrieved by the decree and judgment and he is having an appealable interest. If there are prima facie materials to establish those two facts, leave has to be granted. But, in a position to condone the delay, it is not sufficient to establish that he is aggrieved by the decree or he has an appealable interest or the decree passed is null and void. Infact, to establish the fact that the decree is a nullity, it is not necessary to file an appeal at all. The nullity of a decree is a point the aggrieved party can raise not only in execution of the decree, but even in parallel proceedings. The scope of enquiry u/s 5 of the Limitation Act is to find out whether the person who filed the petition to condone the delay has established sufficient cause for not filing the appeal within time. The fact that they were unaware of the existence of a decree and there was no publication of the notice of the alleged compromise, etc. are relevant in deciding the point whether the respondents 1 to 4 have shown sufficient cause. But, the correctness of the decree is not a matter to be gone into at the stage of

considering the petition to condone the delay in filing the appeal. That can be gone into only after condoning the delay and admitting the appeal after hearing the appellant under Order XLI Rule 11 of the Code of Civil Procedure.

18. It is submitted by the counsel for respondents 1 to 4 that even assuming that the Court below ought to have considered these applications separately, no prejudice is caused to the petitioner due to the disposal of the petitioners by a common order. It is argued that subsequently the appeal itself was heard by the lower appellate Court and posted for judgment and at that time this writ petition is filed and disposal of the appeal is stayed.

19. A perusal of the order under challenge shows that the lower appellate Court has not considered whether the respondents 1 to 4 have shown sufficient cause for condoning the delay in filing the appeal. The fact that the compromise was not in tune with the provisions of Order XXIII Rule 3 is relevant to grant permission to file appeal. But the lower appellate Court has not considered whether the case of the respondents 1 to 4 that they came to know about the impugned judgment on 22.2.2004 is correct or not. So, I am of the view that the petition for condoning the delay requires reconsideration by the lower appellate Court. For that purpose, that part of the impugned order allowing the petition to condone the delay is to be set aside. In case the Court accepts the case of the appellants, then the appeal will have to be posted for admission under Order XLI Rule 11 of the CPC and thereafter the appeal has to be disposed of in accordance with law.

20. The learned counsel appearing for the petitioner has argued that the lower appellate Court had considered the appeal itself on merits while considering the petition for condoning the delay. It is argued that the lower appellate Court had found that the decree passed in this case is a nullity. The appellate Court has considered the provisions contained in Order XXIII Rule 3 of the Code of Civil Procedure. It was also found that there is nothing on record to show that the procedure was followed. At this stage there is no need to consider the case on its merits. That matter ought to have been left open to be decided at the time of hearing the appeal. So, that finding is vacated and, left open to be decided at the time of hearing the appeal. The Court below shall hear and decide the petition to condone the delay untrammelled and uninfluenced by any observations contained in the impugned order.

21. The learned counsel appearing for the respondents 1 to 4 argued that the petitioner is a government servant and working in the Munsiff's Court, Vaikom and hence his claim that he should get 65% offerings made by the devotees to the deity in lieu of salary and he was performing poojas in temple during office hours will amount to misconduct in view of the provisions of Rule 48 of Government Servants' conduct Rules. It is argued that the petitioner has filed O.S. 7 of 2004 before the Sub Court for decree of settlement of accounts between the petitioner and defendants in that suit and got an order of attachment before judgment of the properties of the temple. It is argued that the

petitioner has claimed an amount of Rs. 3 lakhs as being his salary as the priest of the temple. It is also argued that the petitioner is misusing his position as a staff of the Court in conducting the cases. The documents produced by the respondents 1 to 4 shows that at present two suits are pending before the civil Courts at Kottayam. Whether the petitioner was performing poojas in a temple during office hours and whether the claim for share of the offerings will amount to acceptance of salary are not matters to be considered in this proceedings. In W.P.(C) 6439 of 2004, a Division Bench of this Court has held that "that is a matter to be gone in detail with evidence as to the nature of performance, as to whether any wage is being paid or whether the share of offerings is claimed as wage in lieu of the employment of poojari, etc." I am also of the view that it is a matter to be dealt with in the administrative side after conducting a detailed enquiry by the High Court as pointed out by the Division Bench.

In the result, the writ petition is allowed in part. That part of the common order passed by the lower appellate Court allowing I.A. Nos. 257 of 2004 is confirmed. The order passed by the Court below allowing I. A.258 of 2002 is hereby set aside. The lower appellate Court is directed to take I.A. No.258 of 2002 back to file and dispose of the same afresh in accordance with law, as expeditiously as possible, at any rate within one month from the date of receipt of a copy of this judgment. In case the petition to condone delay is allowed, the appeal shall also be disposed of in accordance with law at an early date.

A copy of the judgment will be placed before the Registrar, High Court of Kerala for considering whether the petitioner is guilty of any misconduct as alleged by the respondents 1 to 4.