

(1965) 01 KL CK 0014
In the High Court Of Kerala
Case No : O.P. No. 176 of 1965

P.K. Thomas

APPELLANT

Vs

The Indian Relief Bank Ltd., Madras and Another

RESPONDENT

Date of Decision : 25-01-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5(1)
Constitution of India, 1950 — Article 226, 227
Kerala Civil Courts Act, 1957 — Section 12
Kerala High Court Act, 1958 — Section 3(5), 4(1), 5

Citation : AIR 1966 Ker 141

Hon'ble Judges : M.S. Menon, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : Manuel T. Paikaday and Leelamma Paikaday, for the Appellant;

Final Decision : Dismissed

Judgement

Madhavan Nair, J.—The petitioner is the appellant in A. S. No. 88 of 1963 on the file of this Court. That appeal is from a decree of the District Court, Quilon. for Rs. 52,000 odd with interest from 1953 and costs: and as such can be heard only by a Division Bench, When the petitioner's application (under O. XL1. R. 5(1) C. P. C.) for stay of execution of the decree pending the appeal came up for orders before Raman Nayar, J. on December 16, 1964. Mr. Paikaday challenged the jurisdiction of a Single Judge to hear it The learned Judge overruled the challenge and passed the impugned order granting stay "on condition that petitioner deposits at least Rs. 20,000 into the lower court on or before 1-24-1965". This Original Petition, filed under Articles 226 and 227 of the Constitution, is to "call up the records of the proceedings and quash the order impugned herein" by a "writ of Certiorari, or such other writ, order or direction, as to this Court seems just and proper" and it has been ordered to be placed before a Bench for a preliminary hearing.

2. Though we have great doubt on the competency of a court to issue a writ to

bring up a judicial order passed by a Judge of the same Court--Lord Goddard has observed in *Goonesinha v. O. L. de Kretser*. AIR 1945 PC 83: "It is well settled, and counsel did not seek to argue to the contrary, that a Court having jurisdiction to issue a writ of *certiorari* will not and cannot issue it to bring up an order made by a Judge of that court." we have heard Mr. Paikaday at length on the question of jurisdiction of a Single Judge to hear an interlocutory matter arising in an appeal that can be heard only by a Division Bench. Though counsel contended also that the order is unjust on account of the heaviness of the condition imposed, we are afraid that a judicial order, if passed by a competent court, cannot be challenged in that way under Articles 226 and/or 227 of the Constitution.

3. Sections 3 and 4 of the Kerala High Court Act, 1958, (Act V of 1959). so far as they are relevant here, read:

"3. The powers of the High Court in relation to the following matters may be exercised by a Single Judge,:

(D.....

(5) Any matter of an interlocutory character in appeals and other proceedings:

(13) An Appeal.

(a)

(b) from an original decree or order, where the amount or value of the subject-matter of the suit does not exceed ten thousand rupees:

(4) The powers of the High Court in relation to the following matters may be exercised by a Bench of two Judges. . .:

(1) Any matter in respect of which the powers of the High Court can be exercised by a Single Judge;

(2) An appeal-

(a) from a decree or order of a Civil Court. except those coming u/s 3;. . . "

In regard to appeals the powers of a Single Judge are limited to cases where the amount or value of the subject-matter of the suit is not above Rs. 10,000; but no such limitation is made in regard to interlocutory matters in appeals Nor is a division made of the power to hear and determine interlocutory matters between Single Judges and Division Benches. The expression "in appeals", without any limitation, must necessarily mean "in all appeals". The absence of a specific provision on interlocutory matters in Section 4 of the Act, that deals with the powers of a Division Bench, only confirms the above construction.

Counsel pointed out that Clause (1) of Section 4 covers interlocutory matters in appeals, and contended that, to be consistent with Clause (5) of Section 3, it should be construed to relate to such matters arising in appeals disposable by a

Division Bench. But, the very wording of Clause (1) of Section 4 makes clear that the powers of a Division Bench provided therein are only co-existent with those of a Single Judge. The provision is only that a Bench of two Judges can exercise "the powers of the High Court" in relation to "any matter in respect of which the powers of the High Court can be exercised by a Single Judge", In other words, in respect of matters covered by Clause (1) of Section 4, the powers of a Single Judge and of a Division Bench are not in any way different. Who would exercise the power on a particular matter depends merely on the occasion.

4. Mr. Paikaday contended that an application under Order XLI, Rule 5(1), C. P. C. for stay of execution of the decree appealed from is not an interlocutory matter arising in the appeal and that, under that Rule, such an application can be heard only by the "Appellate Court", which in the instant case is a "Bench of two Judges and not a Single Judge. Order XLI, Rule 5(1), C. P. C. reads: "An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree".

The contention is that an order of stay of execution being final in regard to that relief is not interlocutory but "final". An order under Order XLI, Rule 5(1), C. P. C. is not to outlast the disposal of the appeal. Its purpose and effect is only to preserve the affairs in controversy in status quo till the disposal of the appeal and is not therefore a final adjudication in any sense of the term.

5. True, the word "interlocutory" is not defined in the Kerala High Court Act. It must then be given its ordinary sense in legal parlance, where any motion during the course of a legal action is said to be interlocutory in that action. In the Code of Civil Procedure, orders under Rules 6, 7, 9 and 10 of Order XXXIX are styled "Interlocutory orders" Thus, an order under Rule 6 for sale of moveable property, being the subject-matter of or attached before judgment in a suit, is an interlocutory order, though the mischief thereof cannot be set at naught by any subsequent order. Similarly, an order under Rule 7 for the detention or preservation of any property which is the subject-matter of the suit or as to which any question may arise therein, an order under Rule 8 to put any party in immediate possession of land or tenure being the subject-matter of the suit and an order under Rule 10 directing a party to deposit in court the money or goods held by him are all "interlocutory orders" only. An order to stay execution of a decree pending an appeal is not different in character from the orders mentioned above. A motion under Order XLI, Rule 5(1), made before the Appellate Court during course of an appeal, must therefore be a "matter of an interlocutory character in that appeal".

6. Counsel was vehement that the Appellate Court within the meaning of O. XLI, R.5(1), C. P. C. is, in this case, a "Bench of two Judges" who alone can, under the Kerala High Court Act, hear the appeal. The Kerala High Court Act does not

say to which Court an appeal from a decree of a District Court lies. That is prescribed in the Kerala Civil Cowl Act, 1 of 1057, Section 12 whereof reads:

"12. regular and special appeals shall, when such appeals are allowed by law, lie from the decrees or orders of a District Court..... to the High Court."

From the decree of a District Court, the appeal lies "to the High Court". If the Legislature meant the Appellate Court to be a Bench of two Judges in the High Court it would have stated so expressly, as it has done in Section 6 of the Kerala High Court Act, 1958: ("An appeal shall lie to a Bench of two Judges from a judgment or order of a Single Judge in the exercise of original jurisdiction.") It is nowhere said that an appeal from a decree of a District Court lies to a Bench of two Judges in the High Court. The "Appellate Court" in the instant case is therefore the High Court, and not "a Bench of two Judges" in the High Court. What Sections 3 and 4 of the Kerala High Court Act say is that "the powers of the High Court" in relation to appeals "may be exercised" by a Single Judge if the amount or value of the subject-matter of the suit does not exceed ten thousand rupees, and by a Bench of two Judges in other cases. In the words of the Supreme Court *Ittavira Mathai Vs. Varkey Varkey and Another*, at p. 914) "the appeal lies to the High Court and whether it is to be heard by one, two or a larger number of judges is merely a matter of procedure" A rule laying the procedure for hearing an appeal cannot be misunderstood as one prescribing the Constitution of the Appellate Court in the cause.

7. The contention that disposal of inter loeutory matters by a Single Judge may impair the decree that may ultimately be passed in the appeal by a Division Bench and therefore should not be allowed is one challenging the wisdom or policy in the enactment of Section 3 of the Kerala High Court Act. Such a contention cannot be appreciated by a court of law

8. We see no force in this motion. The petition is dismissed in limine.