
(1984) 11 KL CK 0014
In the High Court Of Kerala
Case No : Writ Appeal No. Nil of 1984

State of Kerala

APPELLANT

Vs

K. Krishnankutty, M.L.A. and Others

RESPONDENT

Date of Decision : 22-11-1984

Acts Referred:

Kerala High Court Act, 1958 — Section 5(1)

Citation : AIR 1985 Ker 144

Hon'ble Judges : K.S. Paripoornan, J; K.K. Narendran, J

Bench : Division Bench

Advocate : Advocate General, for the Appellant;

Final Decision : Dismissed

Judgement

1. The above unnumbered Writ Appeal is filed by the State of Kerala against the common order of Sivaraman Nair J. dt. 20-11-1984, passed in the above proceedings. A civil miscellaneous petition praying for stay of the operation of the order of the learned single Judge has also been filed by the State in the unnumbered writ appeal. The matter was moved as "urgent motion" on 21-11-1984 afternoon by the Advocate General. The State of Kerala, appellant in the unnumbered Writ Appeal was the respondent in the Original Petitions. Petitioners in the Original Petitions are the respondents in the unnumbered Writ Appeal. The petitioners filed the Original Petitions challenging the constitutional validity of Travancore Cochin Hindu Religious Institutions (Amendment) Ordinance, 72 of 1984 and sought stay of enforcement of the provisions of the said enactment in the election to the Travancore Devaswam Board to be conducted on 28-11-1984. The petitioners are Hindu members of the Kerala Legislative Assembly. It is stated that they are entitled to participate in the election of one member of The Travancore Devaswam Board which is proposed to be conducted on 22-11-1984 without being required to deliver a declaration of their faith in God and profession of Hindu religion, as provided by Section 4 of the Ordinance. It is stated that the said provision is an inroad into their freedom

of conscience and religion guaranteed under Articles 25 and 26 of the Constitution. After hearing counsel for the petitioner as also the learned Advocate-General, Sivaraman Nair, J. held as follows :

"In the present case, the argument is that a considerable membership of the denomination, including the petitioners, are being completely ignored in the matter of setting up the Board of Administration, of institutions of the denomination and therefore the restrictions imposed by Section 5(2) of the Act, as amended, forge fetters into the freedom enjoined by Article 26 of the Constitution. This submission seems to me to be prima facie sustainable. In any case, this is a contention which requires further investigation.

The submission that the freedom of conscience and religion assured by Article 25 of the Constitution is being eroded by the requirement contained in Section 5(2) of the: Act, as amended, also seems to me to be a matter for serious deliberation.

I am inclined to accept the submission of the Advocate General, that the election to the Travancore Devaswam Board u/s 3 of the Act any not be stayed in view of the orders of this court in other Original Petitions. But that should not justify the exclusion of conscientious objectors among the electors from exercising their right to participate in the election without filing declarations of faith. The provisions of Section 5 of the Travancore-Cochin Hindu Religious Institutions Act, 1950, and stood the ground for the last 34 years. Two out of the three members of the Board could have already been elected under the unamended provisions. Election of a third member under the same provisions, till such time as the validity of the provisions of the Ordinance is finally pronounced upon by this Court, cannot be considered to cause any serious hardship, or legal, or other problems in the working of the Board.

Considering all the aspects of the matter, it seems to me necessary to direct that the provisions of Section 4 of the Ordinance, 72 of 1984, substituting Section 5 of the Travancore Cochin Hindu Religious Institutions Act, shall not be given effect to in the conduct of the election of one member of the Travancore Devaswam Board. In other words, the election of that one member may be conducted without insisting upon the Hindu members of the Legislative assembly delivering to the person commissioned by the Governor of Kerala to preside over the meeting, a declaration signed by each of them to the effect that he believes in God and professes the Hindu religion. The result of the election will however, be subject to further orders from this court."

The State of Kerala has come up in appeal from the aforesaid order of the learned Single Judge dt. 20-11-1984. There is also a prayer for stay of the operation of the aforesaid interim order.

2. The Registry has taken up an objection to the effect that the writ appeal filed against an interlocutory order is not maintainable. The unnumbered writ appeal along with the unnumbered C.M.P. for stay of operation of the order of the

learned single Judge came up for orders before us. The appeal is sought to be sustained u/s 5(i) of the Kerala High Court Act, 1958. We heard the learned Advocate General on the maintainability of the appeal from the common order dt. 20-11-1984 passed in the interlocutory petitions in the Original Petitions. The learned Advocate General argued that the common order sought to be appealed against is a "final order" adjudicating the rights of parties coming within Section 5(i) of the Kerala High Court Act, 1958 and hence appealable. On the merits, the order or direction of the learned single Judge was assailed.

3. Section 5 of the Kerala High Court Act, 1958 provides for appeal from the judgment or order of a single Judge. Section 5 reads as follows :

"5. Appeal from judgment or order of single Judge: An appeal shall lie to a Bench of two Judges from -

- (i) a judgment or order of a single Judge in the exercise of original jurisdiction; or
- (ii) a judgment of a single Judge in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of original jurisdiction by a subordinate court; or
- (iii) a judgment of a single Judge in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a subordinate court, if the Judge who passed such judgment certifies that the case is a fit one for appeal."

The question that falls to be considered is, whether the crucial words, "a judgment or order of a single Judge in the exercise of original jurisdiction" occurring in Section 5(i) of the High Court Act, 1958, will take in, the order dt. 20-11-1984 passed by a learned single Judge, in interlocutory petitions filed in the Original Petitions. No doubt, the expression "judgment or order" occurring in Section 5(i) of High Court Act 1958, appears to be wide. It is a matter of common knowledge that in pending Original Petitions, parties may move the court for obtaining different kinds of "interlocutory orders". Steps may be taken for summoning persons, production and inspection of documents, in rare cases for the issue of a commission, fixing a date of hearing and the like. It has been held by the Supreme Court in *Central Bank of India Vs. Shri Gokal Chand*, , that all such interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding; they regulate the procedure only and do not affect any right or liability of the parties and so not appealable. Similarly, pending the Original Petition, parties may move for stay of pending proceedings in subordinate courts or tribunals, or for the issue of appropriate directions similar thereto. Can the orders passed in such motions be considered to be "final"? In *State of Kerala Vs. R. Sudarsan Babu and Others*, (FB) Poti C. J. observed at page 769 (of Ker LT) : (at p. 6 of AIR) :

"If Section 5(1) is to be understood as enabling a party to file an appeal against

any order interlocutory or otherwise even an order granting an adjournment will be appealable to a Bench of two Judges. That is not, according to us, the scope of Section 5(1). The term order is found in association with the term "judgment" and therefore necessarily it takes its colour from such association. Section 5(1) applies not only to writ proceedings, but to all proceedings of original jurisdiction. In the exercise of original jurisdiction the learned Judge may dispose of a proceeding by a judgment in certain cases and by an order in other cases. In either of such cases since the disposal is an adjudication there is finality attached to it and the judgment or order operates to decide the issue between the parties."

Again at p. 770 (of Ker LT) : (at p. 7 of AIR) it was held :

"The term "order" in Section 5(i) must have the character of an adjudication which is final and binding on the parties."

an earlier Division Bench decision, *P. K. Kunju v. State of Kerala* 1970 KLT 644 to the following effect was quoted with approval :

"The petition brought by the appellant which despite other unnecessary though perhaps not improper prayers, is for quashing the notification, Ext. P6, is still pending before the learned single Judge and his rejection of some of the grounds urged in support of the prayer is at best a finding regarding those grounds and not a judgment or order within the meaning of Section 5 of the Kerala High Court Act so as to attract the appeal conferred by that section. Therefore, this appeal does not lie."

It can be seen that Section 5(iii) of the Kerala High Court Act, 1958 postulates an appeal to a Bench of two Judges from "a judgment of a single Judge in the exercise of appellate jurisdiction", and construing the aforesaid expression "judgment" occurring in Section 5(iii) of the Act (which is also of similar import at Section 5(i) of the Act) speaking for the Full Bench, in the decision reported in *Mohammad Haji v. Ayamma* 1976 KLT 326 (FB) Balakrishna Eradi J (as he then was) observed :

"In our opinion, the expression "judgment" occurring in Clause (iii) of Section 5 has been used in the same sense in which the said word has been employed in Article 133(1) of the Constitution, and it connotes a decision pronounced by the Court on the merits of the cause finally determining the rights of parties. *Tarapore and Co. Vs. V/O Tractors Export, Moscow and Another*, , and *Shri Prakash Chand Agarwal and Others Vs. Hindustan Steel Ltd.*, By the order sought to be appealed against there has not been any adjudication by the learned single Judge upon the merits of the second appeal. The second appeal is still a live proceeding pending before this court and the points arising for determination therein are yet to be adjudicated upon. Such being the petition, it is not possible to regard the order sought to be appealed against as a "judgment" within the meaning of that expression as used in Clause (iii) Section 5 of the Act."

In this context, it is useful to remember what is a (final) "judgment or order". In

Mohammad Amin Brothers Ltd. v. Union of India AIR 1950 FC 77, B. K. Mukherjea, J. observed at P. 79 :

"It has been held by this Court that the test for determining the finality of an order is, whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lowndes in Abdul Rahman v. D. K. Cassim and Sons 60 IA 76 : AIR 1933 PC 56 :

"the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it."

The fact that the order decides an important and even a vital issue is by itself not material.

If the decision on issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order."

These observations were quoted with approval by a Constitution Bench of the Supreme Court of India in Tarapore and Co. Vs. V/O Tractors Export, Moscow and Another, at p. 1170. See also Shri Prakash Chand Agarwal and Others Vs. Hindustan Steel Ltd., A recent unreported Division Bench decision of this Court in A. S. No. 17 of 1978 and C.M.A. No. 185 of 1984 dated 26-10-1984 (since reported in Thekkayil Damodaran and Others Vs. T. Sankaran and Others, particularly para 26 thereof -- is instructive in the matter.

4. Considered in the light of the above decisions, however wide the expression Judgment or Order", occurring in Section 5(i) of the Kerala High Court Act, 1958, may be, we are of opinion that an appeal from the judgment or order of a single Judge will lie to a Bench of two Judges, only if the judgment or order is "final". "Procedural orders and interlocutory orders" will not be within the sweep of Section 5(i) of the Act. The order under appeal does not finally dispose of the matter. It is not a final order at all. The portions extracted in para 1 hereinabove will show that only an interim order has been passed or direction has been given in a pending Original Petition. The order sought to be appealed against does not finally adjudicate any question that is posed or arise for consideration in the Original Petitions. The Original Petitions are still live proceedings pending in this Court and the points at issue are yet to be adjudicated. The order sought to be appealed against has not finally disposed of the rights of the parties. We hold that, in the circumstances, this writ appeal is not maintainable u/s 5(i) of the Kerala High Court Act, 1958. In this view of the matter, we do not propose to go into the merits of the order sought to be appealed against. So also, the petition filed for stay of the operation of the order of the learned single Judge dt. 20-11-1984 is not maintainable and so does not merit any consideration.

We hold that the Writ Appeal is not maintainable. Order accordingly.