

(1984) 10 KL CK 0006

In the High Court Of Kerala

Case No : A.S. No. 17 of 1978 and C.M.A. No. 185 of 1984

Thekkayil Damodaran and Others

APPELLANT

Vs

T. Sankaran and Others

RESPONDENT

Date of Decision : 26-10-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 104

Kerala High Court Act, 1958 — Section 3, 4, 5

Travancore-Cochin High Court Act, 1125 — Section 20, 21, 4(6)

Citation : AIR 1985 Ker 134

Hon'ble Judges : K. Bhaskaran, Acting C.J.; M.P. Menon, J

Bench : Division Bench

Advocate : T.R.G. Warriyer, K. Ramakumar and Sebastian Davis, for the Appellant; V.P. Mohankumar, for the Respondent

Final Decision : Dismissed

Judgement

M.P. Menon, J.—A.S. No. 17/78 wan appeal from a decree in a suit. The respondent in the appeal passed away on 12-12-1981 and as his legal representatives were not impleaded in time the appeal abated. The appellant thereafter filed C.M.P. Nos. 6533/82 and 6534/82 for impleading legal representatives and for setting aside abatement, but these were dismissed by a learned single judge. C.M.A. 185/84 is an appeal against that dismissal, and the question is whether an appeal would lie to a Bench of two judges of this Court, from an order of a single judge refusing to set aside the abatement of a First Appeal. According to counsel, such an appeal would lie either under Order 43 Rule 1(k) of the CPC read with Section 104 thereof, or u/s 5(ii) of the Kerala High Court Act, 1958.

2. Section 104(1) of the Code conceives of appeals against certain classes of orders, and one such order, under Order 43 Rule 1(k) is

"an order under Rule 9 of Order 22 refusing to set aside the abatement or dismissal of a suit".

Rule 9 of Order 22 provides for an application to set aside the abatement or dismissal of a suit and the combined effect of these provisions is that an appeal would lie from an order refusing to set aside the abatement of a suit. Since Rule 11 of Order 22 further provides that the word "suit" in that Order shall be held to include an appeal, an application to set aside abatement of an appeal is also possible. But these are insufficient to hold that an appeal would lie from an order rejecting such an application. A right of appeal is a creature of statute; and so long as the fiction in Order 22 Rule 11 does not extend to Order 43, it is not easy to suggest that the Code creates a right of appeal from an order rejecting an application to set aside abatement of an appeal. That is the view taken by the High Courts of Punjab, See *Sat Pal L. Rameshwar Dial and Another Vs. Budha Lalji and Others*, Calcutta and Gujarat and unless there are compelling reasons, we would not be persuaded to adopt the contrary view expressed by some other courts. Sub-section (2) of Section 104 and Sub-section (1) of Section 105 also indicate that the former view is preferable.

3. As for the contention based on Section 5(ii) of the Kerala High Court Act, it will be useful to extract the whole of the Section : --

"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."

Ignoring the impact of Section 100A of the Code (introduced by the amending Act of 1976) on Section 5(iii) above, and keeping in mind that the contention regarding maintainability is founded on the word "judgment" in Section 5(ii), it is necessary to examine whether that word could be construed to include an "order" of the kind we are here concerned with. Even a cursory examination of Clauses (i) and (ii) brings out the distinction that while Section 5(i) contemplates an appeal both from a judgment and an order of a single judge in exercise of original jurisdiction, Section 5(ii) provides only for an appeal from a judgment (and not an order) of a single judge in exercise of appellate jurisdiction. Where the legislature has taken care to speak of judgments and orders separately in (i), and where it confines Clause (ii) to judgments alone, it will not be reasonable to infer that the word "judgment" in the latter would include an order also.

4. Counsel for the appellant seeks to get over these difficulties by leaning heavily on the decision of the Supreme Court in *Shah Babulal Khimji Vs. Jayaben D.*

Kania and Another, where the word "judgment" appearing in Clause 15 of the Letters Patent of the Bombay High Court has been liberally construed so as to include different types of orders also. The appellant before their Lordships had instituted a suit on the original side of the Bombay High Court and applied for appointment of a receiver and for injunction, pending disposal of the suit. A single judge of the court dismissed the application, and an appeal taken by the plaintiff to a bench of the court was also dismissed, on the ground that the order of the single judge was not a "judgment" within the meaning of Clause 15 of the Letters Patent. It was this view which was reversed by the Supreme Court; and before analysing the scope of the decision, it will be useful to advert to a few important aspects.

5. The first part of Clause 15 of the Letters Patent provided for an appeal to a bench of the High Court from the "judgment" of a single judge

"not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in exercise of the appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in exercise of criminal jurisdiction."

A careful examination of what is extracted above will show that but for the exceptions engrafted, orders passed by a single judge in exercise of revisional jurisdiction, orders made in exercise of the power of superintendence (now corresponding to Article 227 of the Constitution), and orders passed in exercise of criminal jurisdiction would also have been appealable as judgments of a single judge. In other words, the word "judgment" was wide enough to include certain classes of orders except those specifically excluded.

6. Another aspect to be noticed is that the Letters Patent were drafted at a time when neither the Code of 1908 nor even the Code of 1882 had seen the light of day, so that the word "judgment" in Clause 15 was not used in the same sense in which it subsequently came to be defined in the Code. The word was used to denote the result of adjudications in general i.e. to include decrees and orders of certain types within the meaning of the Code.

7. The third aspect is that the Supreme Court itself had taken care to observe (in para 125 of the judgment) that their Lordships were not

"expressing any opinion on the nature of any order passed by a trial judge in any proceedings under Article 226 of the Constitution....."

The reason stated was that the matter was governed by rules framed by the High Courts under the Code of Civil Procedure. It is also well-known that so far as some of the High Courts are concerned, the matter is governed by State enactments like the Kerala High Court Act.

8. It is also necessary to take note of the following observations in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, made almost at the beginning of the judgment : --

"We might mention here that the significance of the word "judgment" assumes a special importance in these High Courts which have ordinary civil jurisdiction depending on valuation of the suit or the action. These High Courts are Calcutta, Bombay, Madras as also Delhi and Jammu & Kashmir. The other High Courts do not have any ordinary civil jurisdiction but their original jurisdiction is confined only to a few causes like probate and administration, admiralty and cases under Companies Act."

The case before the court had arisen from the exercise of ordinary civil (original) jurisdiction by a single judge of the Bombay High Court, relatable to Clause 12 of the Letters Patent. The Kerala High Court has no such jurisdiction; and in construing the scope of Section 5 of our High Court Act, the view taken in the context of a different set of provisions cannot be conclusive.

9. Proceeding to examine Babulal in the above background, it is important to bear in mind that the real controversy in the case was not on the question as to whether any kind of "order" would fall within the meaning of "judgment" in Clause 15, but on the question as to what type of orders could be so comprehended. The Bombay High Court had apparently taken the view that Order 43 of the Civil P.C. was inapplicable to internal appeals in the High Court i.e. to an appeal from one judge to a bench of judges of the High Court, and that the maintainability of such an appeal depended solely on the Letters Patent. There were even suggestions that Clause 15 of the Letters Patent excluded the applicability of Section 104 C.P.C. to such proceedings. The High Court was also for taking a restricted view of the meaning of the term "judgment" in Clause 15. It is these views which were overruled by the Supreme Court when Fazal Ali J., speaking for Varadarajan J. also, summarised the conclusions of the Court in the following terms : --

"(1) there is no inconsistency between Section 104 read with Order 43, Rule 1 and the appeals under the Letters Patent and there is nothing to show that the Letters Patent in any way excludes or overrides the application of Section 104 read with Order 43, Rule 1 or to show that these provisions would not apply to internal appeals within the High Court.

(2) even if it be assumed that Order 43, Rule 1 does not apply to Letters Patent appeals, the principles governing these provisions would apply by process of analogy.

(3) having regard to the nature of the orders contemplated in the various clauses of Order 43, Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgments within the meaning of Clause 15 of the Letters Patent and

hence, appealable to a larger Bench.

(4) the concept of the Letters Patent governing only the internal appeals in the High Courts and the CPC having no application to such appeal is based on a serious misconception of the legal position."

A. N. Sen J. concurred in holding that Section 104 and Order 43 would apply to the original side of the Bombay High Court. Fazal Ali J. went further and added that even orders outside the fold of Order 43 Rule 1 could fall within the scope of "judgment" in Clause 15, if they satisfied certain tests. Dealing with the attributes necessary for such orders, his Lordship considered the divergent views expressed on the subject by different High Courts and preferred the broader view taken by Madras to the narrower view taken by Calcutta. In *Justices of the Peace for Calcutta v. Oriental Gas Co.* (1872) 8 Beng LR 433 Sir Richard Couch, C. J. had applied the following tests for deciding whether an order passed by a single judge of the High Court could be treated as "judgment" within the meaning of Clause 15 of the Letters Patent : --

(i) the decision must affect the merits of the question between the parties;

(ii) it should involve the determination of some right or liability; and

(iii) the order determining the right or liability may be final, preliminary or interlocutory, but the determination must be final or one which decides even a part of the controversy finally, leaving other matters to be decided later.

But in *Tuljaram Row v. Alagappa Chettiar* ILR (1912) Mad 1 Sir Arnold White C. J. had applied a different test and observed :--

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

I think, too an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained) e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a "judgment" within the meaning of the clause."

It was the above Madras view founded on the effect of an adjudication as distinct from its form, and bringing within its sweep even ancillary proceedings not having any effect on the merits of the suit, which found favour with his Lordship.

10. We are however not persuaded to hold that the observations made in the

context of clause 15 of the Letters Patent could be introduced wholesale into the construction of the term "judgment" in Section 5(ii) of the Kerala High Court Act. It is well established that a term used in one provision of law need not have necessarily the same meaning in another. As already noticed, the very language of Clause 15 of the Letters Patent suggested that certain orders not specifically excluded from its first part were capable of being treated as "judgments" within its scope; the situation arising from the juxtaposition of "judgment" and "order" in Clause (i) of Section 5 of the High Court Act, and the deliberate omission of "order" from Clause (ii), was not available for the construction of Clause 15. The question before the Court in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, was whether an order made by a single judge in exercise of original (civil) jurisdiction would be appealable to a bench; but the question here is whether an order made in exercise of appellate jurisdiction is appealable. More important than all these is the circumstance that the word "judgment" had been understood in a different sense by the Privy Council, in AIR 1925 155 (Privy Council) where it was said that :

"The term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

No doubt subsequent decisions had explained (see for example, *Sital Din and Others Vs. Annant Ram*) that the above was said in connection with Clause 39 of the Letters Patent, and not Clause 15: even so it is clear that one and same term could have different meanings in different contexts. It is the context that matters, the setting and other relevant surrounding circumstances. Enough to say that *Babulal* is not an authority for the proposition that the dismissal of an application to set aside abatement of an appeal by a single judge is appealable to a Division Bench under Order 43 read with Section 104 of the Code, or for the proposition that "judgment" in Section 5(ii) of the High Court Act can be construed in the same fashion as "judgment" in Clause 15 of the Letters Patent.

11. That leads us to the need for a closer examination of the provisions of the Kerala High Court Act and the corresponding or cognate provisions which were there in the Travancore-Cochin High Court Act, 1125. Just as Sections 20 and 21 of the T. C. Act had dealt with the "Powers of a single Judge" and the "Powers of a Bench of two Judges" respectively, Sections 3 and 4 of the Kerala Act also deal with the same topics. And Section 9 of the Kerala Act repeals the provisions of the T.C. Act only "in so far as they relate to matters provided in this Act". The statement of objects and reasons for the Kerala Act was in these terms :

"Section 52 of the States Reorganisation Act, 1956, has provided that the High Court of a new State shall have, in respect of any part of the territories included in that State, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court for existing State. Hence, under this provision, the High Court of Kerala can exercise in respect of the Travancore-Cochin portion of the Kerala State all the powers and jurisdiction which the

former Travancore-Cochin High Court could exercise and in respect of the Malabar District, referred to in Sub-section (2) of Section 5 of the States Reorganisation Act, 1956, all the powers and jurisdiction which the Madras High Court could exercise immediately before the 1st Nov. 1956."

"2. The enactments which regulate the exercise of the powers and jurisdiction referred to above, apart from special statutes in respect of particular matters are,

- (i) the Travancore-Cochin High Court Act, 1125;
- (ii) the Letters Patent relating to the Madras High Court;
- (iii) the Madras Appellate Jurisdiction Rules;
- (iv) the Madras Ordinary Original Jurisdiction Rules.

It is highly necessary that the High Court should have the same powers and jurisdiction both in respect of the Travancore-Cochin portion and the remaining part of the State and a unified law specifying these powers and jurisdiction should be enacted."

While giving shape to the Kerala Act, therefore, the legislature had before it the relevant provisions of both the T.C. Act and the Letters Patent of Madras; and the idea was only to unify the law "regulating the business and exercise of powers by the High Court of the State". And in giving effect to this idea, the legislature had obviously made no attempt to invest the Kerala High Court with ordinary civil jurisdiction over any area in the State, as was the position under Clause 12 of the Madras Letters Patent. This is also clear from the provisions of the Kerala Civil Courts Act, 1957. To put it differently, controversies like those connected with the interpretation of Clauses 11 to 15 of the Letters Patent were not in the contemplation of the legislature.

12. u/s 20 of the T.C High Court Act a single Judge was empowered to hear and decide, among others,

- (i) applications u/s 115 of the Code of Civil Procedure;
- (ii) applications of an interlocutory character in appeals and other matters pending before the High Court (except contested applications for impleading legal representatives in Division Bench appeals);
- (iii) applications for criminal revision;
- (iv) applications for exercise of powers under Article 226(1) of the Constitution;
- (v) appeals against appellate decrees and orders valued at Rs. 1000/- or less.

Section 21 empowered a bench of two Judges to hear and decide or dispose of the following, among other matters :--

- (a) appeals against orders of a single Judge under Article 226(1);

- (b) Appeals from judgments of a single Judge exercising power under (v) above;
- (c) all appeals, civil and criminal, from decrees, orders, convictions or sentences where allowed by law;
- (d) appeals preferred u/s 104 of the CPC from orders of a single Judge passed in exercise of original jurisdiction: and
- (e) appeals against convictions or sentences and orders of acquittal passed by a single Judge in exercise of original jurisdiction.

Before proceeding to consider the provisions of Sections 3 and 4 of the Kerala Act, it will be advantageous to notice here itself that Section 21 of the T.C. Act permitted appeals to a Division Bench, u/s 104 of the Code, only from orders of a single Judge made in exercise of original jurisdiction. That is, orders passed by a single judge u/s 104 of the Code while exercising appellate jurisdiction were not appealable to a bench of two Judges. It is also necessary to notice that while all applications of an interlocutory character in appeals and other matters (including Division Bench matters, subject to the solitary exception specified) were to be heard and decided by a single Judge u/s 20, no appeals to a bench from such decisions were contemplated by Section 21. Another significant aspect to be kept in mind is that throughout Sections 20 and 21, the T.C. Act had been maintaining the distinction between decrees and orders within the meaning of the Civil P.C. even specifically referring to the Code in one of the sub-sections of Section 21.

13. Turning now to the Kerala Act the scheme of conferring powers on a single Judge u/s 3 is broadly the same as in Section 20 of the T.C. Act. Provision is made in the Section for all the matters enumerated as (i) to (v) in para (12) above. One variation is that in respect of applications of an interlocutory character, even the exception relating to impleadment of legal representatives in Division Bench matters has now been taken away. Clause (iii) of Section 3(10) empowers a single Judge to exercise the jurisdiction under Article 226(1) except as regards habeas corpus proceedings, and Clause (iv) also confers power to dispose of matters arising under Articles 227 and 228. As for Section 4, Sub-sections (2) and (6) are the only provisions conferring appellate powers on a Bench of two Judges. Sub-section (2) deals with appeals from :

- (a) decrees or orders of a civil court, except those coming u/s 3; and
- (b) judgments of a criminal court involving sentences of death or imprisonment for life.

Sub-section (6) of Section 4 provides for an appeal from "any original judgment, order or decree passed by a single Judge". An appeal from an order of a single Judge rejecting an application to set aside abatement of an appeal pending before the High Court is plainly outside the scope of Section 4(2)(a), because all orders of a single Judge "coming u/s 3" are specifically excluded. Such an appeal cannot obviously fall u/s 4(6) also, because the appeals there are appeals from "original" orders. Therefore, if Section 4 alone was there in the Kerala High Court

Act, without a further provision for appeals in Section 5, the C.M.A. here would not have been maintainable at all.

14. It seems to us that though not in form, yet in substance, the object of Clauses (ii) and (iii) of Section 5 is to confer additional powers on a bench of two Judges i.e. powers of appeal from judgments of single judges disposing of First Appeals and Second Appeals. In this sense. Section 5 is an extension of Section 4, the two together replacing the provisions of Section 21 of the T.C. Act. However, as already explained. Clauses (ii) and (iii) of Section 5 cannot be read in isolation from Clause (i).

15. All the three clauses of Section 5 speak of an appeal to a bench of two judges from "a judgment of a single judge", though the character or nature of "judgment" in each is different; under Clause (i) it has to be an original judgment, and under Clauses (ii) and (iii) an appellate and second appellate judgment respectively. What then does "judgment" mean? A comparison between Sections 4(6) and 5(i) seems to afford same clue. While Section 4(6) provides for an appeal from any original judgment, order or decree Section 5(i) provides for an appeal from a judgment or order. Why is the term "decree" omitted from Section 5(i) when both the provisions deal with appeals from original proceedings? It cannot have been the intention of the legislature not to provide for appeals from original decrees of a single judge, while providing for appeals from judgments and orders. The only explanation possible is that "judgment" in Section 5(i) is intended to mean a decree or the result of any other adjudication which partakes of that character, as distinct from decisions in the nature of "orders". We have already seen that in AIR 1925 155 (Privy Council) the Privy Council had understood "judgment" in Clause 39 of the Letters Patent to mean a decree. In *Tarapore and Co. Vs. V/O Tractors Export, Moscow and Another*, the Supreme Court was called upon to construe the meaning of the expression "judgment, decree or final order" used in Article 133(1) of the Constitution, and their Lordships had no hesitation to hold that "judgment" meant a final adjudication of the rights of parties in a suit or other proceedings. On an examination of the provisions of Sections 20 and 21 of the T.C. High Court Act and of Sections 3 - 5 of the Kerala Act, and keeping in mind the legislative history, we are of the view that "judgment" in Section 5(i) has to be understood in the sense in which it was understood by the Privy Council in the context of Clause 39 of the Letters Patent, and by the Supreme Court in the context of Article 133(1) of the Constitution, and not in the sense in which it could be understood in the context of Clause 15 of the Letters Patent. And if this is the restricted meaning to be attributed for the purposes of Clause (i) of Section 5, a wider meaning cannot be attributed for the purposes of the other two clauses. That means that "judgment" in Section 5(ii) cannot include orders passed in interlocutory or ancillary matters.

16. The question can be approached from another angle also. Section 3(5) of the Act empowers a single judge to deal with "any matter of an interlocutory

character in appeals and other proceedings"; in fact, that was how C.M.P. 5634/82 came to be disposed of by a single judge in this case. If the legislature had the intention to provide for appeals from judgments or orders passed in such interlocutory proceedings, Section 4(6) could not have been restricted to appeals from original judgments and orders of a single judge. The policy behind Section 4(6) is evidently to confine appeals from judgments and orders of a single judge only when they are rendered in exercise of original jurisdiction, and it cannot be lightly assumed that this policy was discarded by the legislature when it proceeded to Clause (ii) of the next Section.

17. A third approach is also possible, if regard can be had to the object of the Kerala Act, viz., unification of the law regulating the business and exercise of powers by the High Court. u/s 21 of the T.C. Act an appeal from the order of a single judge dismissing an application to set aside the abatement of an appeal pending before the High Court, was impossible in the T.C. area. Was it possible in the Madras area which became part of the Kerala State on States' Reorganisation? Counsel for the appellant did not refer us to decisions of the Madras High Court recognizing such a practice under the Letters Patent. Reference was however made to V.T.V. Rangacharyulu and Another Vs. Sriram Ganeswar, where the Andhra Pradesh High Court had held that the order of a single judge condoning delay in filing application to set aside abatement of an appeal was appealable as a "judgment" under Clause 15 of the Letters Patent. But the same decision also noticed that in the Madras High Court, different views had been expressed in similar matters by different benches, such as in Kyroon Bee and Another Vs. The Administrator-General of Madras, and in Appaji Reddiar Vs. Thailammal, . K.G. Rangaswami Chettiar and Co. and Others Vs. K.R. Eswaramurthy Goundar, is an instance where the Madras High Court itself had noticed such divergence in approach. Is it possible to assume, in the absence of clear provisions to that effect in the Kerala High Court Act, that in attempting to unify the law the Kerala legislature wanted to discard the practice in the T.C. area, supported by clear statutory prescriptions, in favour of the doubtful position obtaining in the other area of the State? The purpose behind Section 5 of the Kerala Act, as we see it, was not to confer new powers on a bench of two judges or to confer new rights on litigants -- a right which was practically unknown to them under the old dispensation.

18. In L. Ram Sarup Vs. Mt. Kaniz Ummehani, the Allahabad High Court took the view that under Clause 10 of the Letters Patent of that Court an appeal would lie to a bench of two judges from an order of a single judge, modifying in appeal, a decision of the lower court in an injunction matter. But in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, the Supreme Court firmly rejected this view as unsound, observing that

"a further second appeal lying to a Division Bench from an appellate order of the trial judge passed under Order 43 Rule 1 is wholly foreign to the scope and spirit of the Letters Patent."

The observation may not be directly in point; still, the reference to "the scope and spirit" of the Letters Patent and the anxiety not to unduly enlarge the meaning of "judgment" are significant.

19. It will also be fruitful to see how this Court has been approaching similar questions after the commencement of the Kerala Act.

20. In *Arumugham Chettiar v. Joseph* 1961 KLT 823 this Court declined to accept the contention that a judgment or order of a single judge in exercise of power under Article 227 of the Constitution was a judgment or order passed in exercise of original jurisdiction so as to permit of an appeal to a bench of two judges, u/s 5(i). M. Section Menon J. (as he then was) speaking for the bench said that the jurisdiction under the Article was revisional and not original. Neither the form nor the effect of the decision was considered material; what was material was the nature of the jurisdiction exercised by the single judge.

21. The question in *P. K. Kunhu v. State* 1970 KLT 644 was whether the rejection by a single judge of some of the grounds in an Original Petition at the admission stage was a judgment or order within the meaning of Section 5; and the Court held :--

"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."

22. In *Monammad Haji v. Ayamma* 1976 KLT 326 (FB) an appeal was attempted to be taken from an order passed by a single judge dismissing a C.M.P. for staying the hearing of a Second Appeal, u/s 3 of the Kerala Debtors' (Temporary Relief) Act, 1975. It was contended that as the Act itself had come into force during the pendency of the Second Appeal and the question relating to the applicability of Section 3 had arisen for the first time only at that stage, the single judge's decision should be construed as a judgment or order in exercise of original jurisdiction. It was also contended that the decision could be treated as a "judgment" within the meaning of Section 5(iii) of the Kerala High Court Act. Both these contentions were rejected by the Full Bench presided over by Eradi J. (as he then was). His Lordship's answer to the first contention was this :--

"The nature and character of the jurisdiction exercised by this court does not depend upon whether any particular point had been raised before the lower courts or was available to be raised there. This court was seized of the appeal in which the interlocutory application was filed only in the exercise of the jurisdiction conferred by Section 100 of the Code of Civil Procedure. In hearing and disposing of the Civil Miscellaneous Petition filed in the second appeal this court was acting in the exercise of its second appellate jurisdiction. The contention put forward by the appellant that the order sought to be appealed

against is one passed by the learned single judge in the exercise of original jurisdiction and that the appeal is maintainable under Clause (i) of Section 5 cannot therefore stand."

The second contention was also rejected for the following reasons :--

"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..... 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."

We could have simply followed this lead of the Full Bench and declined to consider the matter in detail, but for the decision of the Supreme Court in *Babulal* which, according to counsel, throws a new light on the meaning of the term "judgment", applicable to other situations also.

23. It is of course true that in *Vasudevan Namboothiri v. Narayanan Namboothiri* ILR (1969) Ker 387 a Division Bench had proceeded on the basis that an application to amend an appellate decree of this Court u/s 7 of Kerala Act 31/58 could be regarded as a motion on the original side of the court, but the decision has necessarily to be read subject to the Full Bench decision in *Mohammed Haji* 1976 Ker LT 326.

24. In *Fr. Abraham Mathews and Another Vs. Illani Pillai and Others*,) the question was whether a further appeal would lie to a bench of two Judges, u/s 5(ii) of the Kerala High Court Act, from the decision of a single Judge disposing of a CMA preferred u/s 104 of the Civil Procedure Code; and the Full Bench answered the question in the negative. *Vedakkal J.* who spoke for the bench referred to the need for suitably amending Clause (ii) of Section 5 "so as to clarify" the true position, and added :

".....It is necessary to take note of the fact that according to the practice obtained in this Court no further appeal has till now been sought to be filed against the decision of a learned single judge of this Court in a Civil Miscellaneous Appeal preferred u/s 104 of the Code of Civil Procedure, 1908. It has also to be remembered that from the decision in a C.M.A. rendered by a court subordinate to this Court, no further appeal lies to any Court. It cannot be that the legislature intended that the exercise of jurisdiction u/s 104 of the Code by a learned single judge of this Court is amenable to scrutiny in a further appeal therefrom to a Division Bench and that the exercise of the same jurisdiction by a court subordinate to this court cannot be subjected to further appeal therefrom."

25. The latest in the series seems to be *State of Kerala Vs. R. Sudarsan Babu and Others*,) also decided by a Full Bench. Their Lordships fully endorsed the view taken by the Division Bench in *P. K. Kunhu*'s case 1970 KLT 644, and also

noted how the term "judgment" in Section 5(iii) had been understood in Mohammad Haji 1976 KLT 326 (FB). Poti C. J. observed :--

"If Section 5(i) 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(i). The term "order" is found in association with the term "judgment" and therefore necessarily it takes its colour from such association."

26. Thus the practice of this Court as disclosed by case-law has not been to enlarge the scope of "judgment" and entertain appeals under Clauses (ii) and (iii) of Section 5 from decisions of single judges in Civil Miscellaneous Petitions. Even as regards orders passed in exercise of original jurisdiction the observation of Poti C. J., that every interlocutory order cannot be brought within the meaning of Clause (i) is important. This Court has no ordinary original civil jurisdiction directly attracting the provisions of the Civil Procedure Code, though in respect of Matrimonial, Probate, Company and other matters some original jurisdiction is still there, and in respect of them, the procedure in the Code may have to be followed by reason of Section 141. The Explanation to the Section however now excludes proceedings under Article 226 from its purview. What then is the scope of the term "order" in Section 5(i), in the context of proceedings under Article 226? u/s 20(4)(a)(x) of the T.C. High Court Act a single judge had power to deal with matters arising under the Article. And Section 21(1) of the Act conferred powers on a bench of two judges

"to hear and decide appeals against orders passed by a single judge under Sub-clause (a)(x) of Clause (4) of Section 20."

The word "orders" in Section 21(i) could only have meant orders disposing of the Original Petitions, as distinct from interlocutory orders, because the power conferred under Article 226(1) was to "issue directions, orders or writs". That is, the word "order" in Section 21(i) of the T.C. High Court Act had to be understood in the same sense in which it was used in Article 226(1). In view of the Full Bench decision in Mohammed Haji's case 1976 KLT 326 also, where "judgment" in Section 5(i) of the Kerala High Court Act has been equated to "judgment" within the meaning of Article 133(1) of the Constitution, it will be proper to equate "order" in Section 5(i) to "final order" in Article 133(1). Clauses (1) and (3) of Article 226 bring out the distinction between final and interim orders. The Explanation to Article 132 suggests that "final order" in Clause (1) of the Article is used in a wider sense than in Clause (1) of Article 133; conversely, the expression has a more restricted meaning in Article 133(1). In view of these considerations it would be reasonable to hold that in relation to proceedings under Article 226 at least, the word "order" in Section 5(i) of the Kerala High Court Act has to be construed as an order effectively disposing of the cause itself, and not a mere interlocutory order. The observations of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, specifically excluding proceeding under the Article from its broad sweep is also relevant in this context.

27. The decision in Jugal Kishore Paliwal Vs. S. Sat Jit Singh and Another, cannot advance the appellant's case because the matter had arisen from proceedings u/s 5(2) of the Delhi High Court Act, 1966 empowering a single judge to exercise ordinary original civil jurisdiction in suits valued above Rs. 25,000/-. Section 10(1) of the Act empowered a "Division Court" to hear and decide appeals from such a "judgment" and all that the Supreme Court did was to hold that the principle in Shah Babulal Khimji Vs. Jayaben D. Kania and Another,) would apply.

28. For the reasons given above, we are of the opinion that the C.M.A. is not maintainable either u/s 104 of the CPC or u/s 5(ii) of the Kerala High court Act, and we dismiss it. As a result, the abatement of A.S. No. 17/78 will also stand.