

Lilly Vs. Ragesh

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Court : Kerala

Decided On : Oct-11-2004

Reported in : 2004(3)KLT712

Judge : P.R. Raman, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 and 115(2) - Order 9, Rule 13 - Order 43, Rule 1

Appeal No. : C.R.P. No. 1219 of 2004

Appellant : Lilly

Respondent : Ragesh

Advocate for Pet/Ap. : N. Muraleedharan Nair and; M. Manoj Kumar, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

P.R. Raman, J.

1. Petitioner is the defendant in the suit O.S. No. 147/98 which was decreed ex parte. She filed an application for setting aside the ex parte decree along with an application to condone the delay in filing the same. Both these applications were

dismissed by the Court below. C.R.P. No. 1221/20Q4 is filed challenging the order refusing to condone the delay and C.R.P. No. 1219/2004 is filed challenging the order refusing to set aside the ex parte decree. The order passed in the application to set aside the ex parte decree under Order IX, Rule 13 of the C.P.C. is an appealable order under Order XLIII Rule 1 of the C.P.C.

2. As per Section 115 of the C.P.C., the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court, in which no appeal lies thereto and if such subordinate Court appears (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. There is a proviso added with effect from 1.7.2002 by amending Act 1999 which provides that the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. As per Sub-section 2 of Section 115, the High Court shall not, under this Section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto. Sub-section 2 was inserted by the Code of Civil Procedure (amendment) Act, 1976 with effect from 1.2.1977.

3. From a reading of the above provision it can be seen that as per Sub-section 2 of Section 115 of the C.P.C. this Court cannot vary or reverse any decree or order, if an appeal lies either to the High Court or to any Court subordinate thereto. The order refusing to set aside an ex parte order passed under Order IX, Rule 13 is an appealable order as per Order XLIII Rule 1(d) of the C.P.C.

4. In the decision in *Subramonia Iyer v. State of Kerala*, 1967 KLT 210, a Single Judge of this Court held that the legal position is clear that in a case where there is a right of appeal to a Subordinate Court but no right of second appeal, the revisional powers of the High Court even against the order of the first Court are not excluded and that in a case where there is a right of appeal to the lower Appellate

Court and a right of second appeal to the High Court, the revisional powers of the High Court are excluded. But that was a case decided prior to the introduction of Sub-section 2 as it is noticed earlier. In *Lakshmikutty Panickathi v. Bharghavi*, 1987 (2) KLT 562, this Court held that if a revision is filed against the order rejecting the delay petition without challenging the order dismissing the application under Order IX, Rule 9, it could be contended that the revision is incompetent without challenging the ultimate order in the independent proceeding. Since the grounds of rejection of the delay petition and the application under Order 9. Rule 9 are one and the same, those grounds could be challenged in the appeal against the order rejecting the application under Order IX, Rule 9 without even separately challenging the order dismissing the delay petition by a separate revision. It was also held therein that when two remedies are available, the party must have the right to opt the remedy which is best suited to him. In an appeal the grounds could be successfully challenged because scope of interference is wider than in a revision. Following the said decision in *Jayakumari v. Ismail Rawther*, 2001 (2) KLT 551, this Court held that in a case when there is no second appeal provided under the C.P.C. against the judgment in appeal challenging the order passed by the Trial Court under Order IX, Rule 13 of the C.P.C., a revision under Section 115 of the C.P.C. will lie and the contention that an appeal will lie before the lower Appellate Court against the order dismissing the application under Order IX, Rule 13 and that no revision will lie were rejected.

5. In yet another decision of this Court in *Kuruvilla v. Rajagopala Iyer*, 1966 KLT 916, it was held that if the appeal is dismissed in consequence of the dismissal of the application filed under Section 5 of the Limitation Act to condone the delay, the proper remedy available is to file an appeal against the order dismissing the application which amounts to a decree challenging the correctness of the order dismissing the application to condone the delay.

6. In this case both the application for condonation of delay as well as the application to set aside the ex parte order were dismissed by the Trial Court against which two Revision Petitions are filed simultaneously. It is not a case where a revision was pending before this Court against an order refusing to condone the delay, during which time a consequential order was passed by the

trial Court in which case, possibly, the aggrieved person could not be relegated to an appellate remedy, since the order refusing to set aside the ex parte order is only in consequence of the rejection of the application for condonation of the delay which itself is under challenge in a pending CRP. But once consequential orders are also passed under Order 9, Rule 13 it admits no doubt that it is an appealable order under Order XLIII Rule 1(d) of the C.P.C. as already observed above.

7. The question now arises as to whether there are two remedies available so as to elect one of them by the aggrieved party. As against the order dismissing the application to set aside the exparte order is concerned, no revision will lie in view of the expressed provision contained in Section 115(2) of the C.P.C. as amended. Even if an appeal lies to any Court subordinate to that of the High Court, the High Court cannot exercise its revisional power so as to vary or reverse such an order against which an appeal lies to any Court subordinate thereto and if such an appeal remedy is available, the petitioner can without even filing a separate appeal challenge the order refusing to condone the delay as held by this Court in the decision in *Kunhiraman v. Rossy*, 1979 KLT 718.

8. In view of the specific provision contained in Section 115(2) of the C.P.C., when there is an appeal provided to a Court subordinate thereto against an order passed under Order 9, Rule 13 of the C.P.C., no revision will lie. Thus, there is only one remedy available to the petitioner as against the order rejecting the application for setting aside the exparte order passed under Order IX R. 13, namely, to prefer an appeal under Order XLIII Rule 1 of the C.P.C.

In these circumstances, I do not find that these revisions are maintainable. Accordingly, these Revision Petitions are held to be not maintainable, and accordingly dismissed without prejudice to her right of appeal before the appropriate Court.