

**Minimol Vs. Anil Kumar**

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**Court :** Kerala

**Decided On :** Nov-07-2003

**Reported in :** AIR2004Ker107; I(2004)DMC249; 2003(3)KLT1143

**Judge :** J.B. Koshy and; K. Thankappan, JJ.

**Acts :** Family Court Act, 1984 - Sections 19

**Appeal No. :** Unnumbered Mat. Appeal of 2003

**Appellant :** Minimol

**Respondent :** Anil Kumar

**Advocate for Def. :** R. Sreeraj, Adv.

**Advocate for Pet/Ap. :** Mathew John, Adv.

**Judgement :**

ORDER

**J.B. Koshy, J.**

1. When a suit for recovery of gold ornaments and money entrusted to the defendants as parental share at the time of marriage is decreed by the Munsiff's Court before establishment of the Family Court Act, whether appeal will lie to this Court as Mat. Appeal as provided under Section 19 of the Family Court Act, 1984

(hereinafter referred to as 'the Act') if the Family Court was established before the appeal period was over, is the question considered in this order. As far as facts of this case are concerned, the appellant in this case filed a suit before the Munsiff's Court for recovery of gold ornaments and money entrusted to defendants as parental share at the time of marriage. The suit was decreed in part only. The judgment was pronounced on 25.6.1998. The certified copy was ready on 3.6.1999. After passing of the decree and before filing of the appeal, the Family Court was established at Kottayam. Therefore, contending that appeal will lie under Section 19 of the Act, appeal was filed before this Court. Registry raised objection stating that since the suit was disposed of on 25.6.1998 before establishment of the Family Court at Kottayam, appeal suit has to be filed before the appropriate court and not in High Court under Section 19 of the Family Court Act.

2. On establishment of the Family Court all proceedings covered under Section 7 of the Act has to be transferred to the Family Court. Section 8(c)(ii) of the Act provides that every suit which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall be transferred to such Family Court as the date on which it is established. But in this case, the suit was already disposed of before the establishment of the Family Court at Kottayam, However, certified copy was issued only after establishment of the Family Court. Section 19 of the Act provides for appeal. Section 19(1) reads as follows:

'19. Appeal:- (1) Save as provided in Sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973, (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law'.

3. The contention of the appellant is that since the appeal was filed after the establishment of the Family Court at Kottayam, appeal would lie to the High Court under Section 19 of the Act. In support of the above proposition, the learned

counsel for the appellant relied on the decision of a Division Bench of this Court in *Devaki v. Chandrika* (1997 (2) KLT 746). The Division Bench in the above case held that when an ex parte decree was passed with respect to a matter to be decided by a Family Court, by a civil court prior to the establishment of the Family Court and if subsequently the Family Court is established, petition to set aside the ex parte decree will lie only before the Family Court. The appellant also relied on the decision of this Court in *Kunju Beevi v. Syndicate Bank* (1999 (2) KLT 245) wherein on identical provisions in Recovery of Debts due to Banks and Financial Institutions Act, 1993 this Court held that if a suit filed by the bank for recovery of the amounts exceeding Rs. 10 lakhs is decreed by the court before the introduction of the Act, the petition to set aside ex parte decree has to be filed before the Tribunal established under the above Act. Learned counsel for the appellant also relied on the decision of the Full Bench of this Court in *Glenny v. The Catholic Syrian Bank Ltd.* (2003 (2) KLT 973 (FB)). The Full Bench was considering the question whether the Tribunal constituted under that Act has got jurisdiction to set aside an ex parte order which was passed by a civil court before the Tribunal was established. The Full Bench held that eventhough general law is that court which passed the ex parte order alone can set aside the same in view of Sections 17(1) and 18 and since the civil court has no jurisdiction after establishment of the Tribunal, a petition to set aside an ex parte order passed by a civil court can be considered by the Tribunal after the establishment of the Tribunal under the Act. During the course of discussion the Full Bench held as follows:

'..... Lastly, it may also be mentioned that Section 20 confers the right to file appeals before the Appellate Tribunal. This power relates to not only the orders actually passed by the Tribunal but even to those deemed to have been made by a Tribunal'. Does it not mean that even a Decree passed by the Civil Court shall be deemed to have been passed by the Tribunal? It is a well-settled cannon of interpretation that the words of a statute cannot be ignored by the Court. They have to be given some meaning and content. Still further, it is also settled that, if the statute creates a fiction, then all those circumstances, which are necessary for giving the fiction a full meaning and content have to be assumed to exist.....'.

It is submitted by the learned counsel for the appellant that since similar provisions are made in the Family Court Act also, judgment and decree of the court below passed before establishment of the Family Court should be deemed to be the judgment and decree of the Family Court and, therefore, appeal can be filed under Section 19 of the Act before the High Court.

4. There is no dispute regarding the proposition that the proceedings pending before the Civil Court for the reliefs claimed under Section 7 of the Act have to be transferred to the Family Court when Family Court is established. If an *ex parte* order is passed by the civil court, on establishment of the Family Court the petition to set aside an *ex parte* order can be decided only by the Family Court as there is complete bar of jurisdiction of the Civil Court to deal with such cases. But with regard to the appeal, there is no such provision in the Act for transferring appeal proceedings to the Family Court. A Division Bench of this Court in *Thomas and Co. v. UCO Bank*, 2002 (2) KLT 246, was considering the question whether appeal pending before the High Court against the judgment of the Civil Court shall be transferred to the Appellate Tribunal even though at the time when the appeal was filed the Tribunal was not constituted. This Court held that there is no provision for transferring appeals from the Appellate Court to the Appellate Tribunal like transfer of suits to the Tribunal.

5. It is well settled law that the right of appeal is not a mere right of procedure but is a substantive right and institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal can be taken away only by subsequent enactment by express provision or by necessary intendment and not otherwise. In paragraph 23 of the Constitution Bench decision of the Apex Court in *Garikapati Veerava v. N. Subbiah Choudhry and Ors.*, AIR 1957 SC 540, it was held as follows:

'(23) From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

ii) The right of appeal is not a mere matter of procedure but is a substantive right,  
(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise'.

The above decision was followed in *State of Bombay v. Supreme General Films Exchange Ltd.*, AIR 1960 SC 980, and in *Kasibai v. Mahadu*, AIR 1965 SC 703. In *Ramesh Singh and Anr. v. Cinta Devi and Ors.*, AIR 1996 SC 1560, the Supreme Court considered the question whether the right of appeal against an application disposed of under the Motor Vehicles Act, 1988 will survive even after its repeal by the new Act and held that right of appeal will survive. After analysing various decisions, the Apex Court held as follows:

'.....In all these decisions the view taken is that unless the New Act expressly or by necessary implication makes the provision applicable retrospectively, the right to appeal will crystallise in the appellant on the institution of the application in the Tribunal of first instance and that vested right of appeal would not be dislodged by the enactment of the new Act. In other words, the appellant would be entitled to file the appeal without being required to make the deposit under the proviso to Section 173 of the New Act. The law, therefore, seems to be fairly well settled by the said three decisions of this Court'.

Therefore, except by a statutory provision regarding right of appeal, right of appeal at the time of filing of suit cannot be changed. The right of appeal at the time of

filing suit before the Munsiff's Court has to be availed by the parties and they cannot file appeal before this Court as provided under Section 19 on the contention that if the impugned judgment was not passed by the Civil Court before establishment of the Family Court, it would have been transferred and disposed of by the Family Court. There is no provision for deeming such judgments at that of the Family Court. It is true that the Full Bench in Glenny's case (supra) held that if a decree is passed by the civil court for an appeal of Rs. 10 lakhs or more after the establishment of the Debt Recovery Tribunal, appeal will lie before the Appellate Tribunal only. That is because of the specific provision under Section 20 of the Recovery of Debts due to Banks and Financial Institutions Act. Section 20(1) of the above Act reads as follows:

'20. Appeal to the Appellate Tribunal:- (1) Save as provided in Sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.' (Underlining by us)

Words deemed to have been made in Section 20 of that Act is conspicuously absent in Section 19 of the Family Court Act. Therefore, even though pending proceedings before the Civil Court shall be transferred to the Family Court there is no provision under the Family Court Act to deeming the decisions already passed by the Civil Court as passed by the Family Court for the purpose of filing appeal. There is no express or implied provision to that effect. Hence, from the judgment and decree passed by a civil court before establishment of the Family Court, appeal cannot be filed under Section 19 of the Act. In this connection, we also refer to Section 29A of the Administrative Tribunals Act, 1985. The above section provides for filing of appeal to the Central Administrative Tribunal within ninety days from the date of receipt of the copy of the decree or order made or passed by any Court other than a High Court in any suit or proceeding before the establishment of the Tribunal, to the Tribunal if cause of action is coming within the jurisdiction of the Tribunal. There is no such equivalent provision in the Family Court Act directing to file appeal to the Family Court also.

In the above circumstances, we hold that in the absence of specific provisions (either express or implied), appeal from the judgment and decree of the Munsiff's Court cannot be filed under Section 19 of the Act before this Court. Therefore, appeal is directed to be returned to the party for filing before the appropriate Court. Parties should present the appeal before the appropriate court within thirty days of returning of the proceedings. Before closing we place it on record our deep appreciation for the help rendered by Advocate Sri. R. Sreeraj who agreed to assist the Court as amicus curiae for placing all the relevant decisions before the Court and Sri. Mathew John who presented the case for the appellant.

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