Thilakan Vs. Kunhalankutty

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Court : Kerala

Decided On : Sep-04-2003

Reported in : AIR2004Ker95; 2004(1)KLT235

Judge : G. Sasidharan, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 115; Constitution of India - Article 227

Appeal No. : C.R.P. No. 1230 of 2003

Appellant : Thilakan

Respondent : Kunhalankutty

Advocate for Def. : T. Krishnan Unni,; K.K. Mohammed Ravuf, Advs. and; M. La

Advocate for Pet/Ap. : V. Giri, Adv.

Judgement :
ORDER

G. Sasidharan, J.

1.The main question which arises for consideration is whether a revision will lie against the judgment in a civil miscellaneous appeal filed challenging the order made by the trial court in an application for temporary injunction.

2. Section 115 of the Civil Procedure Code which deals with the revisional powers High Court is having was amended in 1976 and before the amendment there was no restriction on the powers of the High Court and any order made by any Court subordinate to it was liable to be revised if there was any of the circumstances mentioned in that section. The order of a subordinate Court should be revised by the High Court if the subordinate Court appeared to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in exercise of its jurisdiction, illegality or with material irregularity.

3. By the amendment made in 1976 Section 115 was divided into two sub-sections. Sub-section (1) retained the provisions in the original Section 115 and a proviso was also added to it. The proviso added was that the High Court shall not, under that 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 proceeding, or the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party whom it was made. Sub-section (2) was added by the amendment in 1976 as a result of which a restriction on the power of the High Court to revise an order was imposed. What Sub-section (2) of Section 115 said was that the High Court shall not, under the section, vary or reverse any decree or order against which an appeal could be filed either to the High Court or to any Court subordinate thereto. Even before amendment of the section in 1976 there was a restriction that the High Court could not exercise revisional powers in cases where the order was one against which an appeal could be filed. Before the amendment the position was that the High Court was not having revisional powers in cases where an order was one against which an appeal could be filed in the High Court. By the amendment in 1976 a change was made to the effect that the High Court will not be having the power of revision when an appeal could be filed against that order either to the High Court or to any Court subordinate to it. The position after the above amendment was that the High Court shall not under that section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto. So, the position till the amendment in 1976 was that the High Court was having the power to exercise revisional powers in respect of orders even though appeal was

maintainable against those orders to any Court subordinate to the High Court.

4. Section 115 of the Civil Procedure Code was further amended by Act of 1999. By that amendment proviso to Section 115(1) was restructured and Sub-section (3) was added. There was an explanation in Section 115 which said that the expression 'any case which has been decided' includes any order made or any order deciding an issue, in the course of a suit or other proceeding. That explanation was retained in Section 115 even after the amendment in 1999. There was also change in the proviso to Sub-section (1) and Clause (b) of the proviso was deleted. Clause (a) of the old proviso was merged in the amended proviso. Clause (b) of the proviso which was deleted by the 1999 amendment said that the High Court shall not, under the 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 allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made. That part of the proviso which was there till 1999 is not there now in the section. Clause (a) of the proviso which said that the High Court shall not vary or reverse any order except where the order if it had been made in favour of a party applying for revision would have finally disposed of the suit or other proceeding merged with the present proviso in which there are no sub-clauses.

5. After the amendment of the section in 1999, the High Court is not having the power of revising an order made in the course of a suit or other proceeding even if the order it' allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Sub-section (2) which says that the High Court shall not, under the section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto is retained in the section even after the amendment of 1999. A new Sub-section (3) was added which said that a revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or proceeding is stayed by the High Court.

6. In 1976 for the first time restriction was imposed in filing application or revision against interlocutory orders. In 1999 Section 115 was further amended by

imposing some more restrictions in filing revision. The proviso added by amendment of 1976 was to limit the power of revision to only such interlocutory orders which if decided in favour of the petitioner would have finally disposed of the suit or proceedings or if allowed to stand is likely to cause irreparable injury or failure of justice. The above restrictions were in addition to the restrictions which were there in Sub-section (1) that a revision application against an interlocutory order must satisfy the Clauses (a), (b) or (c) of Sub-section (1) and also either of the two conditions in the proviso. In 1999 the section was further amended in such a way as to further restrict the scope of revision of interlocutory orders. The ground which was there in Section 115 for revising an order that the order if allowed to stand was likely to cause irreparable injury or failure of justice had been omitted. Now an order cannot be revised on the ground that if the order is allowed to stand it is likely to cause irreparable injury or failure of justice. The position is that a revision against an order will be maintainable only if it appears that any of the circumstances mentioned in Sub-section (1) exists arid the order is of such a nature that if it were made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

7. Sub-section (1) of Section 115 says that the High Court may call for the record of anycase which has been decided by any Court subordinate to such High Court and inwhich no appeal lies thereto, and if any of the three circumstances mentioned in thatsub-section is there the High Court may make such order as it thinks fit. The recordscalled for by the High Court as provided in Sub-section (1) have to be that of a case whichhas been decided by a Court subordinate to the High Court. In the explanation to thesection it is said that the expression 'any case which has been decided' includes anyorder made or any order deciding an issue in the course of a suit or other proceeding.Sub-section (1) does not say that the Court will have to exercise power of revision on theapplication of the party aggrieved by the order. But, on the other hand, the provisomentions about party applying for revision and that would indicate that the provisobecomes applicable when there is an application by a party for revising an order.When there is an application filed by a party for revising an order made by a subordinateCourt or an order made deciding an issue in the course of a suit or other proceedingthe Court will not entertain the revision if the order had been made in favour of theparty

applying for revision would have finally disposed of suit or other proceedings. Itis also necessary that for applying the proviso the order made must be in the course ofa suit or proceeding thereby meaning that the order made should not be an order bywhich the suit or other proceedings is finally disposed of. The power of revision isthere with the High Court and for exercising that it is not necessary that there willhave to be an application by anybody.

8. In Shiv Shakti Co-operative Housing Society v. Swaraj Developers (2003 (2) KLT 503 (SC)) the Supreme Court said that Section 115 is essentially a source of power for the High Court to supervise the subordinate Courts and it does not in any way confer a right on a litigant aggrieved by any order of the subordinate Court to approach the High Court for relief. There is no substantive right for filing a revision. It is well accepted proposition of law that the right of appeal is a substantive right. But there is no such substantive right in making an application under Section 115 of the Civil Procedure Code. In Shiv Shakti's case (supra) the Supreme Court said that a plain reading of Section 115 as it stands now makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. The Supreme Court went on to observe that if the answer is 'yes' then revision is maintainable and if the answer is 'no' revision is not maintainable. If the impugned order is of interim nature or does not finally decide the suit or other proceedings or the order, if it were made in favour of the party applying for revision, would not have finally disposed of the suit or proceedings revision will not be maintainable.

9. In this revision the judgment in a civil miscellaneous appeal is under challenge. The first respondent in this revision filed O.S. 42/2002 in the Munsiff's Court, Parappahangadi for injunction. Along with the suit an interlocutory application was filed for temporary injunction for restraining the petitioner from conducting Peeyusha Bar in the plaint schedule property and the second respondent who was the second defendant from granting licence or renewing licence granted to the petitioner for conducting the bar. The learned Munsiff dismissed the application. The first respondent is this revision filed Civil Miscellaneous Appeal No. 5/2002 in the Court of the Subordinate Judge, Tirur. The learned Sub Judge allowed the appeal on setting aside the order of the trial Court and granting temporary

injunction restraining the petitioner from conducting the bar in the plaint schedule property. Rule 13(3) of the Foreign Liquor Rules provides that FL-3 Licence issued to hotels and restaurants for sale of foreign liquor should not be within 200 meters from educational institution, temple, church, mosque or burial ground. The appellate Court, on the basis of the materials available on record, came to the conclusion that the bar was within a distance of 200 meters from G.M.U.P. School, Kottakkal and granted the temporary injunction prayed for. This revision is against the judgment in civil miscellaneous appeal in which the appellate Court was considering the question whether the trial Court was correct in dismissing the application for temporary injunction. The civil miscellaneous appeal was no doubt from an interim order made by the trial court to be in force during the pendency of the suit.

10. Interlocutory application filed in the trial Court was disposed of by an order. Civil Miscellaneous Appeal was disposed of by a judgment. Proviso to Section 115 mentions only about order and there is no mention in that section about judgment. So, it is necessary to consider whether the judgment pronounced by the trial Court in civil miscellaneous appeal will also come within the ambit of the word 'order' used in Section 115. In the Civil Procedure Code in Section 2(14) it is said that 'order' means the formal expression of any decision of a civil Court which is not a decree. Decree is defined in Section 2(2) and it reads as follows:

(2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final'.

11. It is clear from the definition of order that an order is different from a decree. Coming to the definition of judgment occurring in Section 2(9) it means the statement given by the Judge on the grounds of a decree or order. It is clear from the definition of judgment that there can be a judgment when a decree or order is made and the judgment is the statement given by the Judge regarding the grounds of a decree or order. That would indicate that when an order is made by a Court there could be a judgment containing statement given by the Judge on the grounds of the order. In Adimali St. Pauls Yakkobaya Suriyani Church v. Ithappiri (1971 KLT 889 = AIR 1972 Kerala 217) a learned Judge of this Court referring to Sub-section (2) of Section 104 which provided that no appeal shall lie from any order passed in appeal under that section considered the question whether leave for filing a further appeal before a Division Bench against the decision taken by a learned Judge in civil miscellaneous appeal could be granted. The contention that Section 104(2) would apply only to orders passed in appeal and not to judgments as in the case of a civil miscellaneous appeal was raised by the learned Judge. The learned Judge in the above said decision referring to the definition of order and judgment in the Code held that the judgment of the Court in civil miscellaneous appeal has to be construed as an order only. The same view was taken by another learned Judge of this Court in the decision in Abdul Karim v. Receiver (1971 KLT 469 = AIR 1972 Kerala 95). In the above decision referring to the definition of order, judgment and decree available in the Civil Procedure Code this Court held that there is a judgment and a decree when a suit is disposed of and there is a judgment and an order when a decision is rendered by the civil court except when finally determining the rights of the parties in a suit. The judgment pronounced by the appellate Court disposing of the civil miscellaneous appeal can be said to be one in which there is a judgment and an order made when a decision is rendered in the civil miscellaneous appeal. The judgment made in civil miscellaneous appeal will come within the ambit of the term 'order' used in the proviso to Section 115(1).

12. Proviso mentions about order made by a Court in the course of a suit or other proceeding. The term 'other proceeding' used in the proviso will not be a proceeding in the suit. The use of the word 'other' as a prefix to the term 'proceeding' would indicate that the proceeding made mention of in the proviso is a

proceeding other than a suit. Hence, it is not open to contend that an order made in an application for temporary injunction has to be treated as an order by which the proceedings for granting temporary injunction was finally disposed of. An order by which an application for granting temporary injunction is disposed of either dismissing it or granting the temporary injunction can only be an order made in the course of a suit. That order if it had been made in favour of the party applying for revision can never have the effect of finally disposing of the suit. When the impugned judgment was made by the appellate Court the civil miscellaneous appeal which was pending before the appellate Court came to an end. Even though at the time when the judgment was pronounced the civil miscellaneous appeal was disposed of, what was considered in the civil miscellaneous appeal was the question whether the plaintiff in the suit was entitled to get an interim order in the suit. In the present case the trial Court found that the first respondent, the plaintiff was not entitled to get the temporary injunction. In the civil miscellaneous appeal the question whether the first respondent was entitled to get temporary injunction till the disposal of the suit was considered and it was found that he was entitled to get an interim order. The appellate Court found in the judgment in the appeal that the first respondent was entitled to the interim relief in the suit. What was being considered in the civil miscellaneous appeal was regarding granting of an order of interim nature.

13. In Nagorao v. Narayan N. Yerawar (AIR 2003 Bombay 178) a learned Judge of the Bombay High Court referring to the decision in Laxmikant V Patel v. Chetanbhat Shah (AIR 2002 SC 275) held that the orders under Order 39 are temporary or interlocutory in nature. In Terene Traders v. R.J. & Co. (AIR 1987 SC 1492) which was referred to in the decision of the Bombay High Court also it was held that the orders passed under Order 39 are temporary or interlocutory in nature. In the Bombay decision contention was raised that even though order made under Order 39 Rules 1 and 2 was interlocutory after an appeal is filed under Order 43 CPC the appellate order is no longer an order either in suit or proceedings and therefore is open for revision. The Bombay High Court did not accept the above contention raised in the case and held that an order granting or refusing injunction is appealable under Order 43 Rule 1 and the appeal is a contention of the proceedings and an order granting injunction if maintained in

appeal merges into the appellate order and if reversed ceases to exist. The Bombay High Court went on to observe that even that order of the appellate court continues to be temporary and that order can only be an interim order. It was held in the above decision that a revision application whether against an appellate order or original order granting or refusing injunction is not maintainable after 1.7.2002, the date on which the amendment to Section 115 came into force.

14. The same view was taken by a Division Bench of the Madhya Pradesh High Court in Surajmal v. Sunderlal, (2003) 6 ILD 412 (MP). In the above decision it was held that after 1.7.2002 no revision will lie against an order passed in appeal under Order 43 Rule 1 of C.P.C. in affirmance or otherwise of the order passed in the course of suit or other proceedings on an application for temporary injunction under Order 39 Rules 1 and 2 of the Civil Procedure Code. Reason given by the Court for holding so is that the appeal in such cases has a limited object of testing the correctness or otherwise of the interim order passed in the course of suit or proceeding without in any manner affecting final disposal of the suit and hence the order passed in appeal would fall within the purview of proviso to Sub-section (1) of Section 115.

15. In Sultan Educational Society v. M.S. Ali Khan, (2003) 7 ILD 1105 (AP), the question arose whether a revision will be maintainable against an order by which a civil miscellaneous appeal was disposed of. A civil miscellaneous appeal was filed against an order made by the trial Court in the course of a suit under Order 39 Rules 1 and 2 C.P.C. The Court said that the order by which the appeal was disposed of was not in the nature of finally disposing of the suit or other proceedings and hence in the light of the amendment made to Section 115 Civil Procedure Code a revision was not maintainable against the order by which civil miscellaneous appeal was disposed of. Revision will not lie against the decision by which a civil miscellaneous appeal filed challenging an order made by the trial Court under Order 39 of the Civil Procedure Code is disposed of.

16. This is a case in which the trial court refused to grant the temporary injunction and the appellate Court in civil miscellaneous appeal granted the injunction prayed for by the first respondent, the plaintiff. On going through the judgment which is

impugned it is seen that the appellate Court made an order granting temporary injunction till the disposal of the suit by taking into account the materials available on record. Even though it is found that the revision against the judgment in civil miscellaneous appeal is not maintainable this Court may be justified in invoking powers under Article 227 of the Constitution. On going through the order there is nothing to show that the order made by the appellate Court in disposing of the civil miscellaneous appeal is in any way perverse or illegal. There is nothing to show that there was error of jurisdiction which would warrant exercise of powers under Article 227 of the Constitution. This Court is not expected to make a reappraisal of the evidence available on record and to decide whether the decision of the appellate Court is correct or not on facts. For the above reasons, the petitioner is not entitled to the reliefs prayed for in the petition.

In the result, the revision is dismissed.