**Peter P.O. Vs. Sara**

**Peter P.O. Vs. Sara**

**SooperKanoon Citation** : sooperkanoon.com/730789

**Court** : Kerala

**Decided On :** Sep-27-2006

**Reported in** : AIR2007Ker81

**Judge** : V.K. Bali, C.J.,; Kurian Joseph and; K. Balakrishnan Nair, JJ.

**Acts** : Family Courts Act, 1985 - Sections 7, 7(1), 7(2), 10 and 10(1); Kerala High Court Fees and Suits Valuation Act, 1960; Kerala Court Fees and Suits Valuation Act, 1860 - Sections 51 and 61; Land Acquisition Act, 1894 - Sections 54; Kerala High Court Act, 1958 - Sections 3, 4 and 6; Code of Civil Procedure (CPC) , 1908 - Order 9, Rule 4; Code of Criminal Procedure (CrPC) , 1973 - Sections 125; Court Fees Act, 1870 - Sections 8

**Appeal No.** : RPFC No. 196 of 2005

**Appellant** : Peter P.O.

**Respondent** : Sara

**Advocate for Def.** : V. Rajendran and; George Varghese Kizhakkambalam, Advs.

**Advocate for Pet/Ap.** : D. Anil Kumar, Adv.

**Judgement** :

**Kurian Joseph, J.**

1. Adherence to precedent should be the rule and not the exception' says Benjamin N. Cardozo, Associate justice of the United States Supreme Court during 1932-38. 'The labour of Judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.... We have had ten Judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the Court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not. The Nature of the judicial Process-third Indian edition-2001). In these days of frequent hesitation for the Judges to follow the track, these words of wisdom give us some good guidance. Not that there is no exception to this principle in the words of the same author, 'when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.' With this prelude, we shall now discuss some general principles of judicial decorum and legal propriety in the background of the cases referred by a learned single Judge, despite there being binding decisions.

2. In the Family Court Revision Petition, R.P. (FC) No. 196/05, a minor child represented by her mother filed a petition before the Family Court, Ernakulam for enhancement of maintenance. The petition was dismissed for default. Steps were taken under Order IX, Rule 4 of the Code of Civil Procedure read with Section 7 of the Family Courts Act for restoration which was allowed by the order impugned in the revision petition. One of the main contentions taken in the revision petition is that in view of the Full Bench decision of this Court in Sathyabhama v. Ramachandran 1997 (2) KLT 503 : 1997 Cri LJ 4306 (FB) wherein it was held that proceedings under Chapter IX of the Code of Criminal Procedure are criminal proceedings, the restoration petition is not maintainable. It is seen that without reference to the Full Bench decision a learned single Judge of this Court in Kunhimohammed v. Nafeesa 2003 (1) KLT 364 : 2004 Cri LJ 1000 after referring

to various decisions of other High Courts held that the proceedings under Section 125 of the Code of Criminal Procedure (Chapter IX) stands on a different footing and it is civil in nature. Therefore, the learned single Judge in these cases felt that there is an 'important question of law to be decided by a Larger Bench. The two relevant paragraphs in the reference order read as follows:

5. The question that arises for consideration, therefore, is, to meet the ends of justice and expediency of the proceedings under Section 125 Cr. P.C. whether a Family Court, while exercising the powers under Chapter IX of the Code of Criminal Procedure can restore a petition, which was dismissed for default, either exercising its inherent power, or applying the provisions under Section 10 of the Act.

This, in my opinion, is an important question of law, which is to be considered by a larger Bench, in view of the Full Bench decision in Sathyabhama v. Ramachandra cited above and the decisions of various other High Courts on the point. Hence, place this matter before the Hon'ble the Chief Justice for appropriate orders of posting.

3. At the outset, it has to be noted that the issue considered by the learned single Judge in Kunjimohammed's case 2004 Cri LJ 1000 (supra) had been considered by the Full Bench in Sathyabhama's case 1997 Cri LJ 4306 (supra) and it has been held by the Full Bench that (para 6 of Cri LJ):

There is a specific deeming provision which states that while exercising the jurisdiction under Section 7 (1), the Family Court shall be deemed to be a District Court or as the case may be a Subordinate Civil Court depending upon the nature of the suits or proceedings before it. There is also further deeming provision in Section 10(1) which states that while exercising jurisdiction under Section 7(1) Family Court shall be deemed to be a 'Civil Court' for the purpose of the provision of the Code and shall have all the powers of such Court. The restricted deeming provision in our view would clearly indicate that Family Court can be deemed to be a Civil Court only while exercising the jurisdiction conferred on it under Section 7(1) and disposing of suits or proceedings enumerated in the Explanation to Section 7(1), in accordance with the provision in the CPC. As a corollary we think,

it must follow that while exercising jurisdiction under Section 7(2)(a) in accordance with the provisions of the Cr. P.C. Family Court cannot be deemed or treated as a Civil Court.

Section 7(2)(a) of the Family Courts Act provides for the exercise of jurisdiction by the Family Court, of a Magistrate of the First Class under Chapter IX of the Cr. P.C. relating to maintenance. The provision reads as follows:

(7) Jurisdiction -- (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise -

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974).'

Thus, it is patently clear that Kunhimohammed's case 2004 Cri LJ 1000 (supra) is an erroneous decision, rendered per incuriam and hence a precedent sub silentio. The same is not the law, in view of the Full Bench decision referred to above. Having come across such a decision, we overrule the decision of the learned single Judge in Kunhimohammed v. Nafeesa 2003 (1) KLT 364 : 2004 Cri LJ 1000. The proceedings for maintenance before the Family Court under Section 7(2)(a) of the Act is criminal in nature as held by the Full Bench in Sathyabhama's case 1997 Cri LJ 4306 (supra).

4. In the other set of cases, reference is on the disputed question as to whether ad valorem court-fee is payable in Land Acquisition Appeals. That also is a point no more res integra concluded by a Full Bench decision of this Court in Balakrishnan Nambiyar v. Madhavan 1979 KLT 843 : AIR 1979 Ker 40 (FB) wherein, in unequivocal terms it was held that court-fee is liable to be paid on an ad valorem basis on the compensation amount the appellant laid the claim in the appeal, under Section 51 of the Kerala High Court Fees and Suits Valuation Act, 1960. It is also to be see that a Division Bench of this Court in Jose v. District Collector 2005 (4) KLT 207 : AIR 2006 Ker 45 after refer ring to the Full Bench decision in Balakrishnan Nambiyar's case (supra) has held that under Section 51 of the Kerala Court Fees and Suits Valuation Act, an appeal in terms of Section 54 of the

Land Acquisition Act is chargeable with ad valorem court-fee. It is significant to note that the learned single Judge has referred to both the Full Bench as well as the Division Bench decisions referred to above, in the reference order and yet a doubt was entertained and that too in a case argued by the same learned Counsel on the very same point and lost before the Division Bench, as can be seen from the reference order itself. To quote-

2. In a similar occasion, Adv. Mr. K. G. Balasubramanian has challenged that in a land acquisition appeal, no ad valorem court fee need be paid. Therefore, the matter was referred to the Division Bench. As per the order dated 30-8-2005, applying and accepting the principle contained in Balakrishnan Nambiyar v. Madhavan 1978 KLT 843 the Division Bench held that 'the word 'awarded' occurring in Sction 51 of the Court-fees Act has to be given a wide and generic sense as meaning 'ordered to be paid'. The Division Bench, therefore, further held that under Section 51 of the Kerala Court Fees and Suits Valuation Act, in short 'the Act', the appellant has to pay court-fee on the appeal, which shall have to be computed in terms of Article 1 in Schedule 1 of the Act.' (The Division Bench order dated 30-8-2005 is the reported decision in Jose v. District Collector AIR 2006 Ker 45 (supra).

3. When the matter came up before me, the learned Counsel submitted, relying on Section 8 of the Court Fees Act, 1870, which had been adopted in Section 61 of the Act, that the former is not a charging Section, and therefore, there being no schedule or article contained in it, no court-fee can be levied at the time of preferring a land acquisition appeal. The counsel relied on decisions reported in Aljaz Uddin v. Taxing Officer AIR 1966 Allahabad 227 : Hirji Virji Jangbari v. Government of Bombay AIR 1945 Bombay 348 : Moolesh Jain v. Imumuddin Ansari AIR 1968 Cal 364 in support of his contention which had not been considered by the Division Bench of this Court.

In that view of the matter, the learned single Judge was of the view that the issue requires consideration by a Larger Bench. The relevant paragraph 9 reads as follows:

9. Various High Courts of this Country, as discussed above, had held that Section 8 of the Court Fees Act, 1870, not being a charging section, as held in paragraph 7 in Sahadu Gangaram Bhagadi's case AIR 1971 SC 1897 supra, and there being no relevant provision for realisation of the fee, if Section 51 is construed as not a charging section, akin to that of Section 8 of the Central Act, the contention of the counsel that no court-fee is liable to be paid requires reconsideration. Therefore, despite the conclusion arrived at by a Decision Bench of this Court in Jose v. District Collector, Thrissur, as per the order dated 30-8-2005, in an unnumbered L.A.A. I am of the opinion that the entire matter has to be gone through afresh, laying down an authoritative pronouncement on the subject.

Hence, I refer this matter for the consideration of the Honourable the Chief Justice, for placing before a Larger Bench of this Court for the discussions held above.

5. Adherence to precedents is a matter of judicial discipline. It is the linchpin of justice system. It is intended to secure uniformity and certainty on legal positions, based on the principle of judicial comity, otherwise it brings law as well as the system to disrepute, if not the Court. Thus ordinarily, a Court of coordinate jurisdiction is expected to follow the decision of a co-equal Bench. Refusal is only exception and to be exercised in exceptional circumstances, not merely because a different view is possible, but because the view expressed by the Court of coordinate jurisdiction is not merely wrong, but so clearly and seriously wrong that it cannot locally exist or when it is productive of public hardships or inconvenience, as observed by the Supreme Court in M. Chhagganlal v. Greater Bombay Municipality AIR 1974 SC 2009. Thus where a precedent is not followed and another decision rendered, in view of the conflicting position, the legal antinomy must be resolved by a Division Bench, Full Bench, Larger Bench, as the case may be, where one view would have to be formally overruled. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate Court. Overruling occurs when the appellate Court/larger bench declares in another case that the precedent case was wrongly decided and hence not to be followed. A decision is confirmed by the appellate Court in the same case and a principle is affirmed when the same is referred before the appellate Court or before a Court consisting of larger strength in another case. Decisions of co-equal bench are

either followed or distinguished. A decision is distinguished when a precedent is obnoxious or when the same is inapplicable to the fact situation arising in the case. Thus by distinguishing the precedential value of the decision distinguished is not lost. However, as cautioned by Prof. P. J. Fitzgerald in the IVth edition of Salmond on jurisprudence, 'Over-subtle distinguishing itself leads to uncertainty and brings the law into disrepute.' Decisions of other Courts with persuasive force are either followed, or not followed for reasons to be noted in the judgment. Dissenting is an expression and process of disagreement with the view/reasoning in the same judgment either by the Bench partner or the minority.

6. Though there are several decisions with regard to the propriety of the single Bench and Division Bench making incompetent references to the Larger Bench, since certain fundamental questions are also raised with regard to the interpretation oi Section 6 of the Kerala High Court Act, 1958, we shall examine the question on both aspects of propriety as well as legality. Section 3 of the Kerala High Court Act, to the extent reads as follows:

3. Powers of single Judge : The powers of the High Court in relation to the following matters may be exercised by a single Judge provided that the Judge before whom the matter is posted for hearing may adjourn it for being heard and determined by a Bench of two Judges.

Section 4 of the Act dealing with the powers of the Bench of two Judges, to the extent relevant reads as follows:

4. Powers of a Bench of two Judges :- The powers of the High Court in relation to the following matters may be exercised by a Bench of two Judges, provided that if both Judges agree that the decision involves a question of law they may order that the matter or question of law be referred to a Full Bench....

Section 6 of the Act reads as follows:

6. Cases to be heard by Full Bench under direction by Chief Justice :-- Notwithstanding anything contained in this Act, the Chief Justice may direct that any matter be heard by a Full Bench.

7. The expression 'adjourn' appearing in Section 3 has to be understood and given a narrow and restricted meaning as 'refer' as held by the Larger Bench consisting of seven Judges of this Court in the decision reported in Babu Premarajan v. Superintendent of Police 2003 (3) KLT 177 : AIR 2000 Ker 417 (FB). It is also held that reasons are to be stated for such adjournment of the case by the single Judge for being heard by the Division Bench. Such a power under Section 3 is not intended to avoid an otherwise inconvenient situation requiring deeper analysis etc. lest it should amount to abdication of judicial functions as held by the Larger Bench in Babu Premarajan's case (supra). Merely because a question raised in a case is important, the same cannot be ordered to be placed before the Division Bench, the single Judge is empowered, expected and bound to deal with such questions also. The expression 'question of law' appearing in Section 4 in the matter of exercise of power by a Division Bench for referring a matter to the Full Bench, was considered by the Full Bench in the decision reported in Cochin Malabar Estates and Industries v. State of Kerala 2002 (1) KLT 588 (FB), wherein it has been held that the provision is not intended to enable the Division Bench to refer every question by agreement between the Judges to the Full Bench. On the contrary, 'in our view, Section 4 of the Kerala High Court Act is intended to confer power on the Division Bench to refer a question of law to a Full Bench, where the Division Bench finds itself in a situation of being bound by the observations of an earlier Division Bench about the correctness of which it entertains serious doubt.... Another situation we may contemplate where a Division Bench may refer the matter to a Full Bench is when there are conflicting views expressed by Division Benches and the state of law has become uncertain.' The Full Bench also in unmistakable terms clarified that merely because single Judge had expressed a different opinion, the Division Bench cannot refer the matter to the Full Bench. The Division Bench ought to overrule the decision, if required in such circumstances. To quote,

it is an elementary proposition of the doctrine of precedents that law laid down by a single Judge is capable of being dissented from and overruled by a Division Bench. Thus, if a Division Bench comes across a proposition of law laid down by a single Judge, and if it differs therefrom nothing prevents the Division Bench from dissenting therefrom or overruling the judgment of a single Judge.

8. In Kannappan v. R.T.O. Ernakulam 1988 (1) KLT 902 a Division Bench of this Court considered the question as to whether the single Judge has power to refer a case to the Full Bench. It was held that,

2. There can be no 'hesitation' for a single Judge to follow a Division Bench ruling binding on the single Bench for, he is bound in law to follow the Division Bench decision. The fact that the views of the learned Judge did not find acceptance at the hands of the Division Bench does not mean that whenever the identical question is raised before the learned Judge the matter has to be again referred to a Division Bench till the views of the single Judge are endorsed by a Division or Full Bench. Brought up in the highest traditions of judicial discipline, this court cannot at any time swerve from the path of judicial decorum and propriety....

4. Under Section 3 of the Kerala High Court Act, a single Judge may adjourn a case for being heard and determined by a Bench of two Judges. But a single Judge has no power to refer a case to a Full Bench for that power is expressly reserved to a Bench of two Judges under Section 4 of the Act....

Thus under Section 3 of the Kerala High Court Act, single Judge may adjourn a case for being heard and determined by a Bench of two Judges. But single Judge has no power to refer a case to the Full Bench and that power is expressly reserved to a Bench of two Judges under Section 4 of the Act. A conjoint reading of the Bench decisions in Kannappan v. R.T.O., Ernakulam (Division Bench) (supra), Cochin Malabar Estates & Industries v. State of Kerala (Full Bench) (supra) and Babu Premarajan v. Supdt. of Police. AIR 2000 Ker 417 (Larger Bench) (supra) the legal position is well settled that a single Judge cannot refer a matter to a Full Bench. Only in limited circumstances and that too stating the reasons thereof, a reference is competent to the Division Bench. Except in such a situation, a single Bench is normally bound by the decision of another single Bench and definitely bound by the Division Bench and Larger Bench decisions of the same Court. At the risk of redundancy we may state that merely because a learned single Judge/Division Bench entertains another view or merely because another view is possible, the judgment shall not be distinguished. If the situation is so compelling, a reference for reasons and coining the question to be decided in

reference can be made. It may be fruitful to note that the reference Court is free to answer the question and send back the case for appropriate orders on merits. The Supreme Court as early as in 1960, had occasion to deal with the issue. In Mahadeolal v. Administrator General of W. B. AIR 1960 SC 936 it has been held as follows (para 19):

We have noticed with some regret that when the earlier decision of two Judges of the same High Court in Deorajin's case, 58 Cal WN 64 : AIR 1954 Cal 119 was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court.

In Tribhuvandas Purshottamdas Thakkar v. Ratilal Patel AIR 1968 SC 372 the Supreme Court held thus (Para 8):

Precedents which enunciate rules of law form the foundation of administration of justice under our system. It has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of Co-ordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of this Court. The reason of the rule which makes a precedent binding lies in

the desire to secure uniformity and certainty in the law.

To quote Blackstone,

It is an established rule to abide by former precedents when the same points come again into litigation : as well to keep the scale of justice even and steady and not likely to waver with every Judge's new opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter or vary from according to his private sentiments.

9. Regarding reference to larger Benches also, the Supreme Court had occasion to consider the matter, in a recent case in Pradip Chandra Parija v. Pramod Chandra Patnaik 2001 (10) JT (SC) 347 : AIR 2002 SC 296 wherein it has been held that whether a decision requires reconsideration is itself to be first decided by the Bench of co-equal strength. In other words, a bench of smaller strength cannot bypass the bench of larger strength and make a reference to a bench of still larger strength. To quote, para 6 of AIR:

In our view, judicial discipline and propriety demands that a bench of two learned Judges should follow a decision of a bench of three learned Judges. But it a bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a bench of three learned Judges setting out. as has been done here, the reasons why it could not agree with the earlier judgment. If. then the bench of three learned Judges also comes to the conclusion that the earlier judgment of a bench of three learned Judges is incorrect, reference to a bench of five learned Judges is justified.

10. Section 6 of the Kerala High Court Act confers on the Chief Justice being the master of the roster, to place any case before a Full Bench. That is a power to be exercised on the administrative side. It is not to be invoked on a reference. The plain purpose is only to enable the Chief Justice to place any matter before the Full Bench otherwise than on a reference, in the required contingencies like public interest, the interests of administration of justice, the exigencies of administration

of the institution etc. It is the absolute prerogative of the Chief Justice to distribute the work in the High Court and post any case before any Bench, subject of course to the provisions in the High Court Act. That power cannot be compelled to be invoked on a reference.

11. Accordingly, we hold that the reference in all the cases is incompetent since there are binding Full Bench and Division Bench decisions on all the points in the order of reference. It is for the single Judge to consider the matters in accordance with the principles laid down by us above and render the decision on merits. Reference is answered as above.