

A. Thaha Vs. Sumina @ Sumayya and Another

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Court : Kerala

Decided On : Dec-07-2011

Reported in : 2012(1)KLT39; 2012(1)ILR(Ker)104; 2012(1)KLJ369;
2012(1)KHC136

Judge : K.M. Joseph & a.M. Shaffique

Appeal No. : F.A.O.No.213 of 2011

Appellant : A. Thaha

Respondent : Sumina @ Sumayya and Another

Advocate for Def. : Sri. G.S. Reghunath

Judgement :

K.M. Joseph, J.

1. This is a First Appeal directed against an order passed under Order IX Rule 13. Apparently there was delay. The Application to Condone delay was dismissed. An order was passed by the court below dismissing the application under Order IX Rule 13 as belated. The matter stands posted before us. Sri. G.S. Reghunath, learned counsel for the respondents submits that the matter is to be heard by the Single Bench under The Kerala High Court Act. The Registry has stated as follows:

“Kindly see Section 3(13)(d) of the Kerala High Court Act. As per the same, the powers of the High Court in relation to the following matters may be exercised by a Single Judge, that an appeal from an order under Section 104 of the CPC, except an order of the kind mentioned in Clause (h) of sub-section (1) of the said section or in Clauses (c), (d) or (j) of Rule 1 of Order XLIII of the First Schedule to the said Code. Since this FAO is filed under Order XLIII Rule 1(d) of CPC the same was posted before the Hon’ble Division Bench. Page 5 paragraph 7 of FAO 281/10 may also kindly be perused in this regard. Decision in FAI 281/10 is herewith for reference.”

2. In the Kerala High Court Act, Section 3 deals with the powers of the Single Judge. Section 3(13) deals with Appeals which may be heard by the Single Bench. We extract Section 3(13) in so far as relevant 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:-

(1) to (12)

(13) An appeal -

(b) from an original decree or order in any suit or other proceeding, where the amount or value of the subject-matter of the suit or other proceeding does not exceed one lakh rupees;

(d) from an order under Section 104 of the Code of Civil Procedure, 1908, except an order of the kind mentioned in Clause (h) of sub-section (1) of the said section or in Clauses (c), (d) or (j) or Rule 1 of Order XLIII of the First Schedule to the said Code;

3. A Bench of this Court has in F.A.O. No.281/2010 considered the question in a matter where an Appeal arose from an order or remand. The court, inter alia, held as follows:

“4. It must be said in all fairness that when the matter again came up for consideration, learned counsel appearing for the petitioner submits that he too feels that the appeal should be heard by a Single Bench of this Court. Learned Amicus Curiae was also of the same opinion. The reasons are as follows:

The forum of appeal in a civil case is not determined by the Kerala High Court Act. Rather, it is controlled by the provisions of the Kerala Civil Courts Act, 1957. Sections 12 and 13 are the relevant provisions of the Kerala Civil Courts Act. Going by Section 13 of the Civil Courts Act, when the value of the subject matter of the suit does not exceed Rs. Two Lakhs, an appeal from the original decree or subordinate court lies to the District Court. In the case of original decrees passed by the Munsiff Court, that too lies to the District Court or the Sub Court as the case may be.

7. However, the procedures before the High Court are governed by the Kerala High Court Act and Rules. Section 3(13)(b), (d) and (e) of the Kerala High Court Act 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:-

(1) to (12)

(13) An appeal-

(a)

(b) from an original decree or order in any suit or other proceeding, where the amount or value of the subject-matter of the suit or other proceeding does not exceed one lakh rupees.

(c)

(d) from an order under Section 104 of the Code of Civil Procedure, 1908, except an order of the kind mentioned in Clause (h) of sub-section (1) of the said section

or in Clauses (c), (d) or (j) or Rule 1 of Order XLIII of the First Schedule to the said Code.;

(e) from an appellate decree or order.”

Going by Section 4 of the Act, the Division Bench of the High Court can exercise the jurisdiction exercised by a Single Bench. Going by Section 3 (13)(d), except in the cases mentioned therein, an appeal lies to the Single Judge. The present appeal being one under Order 43 Rule 1(u) does not fall within the above prohibition. So, the present appeal is within the ambit of Section 3(13)(d). In the case on hand, it is not in dispute that the Second Appeal, if any, from the decree of the lower appellate court lies before the Single Bench. Therefore, going by the provisions of the Civil Courts Act as well as the Kerala High Court Act, it is evident that the present appeal has to be dealt with by a Single Bench initially.”

4. It is accordingly that the office placed the Appeal before this Division Bench. Sri. G.S. Reghunath, learned counsel for the respondents would submit that in so far as Section 3(13)(b) provides that a Single Judge may hear an Appeal from original decree, Suit or other proceedings where the amount or value of the subject matter does not exceed Rs. 1,00,000/- (rupees One lakh only) and in so far as the Suit from which this Appeal arises, is valued at Rs.40,000/- (Rupees Fourty Thousand only), it is the learned Single Judge who can hear the Appeal.

5. We are unable to agree. This is for the reason that we are of the opinion that Section 3(13)(b) should be read in harmony with Section 3(13)(d). Under Section 3(13)(d), a Single Judge is to hear the Appeal from an order under Section 104 of the Code of Civil procedure except certain order which are mentioned. The excepted categories of orders passed include an order under Clause (d) Order XLIII of the First Schedule to the Code of Civil Procedure. Order XLIII Clause (d) provides for an Appeal against an order passed under Rule 13 of Order IX rejecting the application in a case, which is open to appeal for an order to set aside the decree passed, ex parte.

6. The present Appeal filed is against an order passed under Clause (d) of Order XLIII. If it is so, under Section 3(13) Clause (d) such an Appeal cannot be heard by

a Single Bench and can only be heard by a Division Bench. According to us, in order that an Appeal from a decree or an order be heard under Section 3(13)(b), it is subject to the further condition which inevitably flows from Section 3(13)(d). In other words, if an order is passed under Clause (d) of Order XLII of the Code of Civil Procedure, then, even if the amount or value of the subject matter of the suit or proceedings is below Rs.1,00,000/- (Rupees One Lakh only), it can be heard only by the Division Bench.

7. In view of the specific carving out of an order passed under Clause (d) from the ambit of power of the Single Judge, an Appeal from such an order can only be heard by a Division Bench. In other words, by way of harmonizing Section 3(13)(d), the following result necessarily follows. If an Appeal is to be heard on the basis of the valuation provided under Section 3(13) it can only be done in cases where under Section 3(13)(d) an order is one from which an Appeal can be heard by the Single Bench. If under Section 3(13)(d) an Appeal cannot be heard by the Single Bench and therefore, only be heard by the Division Bench, then, even if the valuation is below Rs.1,00,000/- (Rupees One Lakh only), the matter can be heard only by the Division Bench.

In such circumstances, we uphold the report of the office and hold that the Appeal is to be heard by the Division Bench.

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