

**Balan Vs. Devaki**

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**Court :** Kerala

**Decided On :** Jun-07-2011

**Judge :** Thomas P. Joseph

**Appeal No. :** W.P.(C).No.2925 of 2010

**Appellant :** Balan

**Respondent :** Devaki

**Judgement :**

1. Maintainability of this writ petition is challenged by learned counsel for respondents on the ground that order refusing to set aside the ex parte decree is subject to a revision under Section 115 of the Code of Civil Procedure (for short, "the Code") and hence writ petition under Article 227 of the Constitution would not lie. Learned counsel for petitioner maintain that writ petition is maintainable as the order under challenge if passed in favour of petitioner would not have terminated the proceedings.

2. Petitioner wanted the ex parte decree against him to be set aside and filed I.A.No.1594 of 2007 in O.S.No.75 of 2002 with an application to condone the delay. Learned Munsiff dismissed application to condone the delay and consequently the application to set aside the ex parte decree. Petitioner preferred CM. Appeal No.23 and 24 of 2008 before learned Sub judge, Tirur. The said appeals were dismissed in confirmation of the order of learned Munsiff. Question

is whether order of the learned Munsiff which has been confirmed by the learned Sub judge is amenable to a revision under Section 115 of the Code or is subject to a writ petition under Article 227 of the Constitution.

3. To understand the contention it is necessary to refer to Section 115 of the Code. As per the said provision which stood before amendment by Amendment Act 46 of 1999 the proviso to Section 115 stated that High Court shall not under that provision vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where -

(a) 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

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

By the Amendment Act 46 of 1999 clause (b) of the proviso has been deleted and instead, sub section (3) has been incorporated which states that a revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceedings is stayed by the High Court. Sub section (1) of Section 115 of the Code states that the High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto. The Proviso deals with cases where orders are passed "in the course of a suit or other proceeding." Explanation added by Amendment Act 46 of 1999 also makes it clear that the proviso to Section 115(1) deals with orders passed in the course of a suit or other proceedings in that explanation states 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." It is therefore clear that the proviso to Section 115(1) is with regards to orders passed in the course of a suit or other proceedings. The proviso to subsection (1) or the explanation does not apply to orders other than those passed in the course of a suit or other proceeding. Orders passed otherwise than in the course of a suit or other proceedings come under Section 115(1). In this case an application was filed in the trial court to set aside the ex parte decree and to condone the delay in filing the application. Though the applications were

numbered as interlocutory applications (as if filed in a pending suit) fact remained that the suit had come to an end by the ex parte decree and the application was to set aside that ex parte decree. That cannot be taken as an order passed “in the course of a suit or other proceeding” coming within proviso to section 115(1) of the Code or its explanation. As such contention that the order under challenge is subject to a writ petition under Article 227 of the Constitution cannot be accepted. I accept the preliminary objection raised by learned counsel for respondents that the order is revisable as if it is a case decided and dismissed whatever be the reason thereof and hence revisable under Section 115 of the Code.

Hence petitioner has to take steps to convert this writ petition into a revision under Section 115 of the Code. Put up the case for admission after necessary corrections are made. Interim order will remain in force until then.

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