

## Sreekumaran Vasudevan Namboothiri Vs Vasudevan Narayanan Namboodiri and others

**Court:** High Court Of Kerala

**Date of Decision:** June 30, 1969

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 41 Rule 5

**Citation:** (1969) KLJ 631

**Hon'ble Judges:** T.C. Raghavan, J; E.K. Moidu, J

**Bench:** Division Bench

**Advocate:** K.N. Narayanan Nair, for the Appellant;

### Judgement

@JUDGMENTTAG-ORDER

T.C. Raghavan, J.

The appellant in the proposed appeal is a debtor; and he filed C.M.P. No. 384 of 1967 to amend the decree passed

by the High Court in A.S. No. 82 of 1956 (K) u/s 7 of Kerala Act XXXI of 1958. The petition was dismissed by a Single Judge; and the

appellant questions the correctness of the said order in the proposed appeal. The office has taken the objection that no appeal lies u/s 5 of the

Kerala High Court Act. Section 5 of the High Court Act provides for three types of appeals: (1) appeals against judgments or orders of a Single

Judge in the exercise of original jurisdiction, (2) appeals against judgments of a Single Judge in the exercise of appellate jurisdiction in respect of a

decree or order made in the exercise of original jurisdiction by a subordinate court and (3) appeals against judgments of a Single Judge in the

exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a subordinate court, if the Judge

who passes the judgment certifies that the case is a fit one for appeal. In other words, there is an appeal against a judgment or order of a Single

Judge in the exercise of original jurisdiction; there is an appeal against a judgment of a Single Judge in a first appeal; and there is also an appeal

against a judgment of a Single Judge in a second appeal of the Judge who disposes of the second appeal grants leave or certifies that the case is a

fit one for a further appeal. The question for us to consider is whether the order passed by a Single Judge in the civil miscellaneous petition for

amendment of the decree u/s 7 of Act XXXI of 1958 falls within any one of these categories mentioned above.

2. The order cannot fall within categories 2 and 3, because it appears fairly clear that the order is not one passed in the exercise of the appellate

power or the second appellate power of the Single Judge. Can it be said that the order falls under the first category as it is passed in the exercise of

the original power of the Single Judge ? To us it appears that an order passed u/s 7 of Act XXXI of 1958 is more an original order than an

appellate order. It cannot be doubted that an appeal lies against such an order refusing to amend the decree u/s 7 of Act XXXI of 1958 (vide

Varkey Mathew v. Velayudhan Pillai: 1965 KLT. 674). If an appeal lies, is the forum a Division Bench of this Court or the Supreme Court ? And

on this question we are of opinion that, since the order passed in the civil miscellaneous petition is in the exercise of the original jurisdiction of the

Single Judge, the appeal must lie to a Division Bench of this Court u/s 5 (i) of the High Court Act. Here we may refer to the Full Bench decision of

the Madras High Court in K.G. Rangaswami Chettiar and Co. v. K.R. Eswaramurthy Goundar (A.I.R. 1954 Mad. 1053). In that case a Single

Judge passed an order under O.41 R. 5 of the CPC in a first appeal; and the question before the Full Bench was whether such an order was

appealable under clause 15 of the Letters Patent. The Full Bench held that the order would amount to a judgment under clause 15 of the Letters

Patent. Such an order, in our opinion too, may amount to a judgment under clause (ii) or clause (iii) of section 5 of the High Court Act as the order

is passed in a first appeal or a second appeal. The further question may then arise whether such an order is appealable without the leave of the

Single Judge if the order is passed in an interlocutory application in a second appeal. We do not propose to answer these questions in this case;

and for the purpose of this case, it is enough if we hold that an order u/s 7 of Act XXXI of 1958 is in the nature of an original order. And we do

so. The proposed appeal to a Division Bench is competent.