

(1969) 06 KL CK 0006

High Court Of Kerala

Case No: C.M.P. No. 384 of 1967 in A.S. 82 of 1956 (K)

Sreekumaran Vasudevan
Namboothiri

APPELLANT

Vs

Vasudevan Narayanan
Namboodiri and others

RESPONDENT

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.