(2013) 01 KL CK 0121

High Court Of Kerala

Case No: O.P. (C) No. 3593 of 2011 (O)

Muthuswamy		APPELLANT
	Vs	
P.A. Noorudheen and P.V. Gangadharan		RESPONDENT

Date of Decision: Jan. 4, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1, Order 9 Rule 13, 104, 115, 115(1)
- Constitution of India, 1950 - Article 227
- Limitation Act, 1963 - Section 5

Citation: (2013) 1 ILR (Ker) 417 : (2013) 1 KHC 248 : (2013) 1 KLJ 436 : (2013) 1 KLT 257

Hon'ble Judges: Thottathil B. Radhakrishnan, J; A.V. Ramakrishna Pillai, J

Bench: Division Bench

Advocate: Jacob Sebastian, for the Appellant; K. Narayanan (Parur) and Sri Alunkal George, for the Respondent

Judgement

A.V. Ramakrishna Pillai, J.

Whether an order refusing to set aside an ex parte decree in a suit which was affirmed in appeal under Order XLIII Rule 1 of the Code of Civil procedure, for short, the Code, be challenged by taking recourse to revisional jurisdiction of this Court u/s 115 of the Code is the limited question which we are called up on to answer in this reference. Ex parte decree was passed in the original suit against the petitioner who is the defendant. He filed application under Order IX Rule 13 of the Code to set aside the ex parte decree along with an application to condone the delay u/s 5 of the Limitation Act alleging that he was laid up due to illness while his presence was required by the trial court. The trial court by a common order dismissed both the applications. The petitioner carried the matter in appeal before the District Judge, Palakkad, who by the impugned order, dismissed the appeal. The petitioner challenged the order under Article 227 of the Constitution of India.

2. The maintainability of the same was challenged by one of the respondents on the ground that the order refusing to set aside the ex parte order is subject to revision u/s 115 of the Code. The learned Single Judge, before whom the matter came up, expressed the view that the term "proceeding" contained in the Explanation to Section 115 of the Code would take in steps under Order IX Rule 13 of the Code and in the suit as well. The learned Single Judge was of the view that the proceedings are not finally terminated by setting aside the ex parte decree, but the suit stands resurrected on file for disposal on merits. The learned Single Judge after making a reference to the decision in Thilakan Vs. Kunhalankutty, also expressed doubt regarding the correctness of the dictum laid down by this Court in Balan Vs. Devaki, and recommended re-consideration of the issue by the Division Bench. Thus, the matter came up before us.

3. Arguments have been heard. We have also gone through the decision in Balan v. Devaki (supra). In that case, this Court while considering an identical situation examined the scope of the proviso to sub section (1) of Section 115 of the Code as well as the explanation thereto and held that the order of the appellate court in such cases is revisable u/s 115 of the Code.

4. In this context, it is quite apposite to read Section 115 of the Code with its legislative changes. Section 115 as it stood before the amendment of 1976 was as follows:

115. Revision.-- 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, and if such Subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

5. In the year 1976, Section 115 of the Code was amended, renumbering the original section as sub section (1). Apart from adding sub section (2), a proviso as under was added to sub section (1) :-

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings, 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.

The following explanation was also added:-

Explanation:- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit of other proceeding

6. The legislative intent for bringing out these changes can be gathered from the objects and reasons contained in the Bill of 1976. It reads as follows:-

Clause 43 (Original clause 45):- By clause 45 of the Bill, S. 115 of the Code was proposed to be omitted. The question whether it is at all necessary to retain S. 115 was carefully considered by the Committee. The Law Commission has expressed the view that in view of Art. 227 of the Constitution S. 115 of the Code is no longer necessary. The Committee however, feel that the remedy provided by Art. 227 of the Constitution is likely to cause more delay and involve more expenditure. The remedy provided in S. 115 is, on the other hand, cheap and easy. The Committee, therefore, feel that S. 115, which serves a useful purpose, need not be altogether omitted particularly on the ground that an alternative remedy is available under Article 227 of the Constitution.

The Committee however, feel that, in addition to the restrictions contained in S. 115, an overall restriction on the scope of application for revision against interlocutory orders should be imposed. Having regard to the recommendations made by the Law Commission in the Fourteenth and Twenty-seventh Reports, the Committee recommend that S. 115 of the Code should be retained subject to the modification that no revision application shall lie against an interlocutory order unless either of the following conditions is satisfied, namely.-

(i) that if the order were made in favour of the applicant, it would finally dispose of the suit or other proceeding: or

(ii) that if the order, if allowed to stand, is likely to occasion a failure of justice or cause an irreparable injury.

The Committee feel that the expression "case decided should be defined so that the doubt as to whether S. 115 applies to an interlocutory order may be set at rest. Accordingly, the Committee have added a Proviso and an Explanation to S. 115".- J.C.R. (Gaz. Of Ind., 1-4-76, Pt. II, S. 2, Exp. Pp. 804/10).

7. Again in the year 1999, the section was amended (it was made enforceable with effect from 1.7.2002). By the said amendment, the aforesaid proviso has been substituted by a new proviso and a new sub section (3) has been added. The proviso to sub section (1) now reads as follows:-

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit of other proceedings.

8. The meaning of the word "order" used in the proviso is "interim non-appealable order". That word is used thrice in the proviso, and it carries the same meaning. In respect of such an order, an exception has been engrafted in the proviso itself. Interim non-appealable orders coming within that exception would be revisable by the High Court. What was intended by the amendments introduced in the years 1976 and 1999 was to impose an overall restriction on the scope of application for revision against interlocutory orders in addition to the restriction already contained in Section 115. It was not the legislative intent to take away the remedy of revision against the final orders passed in appeal u/s 104 or Order XLIII Rule 1 of the Code. This legal position is not altered by the proviso. In other words, the revisional jurisdiction u/s 115 of the Code is available against the orders deciding finally the suit or other proceedings, where no appeal is provided and where the effect of order in revision would finally dispose of the suit or other proceedings. The revisional jurisdiction will not be exercised in respect of other orders ''deciding any case'' in the course of suit or other proceedings, though there may be an error, defect, irregularity or illegality in exercise of jurisdiction, where allowing revision would not finally dispose of the suit or other proceedings.

9. In Thilakan v. Kunhalankutty (supra) the question considered was whether a revision would lie against the judgment in a civil miscellaneous appeal filed challenging the order passed by the trial court in an application for temporary injunction. In that case, the trial court refused to grant temporary injunction and the appellate court in the civil miscellaneous appeal granted injunction as prayed for by the plaintiff till the disposal of the suit. There it was held that revision against the said judgment is not maintainable before this Court, in the light of the proviso to Section 115 (1) of the Code. That decision cannot be quoted as an authority for the proposition that all orders passed u/s 104 or Order XLIII Rule 1 of the Code are not subject to revision. Orders like the one impugned in this case are not covered by the proviso to sub section (1) of Section 115 of the Code. So long as the legal position, that revision u/s 115(1) is maintainable against final appellate orders if the conditions provided therein are satisfied, stands unaltered, Balan v. Devaki (supra) lays down the correct law. Reference answered accordingly.

In the result, the petitioner is directed to take steps to convert this petition into a revision u/s 115 of the Code. The case shall be put up for admission after necessary corrections are made. Till that exercise is completed, the interim order granted by this Court will stand.