Kerala High Court
Thomas K. Varghese vs The Family Court on 28 April, 2004
Equivalent citations: I (2005) DMC 495, 2004 (3) KLT 1036
Author: C Joseph
Bench: C Joseph, A Basheer
JUDGMENT Cyriac Joseph, J.

1. This Writ Appeal is filed against the Judgment in O.P. No. 6500 of 2002 which was dismissed by the learned Single Judge. The appellant is the petitioner in the Original Petition and the respondents herein are the respondents in the Original Petition.

2. The petitioner Thomas K.Varghese and the second respondent Asha Mary Alexander are husband and wife. They professed the Christian religion and their marriage was solemnized at Jerusalem Marthoma Church, Nanthencode, Thiruvananthapuram on 25th May, 1995. The petitioner has his permanent residence at Ernakulam and he has been residing at Palarivattom, Ernakulam along with his parents in their own house. At the time of marriage the petitioner was employed at Ernakulam as Civil Engineer with M/s. Penta Group. The second respondent filed O.P. (I.D.A.) No. 942 of 1997 before the Family Court, Thiruvananthapuram praying for divorce on the ground of cruelty and desertion by the husband. She filed the case before the Family Court, Thiruvananthapuram claiming that she and her husband last resided together for a month at Thiruvananthapuram in her house and that the husband deserted her on 10th September, 1995 at her house at Thiruvananthapuram. The petitioner raised a preliminary objection regarding the territorial jurisdiction of the first respondent -(Family Court, Thiruvananthapuram) and a petition was filed praying that the preliminary objection may be heard first. The petitioner contended that he did not reside in the second respondent's house at Thiruvananthapuram for a month as alleged and that he was employed at Ernakulam during the relevant period. However by an order dated 15th January, 2000 the first respondent held that the preliminary objection would be considered at the time of trial. Hence the petitioner filed O.P. No. 11602 of 2000 before the High Court praying for a direction to the first respondent to decide first the preliminary objection regarding territorial jurisdiction. By Judgment dated 7th April, 2000 in O.P. No. 11602 of 2000 the High Court directed that the petitioner be allowed to adduce evidence on territorial jurisdiction and that the Family Court may pass an order on the question of jurisdiction first and then proceed with the matter expeditiously. After recording evidence on territorial jurisdiction and after hearing the parties on the preliminary objection regarding territorial jurisdiction the first respondent passed Ext.pl order dated 7th January, 2002 holding that the first respondent has territorial jurisdiction to entertain O.P. (I.D.A.) No. 942 of 1997 in view of the amendment to Section 3(3) of the Divorce Act, 1869 by Act No. 51 of 2001. Though the first respondent found that the allegation of the second respondent that she and the petitioner last resided at Thiruvananthapuram was not at all correct, the first respondent held that it has got jurisdiction to entertain the O.P. on account of the Indian Div,orce (Amendment) Act, 2001 (Act 51 of 2001) since the marriage of the petitioner and the second respondent was solemnized at Thiruvananthapuram. Aggrieved by Ext.Pl order of the first respondent the petitioner filed the present Original Petition (O.P. No. 6500 of 2002) under Articles 226 and 227 of the Constitution of India praying for quashing Ext.P 1 order to the extent it held that the first respondent has territorial jurisdiction to entertain O.P. (I.D.A.) No. 942 of 1997 and also for a

declaration that the Indian Divorce (Amendment) Act, 2001 is not applicable to O.P. (I.D.A.) No. 942 of 1997. He also prayed for a direction to the first respondent to return O.P. (I.D.A.) No. 942 of 1997 to the second respondent for want of territorial jurisdiction to entertain the same. The learned Single Judge dismissed the Original Petition holding that the Family Court, hiruvananthapuram has jurisdiction to entertain the counter of the petitioner in the divorce case and to dispose of the same on merits without insisting the second respondent to file a fresh divorce petition. According to the learned Single Judge, Ext.Pl order is correct and no case is made out to interfere under Art.226 or 227 of the Constitution of India. Aggrieved by the Judgment of the learned Single Judge the petitioner in the Original Petition has filed this Writ Appeal.

3. According to the learned Counsel for the appellant the Indian Divorce (Amendment) Act, 2001 has no retrospective operation and that it has only prospective operation. It is contended that as per the definition contained in Section 3(3) of the Divorce Act, 1869, as it stood on the date of institution of O.P. (I.D. A.) No. 942 of 1997 'District Court' means, in the case of any petition under the said Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction the husband and wife reside or last resided together; that the petitioner and the second respondent was not residing at Thiruvananthapuram at the time of filing the petition and they had not last resided together at Thiruvananthapuram; and that the second respondent had instituted O.P. (I.D.A.) No. 942 of 1997 before a Court which did not have territorial jurisdiction to entertain the same. It is further contended that the amendment of Section 3(3) of the Divorce Act, 1869 by Act 51 of 2001 cannot confer on the first respondent jurisdiction to entertain O.P. (I.D.A.) No,942 of 1997 since Act 51 of 2001 has no retrospective operation. According to the appellant, the learned Single Judge erred in holding that no substantive right of the petitioner has been taken away by the amendment to Section 3(3) of the Act and that change of forum is only procedural in nature. It is also contended that the right to have a suit entertained and tried by the Court having jurisdiction is not a matter of procedure but a matter of substantive or vested right and similarly the right to appear in and defend a suit is not a matter of procedure but a substantive right vested in the defendant at the time of institution of the suit against him.

4. According to the learned Counsel for the second respondent, the learned Single Judge rightly held that the first respondent has territorial jurisdiction to entertain O.P. (I.D.A.) No. 942 of 1997 in view of Act 51 of 2001. It is contended that the O.P. was dismissed for valid and sufficient reasons.

5. It is not disputed by the second respondent that going by the definition of District Court' in Section 3(3) of the Divorce Act, 1869 as it stood on the date of filing of O.P. (I.D.A.) No. 942 of 1997, a petition for divorce could be filed only in the District Court within the local limits of whose ordinary jurisdiction the husband and wife reside or last resided together. In Ext.Pl order the first respondent has held that the appellant and the second respondent did not reside together and had not last resided together within the local limits of the jurisdiction of the first respondent and therefore on the date of filing of O.P. (I.D.A.) No. 942 of 1997 the first respondent did not have territorial jurisdiction to entertain the said O.P. It is not disputed by the parties that during the pendency of O.P. (I.D.A.) No. 942 of 1997, Section 3(3) of the Divorce Act, 1869 was amended by the Indian Divorce (Amendment) Act, 2001 (Act 51 of 2001) and that as per the said amendment the Family Court, Thiruvananthapuram has got jurisdiction to entertain a petition for divorce if the

marriage was solemnized within the local limits of jurisdiction of that Court. Hence the only question that arises for consideration is whether, by the amendment to S .3(3) of the Divorce Act, 1869 by Act 51 of 2001, territorial jurisdiction to entertain O.P. (I.D.A.) No. 942 of 1997 was conferred oh the Family Court, Thiruvananthapuram (first respondent herein) which had no jurisdiction to entertain that case on the date on which it was filed and till the date on which the amendment came into effect.

6. Before the learned Single Judge it was agreed by both sides that all amendments affecting substantive rights of parties can be only prospective unless it is made retrospective by the amending Act itself. It was also agreed that amendments which are affecting procedural rights of parties are deemed to be retrospective in nature. Therefore the learned Single Judge proceeded on the basis that the question to be decided was whether the amendment to Section 3(3) of the Divorce Act, 1869 conferring jurisdiction on the District Court within whose jurisdiction the marriage was solemnized would validate the petitions already filed which on the finding of facts could not be filed before that Court but for the amendment. Relying on the decision of the Honourable Supreme Court in New India Insurance Co. Ltd. v. Shanti Misra (AIR 1976 SC 237) the learned Single Judge held that no substantive right of the petitioner was taken away by the amendment and that the change of forum was only procedural in nature and therefore the Family Court, Thiruvananthapuram has jurisdiction to entertain O.P. (I.D.A.) No. 942 of 1997.

7. It is necessary to refer to the facts in New India Insurance Co. Ltd. v. Shanti Misra (supra). On 11 th September, 1966 an accident occurred in which one Amar Nath Misra died. A cause of action accrued to the respondents as legal representatives of the deceased under the Indian Fatal Accidents Act, 1855. A suit could be brought under Art.82 of the Limitation Act, 1963 within two years of the occurrence of the accident. But in the meantime the Government of Uttar Pradesh constituted the Claims Tribunal under Section 110 of the Motor Vehicles Act, 1939 by a notification published in the Gazette on 18th March, 1967. As soon as a Claims Tribunal was constituted, the jurisdiction of the Civil Court was barred by Section 110F. The respondents filed an application under Section 110A on 8th July, 1967', i.e. after the constitution of the Claims Tribunal. The appellants objected to the jurisdiction of the Tribunal to entertain the said application. The Tribunal overruled the objection and held that it had jurisdiction to entertain the application. The appellants filed a Writ Petition in the High Court and it was allowed by a learned Single Judge. In the appeal filed by the respondents, the Division Bench held that the Tribunal had jurisdiction to entertain the application. Hence the appellants (the Insurance Company and the owner of the truck) filed the appeal-before the Supreme Court. The Supreme Court observed that there could not be any debate or dispute that if an accident occurred after the constitution of the Claims Tribunal the only remedy of the claimant was to file an application under Section 110A of the Motor Vehicles Act, 1939. The jurisdiction of the Civil Court in such a case was ousted in express language. Suits which had been instituted prior to the constitution of the Claims Tribunal remained unaffected and had to proceed to disposal in Civil Courts. But the difficulty arose in cases where accidents had occurred prior to the constitution of the Claims Tribunal and though the remedy of action in Civil Court was alive, no suit had been filed. According to the Supreme Court, in such cases the vested right of action was not meant to be extinguished. The remedy of either an application under Section 110A or a civil suit must be available, but surely not both. Majority of the High Courts had expressed the view that in such a situation the only remedy

available was that of filing an application before the Tribunal and that the jurisdiction of the Civil Court was barred. A contrary view was taken by the Madhya Pradesh High Court. Section 110A(l) of the Motor Vehicles Act, 1939 provides for the filing of an application for compensation arising out of an accident of the nature specified in Sub-Section (1) of Section 110. According to Section 110A(2), every application under Sub-Section (1) shall be made to the Claims Tribunal having jurisdiction over the area in which the accident occurred, and shall be in such form and shall contain such particulars as may be prescribed. According to Section 110A(3), no application for compensation shall be entertained unless it is made within sixty days of the occurrence of the accident, provided that the Claims Tribunal may entertain the application after the expiry of the said period of sixty days if it is satisfied that the applicant was prevented by sufficient cause from making any such application in time. Before the constitution of the Claims Tribunal the remedy was to file the application for compensation before the Civil Court. With the constitution of the Claims Tribunal the jurisdiction of the Civil Court was ousted. If an accident occurred after the constitution of the Claims Tribunal the only remedy of the claimant was to file an application before the Claims Tribunal under Section 110A. But suits which had been instituted prior to the constitution of the Claims Tribunal remained unaffected and had to proceed to disposal in Civil Courts. Where an accident had occurred prior to the constitution of the Tribunal and the remedy of civil suit stood barred on the date of such constitution, no suit could be filed before the Civil Court after the constitution of the Tribunal. The difficulty arose in cases where an accident had occurred prior to the constitution of the Claims Tribunal and the remedy of action in Civil Court was alive but no suit had been filed and the claimant wanted to file an application before the Claims Tribunal after the constitution of the Claims Tribunal. Obviously the claimants could not file a suit before the Civil Court after the constitution of the Claims Tribunal. But their vested right of action was not meant to be extinguished. Hence the Honourable Supreme Court held thus:

"5. On the plain language of Sections 110A and 110F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions 'arising out of an accident' occurring in Sub-Section (1) and 'over the area in which the accident occurred', mentioned in Sub-Section (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. To that extent there was no difficulty in giving the answer in a simple way."

The Supreme Court opined that the jurisdiction of the Civil Court was ousted as soon as the Claims Tribunal was constituted and the filing of the application before the Tribunal was the only remedy available to the claimant. Accordingly the appeal was dismissed by the Supreme Court.

8. The facts in this case are different from the facts in the above-mentioned case before the Supreme Court. In this case, the petition for divorce was filed before a Court which did not have jurisdiction

to entertain it at that time, whereas in the case before the Supreme Court, the claim petition was filed before the Tribunal which had jurisdiction to entertain it at that time. In this case the second respondent had resorted to the remedy of filing petition for divorce but it was filed in the wrong Court, whereas in the case before the Supreme Court the claimants had not availed of the remedy to file a civil suit and after the change of law when they decided to file a claim petition, it was filed before the Tribunal having jurisdiction to entertain it. In such a situation, the Supreme Court held that in the absence of express words by which the new forum is made available only to causes of action arising after the creation of the forum, the new forum can entertain an application filed after the creation of the forum in respect of a cause of action which had arisen before the creation of the forum and to that extent, the change of law operates retrospectively. However the Supreme Court has not held that by such retrospective operation of the change of law an invalid application filed before the wrong Court can be validated. Hence the above decision of the Supreme Court cannot support the view that the first respondent has jurisdiction to entertain the second respondent's petition on account of the amendment to Section 3(3) of the Divorce Act, 1869 by Act 51 of 2001.

9. In Memon Abdul Karim Haji Tayab v. Deputy Custodian General, New Delhi and Ors. (AIR 1964 SC 1256) the Honourable Supreme Court has stated thus:, "It is well-settled that procedural amendments to a law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based, may be of an anterior date."

But there also the Supreme Court has not said that the procedural amendment to a law will apply to invalid actions begun before the forum which had no jurisdiction to entertain it.

10. In K. Eapen Chacko v. The Provident Investment Company (P) Ltd. (AIR 1976 SC 2610) the Honourable Supreme Court observed as follows:

"37. A statute has to be looked into for the general scope and purview of the statute and at the remedy sought to be applied. In that connection the former state of the law is to be considered and also the legislative changes contemplated by the statute. Words not requiring retrospective operation so as to affect an existing statutory provision prejudicially ought not be so construed. It is a well-recognised rule that statute should be interpreted if possible so as to respect vested rights. Where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid, to make an instrument which had no effect at all, and from enactments merely affect procedure and do not extend to rights of action. See Re Joseph Sucha and Co. Ltd. (1875) 1 Ch. D48. If the Legislature forms anew procedure alterations in the form of procedure are retrospective unless there is some good reason or other why they should not be. In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties it will be held to apply prima facie to all actions, pending as well as future."

Before the amendment of Section 3(3) by Act 51 of 2001 the existing statutory provision was that a petition for divorce could be filed only before the Court of the District Judge within the local limits of whose ordinary jurisdiction the husband and wife reside or last resided together. The Court of the District Judge within the local limits of whose jurisdiction the marriage was solemnized had no

jurisdiction to entertain a petition for divorce. Even if such a petition was filed the defendant had a right to defend it on the ground of lack of jurisdiction. If the contention of the second respondent is accepted and the view of the first respondent is upheld, the effect would be to "make that valid which was previously invalid". It would also affect the right of the appellant who was entitled to defend the petition on the ground that the first respondent had no jurisdiction to entertain the petition. The amendment to Section 3(3) by Act 51 of 2001 cannot have retrospective operation to make valid what was previously invalid or to affect the above-mentioned right of the appellant to defend the petition.

11. In this case the question is whether a petition for divorce which could not have been entertained by the first respondent for want of territorial jurisdiction when it was filed can be now entertained by the first respondent on the basis of an amendment to Section 3(3) of the Divorce Act, 1869 subsequent to the filing of the said petition. In other words, can the amendment which is not retrospective in character confer territorial jurisdiction on the first respondent to entertain a petition which could not have been entertained by the first respondent on the date of filing and till the said amendment to Section 3(3) of the Divorce Act, 1869 came into effect. In our view, since the amendment is not retrospective in character, the petition filed by the second respondent cannot be entertained by the first respondent, because, when it was filed before the Court having no jurisdiction to entertain it, it was liable to be returned to the second respondent to be presented before the Court having jurisdiction. Merely because the first respondent wrongly or illegally failed to return the petition and kept it pending till the amendment to Section 3(3) of the Divorce Act, 1869 was effected, the second respondent is not entitled to prosecute the said petition and the appellant cannot be made liable to defend the petition which ought to have been returned to the second respondent when it was filed before the first respondent. Learned Counsel for the second respondent could not bring to our notice any judicial precedent in which a petition filed before a Court which did not have territorial jurisdiction to entertain it, was directed to be entertained by the said Court on the basis of an amendment to the law which was not retrospective in character. Hence we hold that the first respondent erred in taking the view in Ext.Pl order that the first respondent has territorial jurisdiction to entertain O.P. (I.D. A.) No. 942 of 1997 on account of the amendment to Section 3(3) of the Divorce Act. Even if the petition in O.P. (I.D.A.) No. 942 of 1997 is returned to the second respondent nothing, prevents the second respondent from filing a fresh petition for divorce before the first respondent in accordance with law. Hence the view we are taking cannot cause any serious prejudice to the second respondent.

12. Learned Counsel for the second respondent submitted that if the second respondent withdraws the present petition for divorce and files a fresh petition as per the amended Act, the fresh petition will be maintainable before the same Court and the appellant will be liable to defend it and hence no prejudice will be caused to the appellant even if the present petition is entertained by the first respondent. In our view, what is relevant is not the prejudice that will be caused to the appellant. The relevant question is whether the appellant can be compelled to defend a petition for divorce which was filed before a Court which did not have territorial jurisdiction to entertain it and which was liable to be returned to the second respondent.

13. For the reasons already stated we do not agree with the observation of the learned Single Judge that no substantive right of the petitioner is taken away by the amendment and the change of forum is only procedural in nature. This is not a mere change of forum that is involved in this case. It is not a case where the petition was filed before a Court having jurisdiction to entertain it and later the said Court lost jurisdiction on account of subsequent amendment to the law. This is also not a case where a petition pending before a Court having jurisdiction to entertain it is sought to be transferred to another Court by the subsequent amendment to the law. This is a case where the petition was filed before a Court which did not have territorial jurisdiction to entertain it and instead of returning it to the petitioner it was wrongly entertained by the said Court and was kept pending and now the Court claims jurisdiction to entertain it on the basis of an amendment to the law which has? no retrospective operation. As pointed out by the Mysore High Court in Yankappa v. Shavakka (AIR 1960 Mysore 265) the principle that a statute relating to matters of procedure operates retrospectively unless otherwise provided in the statute, is not applicable when the statute in question affects the jurisdiction of a Court.

14. The learned Counsel for the second respondent contended that this Writ Appeal is not maintainable since an appeal does not lie against the decision of the Single Judge exercising powers under Articl 227 of the Constitution of India. The learned Counsel relied on the decisions of this Court in Ramachandran Nair v. Krishna Pillai (1991 (2) KLT 162) and Union of India v. Vijaya Mohini Mills (1992 (1) KLT 404). However we do not find any merit in this contention. This appeal arose from O.P. No. 6500 of 2002 which was an Original Petition filed under Article 226 and 227 of the Constitution of India. The substantial prayer in the Original Petition was for a writ of certiorari or other appropriate writ, direction or order quashing that part of Ext.Pl order finding that the first respondent has territorial jurisdiction to entertain O.P. (I.D.A.) No. 942 of 1997. It is a prayer which could be made and entertained under Article 226 of the Constitution of India. Going by the pleadings and the reliefs claimed in the Original Petition it cannot be said that the Original Petition was not filed under Article 226 and that it was filed only under Art.227 of the Constitution of India. In such circumstances, in the light of the decision of the Honourable Supreme Court in Surya Dev Rai v. Ram Chander Rai and Ors. (2003 (3) KLT 490 (SC) = (2003) 6 SCC 675) we overrule the objection regarding the maintainability of the Writ Appeal.

15. The learned Counsel for the second respondent also raised a contention that the Original Petition itself was not maintainable since an appeal would lie against Ext.Pl order of the first respondent under Section 19(1) of the Family Court Act. Learned Counsel relied on the decision of this Court in Abdul Jaleel v. Sahida (1997 (1) KLT 734) to substantiate the contention that an appeal would lie against Ext.Pl order under Section 19(1) of the Family Court Act. However no such contention regarding maintainability of the Original Petition is seen raised before the learned Single Judge and hence such a contention cannot be entertained in the Writ Appeal. Even otherwise, we do not find any merit in the contention since the availability of an alternate remedy of filing appeal is not an absolute bar against approaching the High Court under Art.226 of the Constitution of India.

16. For the reasons stated above we allow the appeal and set aside the Judgment in O.P. No. 6500 of 2002. The Original Petition is allowed by quashing Ext.Pl order to the extent it held that the first respondent has territorial jurisdiction to entertain O.P. (I.D.A.) No. 942 of 1997 on account of the

Indian Divorce (Amendment) Act, 2001. The first respondent is directed to take further action in O.P. (I.D.A.) No. 942 of 1997 on the basis that the first respondent has no jurisdiction to entertain it.