IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 26TH DAY OF OCTOBER 2021 / 4TH KARTHIKA, 1943

WA NO. 1339 OF 2021

AGAINST THE ORDER/JUDGMENT IN WP(C) 19706/2021 OF HIGH COURT OF KERALA, ERNAKULAM

APPELLANT/RESPONDENTS 5 AND 6 IN W.P(C) 19706/2021:

1 P.T.THOMAS,
AGED 62 YEARS
S/O. THOMAS, PADINJAREMURI HOUSE, ADIMALI KARA,
MANNAMKANDAM VILLAGE, DEVIKULAM TALUK-685 565

2 GEORGE THOMAS,
AGED 53 YEARS
S/O. THOMAS, PADINJAREMURI HOUSE, ADIMALI KARA,
MANNAMKANDAM VILLAGE, DEVIKULAM TALUK 685 565.

BY ADVS.
S.NIDHEESH
C.S.MANILAL

RESPONDENTS/PETITIONER & RESPONDENTS 1 TO 4 IN W.P(C) 19706/2021:

1 BIJO THOMAS,
AGED 44 YEARS
S/O. THOMAS JOHN, AKKATTU HOUSE, KALVARI MOUNT P.O,
THANKAMANI VILLAGE, IDUKKI DISTRICT-685 515

2 STATE OF KERALA,
REP. BY THE SECRETARY, HOME DEPARTMENT, SECRETARIAT,
TRIVANDRUM 695 001.

3 THE DISTRICT SUPERINTENDENT OF POLICE,
IDUKKI DISTRICT, PAINAVU-685 603.

4 THE CIRCLE INSPECTOR OF POLICE,
OFFICE OF THE CIRCLE INSPECTOR OF POLICE, ADIMALI,
IDUKKI 685 561.

**5 SUB INSPECTOR OF POLICE,
ADIMALI POLICE STATION, IDUKKI 685 561.**

**BY ADV.DENU JOSEPH
T.K.VIPINDAS, SR GP**

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 26.10.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Writ Appeal No.1339 of 2021

Dated this the 26th day of October, 2021

J U D G M E N T

P.B.Suresh Kumar, J.

This writ appeal is directed against the order passed by the learned Single Judge in W.P.(C) No.19706 of 2021 on 22.09.2021.

2. Respondents 5 and 6 in the writ petition are the appellants.

3. The order impugned in the appeal reads thus:

> The petitioner will *take* out notice before admission by special messenger to respondents 5 and 6.
>
> The learned Government Pleader will obtain instructions from respondents 1 to 4.
>
> List this case for further consideration on 01.10.2021; until which time, the 4th respondent – Sub Inspector of Police will ensure that the petitioner and his employees are afforded adequate and effective protection to carry on business in the premises in question; provided they are supported by all necessary licenses and permissions, without any let or interference from any person including respondents 5 and 6.

4. The appellants do not dispute the fact that the impugned order was one passed when the writ petition came up for admission on 22.09.2021. They also do not dispute the fact that the same is an *ad interim* order. On being required to submit as to the reason for challenging such an order in appeal, instead of moving the learned Judge for vacating/varying the order, the learned counsel for the appellants submitted that despite the appellants entering appearance and filing counter affidavit in the proceedings, the learned Judge extended the impugned *ad interim* order.

5. As we entertained a doubt as to the maintainability of the appeal, the learned counsel for the appellants was requested to address arguments on the question of maintainability of the appeal. The learned counsel for the appellants then sought time and addressed us today on the question of maintainability of the appeal.

6. The right of appeal being a statutory conferment, in order to examine the question as to the maintainability of the appeal, it is necessary to refer to Section 5 of the Kerala High Court Act, 1958 (the Act), which is invoked by the appellants for preferring the appeal. Section 5 of the Act reads thus:

> "5. **Appeal from judgment or order of Single Judge**:-An appeal shall lie to a Bench of two Judges from-
>
> (i) a judgment or order of a Single Judge in the exercise of original jurisdiction; or

> (ii) a judgment 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 Subordinate Court"

The question whether an appeal lies to a Division Bench under Section 5(i) of the Act against an interlocutory order in a writ petition, while the main writ petition is pending and if so, what are the circumstances under which or the types of cases in which such an appeal would lie, has been examined by a Larger Bench of this Court in **K.S.Das v. State of Kerala,** 1992 (2) KLT 358. The majority opinion in the said case is as follows:

> **"Conclusion**: (1) The word 'order' in S.5(i) of the Kerala High Court Act, 1958 includes, apart from other orders, orders passed by the High Court in Miscellaneous Petitions filed in the Writ Petitions provided the orders are to be in force pending the Writ Petition. An appeal would lie against such orders only if the orders substantially affect or touch upon the substantial rights or liabilities of the parties or are matters of moment and cause Substantial prejudice to the parties. The nature of the 'order' appealable belongs to the category of 'intermediate orders' referred to by the Supreme Court in ***Madhu*** *Limaye's* case, AIR 1978 SC47. The word 'order' is not confined to 'final order' which disposes of the Writ Petition. The 'orders' should not. however, be ad interim orders in force pending the Miscellaneous Petition or orders merely of a procedural nature.
>
> (2) But this does not mean that the Division Bench hearing the appeal against such 'orders' will have to admit the appeal or have to modify the impugned order or set it aside the same in every case. There is difference between the question whether an appeal lies to a Division Bench and as to the scope of interference. Normally, discretionary orders are not interfered with unless the impugned orders are without jurisdiction, contrary to law, or are perverse, and they also cause serious prejudice to the parties in such a manner that it might be difficult to restore the status quo ante or

> grant adequate compensation. The idea is to provide an internal remedy in such cases without compelling the parties to go all the way to the Supreme Court under Art. 136 of the Constitution of India or increase the burden of that court unnecessarily,
>
> (3) It will, however, be incumbent upon the appellant to serve the counsel who has appeared before the Single Judge for the opposite party (unless of course the counsel's authority has been revoked or he is dead) and when such appeals against orders come up in appeal for admission before the Division Bench, it will be open to the Bench to treat such service as mentioned above as sufficient service on the parties (unless the court, in the circumstances of the case, thinks otherwise) and to dispose of the appeal either at the stage of admission or soon thereafter, after considering the facts of the case or subsequent events. This would generally obviate admission of the Writ Appeals, issue of notice and the passing of interim orders pending Writ Appeals."

As explicit from the extracted opinion, the view that was upheld in the said case was that even though an appeal could be filed against an interlocutory order passed in a writ petition, in order to be qualified for challenge in an appeal, the order shall be either substantially affecting or touching upon the substantial rights or liabilities of the parties or which are matters of moment and cause substantial prejudice to the parties. According to the Larger Bench, the nature of the order appealable belongs to the category of intermediate orders referred to by the Apex Court in **Madhu Limaye v. State of Maharashtra**, (1977) 4 SCC 551. It was, however, clarified by the Larger Bench in the said case that such orders should not, however, be *ad interim* orders or orders merely of a procedural

nature.

7. The expression '*ad interim*' only means 'in the meantime' or 'temporarily'. The expression '*ad interim* order' is understood in legal parlance as an order which would operate till the hearing of the matter. Usually, *ad interim* orders are passed *ex parte* in interlocutory applications, pending disposal of the main proceedings, though it can also be passed when the opposite side is present, if the court does not have time to hear the matter and feels that it is necessary to grant an interim order pending hearing of the matter to protect the interest of one of the parties to the proceedings. The question falls for consideration, therefore, is whether the order impugned in the appeal is an *ad interim* order or an intermediate order against which an appeal is provided for under Section 5(i) of the Act.

8. The learned counsel for the appellants did not dispute the propositions of law laid down in **K.S.Das**. He, however, argued that the decision in **K.S.Das** does not preclude an appeal against an *ad interim* order, if the same is contrary to law or perverse and causes serious prejudice to the parties. The learned counsel has relied on the decision of the Division Bench of this Court in **Secretary, Home Department v. Abdul Azeez,** 1995 (1) KLT 709, in support of the said proposition.

9. Before considering the question, it is worth referring to the relevant passage in the order in **K.S.Das** dealing with the decision of the Apex Court in **Madhu Limaye** and the concept of intermediate orders. The relevant passage reads thus:

> The above decision in *Amarnath's* case was followed and explained by Untwalia, J. in ***Madhu Limaye*** *v. State of Maharashtra,* AIR 1978 SC 47 = 1977 (4) SCC 551. That case also arose in the context of S.397 (2) of the Criminal Procedure Code. Untwalia, J. referred to the following passage in Halsbury's Laws of England (3rd Edn.,para.!608,pp. 744-745):
>
> > "An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals." (emphasis supplied)
>
> After adverting to the meaning of the words 'final order' in certain cases (to which we shall refer in due course), it was observed in the context of S.397(2) of the Cr.P.C., that although the words occurring in the particular statute are plain and unambiguous, they have to be interpreted in a particular manner which could fit in the context of other provisions of the state and bring about the real intention of the Legislature (R.M.D. *Chamevrbangwalla v. Union of India,* AIR 1957 SC 628): *The River Wear Commissioners v. William Adamton,* (1876-77) 2 AC. 743). Orders revisable under S.397(2) need not be either final orders which dispose of a case nor can they be every procedural order, pure and simple; The revisable orders were 'intermediate orders' which affect or touch upon rights of parties or are mallets of moment, even though the main case is pending in the same Court which passed the order. Untwalia, J. observed (in ***Madhu*** *Limaye's* case):
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> > "In such a situation, it appears to us that the real intention of the Legislature was not to equate the expression 'interlocutory order' as invariably being the converse of the words 'final order'. There may be an order passed during the course of a

> proceeding which may not be final..... but vet it may not be an interlocutory order - pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we think that the bar in sub-section (2) of S.397 is not meant to be attracted for such kinds of intermediale orders."
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> Thus, 'interlocutory orders' may mean purely procedural orders and not orders which affect or, touch upon rights of parties or matters of moment, though the main case is not disposed of. In that sense, they are not final. But they are interlocutory orders which are not mere orders of a procedural nature, but can be treated as a kind of intermediate orders which affect or touch upon rights of parties or are matters of moment. It all depends upon the context of the words in the Act taken as a whole and the intention of the Legislature. In such a case word 'order' or 'interlocutory order' cannot be given its plain or grammatical meaning. The orders appealable in *Central Bank of India v. Gokul Chand,* AIR 1987 SC 799, and those held revisable in *Amarnath's* case, AIR 1977 SC2185 = 1977(4) SCC 137; *and* ***Madhu Limaye's*** case, AIR 1978 SC 47= 1977 (4) SCC 551 are, therefore, of the 'intermediate category'.

Madhu Limaye was a case dealing with the scope of Section 397(2) of the Code of Criminal Procedure. As discernible from the extracted passage, it was held in the said case that the bar under sub-section (2) of Section 397 in entertaining revision against interim order does not apply to the category of orders which are not mere orders of a procedural nature, but can be treated as a kind of intermediate orders which affect or touch upon the rights of parties or are matters of moment. If the decision of the Apex Court in **Madhu Limaye** is understood in the light of the passage from Halsbury's laws of England quoted in the said judgment, it is clear that in order to be

qualified to be impugned in a proceedings under Section 397(2), the order need not be conclusive as to the main dispute and it is sufficient that it is conclusive at least as to the subordinate matters with which it deals. In other words, if the decision of the Larger Bench in **K.S.Das** is understood in the light of the decision of the Apex Court in **Madhu Limaye,** it can be seen without any doubt that in order to be qualified for a challenge under Section 5(i) of the Act, the order shall be conclusive at least as to any of the subordinate matters with which it deals.

10. Reverting to the facts, a reading of the impugned order would show that such an *ad interim* order was passed in the matter as the learned Judge found it necessary to pass such an order to protect the interest of the petitioner in the writ petition. An order of this nature, according to us, cannot be understood, at any rate, as conclusive as to any matter, main or subordinate. The same cannot also be understood to be one intended to be in force until the main dispute is decided. Orders of this nature can only be understood as one intended to be in force until varied or modified. Merely for the reason that the learned Judge has extended the impugned order after the appellants entered appearance and filed counter affidavit, it cannot be said to be one intended to be in force until the main dispute is decided. In other words, the character of

the *ad interim* order would continue to be the same until an adjudication is made by the Court, at least for the interlocutory purpose, irrespective of the fact as to whether the opposite side had entered appearance. If that be so, according to us, such orders cannot be impugned in an appeal under Section 5(i) of the Act, for if appeals against such orders are entertained, the appellate court would be usurping the original jurisdiction of this Court under Article 226 of the Constitution.

11. The contention that **K.S.Das** does not preclude an appeal against an *ad interim* order, if the same is contrary to law or perverse and causes serious prejudice to the parties, was advanced by the learned counsel for the appellants, placing reliance on the second paragraph of the majority opinion in the said decision, wherein it has been held that normally, discretionary orders are not interfered with unless the impugned orders are without jurisdiction, contrary to law, or perverse, and they also cause serious prejudice to the parties in such a manner that it might be difficult to restore the *status quo ante* or grant adequate compensation. A close reading of the majority opinion in **K.S.Das**, especially the first sentence in the second paragraph namely “But this does not mean that the Division Bench hearing the appeal against such 'orders' will have to admit the appeal or have to modify the impugned order or

set it aside in every case" would show beyond doubt that the said opinion deals with the manner in which an appeal against an intermediate order is to be dealt with. In other words, the statement in the second paragraph of the majority opinion in **K.S.Das** that discretionary orders are not normally interfered with unless they are without jurisdiction, contrary to law, or perverse, and cause serious prejudice to the parties, cannot be understood as one permitting an appeal to be preferred against an *ad interim* order if it is without jurisdiction, contrary to law, or perverse, and cause serious prejudice to the parties, for such an understanding would run counter to the unambiguous statement in the first paragraph of the majority opinion that an appeal will not lie against an *ad interim* order, even if it falls within the category of 'intermediate orders' in terms of the decision of the Apex Court in **Madhu Limaye**.

12. True, **Abdul Azeez** is a case where an *ad interim* order was impugned in an appeal under Section 5(i) of the Act and the appeal was admitted to file despite the objection that the appeal is not maintainable in the light of the Larger Bench decision in **K.S.Das**. A close reading of the judgment in the said case would show that when the appeal came up for final hearing later, it was felt that the writ petition also has to be called for a proper decision

in the matter and accordingly, the writ petition was called for and decided along with the writ appeal. Insofar as the bench was deciding the writ petition itself, there was no occasion for the court to decide the maintainability of the appeal. The decision aforesaid, according to us, may not be of any help to the appellants.

The writ appeal, in the circumstances, is dismissed as not maintainable.

Sd/-

P.B.SURESH KUMAR

JUDGE

Sd/-

C.S. SUDHA

JUDGE

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