

Lamiya Silks vs 1. Kozhikode District Lorry Operators Co-Operative Society Limited (No. D. 2026)

Lamiya Silks vs 1. Kozhikode District Lorry Operators Co-Operative Society Limited (No. D. 2026)

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Court : Kerala

Decided On : Mar-07-2023

Judge : Honourable Mr.Justice C.S.Dias

Appeal No. : OP(C)/104/2023

Appellant : Lamiya Silks

Respondent : 1. Kozhikode District Lorry Operators Co-Operative Society Limited (No. D. 2026)

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE C.S.DIAS TUESDAY,
THE 7TH DAY OF MARCH 2023 / 16TH PHALGUNA, 1944 OP(C) NO.
104 OF 2023 AGAINST THE ORDER/JUDGMENT IN OS 60/2019 OF II
ADDITIONAL SUB COURT,KOZHIKODE PETITIONER/S:

1 LAMIYA SILKS AGED 35 YEARS (PARTNERSHIP), 5/3418AC,
MAVOOR ROAD, KALAAATHINKUNNU AMSOM DESOM AND POST,
KOZHIKODE TALUK - 673004, REPRESENTED BY ITS MANAGING

PARTNER, MUHAMEMD MANZOOR AGED 35, S/O. PM ABDUL JABBAR, PIN - 673004 2 MUHAMMED MANSOOR, AGED 35 YEARS S/O. PM ABDUL JABBAR, LAMIYA SILKS (PARTNERSHIP), DESOM AND POST, KOZHIKODE TALUK, PIN - 673004 BY ADVS. K.M.FIROZ M.SHAJNA MUNEER AHMED MUDASSER AHAMED

RESPONDENT/S: 1 1. KOZHIKODE DISTRICT LORRY OPERATORS CO- OPERATIVE SOCIETY LIMITED (NO. D. 2026) REGISTERED OFFICE, NADAKKAVU CROSS ROAD, KACHERI AMSOM DESOM, NADAKKAVU POST, KOZHIKODE TALUK - 673011, REPRESENTED BY ITS SECRETARY., PIN - 2 T.K. MOHAMMED AGED 71 YEARS S/O. IMPICHI BAVU, PRESIDENT, KOZHIKODE DISTRICT

LORRY OPERATORS CO-OPERATIVE SOCIETY LIMITED (NO. D. 2026), REGISTERED OFFICE, NADAKKAVU CROSS ROAD, KACHERI AMSOM DESOM, NADAKKAVU POST, KOZHIKODE TALUK, PIN - 673011 3 PURAYIL RIYAS AGED 33 YEARS S/O. ABOOBACKER, SECRETARY, KOZHIKODE DISTRICT LORRY OPERATORS CO-OPERATIVE SOCIETY LIMITED (NO. D. 2026), REGISTERED OFFICE, NADAKKAVU CROSS ROAD, KACHERI AMSOM DESOM, NADAKKAVU POST, KOZHIKODE TALUK, PIN - 673011 4 K.K. HAMSA, S/O. BEERANKUTTY, DIRECTOR, KOZHIKODE DISTRICT LORRY OPERATORS CO-OPERATIVE SOCIETY LIMITED (NO. D. 2026), REGISTERED OFFICE, NADAKKAVU CROSS ROAD, KACHERI AMSOM DESOM, NADAKKAVU POST, KOZHIKODE TALUK, PIN - 673011 5 SHEHARBAN, AGED 51 YEARS W/O. ABDUL JABBAR, PUZHANGARILLATH HOUSE, CHALINGAD POST, KAIPPAMANGALAM, THRISSUR DISTRICT, PIN - 680681 6 MUHAMMED AASHIQ, AGED 32 YEARS S/O. ABDUL JABBAR, PUZHANGARILLATH HOUSE, CHALINGAD POST, KAIPPAMANGALAM, THRISSUR DISTRICT, PIN - 680681 7 MISRIA AGED 35 YEARS D/O. ABDUL JABBAR, PUZHANGARILLATH HOUSE, CHALINGAD POST, KAIPPAMANGALAM, THRISSUR DISTRICT -, PIN

- 680681 8 MOIDEEN KUTTY AGED 67 YEARS S/O. AHMED KUTTY, THIRUTHUMMAL HOUSE, MELE PATAMBI POST, PALAKKAD DISTRICT, PIN - 679306 9 ABDUL GHAFOR K.H AGED 59 YEARS

S/O. HAIDER, KOTTAPURATH HOUSE, PATTAMBI POST, PALAKKAD DISTRICT, PIN - 679306 10 P. RAZIA AGED 55 YEARS W/O. V. FAISAL, JASMINE HOUSE, FOROOK PETA, FAROOK AMSOM DESOM, KOZHIKODE TALUK, PIN - 673631 11 P.N. SHAMIM AHMED AGED 35 YEARS S/O. P.N. MOOSHAJI, SHAMIM HOUSE, KATTUNGAL DESOM, MELMURI AMSOM, ERNAD TALUK, MALAPPURAM DISTRICT, PIN - 676514 BY ADVS. P.A.HARISH V.V.SURENDRAN(K/000150/1974) THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 07.03.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: C.S. DIAS, J
..... O.P.(C)No. 104 of 2023
..... Dated this the 7th day of March, 2023

JUDGMENT

This original petition is filed challenging Ext.P4

order passed in I.A.No.4 of 2021 and Ext.P12 common

order passed in I.A.Nos. 9, 11 and 12 of 2022 all in OS

No.60 of 2019 by the Court of Second Additional Subordinate Judge, Kozhikode. The petitioners are the defendants 1 and 2 in the suit and the respondents are the plaintiff and defendants 3 to 9.

2. The relevant background facts leading to Ext.P4 and P12 orders are;

(i) The respondents 1 to 4 filed the suit against the petitioners seeking a decree of mandatory injunction for the vacant possession of the plaint scheduled property.

(ii) The petitioners resisted the suit through Ext.P2 written statement and Ext.P3 additional written statement.

(iii) The respondents 1 to 4 filed I.A.No.4 of 2021 Ext.P3(a) to direct the petitioners to deposit the arrears of license fee. The application was resisted by the petitioners through Ext.P3(b) counter statement.

(iv) The court below, by the impugned Ext.P4 order, directed the petitioners to deposit 50% of the arrears of license fee.

(v) As the petitioners have not admitted any arrears of license fee, Ext.P4 order is unsustainable law.

(vi) The respondents 1 to 4 filed I.A.No.5 of 2022 to

direct the petitioners to produce the key of the building. Alleging that the petitioners did not produce the key, the court below permitted the respondents 1 to 4 to break open the lock with the aid of the 'Amin'.

(vii) The respondents 1 to 4 then filed I.A.No.8 of 2022 (Ext.P5) to handover the keys to them. (viii) The respondents 1 to 4 also filed I.A.No.9 of 2022 (Ext.P6), under Section 151 of the Code of Civil

Procedure, to permit them to let out the plaint scheduled building to the third parties. The petitioner. The petitioners resisted the application through Ext.P7 counter statement.

(ix) The petitioners then filed I.A.No.11 of 2022 (Ext.P8)

to appoint an Advocate Commissioner to prepare an inventory of the articles in the plaint scheduled property. The application was resisted by respondents 1 to 4 through Ext.P9 counter statement.

(x) The petitioners also filed I.A.No.12 of 2022 (Ext.P10) to return the key of the building back to them. The application was also resisted by the respondents 1 to 4 through Ext.P11 counter statement.

(xi) The court below, by the impugned Ext.P12 order, allowed Exts.P6 and P8 applications but, rejected Ext.P10 application. Ext.P12 order is also illegal, improper and unsustainable in law. Hence, the original petition.

3. Heard, Sri. K.M. Firoz, the learned counsel appearing for the petitioners and Sri. P.A. Hariz, the learned counsel appearing for respondents 1 to 4.

4. The question is whether there is any error in Exts.P4 and P12 orders?

5. Ext.P1 plaint was instituted on 25.03.2019 by the respondents 1 to 4, against the petitioners, for a decree of mandatory injunction and to recover arrears of license fee. Ext.P3(a) application was also filed to direct the petitioners to deposit admitted arrears of

license fee. Although, the petitioners filed Ext.P3(b) counter statement, the court below, by the impugned Ext.P4 order, allowed the application on the ground that no counter affidavit was filed and that there was a huge arrears of license fee. Accordingly, the court below directed the petitioners to deposit 50% of the arrears of license fee within one month from the date of order.

6. Ext.P3(a) application is filed under Section 151 r/w Order 39 Rule 10 of the Code of Civil Procedure (in short 'Code').

7. The pleadings and materials on record substantiate that the petitioners had filed Ext.P3(b)

counter statement to Ext.P3(a) application. Nevertheless, the court below has held that the petitioners have not filed any counter statement to Ext.P3(a) application.

8. On a closer scrutiny of the materials on

record, it is apparent that there is a mistake in the number on Ext.P3(b) which is shown as I.A.No.2 of 2021, instead of I.A.No.4 of 2021. Thus the court below cannot be blamed for the finding but, the fact remains that Ext.P3(b) counter statement was filed to Ext.P3(a) application.

9. Indisputably, Ext.P3(a) application was filed under Order XXXIX Rule 10 r/w Section 151 of the Code. Order 39 Rule 10 of the Code reads as follows;

"10. Deposit of money etc. in Court. - Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to further direction of the Court.

10. The learned counsel appearing for the

petitioner vehemently argued that Order XXXIX Rule 10 of the Code does not apply to the case on hand because there is no clear admission made by the petitioners and the amount sought to be recovered is not in the status of a trust. To fortify his contention, he placed reliance on the decision of the Madhya Pradesh High Court in Balakrishna Agrawal and Another v. Central Bank of India and Another [1984 KHC 1791], the decision of the Gauhati High Court in Lalbiakthangi v. H. Duna [1995 KHC 1798], and the decision of the Delhi High Court in Gujarat Co-operative Milk Marketing

v. M/s Jawahar Mal and Sons and others [2003 KHC 3381].

11. On the contrary, the learned counsel

appearing for the respondents 1 to 4 placed reliance on the decision of the Bombay High Court in Sangeeta Prints v. Hemal Prints and others [AIR 1986 Bombay 423], to buttress his contentions that an application under Order XXXIX Rule 10 of the Code is perfectly maintainable for the purpose of realising arrears of rent in cases of present nature.

12. On an appreciation of Ext.P4 order, it is seen that the court below has not considered Ext.P3 application on its merits.

13. Moreover, the court below has not fixed the admitted arrears of rent, but has just directed the petitioners to pay 50% of the said amount.

14. A Division Bench of this Court while dealing with an analogous provision under Section 12 of the Kerala Buildings (Lease and Rent Control) Act, 1965 in

Koyakkanari Sivadasan v. K.K. Nirmala [2022(3) KHC 375] has laid down the procedure that courts have to follow with respect to applications to application to recover admitted arrears of rent.

15. Taking into consideration the fact that the

petitioners had filed Ext.P3(b) counter statement to Ext.P3(a) application, I am of the firm view that the court below is to be directed to re-consider Ext.P3(a) application, after adverting to Ext.P3(b) objections, afresh after giving both sides an opportunity of being heard, which will render complete justice. It is only thereafter, the question whether the respondents 1 to 4 have right to let out the shop room to the third parties,

the petitioners' right to appoint an Advocate Commissioner and to also get back the keys of the building arises.

16. In the above conspectus, in exercise of the

supervisory powers of this Court under Article 227 of the Constitution of India, I set aside Exts.P4 and P12 orders. Resultantly, I allow the original petition as follows;

(i) Ext.P4 order is set aside.

(ii) The Court of the 2nd Additional

Subordinate Judge, Kozhikode is directed to re-consider and dispose of Ext.P3(a) application, after adverting to Ext.P3(b) objections, and after affording both sides an opportunity of being heard, in accordance with law and as expeditiously as possible, at any rate, on or before 25.03.2023.

(v) Ext.P12 order is set aside.

(vi) The court below is directed to re- consider Exts.P6, P8 and P10 applications afresh, in accordance with law, after a decision is taken on Ext.P3(a) application.

Sd/- C.S. DIAS, JUDGE

Dxy APPENDIX OF OP(C) 104/2023 PETITIONER EXHIBITS Exhibit P1 TRUE COPY OF THE PLAINT IN O.S. NO. 60 OF 2019 PRESENTLY ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE DATED 25.03.2019 Exhibit P2 TRUE COPY OF THE WRITTEN STATEMENT DATED

26.08.2019 FILED BY DEFENDANT NOS. 1 AND 2 IN O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit P3 TRUE COPY OF THE ADDITIONAL WRITTEN STATEMENT DATED 20.07.2022 IN O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit P3(a) A TRUE COPY OF THE AFFIDAVIT AND PETITION IN IA NO 4 OF 2021 IN OS NO 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit P3(b) . A TRUE COPY OF THE COUNTER STATEMENT

FILED BY THE PETITIONERS IN IA 4 OF 2021 IN OS NO 60 OF 2019 (BUT WRONGLY MENTIONED IN THE STATEMENT AS IA 2 OF 2021 IN OS NO 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE

Exhibit P4 TRUE COPY OF THE ORDER DATED 16.12.2021 IN I.A. NO. 4 OF 2021 IN O.S. NO. 60 OF 2019 PASSED BY SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit P5 TRUE COPY OF THE ORDER DATED 20.05.2022 IN I.A. NO. 8 OF 2022 IN O.S. NO. 60 OF 2019 SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit P6 TRUE COPY OF I.A. NO. 9 OF 2022 IN O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE DATED 14.07.2022 Exhibit P7 TRUE COPY OF THE COUNTER STATEMENT DATED NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit1 P8 TRUE COPY OF I.A. NO. 11 OF 2022 IN O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE DATED Exhibit1 P9 TRUE COPY OF THE COUNTER STATEMENT DATED O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit1 P10 TRUE COPY OF I.A. NO. 12 OF 2022 IN O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE DATED Exhibit P11 TRUE COPY OF

THE COUNTER STATEMENT DATED O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit P12 TRUE COPY OF THE COMMON ORDER DATED

NO. 11 OF 2022 AND I.A. NO. 12 OF 2022 IN O.S. NO. 60 OF 2019 PASSED BY SECOND ADDITIONAL SUB COURT, KOZHIKODE Exhibit P13 TRUE COPY OF THE STATEMENT DATED 22.08.2022 FILED BY THE 1ST AND 2ND PETITIONER HEREIN IN O.S. NO. 60 OF 2019 ON THE FILES OF SECOND ADDITIONAL SUB COURT, KOZHIKODE

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