

Kunhimoithu vs Yousaf

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Court : Kerala

Decided On : Aug-25-2023

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : FAO/72/2023

Appellant : Kunhimoithu

Respondent : Yousaf

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR FRIDAY, THE 25TH DAY OF AUGUST 2023 / 3RD BHADRA, 1945 FAO NO. 72 OF 2023 AGAINST THE ORDER DATED 27.01.2023 IN I.A No.3 OF 2020 IN A.S NO.76 OF 2013 OF THE SUB COURT, OTTAPPALAM, PALAKKAD APPELLANTS/PETITIONERS IN I.A/APPELLANTS IN A.S:

1 KUNHIMOITHU AGED 57 YEARS, S/O LATE VATTAPARAMBIL MOIDEENKUTTY, KURUVATTOOR AMSOM AND DESOM, OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 2

PATHUMMAKUTTY AGED 62 YEARS, D/O VATTAPARAMBIL LATE OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 3 KUNHUMHAMMED AGED 55 YEARS, S/O.VATTAPARAMBIL LATE OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 4 AMINA AGED 52 YEARS, D/O VATTAPARAMBIL LATE OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 5 SAFIYA AGED 49 YEARS D/O.VATTAPARAMBIL LATE MOIDEENKUTTY, KURUVATTOOR AMSOM AND DESOM, OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336

6 AABID AGED 42 YEARS, S/O.VATTAPARAMBIL LATE OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 7 PATHUMMAKUTTY AGED 74 YEARS, W/O VATTAPARAMBIL LATE OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 8 JASEERA AGED 39 YEARS, D/O.VATTAPARAMBIL LATE OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 9 RAJEENA AGED 36 YEARS, D/O.VATTAPARAMBIL LATE OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679336 BY ADV. RAJIT

RESPONDENTS/RESPONDENTS IN I.A/RESPONDENTS IN A.S: 1 YOUSAF AGED 70 YEARS S/O.VATTAPARAMBIL KUNHU MOITHU, KURUVATTOOR AMSOM, OTTAPPALAM TALUK, PALAKKAD DISTRICT (DIED), PIN - 679336 2 KAMALADEVI AGED 79 YEARS, W/O. KADAMKOTIL SANKARAN EZHUTHASSAN, KANNIYAMPURAM AMSOM, THOTTAKARU DESOM, OTTAPALAM TALUK, PALAKKAD DISTRICT, PIN - 679104 BY ADV. K.RAVI (PARIYARATH) THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 25.08.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

P.G.Ajithkumar, J.

The appellant filed I.A No.3 of 2020 before the Sub

Court, Ottapalam seeking readmitting A.S No.76 of 2013 to file which was dismissed for default on 10.11.2020. The Sub Court dismissed that petition as per order dated 27.01.2023. Aggrieved by that order, the appellant filed this appeal under Section 104 read with Order XLIII Rule 1(c) and (t) of the Code of Civil Procedure, 1908.

2. Despite giving notice, the respondents did not choose to appear before this Court.

3. Heard the learned counsel appearing for the appellants.

4. The appellants are the legal representatives of

plaintiff in O.S No.342 of 1993. He filed the said suit seeking a decree of declaration that the judgment and decree in O.S 56 of 2085 of the Sub Court, Ottapalam were not binding him or his share in the plaint schedule property and also injunction. After trial the suit was dismissed. Hence he

preferred A.S No.76 of 2013 before the Sub Court, Ottaplam. The appeal was dismissed for default on 10.11.2020 for the reason that neither the appellant nor his counsel appeared before the Court. The appellant expired by that time and his legal representatives filed I.A No.3 of 2020 seeking re- admission of the appeal. The 2nd respondent opposed that application by filing a counter. The contentions of the 2nd respondent were that no sufficient reason for readmission of the appeal was made out and steps to implead legal representatives of the deceased 1st respondent were not taken with the ulterior motive of protracting the appeal.

5. The learned Sub Judge after referring in detail to

the history of the litigation between the parties on the same issue, and also the lethargic attitude of the appellant in prosecuting the appeal, held that there was no sufficient reason to readmit the appeal. It was further held that neither Section 151, nor Order IX, Rule 1 of the Code would apply to an application for readmission of the appeal which was dismissed for default, and therefore the petition filed by the

appellants invoking the aforesaid provisions is untenable. The learned Sub Judge by placing reliance on the decisions in *Kishore Samrite v. State of U.P* [(2013) 2 SCC 398] and *Udayami Evam Khadi Gramodyog Welfare Sanstha and Another v. State of Uttar Pradesh* [(2008) 1 SCC 506],

held that undue delay caused by the appellant and repeated

litigation on the same issue disentitle the appellants from getting the appeal readmitted.

6. The learned counsel appearing for the appellants would submit that the original appellant was an aged and ailing man confined to bed most of the time and he could not

approach his counsel on account of the COVID related restrictions and the impugned order was rendered without considering any of such aspects. It is further submitted that the court below gave more emphasis to the facts of the case instead of considering sufficiency of reasons for the non- appearance of the appellant and his counsel on 10.11.2020 when the appeal was taken up for consideration and that resulted in travesty of justice. When such an old man failed to

instruct his counsel during the period of COVID, and resultantly the counsel could not make appearance before the court on 10.11.2020, in the view of the learned counsel, another chance should have been given to get a decision on merits in the appeal.

7. It is seen that the appellants filed I.A No.3 of 2020

invoking the provisions of Section 151 and Order IX, Rule 9 of the Code. Undoubtedly, the petition should have been filed under Order XLI, Rule 19 of the Code. When the averments in the petition constitute a cause for invoking the provisions

Order XLI, Rule 19 of the Code, misquoting of wrong

provisions in the petition filed by the appellants does not disentitle the appellants from getting the relief, if they are otherwise entitled.

8. The Apex Court in *Sangram Singh v. Election Tribunal, Kotah* [AIR 1955 SC 425], while dealing with a case arising out of Order IX of the Code reminded the Courts of their duty. It was held as under: "A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and

further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

9. The Apex Court after referring to the above

principle held in *Commissioner, Mysore Urban Development Authority v. S. S. Sarvesh* [2019 (5) SCC 144] that the Courts below should have seen that the first appeal is a valuable right of the appellant and, therefore, the

appellant was entitled to an opportunity to prosecute their appeal on merits. If the appellant's advocate did not appear, may be for myriad reasons, the Court could have imposed some cost on them for restoration of their appeal to compensate the respondent instead of depriving them of their valuable right to prosecute the appeal on merits.

10. On the day when the appeal was listed for hearing,

i.e, 10.11.2020, the learned counsel appearing for the predecessors of the appellants did not turn up. It cannot be said that the appellant was wholly irresponsible or negligent in prosecuting the appeal. Certainly, the responsibility for the failure of the counsel to appear before the court below has to be borne by the appellant. When it is shown that as a result of the old age and ailments, the appellant was not able to instruct his counsel appropriately, the merits of the appeal shall not be the sole criteria to decide whether or not the petition for readmission of the appeal is to be allowed. In the light of the law laid down in the aforesaid decisions, we are of the view that this is a case where the appellants are to be

given a chance to get a decision on merits in A.S No.76 of

2013. While doing so, the inconvenience caused to the respondents shall be compensated. We are of the view that this appeal can, therefore, be allowed on payment of a cost of Rs.10,000/- to the respondents. Accordingly, this appeal is allowed on the appellants'

making payments Rs.10,000/- to the respondents within a period of three weeks from today. On such payment, I.A No.3 of 2020 will stand allowed and A.S No.76 of 2013 restored on file. Both parties shall appear before the Sub Court, Ottapalam on 25.09.2023. The Sub Court, Ottapalam shall take every endeavour to dispose of the appeal within a period of two months from the date of appearance of both parties. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE PV

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