

Mayankutty vs Premanandan

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Court : Kerala

Decided On : Jul-19-2022

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

Appeal No. : FAO/27/2022

Appellant : Mayankutty

Respondent : Premanandan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR TUESDAY, THE 19TH DAY OF JULY 2022 / 28TH ASHADHA, 1944 F.A.O.NO. 27 OF 2022 AGAINST THE ORDER DATED 18.08.2005 IN I.A.NO.58 OF 2005 IN O.S.NO.48 OF 2001 OF THE SUB COURT, VADAKARA APPELLANT/ONE OF THE LR OF THE APPLICANT/DEFENDANT: MAYANKUTTY AGED 55 YEARS, S/O LATE MOIDEEN, MEETHALE PANAYULLATHIL, PUTHENPURAYIL HOUSE, PONERIPARAMBIL P.O, VILYAPALLI VIA, KOZHIKODE DISTRICT, PIN - 673542. BY ADVS. T.SETHUMADHAVAN (SR.) ZUBAIR PULIKKOOL

RESPONDENTS/RESPONDENTS/PLAINTIFF AND LR.S.OF
APPLICANT/DEFENDANTS: 1 PREMANANDAN S/O. KUNHIKANNAN,
MEETHALE PERYATATH, RESIDING AT THIRUVATHIRA, CHORODE
P.O, VATAKARA TALUK, KOZHIKODE DISTRICT - 673106. 2
ABDULLA AGED 62 YEARS, S/O. LATE MOIDEEN, MEETHALE
PANAYULLATHIL, CHETTIAMVEETIL, PARAMBIL DESOM,
VATAKARA, KOZHIKODE DISTRICT, PIN - 673012. 3 KUNJAYISHA
AGED 53 YEARS, D/O. LATE MOIDEEN, MEETHALE PANYULLATHIL,
PONMERIPOARAMBIL P.O, VILYAPALLI VIA, KOZHIKODE DISTRICT,
PIN - 673542. BY ADVS. SUBRAMANYAN P B M.GOPIKRISHNAN
NAMBIAR K.JOHN MATHAI JOSON MANAVALAN KURRYAN THOMAS
PAULOSE C. ABRAHAM R.CHETHAN KRISHNA P.B.KRISHNAN SABU
GEORGE MANU VYASAN PETER THIS FIRST APPEAL FROM
ORDERS HAVING COME UP FOR FINAL HEARING ON 13.07.2022,
THE COURT ON 19.07.2022 DELIVERED THE FOLLOWING: ANIL K.
NARENDHAN & P.G.AJITHKUMAR, JJ.

----- Dated this the 19th day of July,
2022 ORDER/JUDGMENT

Ajithkumar, J.

C.M.Appl.No.1 of 2022 This is a petition filed under Section 5 of the
Limitation Act, 1963 seeking to condone the delay of 5323 days in filing
the appeal.

2. The reasons for the delay are the following:

O.S.No.48 of 2001 on the file of the Sub Court, Vadakara, was decreed exparte on
16.11.2004. The father of the petitioner was the defendant. He filed I.A.No.58 of
2005 seeking to set aside the said exparte decree. He had some minor mental
ailments. Therefore, he could not properly prosecute that matter. That petition was
dismissed on 18.08.2005. His father died on 08.08.2014. During the said period,
matters connecting to the litigation were being looked into by the brother of the

petitioner, who is the 2nd respondent herein. He has filed a claim petition

before the Sub Court, Vatakara, under Order XXI, Rule 58 of the Code of Civil Procedure, 1908. But that petition was dismissed. He filed Ex.F.A.No.43 of 2014. During the pendency of the appeal,

the father died. Therefore, the petitioner, his sister (3 rd respondent)and mother were impleaded. That appeal was, however, compromised between the 1st respondent-decree holder and the 2nd respondent stating that the petitioner, 3 rd respondent and their mother were not necessary parties. Respondents No.1 and 2 did so collusively. Subsequently, the 1 st respondent took steps for delivery of the property, all without the knowledge or information of the petitioner, but by respondents No.1 and 2 hands-in-glove. Thus the petitioner has been prevented from

approaching this Court to file an appeal for challenging the order

dated 18.08.2005 in I.A.No.58 of 2005. There is sufficient reason to condone the delay.

3. The 1st respondent filed a detailed counter affidavit

controverting the contentions of the petitioner. It was incorrect that the petitioner's father had mental ailments. The suit was decreed exparte twice. I.A.No.58 of 2005 was filed for setting aside the decree the second time. After a delay of more than 15 years, the petitioner has now filed the appeal to challenge that order. Claim petition filed by the 2 nd

respondent was compromised during the appeal stage genuinely. The 2nd respondent claimed right in the disputed property on the basis of a registered gift deed executed by his father, who is the defendant in the suit. Therefore, other legal representatives of the defendant were not necessary parties to that claim petition or the appeal. The said compromise is not vitiated in any manner or is liable to be challenged by the petitioner. The petitioner himself filed I.A.No.1228 of 2007 claiming independent rights in the disputed property. He claimed that he got the property as per an oral gift from his brother the 2nd respondent. That claim

petition and also the Ex.F.A.No.125 of 2009 in that matter were dismissed. The petitioner also had filed I.A.No.1291 of 2009 for setting aside the exparte decree in O.S.No.48 of 2001. There was a delay of 2025 days, and therefore, I.A.No.1290 of 2009 was also filed. Both those petitions were dismissed on 11.04.2012. He,

therefore, has filed petitions for restoring I.A.Nos.1290 and 1291 of 2009, which were also dismissed. When the 1 st respondent took steps for getting delivery of the plaint schedule property by pursuing I.A.No.7 of 2005 before the Sub Court, Vatakara, the 3rd respondent filed an Original Petition before this Court and obtained an order of stay. That petition was eventually dismissed. The petitioner had also filed an Original Petition as O.P.(C) No.6 of 2022 before this Court with a view to stall the delivery proceedings. That petition was dismissed and there arose some doubt regarding the order of stay and therefore the person, who purchased the disputed property from the 1st respondent Sri.Valsarajan K. filed a Review Petition and got it clarified. Again, when the delivery proceedings have been pursued, the petitioner filed Review Petition No.497 of 2021 seeking to review the

judgment in Ex.F.A.No.43 of 2014, before this Court. That

Review Petition also has been dismissed. It was after all such efforts to see that execution of the decree in O.S.No.48 of 2001 does not take place, the petitioner now has filed the present appeal. There is absolutely no reason to condone the delay. The petition is accordingly sought to be dismissed.

4. The 2nd respondent also filed a counter affidavit. He

denied the allegations levelled against him that he in collusion with the 1st respondent settled the dispute involved in Ex.F.A.No.125 of 2009. He also maintained that there is absolutely no reason to condone the delay.

5. Heard the learned Senior Counsel appearing for the petitioner and the learned counsel appearing for the 1 st respondent and also the 2nd respondent. The 3rd respondent did not choose to enter appearance.

6. I.A.No.58 of 2005 was dismissed on 18.08.2005. That

petition was filed by the defendant in the suit. He contended that due to ailment, he could not appear before the court when the suit was posted for his evidence and therefore the decree dated 16.11.2004 was to be set aside. The Sub Court after considering the matter in detail held that it was the second time an exparte decree has been passed and the reason stated for the non- appearance of the defendant was not supported by any evidence.

That petition was dismissed finding that there was no sufficient reason to set aside the exparte decree.

7. Of course, I.A.No.58 of 2005 was filed within the statutory period of one month, and therefore, it deserved a lenient treatment. But the Sub Court for reasons stated in the

order had dismissed that petition. Ordinarily, some latitude

should be shown while dealing with an appeal challenging such an order. It is the rule that, as far as possible, every litigation has to be decided on merits. Therefore, this suit also should have been allowed to be decided on merits. But the

facts and circumstances of this case are such that, serious

consideration is required since the delay is of a colossal magnitude and the petitioner himself has taken a slew of steps before to get the decree avoided.

8. The precise reason for condoning the delay is that

the 2nd respondent, who is none other than the petitioners brother had been conducting the case on his behalf also, but the 2nd respondent not only failed to take due diligence but also colluded with the 1st respondent-decree holder. Thus the case of misuse of the trust reposed on the 2 nd respondent is alleged. The learned Senior Counsel appearing for the petitioner accordingly contended that in view of such a breach of trust, the delay, although inordinate, is liable to be condoned.

9. First of all, the petitioner does not have a case that

he is a person incapable of taking care of himself, and therefore he had to depend upon his brother for prosecuting the matter. Secondly, the fiduciary relationship between the petitioner and the 2nd respondent is not properly pleaded or is supported by any evidence. Whereas, the facts and circumstances arising from the materials on record make such a relationship totally improbable.

10. The following circumstances assume much importance while deciding the merits of the plea for condonation of the delay:-

(1) The defendant Moideen filed I.A.No.58 of 2005. He seriously contested it. It was dismissed on 18.08.2005, but he did not file an appeal during his lifetime. He died only on 08.08.2014.

(2) The petitioner himself filed I.A.Nos.1290 and 1291 of

2009 for condonation of delay of 2025 days and to set aside the exparte decree dated 16.11.2004 in O.S.No.48 of 2001. When those applications were dismissed for default, the petitioner filed I.A.Nos.1486 and 1487 of 2011 for restoration of those applications. Those applications were also dismissed and those orders have become final. When the application filed by the petitioner seeking to set aside the exparte decree has been dismissed, that will create a constructive res judicata barring the petitioner from re-agitating the same issue.

(3) The petitioner filed I.A.No.1228 of 2007 under Order

XXI, Rule 97 of the Code claiming independent right and title to the property in question. His plea was that father Sri.Moideen gifted the property in question in favour of the 2nd respondent as per a registered gift deed and the 2nd respondent orally gifted the property to the petitioner. While he claimed so, he admitted that the petitioner or any other children of Sri.Moideen would not

obtain any right on the property. I.A.No.1228 of 2007, the claim petition filed by the petitioner was dismissed.

(4) In I.A.No.1228 of 2007, the respondents were

Sri.Moideen and the decree-holder, who is the 1st respondent herein. With them in the party array, the petitioner pleaded in that petition that O.S.No.48 of 2001 was decreed *exparte*. When he filed such a petition claiming independent right in the property with the averment that the suit was decreed *exparte* long before, that too with the original defendant as one of the respondents, how can he allege lapse on the part of his brother, 2nd respondent to save the period of limitation.

(5) When I.A.No.1228 of 2007 was dismissed, the petitioner filed Ex.F.A.No.125 of 2009 before this Court, which he had pursued seriously. That appeal was dismissed as per Annexure R1(A) judgment on 15.12.2009.

(6) When Ex.F.A.No.43 of 2014 filed by the 2nd respondent was

disposed of on the basis of a compromise petition, the petitioner filed R.P.No.497 of 2021 in the appeal setting forth all the possible contentions as he now raised. The said review petition was dismissed on 25.05.2022.

11. Without disclosing any of the aforesaid facts, the

petitioner has filed this application. When the petitioner contends that the collusive attitude of the 2nd respondent and misuse of the trust reposed on him by the petitioner resulted the delay of 5328 days, the petitioner is certainly bound to disclose the entire truth before the court. But he suppressed the slew of steps he has taken to get the decree dated 16.11.2004 in the suit and its consequential actions effaced. That amounted not simply to the suppression of facts but also furnishing of totally false statements and evidence before this Court.

12. The learned Senior Counsel appearing for the

petitioner pointed out the principle laid down by the Apex Court in *Esha Bhattacharjee v. Raghunathpur Nafar Academy* [(2013) 12 SCC 649] in order to contend that a lenient view is required to be taken in the matter of condonation of delay. Following are the principles laid down by the Apex Court,- 21. From the aforesaid authorities the principles that

can broadly be culled out are: 21.1 There should be a liberal, pragmatic, justice- oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice. 21.2 The terms sufficient cause should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation. 21.3 Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis. 21.4 No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of. 21.5 Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact. 21.6 It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice. 21.7 The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8 There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation. 21.9 The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties

and the said principle cannot be given a total go by in the name of liberal approach. 21.10 If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation. 21.11 It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation. 21.12 The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception. 21.13 The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

13. Clause 21.8 says that if the delay is of long

duration, the doctrine of prejudice will be attracted and no lenient view is possible. It was further held in clause 21.11 that the court has to bear in mind that no one is allowed to get away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of the law of limitation.

14. It is also apposite to refer to the views expressed

by this Court in Radhakrishnan C. Sundaran [2017 (4) KLJ 440] regarding the approach to be taken in case of fraud and suppression of material facts. It was held,- 13. The petitioner/defendant, who had approached the Sub Court with unclean hands, suppressing material

facts from the notice of the said court, when the

proceedings in E.P.No.218/2013 are about to reach its finality, does not deserve any sympathy or indulgence of the court. Any leniency shown to such persons would result in giving a premium to persons, who committed

fraud on the court, since suppression of material facts

from the notice of the court would amount to fraud on the court.

15. It is clear that the petitioner has approached this Court with this appeal and petition for condonation of delay of 5323 days with mala fides. By filing this petition he has misled the Court. It amounted to an abuse of the process of this Court.

16. Hence, we are of the view that absolutely no

latitude can be shown in favour of the petitioner. The petition is liable only to be dismissed. Hence, the petition is dismissed with costs of Rs.10,000/- (Rupees ten thousand only) to the respondents.

Since C.M.Appl.No.1 of 2022 seeking to condone the delay of 5323 days is dismissed, the appeal is also dismissed. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE dkr APPENDIX OF FAO 27/2022 RESPONDENT ANNEXURES ANNEXURE R1(A) TRUE COPY OF THE JUDGMENT IN EX-F.A.NO.125 OF 2009 OF THIS COURT, DATED 15-12-2009 ANNEXURE R1(B) TRUE COPY OF THE INTERIM ORDER IN O.P(C) NO.2352 OF 2021 OF THIS DATED 7-12-2021 ANNEXURE R1(C) TRUE COPY OF THE JUDGMENT IN O.P(C) NO.2352 OF 2021 OF THIS COURT DATED 22-12-2021

ANNEXURE R1(D) TRUE COPY OF THE JUDGMENT IN O.P.(C)

I.A.NO.1290 OF 2009 AND I.A.NO.1 OF 2021 AND I.A.NO.2 OF 2021 IN I.A.NO.1291 OF 2009 IN O.S.NO.48 OF 2001 ON THE FILE OF THE SUBORDINATE JUDGE'S COURT, VATAKARA, DATED 6-12 ANNEXURE R1(F) TRUE COPY OF THE JUDGMENT IN R.P.NO.497 OF 2021 IN EX-F.A.NO.43 OF 2014 OF THIS COURT, DATED 25-05-2022 ANNEXURE R1(G) TRUE COPY OF THE JUDGMENT IN F.A.O.NO.35 OF 2022 OF THIS COURT, DATED 16-03-2022 ANNEXURE R1(H) TRUE COPY OF THE JUDGMENT IN O.P.(C) NO.1088 OF 2022 OF THIS COURT, DATED 22-06-2022.

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