

**Bobby Jose vs Jose Thomas**

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**SooperKanoon Citation :** [sooperkanoon.com/1443734](https://sooperkanoon.com/1443734)

**Court :** Kerala

**Decided On :** Jun-07-2022

**Judge :** Honourable Mr.Justice C.S.Dias

**Appeal No. :** OP(C)/145/2020

**Appellant :** Bobby Jose

**Respondent :** Jose Thomas

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE C.S.DIAS TUESDAY, THE 7TH DAY OF JUNE 2022 / 17TH JYAISHTA, 1944 AGAINST THE ORDER IN I.A NO.680/2019 IN O.S NO.150/2016 ON THE FILE OF THE MUNSIFF COURT, PALA, CONFIRMED IN C.M.A NO.23/2019 OIN THE FILE OF THE SUB JUDGE, PALA PETITIONERS 1 BOBBY JOSE, AGED 43 YEARS, S/O. JOSE, THOPPIL HOUSE, VELLAPPADU KARA, PALA P.O., MEENACHIL TALUK, KOTTAYAM-686 575. 2 LISHA BOBBY AGED 39 YEARS W/O. BOBBY JOSE, THOPPIL HOUSE, VELLAPPADU KARA, PALA P.O., MEENACHIL TALUK, KOTTAYAM-686 575. BY ADV B.MOHANLAL RESPONDENTS:

1 JOSE THOMAS AGED 83 YEARS, S/O. THOMAS, THOPPIL HOUSE, JANATHA ROAD, VELLAPPADU KARA, PALA P.O., MEENACHIL TALUK, KOTTAYAM-686 575. 2 THRESSIYAMMA AGED 73 YEARS W/O. JOSE THOMAS, THOPPIL HOUSE, JANATHA ROAD, VELLAPPADU KARA, PALA P.O., MEENACHIL TALUK, KOTTAYAM-686 575. BY ADVS. SRI.TOM JOSE (PADINJAREKARA) SRI.SHIBU JOSEPH

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 07.06.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

## **JUDGMENT**

The Original Petition is filed to set aside the order in I.A No.680/2019 in O.S No.150/2016 (Ext.P8) of the Court of the Munsiff, Pala and the judgment in C.M.A No.23/2019 (Ext.P14) of the Court of the Subordinate Judge, Pala.

2. The concise case of the petitioners, shorn of exhaustive pleadings, in the original petition is that, the

petitioners are the defendants in Ext.P3 suit, filed by the respondents, who are the parents of the 1 st petitioner. The respondents have sought decrees for a mandatory injunction and a permanent prohibitory injunction. The petitioners have filed Ext.P4 written statement and suit was listed for trial. During the course of the proceeding, the 1 st petitioner's illness aggravated and he could appear before the Trial Court on the date the case was listed for trial. Their counsel

reported no instructions. The Trial Court recorded the evidence of the 1st respondent, marked documents and passed Ext.P5 ex parte decree. The petitioners filed Ext.P6 application to set aside the ex parte decree. The same was objected to by the respondents by filing Ext.P7 objection. The learned Munsiff by the impugned Ext.P8 order dismissed

Ext.P6 application. Challenging Ext.P8, the petitioners filed CMA 23/2019 before the Court of the Subordinate Judge, Pala. The Appellate Court, without

considering the contentions raised by the petitioners, has dismissed the appeal by Ext.P14 judgment. Exts.P8 and P14 are erroneous and wrong. Hence the original petition.

3. Heard; Sri.B.Mohan Lal, the learned counsel appearing for the petitioners and Sri.Shibu Joseph, the learned counsel appearing for the respondents.

4. The short point that arises for consideration in this original petition is whether there is any illegality or irregularity in Exts.P8 order and P14 judgment passed by the courts below?

5. Ext.P3 suit was instituted as early as in the year

2016. Going by the materials on record, particularly Ext.P8 order, it can be gathered that the suit was listed for trial as early as on 5.2.2018 and, thereafter, in the special list on 6.3.2018. The petitioners filed an application for removal of the case from the list, which was allowed and the case was

listed on 2.6.2018. Then the respondents filed I.A

petitioners filed I.A 167/2019 for removing the case from the list. They have also filed an application to stay the trial of the suit. On 14.2.2019, the applications were dismissed and the case suit was listed for trial to 16.2.2019. On 25.2.2019, the petitioners again filed I.A 395/2019 for adjourning the case on the ground that they have filed a transfer petition. The suit was again adjourned to 1.3.2019.

Even though the petitioners filed an additional written statement in their own parte and passed Ext.P5 ex parte judgment.

6. The above sequence of events demonstrate that the petitioners had attempted to procrastinate the culmination of the suit.

7. In G.P.Srivastava v. R.K.Raizada & Others [2000 KHC 1023] the Hon'ble Supreme Court has held that the crucial aspect to be considered in an application filed under

## **Order IX of the Code of Civil Procedure (Code) is whether**

the defendant has made out 'sufficient cause' for his non- appearance on the date the case was posted. The court is not bound to look into the antecedents of the defendant against whom an ex parte order/decreed is passed.

9. Undisputedly, the petitioners have not produced

any material before the Trial Court to prove that the 1 st petitioner was indisposed, due to severe pain over his lower back, although he had specifically pleaded about the same in the affidavit in support of Ext.P6 application. However, the Trial Court went on the premise that the 1st petitioner had not produced any material and there was no reason pleaded which prevented the 2nd petitioner from appearing before the Court on the said date. The Trial Court also took serious note of the antecedents of the petitioners in protracting the determination of the suit. Accordingly, the Trial Court passed Ext.P8 order.

8. It is undisputed that the petitioners had produced Ext.P10 before the Appellate Court, which is discernible from

paragraph 12 of Ext.P14 judgment.

Nevertheless

determination of the suit and that the respondents were senior citizens, confirmed Ext.P8 order by Ext.P14 judgment.

9. In G.P.Srivastava (supra), the Hon'ble Supreme

Court has empathetically held that 'sufficient cause' contemplated under Order IX of the Code has to be liberally construed so as to enable the Court to do complete justice between the parties. The term 'sufficient cause' is an elastic expression for which there is no hard and fast rule. The Court is to be given a wide discretion in deciding what is 'sufficient case'.

10. In Robin Thapa v. Rohit Dora [2019 KHC 6641], the Hon'ble Supreme Court has held that, ordinarily a litigation is based on adjudication on the merit of the contention of the parties and litigation may not be terminated by default of either the plaintiff or the defendant. The cause of justice does require that, as far as

possible, adjudication be done on merits.

11. Ext.P10 medical certificate issued by the Consultant Orthopaedic Surgeon of S.H.Medical Centre,

Nagampadom, specifically proves that the 1 st petitioner was diagnosed with prolapsed inter vertebral disc L4 L5/L5 S1 with L5 S1 radiculopathy (Rt) side and was taken to the Emergency Department of the above hospital on 28.2.2019 and was advised complete bed rest for two weeks for

restoration of his health. Therefore, the 1 st petitioner has established sufficient cause for his non-appearance on the day the suit was listed for trial. However, Ext.P10 was not given due consideration by the Appellate Court, instead, the antecedents of the petitioners in protracting the culmination of the suit was given weightage. Furthermore, it is on record in the original petition that, as per Ext.P1 scan report dated 26.10.2007 and Ext.P2 discharge summary dated 26.5.2011,

the 1st petitioner has a history of acute back pain. Thus, Ext.P10 is to be accepted on its face value and is enough to establish the sufficient cause pleaded in Ext.P6 application.

12. It may be true that the 2 nd respondent could have informed the counsel and made necessary arrangements to get the case adjourned on the date it was listed for trial. But,

the fact remains that despite the petitioners filing Ext.P6 application and seeking to set aside the ex parte decree, the courts below have refused to accept the assertion of the

petitioners. Even though this Court does not approve or endorse

respondents are an octogenarian and a septuagenarian and are in the twilight of their lives, this Court is of the view that Ext.P10 establishes that the petitioners were prevented by

sufficient cause for their non-appearance.

Certainly,

(supra).

13. To do complete justice in the matter to both sides,

especially considering that the respondents are aged 85 and 75 years of age and the suit is of the year 2016, I am of the view that the Trial Court can be directed to give top most priority to the suit and dispose it of in a time frame, and the respondents be adequately compensated for the inconvenience caused to them, subject to the condition that the petitioners be permitted to contest the suit on merits.

14. On a comprehensive re-appreciation of the pleadings and materials on record, the law laid down in the aforecited precedents and in view of the findings rendered above, I am inclined to exercise of the supervisory jurisdiction of this Court under Article 227 of the Constitution of India and set aside the impugned order and

### **judgment.**

In the result, the original petition is allowed in the following manner:

(i) The order dated 24.10.2019 in I.A. No.680/2019 in O.S.150/2016 of the Court of the Munsiff, Pala and the

### **judgment dated 15.1.2020 in C.M.A 23/2019 of the Court of**

the Subordinate Judge, Pala are set aside, on condition that the petitioners deposit an amount of Rs.10,000/- as cost before the Trial Court within a period of two weeks from the date of receiving the certified copy of this

### **judgment.**

(ii) If condition No.(i) is complied with by the

petitioners, the judgment and decree dated 7.3.2019 in O.S No.150/2016 (Ext.P5) of the Trial Court will stand set aside and the suit would stand restored to file, and the counsel for the parties shall mark their appearance before the Trial Court on 27.6.2022.

(iii) The deposited amount shall be released to the respondents in accordance with law.

(iv) The Trial Court shall list the case for trial in the

special list for month of July, 2022, itself, and complete the recording of evidence and hearing of both sides, and make every endeavour to dispose of the suit, in accordance with law, as expeditiously as possible, at any rate, before 2.9.2022.

(iv) It is made clear that, if the petitioners do not obey the conditions mentioned above, the Trial Court would be at liberty to set them ex parte and pass an ex parte decree.

Sd/-C.S.DIAS ma/7.6.2022 JUDGE APPENDIX OF OP(C) 145/2020 PETITIONER EXHIBITS EXHIBIT P1 THE TRUE COPY OF THE MRI REPORT OF LUMBOSACRAL SPINE OF THE IST PETITIONER DATED 26.10.2007.

## **EXHIBIT P2 THE TRUE COPY OF THE DISCHARGE SUMMARY**

ISSUED FORM SUNRISE HOSPITAL, ERNAKULAM OF THE IST PETITIONER DATED 26.5.2011. EXHIBIT P3 THE TRUE COPY OF THE PLAINT IN O.S.NO.150/2016 BEFORE THE MUNSIFF COURT, PALA. EXHIBIT P4 THE TRUE COPY OF THE WRITTEN STATEMENT FIED BY THE PETITIONERS IN O.S.NO.150/2016 BEFORE THE MUNSIFF COURT, PALA. EXHIBIT P5 THE TRUE COPY OF THE JUDGMENT DATED 7.3.2019 IN O.S.NO.150/2016 ON THE FILE OF THE MUNSIFF COURT, PALA. EXHIBIT P6 THE TRUE COPY OF THE AFFIDAVIT AND I.A.NO.680/2019 IN O.S.NO.150/2016 FILED BY THE PETITIONERS BEFORE THE MUNSIFF COURT, PALA. EXHIBIT P7 THE TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENTS IN O.S.NO.150/2016 ON THE FILE OF THE MUNSIFF COURT, PALA. EXHIBIT P8 THE TRUE COPY OF THE ORDER IN I.A.NO.680/2019 IN O.S.NO.150/2016 DATED 24.10.2019 ON THE FILE OF THE MUNSIFF COURT, PALA. EXHIBIT P9 THE TRUE COPY OF THE MEMORANDUM OF C.M.A.NO.23/2019 ON THE FILE OF THE SUB COURT, PALA. EXHIBIT P10 THE TRUE COPY OF THE MEDICAL CERTIFICATE DATED 19.11.2019 OBTAINED BY THE IST

PETITIONER FROM S.H.MEDICAL CENTRE, NAGAMPADOM, KOTTAYAM. EXHIBIT P11 THE TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENTS IN C.M.A.NO.23/2019 ON THE FILE OF THE MUNSIF COURT, PALA. EXHIBIT P12 THE TRUE COPY OF E.P.NO.47/2019 IN O.S.NO.150/2016 ON THE FILE OF THE MUNSIF COURT, PALA. EXHIBIT P13 THE TRUE COPY OF THE ORDER IN E.P.NO.47/2019 IN O.S.NO.150/2016 ON THE FILE OF THE MUNSIF COURT, PALA. EXHIBIT P14 THE TRUE COPY OF THE ORDER IN C.M.A. NO.23/2019 DATED 15.1.2020 ON THE FILE OF THE SUB COURT, PALA. EXHIBIT P15 THE TRUE COPY OF THE APPLICATION AND THE MEDICAL CERTIFICATE SUBMITTED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA. EXHIBIT P16 THE TRUE COPY OF THE AFFIDAVIT AND APPLICATION IN I.A. NO.340/2018 IN O.S.NO.150/2016 OF THE MUNSIF COURT, PALA. EXHIBIT P17 THE TRUE COPY OF THE AFFIDAVIT AND I.A.NO.679/2018 IN O.S. NO.150/2016 FILED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA EXHIBIT P18 THE TRUE COPY OF THE AFFIDAVIT AND I.A.NO.740/2018 IN O.S.NO.150/2016 FILED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA EXHIBIT P19 THE TRUE COPY OF THE I.A.NO.834/2018 IN O.S.NO.150/2016 FILED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA EXHIBIT P20 THE TRUE COPY OF THE I.A.NO.834/2018 IN O.S. NO.150/2016 FILED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA. EXHIBIT P21 THE TRUE COPY OF THE I.A.NO. 167/2019 IN O.S.NO.150/2016 FILED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA. EXHIBIT P22 THE TRUE COPY OF THE I.A.NO. 168/2019 IN O.S.NO.150/2016 FILED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA. EXHIBIT P23 THE TRUE COPY OF THE ORDER IN O.P.(TRANSFER) NO.36/2019 DATED 25/02/2019 OF THE DISTRICT COURT, KOTTAYAM EXHIBIT P24 THE TRUE COPY OF THE REPLICATION FILED BY THE PETITIONERS FILED BY THE PETITIONERS BEFORE THE MUNSIF COURT, PALA.