

Ismail vs Kunjupunnoose

Ismail vs Kunjupunnoose

SooperKanoon Citation : sooperkanoon.com/1630077

Court : Kerala

Decided On : Sep-30-2021

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

Appeal No. : FAO/128/2017

Appellant : Ismail

Respondent : Kunjupunnoose

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE K. BABU THURSDAY, THE 30TH DAY OF SEPTEMBER 2021 / 8TH ASWINA, 1943 FAO NO. 128 OF 2017 AGAINST THE COMMON ORDER DATED 30.05.2017 IN I.A.NO.1741 OF 2015 IN O.S.NO.527 OF 2012 OF THE ADDITIONAL SUB COURT, NORTH PARAVUR, ERNAKULAM APPELLANT: ISMAIL S/O.ABDUL RAHMAN, MALAKARAN HOUSE,KUNNUKARA EAST, NORTH PARUR,ERNAKULAM DISTIRCT 683513 BY ADVS. SRI.G.HARIHARAN SRI.PRAVEEN.H. RESPONDENT: KUNJUPUNNOOSE S/O.MATHEW PUNNOOSE, CHETHIPURAKKAL

PULIMOOTTIL HOUSE,ANAPARAMBIL
THEKKUMURIYIL,KUTTANADU TALUK, ALAPPUZHA DISTRICT,
686534 BY ADVS. SRI.GHOSH YOHANNAN SRI.K.RAKESH ROSHAN
THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR
ADMISSION ON 30.09.2021, ALONG WITH OP(C).1428/2019, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA &
THE HONOURABLE MR.JUSTICE K. BABU THURSDAY, THE 30TH
DAY OF SEPTEMBER 2021 / 8TH ASWINA, 1943 OP(C) NO.1428 OF
2019 AGAINST THE ORDER DATED 15.03.2019 IN C.M.A.NO.35 OF
2017 OF THE ADDITIONAL DISTRICT COURT, NORTH PARAVUR,
ERNAKULAM PETITIONER: ISMAIL, AGED 69 YEARS S/O.ABDUL
RAHMAN, MALAKARAN HOUSE, KUNNUKARA EAST, NORTH
PARUR, ERNAKULAM DISTRICT-683513 BY ADVS. G.HARIHARAN
SRI.PRAVEEN.H. RESPONDENT: KUNJUPUNNOSE, S/O.MATHEW
PUNNOOSE CHETHIPURAKKAL PULIMOOTTIL HOSUE
ANAPARAMBIL THEKKUMURIYIL, KUTTANADU TALUK, ALAPPUZHA
DISTRICT-686534 THIS OP (CIVIL) HAVING COME UP FOR
ADMISSION ON 30.09.2021, ALONG WITH FAO.128/2017, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

COMMON JUDGMENT

K. Babu, J.

F.A.O.No.128 of 2017 and O.P.(C)No.1428 of 2019 emanate from a common order dated 30.05.2017 passed by the Additional Sub Judge, North Paravur in I.A.No.1741 of 2015 in O.S.No.527 of 2012 and I.A.No.1742 of 2015 in O.S.No.103 of 2014. The appellant in F.A.O.No.128 of 2017 is the petitioner in O.P(C).No.1428 of 2019.

2. Heard the learned counsel for the appellant-petitioner and also the learned counsel for the respondent.

3. The appellant-petitioner instituted O.S.No.527 of 2012

against the respondent, for specific performance of a contract for sale. The respondent instituted O.S.No.103 of 2014 against the appellant-petitioner and another, for recovery of possession of the properties scheduled therein.

4. Both the cases were scheduled for trial placing them in

the special list. During the course of trial second defendant died. The appellant-petitioner filed I.A.No.1564 of 2015 in O.S.No.103 of 2014, to remove both the cases from the list stating the reason that he had no information regarding the death of the 2nd defendant in O.S.No.103 of 2014 and that the respondent had not taken steps to implead the legal representatives of the deceased 2nd defendant. The Court below rejected the application, seeking removal of cases from the special list.

5. The Court below by order dated 05.08.2015 dismissed O.S.No.527 of 2012 for default. In O.S.No.103 of 2014 the appellant-petitioner was set ex-parte and the suit was decreed.

6. The appellant-petitioner on 02.09.2015 filed I.A.No.1741

of 2015 under Order IX Rule 9 of the CPC in O.S.No.527 of 2012 and I.A.No.1742 of 2015 under Order IX Rule 13 in O.S.No.103 of 2014. Both the applications were dismissed by the Sub Court, North Paravur as per common order dated 30.05.2017.

7. The appellant-petitioner challenged the order of dismissal of I.A.No.1742 of 2015 in O.S.No.103 of 2014 before the Additional District Court, North Paravur in C.M.A.No.35 of

2017. The Additional District Court by order dated 15.03.2019 dismissed C.M.A.No.35 of 2017 for default.

8. The learned counsel for the appellant-petitioner

submitted that impleadment of the legal representatives of the 2nd defendant in O.S.No.103 of 2014 was highly required for the adjudication of the lis and the factum of death was not reported by the respondents in time, which resulted in the failure on the part of the appellant-petitioner to take necessary steps for impleadment. The learned counsel further contended that the application to set aside ex-parte decree against the appellant- petitioner in O.S.No.103 of 2014 and the application to restore O.S.No.527 of 2012 were filed within the statutory period stating sufficient reasons. The learned counsel submitted that the Trial Court was not justified in dismissing those applications.

9. Per contra, the learned counsel for the respondent submitted that no sufficient reasons were placed before the Court below for allowing the application.

10. Admittedly, I.A.Nos.1741 of 2015 and 1742 of 2015 were filed within the statutory time limit.

11. We have perused the affidavits filed in support of

I.A.Nos.1741 of 2015 and 1742 of 2015. We are satisfied that the appellant-petitioner had advanced sufficient reasons for the non-prosecution of the matter in the Court below.

12. In Plantation Corporation of Kerala Ltd v. Hussain [1998 (1) KLT 1008] a Division Bench of this Court, while construing the provisions of Order IX Rule 9 CPC, held thus:

15.....The above mentioned rule contemplates that if a suit is dismissed for default, it should be restored only when sufficient cause is made out and not otherwise. When sufficient cause is shown the reopening is mandatory and when sufficient cause is not shown it is discretionary. If a suit is dismissed for default, not due to the fault of the plaintiff or due to reasons beyond the control of the plaintiff, needless to say, when an application is filed by the plaintiff, the court is bound to

restore the suit, since those grounds would constitute sufficient cause for his non-appearance. Those are areas where the court has no discretion, and the court is bound to restore the suit. There may be cases where the plaintiff could not appear on the date notified due to his default, but the plaintiff should show sufficient reasons for his non-appearance. In those cases also, court is also bound to restore the suit, since the plaintiff has established sufficient cause. There may be also cases where the plaintiff could not establish sufficient cause. Still the court should exercise its discretion depending upon

facts of each case. That is the reason why Legislature has given

power to the courts to set aside the order of dismissal on such terms as to costs or otherwise as it thinks fit.

16. Legislature has used the expression as it thinks fit in

O.9, R. 9, which gives considerable amount of discretion to the court while entertaining an application for restoration of the suit, which was dismissed for default. The expression 'as it thinks fit' came up for consideration before the Supreme Court in AIR 1984 SC 1164. Supreme Court said that expression confers very wide jurisdiction on an authority which exercises the power. Calcutta High Court in AIR 1989 Cal. 91 (Dulal Chandra v. Banamati Guchatt), relying upon the decision of the Supreme Court in Collector, Land Acquisition, Anantnag v. Kattji, AIR 1987 SC 1353, while considering the scope of O. IX, R. 9, took the view that while considering the expression sufficient cause Legislature has intended to use it as an elastic expression so as to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. According to the Court, a liberal approach ought to have been made to understand the sufficient cause as to the absence of the petitioner on the date of dismissal of the suit for default. Court felt that for ends of justice, an opportunity may be given to the petitioner to contest the main case on

merit.

13. Following Plantation Corporation of Kerala Ltd.,

(supra) in Sarojini Amma v. Gopalan [2016 (4) KLT SN 77 (C.No.91)] this Court held that the court must be liberal in considering the application to condone the delay and also to set aside the ex-parte decree passed. It must always keep in mind that substantial justice must be done and the justice should not be denied on technical grounds and while considering the words 'sufficient cause', pragmatic approach must be taken by the court and if it is taken in the restricted sense, substantial justice will suffer. This Court observed that as far as possible, an opportunity must be given to the parties to meet their case on merit and the justice should not suffer on technical ground of limitation or strict approach of the words used in the statute should not be taken which was not intended by the legislature itself. This Court further stated that it is not necessary that the reason stated must be proved beyond reasonable doubt and what is required is to consider whether the reason stated is convincing and appeals to the mind of the prudent man and nothing more.

14. In Kunjamma v. Chellappan [2004 (3) KLT SN 78

(C.No.108)] following Plantation Corporation of Kerala Ltd., (supra) this Court held that when interests of technicalities and those of substantial justice are pitted against each other, the Court shall strive to advance those of substantial justice rather than technicalities.

15. In Joseph John v. Joseph [2001 (3) KLT 525], this

Court, following Plantation Corporation of Kerala Ltd., (supra) held that if there is only minor negligence or laches on the part of the party who is making application under Order IX Rule 13 ex-parte decree can be set aside awarding costs.

16. In G.P. Srivastava v. R.K. Raizada (2000 (3) SCC 54) the Apex Court held thus:

7. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. In a case where the defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.

17. In M.K. Prasad v. P. Arumugam [(2001) 6 SCC

176], it has been held that while considering the application to condone the delay in filing the application for setting aside ex- parte decree, failure to adopt extra vigilance should not be made a ground for ousting a party from a litigation, in particular where the inconvenience caused to the other party can be compensated

by awarding appropriate and exemplary costs. It is further held

that while deciding the application for setting aside the ex-parte decree, the Court should keep in mind the judgment impugned, the extent of the property involved and the stake of the parties.

18. On perusal of the materials placed before this Court we

are of the view that the appellant-petitioner had placed a plausible explanation for non-prosecution of the matter before the Courts below. The stake involved is very high. Having considered the entire circumstances, we are of the view that the reliefs sought for can be allowed by imposing reasonable costs.

19. In the result,

(i) O.P.(C).No.1428 of 2019 and F.A.O.No.128 of 2017 are allowed.

(ii) The common order dated 30.05.2017 dismissing I.A.No.1741 of 2015 in O.S.No.527 of 2012 and I.A.No.1742 of 2015 in O.S.No.103 of 2014 is set aside.

(iii) The judgment dated 15.03.2019 dismissing C.M.A No.35 of 2017 is also set aside.

(iv) I.A.No.1741 of 2015 in O.S.No.527 of 2012 and I.A.No.1742 of 2015 in O.S.No.103 of 2014 are allowed.

(v) The decree dated 05.08.2015 dismissing O.S.No.527 of 2012 is set aside.

(vi) The ex-parte decree dated 05.08.2015 in O.S.No.103 of 2014 is also set aside.

(vii) O.S.Nos.527 of 2012 and 103 of 2014 are restored to

file. (viii) The appellant-petitioner shall pay a sum of Rs.5,000/- each in both the cases to the respondent as costs and file memo to that effect before the Trial Court on the date scheduled for the appearance of the parties.

(ix) The parties are directed to appear before the Trial Court on 23.12.2021.

(x) The court below shall dispose of both the suits within

four months from the date proposed for the appearance of the parties. With these observations, the original petition and the appeal are disposed of as above. Sd/- ANIL K. NARENDRAN JUDGE Sd/- K. BABU JUDGE yd APPENDIX OF OP(C) 1428/2019 PETITIONER EXHIBITS: EXHIBIT P1 TRUE COPY OF THE PLAINT FILED BY THE PETITIONERS AGAINST THE RESPONDENT AS O.S.NO.527/2012 BEFORE THE HON'BLE SUB COURT, NORTH PARAVOOR. EXHIBIT P2 TRUE COPY OF THE PLAINT FILED BY THE RESPONDENT AS O.S.NO.103/2014 BEFORE THE SUB COURT, NORTH PARAVOOR EXHIBIT P3 TRUE COPY OF THE APPLICATION FILED BY

THE PETITIONERS AS IA.NO.1741/2015 IN O.S.NO.527/2012 BEFORE HON'BLE SUB COURT, NORTH PARAVOOR FOR RESTORATION OF THE

SUIT EXHIBIT P4 TRUE COPY OF THE APPLICATION FILED BY THE PETITIONERS AS I.A.NO.1742/2015 IN O.S.NO.103/2014 FOR SETTING ASIDE A EX- PARTE DECREE BEFORE THE HON'BE SUB COURT, NORTH PARAVOOR EXHIBIT P5 TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE RESPONDENT IN I.A.NO.1741/2015 IN O.S.NO.527/2012 ON THE FILES OF THE HON'BLE SUB COURT, NORTH PARAVOOR EXHIBIT P6 TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE RESPONDENT IN I.A.NO.1742/2015 IN O.S.NO.103/2014 ON THE FILES OF HON'BLE SUB COURT, NORTH PARAVOOR EXHIBIT P7 TRUE COPY OF THE COMMON ORDER DATED

30.05.2017 PASSED BY THE HON'BLE ADDITIONAL SUB JUDGE, NORTH PARUR IN IA.NO.1741/2015 IN OS. NO.527/2012 AND IA NO.1742/2015 IN O.S.NO.103/2014. EXHIBIT P8 TRUE COPY O THE MEMORANDUM OF APPEAL NO.35/2017 DATED 24.08.2017 FILED BEFORE THE ADDITIONAL DISTRICT COURT, NORTH PARUR AS AGAINST THE ORDER MADE IN I.A.NO.1742/2015 IN O.S.NO.103/2014 EXHIBIT P9 TRUE COPY OF THE CASE DETAILS RELATING TO THE POSTING OF CMA.35/2017 BEFORE THE ADDITIONAL DISTRICT COURT, NORTH PARUR

EXHIBIT P10 TRUE COPY OF THE INTERIM STAY ORDER

DATED 25.07.2017 MADE IN I.A.NO.674/2017 IN FAO.128/2017 BY THIS HON'BLE COURT EXHIBIT P11 TRUE COPY OF THE ORDER DATED 15.03.2019 MADE IN CMA.NO.35/2017 BY THE ADDITIONAL DISTRICT COURT, NORTH PARUR

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