

Sathyan Vs. Kamalasanan

Sathyan Vs. Kamalasanan

SooperKanoon Citation : sooperkanoon.com/3574

Court : Kerala

Decided On : Nov-21-2014

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : Sathyan

Respondent : Kamalasanan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN FRIDAY, THE 21ST DAY OF NOVEMBER 2014 30TH KARTHIKA, 1936 OP(C).No. 2739 of 2014 (O) ----- AGAINST THE

JUDGMENT

IN CMA452012 of DISTRICT COURT, THIRUVANANTHAPURAM PETITIONER: ----- SATHYAN, S/O. CHELLAN NADAR, THADATHARIKATHU PUTHEN VEEDU, NEDUMAN MURI, VATTAPPARA VILLAGE, THIRUVANANTHAPURAM. BY ADVS.SRI.V.N.GOPALAKRISHNAN NAIR SRI.A.CHANDRA BABU SRI.G.ARUN SRI.G.VARUN RESPONDENTS: ----- 1. KAMALASANAN, S/O. DAMODARA PANICKER, PLAVILA VEEDU, VENNIYOOR, VENGANOOR, THIRUVANANTHAPURAM (DIED ON 19.12.11).

2. LALITHAMBIKA, W/O. KAMALASANAN, AGED 60 YEARS, RESIDING AT KUTTARATHALAKKAL PUTHEN VEEDU, KARINGAL, KANDALA P.O.,

THIRUVANANTHAPURAM - 695 512.

3. NEENAMOL, D/O. KAMALASANAN, AGED32YEARS, RESIDING AT KUTTARATHALAKKAL PUTHEN VEEDU, KARINGAL, KANDALA P.O., THIRUVANANTHAPURAM - 695 512.

4. VIJULAL, S/O. KAMALASANAN, AGED29YEARS, RESIDING AT KUTTARATHALAKKAL PUTHEN VEEDU, KARINGAL, KANDALA P.O., THIRUVANANTHAPURAM - 695 512.

5. VINULAL, S/O. KAMALASANAN, AGED28YEARS, RESIDING AT KUTTARATHALAKKAL PUTHEN VEEDU, KARINGAL, KANDALA P.O., THIRUVANANTHAPURAM - 695 512. THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON2111-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: O.P.(C) No.2739/2014 A P P E N D I X PETITIONER'S EXHIBTIS: EXT. P1 : COPY OF PLAINT IN O.S.1264/08 DTD. 11.12.08 BEFORE THE SUB COURT, THIRUVANANTHAPURAM. EXT. P2 : COPY OF

JUDGMENT

IN O.S.1264/08 DTD. 26.3.09 BEFORE SUB COURT, THIRUVANANTHAPURAM. EXT. P3(a) : COPY OF I.A.9735/09 IN O.S.1264/08 BEFORE SUB COURT, THIRUVANANTHAPURAM DTD. 18.12.09. EXT.P3(b) : COPY OF I.A.9734/09 IN O.S.1264/08 BEFORE SUB COURT, THIRUVANANTHAPURAM DTD. 18.12.09. EXT. P4 : COPY OF MEDICAL CERTIFICATE DTD. 17.12.09. EXT. P5(a) : COPY OF OBJECTION IN I.A.9735/09 IN O.S.1264/08 BEFORE SUB COURT, THIRUVANANTHAPURAM. EXT.P5(b) : COPY OF OBJECTION IN I.A.9734/09 IN O.S.1264/08 BEFORE SUB COURT, THIRUVANANTHAPURAM DTD. 3.6.10. EXT. P6 : COPY OF COPY OF COMMON

ORDER

DTD. 17.11.11 IN I.A.9734/09 AND I.A.9735/09 IN O.S.1264/08 BEFORE SUB COURT, THIRUVANANTHAPURAM. EXT. P7 : COPY OF CASE DIARY IN O.P.805 BEFORE FAMILY COURT, THIRUVANANTHAPURAM. EXT. P8 : COPY OF

JUDGMENT

IN O.S.378/04 BEFORE FAMILY COURT, THIRUVANANTHAPURAM DTD.
31.7.08. EXT. P9 : COPY OF

JUDGMENT

IN C.M.A.45/12 BEFORE DISTRICT COURT, THIRUVANANTHAPURAM DTD.
20.8.14. RESPONDENT'S EXHIBITS: NIL. // True Copy // P.A. to Judge. smp
P.BHAVADASAN, J.

----- Original Petition (Civil) No.2739
OF2014----- Dated this the 21st day of
November, 2014.

JUDGMENT

Aggrieved by Ext.P9 order whereby the lower appellate court reversed the finding of the trial court in I.A.Nos.9734 & 9735/2009 and allowed the petitions to set aside the ex parte decree and to condone delay, the respondent before the lower appellate court has come up with this original petition.

2. The petitioner filed a suit as O.S.No.1264/2008 for specific performance in pursuance to an agreement said to have been executed by the original defendant. The defendant had agreed to sell certain extent of property with a residential building for a total consideration of Rs.5 lakhs. From the order of the lower appellate court, it is seen that the suit was filed on 11.12.2008 and it was posted to 19.03.2009 for appearance of the defendant. On that day, the defendant remained absent and the suit was decreed ex parte on 26.03.2009. The defendant then filed two applications namely, I.A.No.9735/2009 to set aside O.P.(C) No.2739/2014 2 the ex parte decree and I.A.No.9734/2009 to condone the delay of 268 days in filing the petition to set aside the ex parte decree. He explained the delay by pointing out that he was laid up due to rheumatic complaint and chikungunya and was unable to move and therefore he could not engage a counsel and give proper instructions. He came to know that ex parte decree has been passed only when he received notice dated 07.12.2009. It was pointed out in the petition that there was

no willful latches or negligence on his part and the delay occurred due to reasons beyond his control.

3. The respondent in the petitions opposed the petitions and pointed out that the reasons given are not acceptable. In support of his contention, he pointed out that there were proceedings before the Family Court and in that proceedings the petitioner before the trial court had been appearing and that, according to the respondent, will belie the claim of the petitioner that he was laid up and was unable to move about. Before the trial court, PW1 was examined and Ext.A1 was marked. The trial court was not impressed by the reason given for the condonation O.P.(C) No.2739/2014 3 of delay and therefore, dismissed the delay condonation petition. Consequently, the petition to set aside the ex parte decree was also dismissed. It so happened that the original defendant died and his legal heirs filed an appeal before the District Court, Thiruvananthapuram. The lower appellate court, after evaluating the entire materials, found that it could not be said that there was total lack of bonafides in the claim made by the person concerned for setting aside the ex parte decree and it is only proper, according to the court, to grant an opportunity to the appellants before it who are legal heirs of the original defendant to have the case decided on merits. Accordingly, the lower appellate court set aside the orders of the trial court and allowed the petitions to condone the delay and also to set aside the ex parte decree and directed the trial court to take the suit on file and dispose of it on merits.

4. Learned counsel appearing for the petitioner very vehemently contended that the lower appellate court has erred both on facts and in law in allowing the appeal. It ought to have seen that the trial court had given cogent and convincing reason O.P.(C) No.2739/2014 4 as to why the delay should not be condoned and the lower appellate court has not given any reason to show that the finding entered into by the trial court is erroneous. Merely because a different view is possible, that will not be proper on the part of the lower appellate court to interfere with the order of the trial court. Learned counsel also emphasised that the records produced by the petitioner show that during the time when the original defendant was claimed to be laid up, he was shown to be attending the Family Court and that will show that what is stated in the affidavit in support of the petition to condone the delay is

not true. That alone is sufficient to disbelieve him and discard his case. The lower appellate court, according to the learned counsel, was therefore not justified in coming to the conclusion that the petitions can be allowed.

5. True, there might have been some latches on the part of the original defendant in applying for setting aside the ex parte decree. But it is to be noticed that he does not deny the receipt of notice in the suit. He says that he was unable to engage a counsel as he was laid up. Even though the petitioner before this O.P.(C) No.2739/2014 5 Court contended that the original defendant has been regularly appearing in the proceeding before the Family Court, the lower appellate court found that there was no evidence to prove the said fact. Thereafter the lower appellate court went on to consider the three documents produced by the respondent before the lower appellate court to consider the argument that the original defendant was appearing before the Family Court in the proceeding pending there. The lower appellate court has considered those documents and found that two of the documents are of no help and the third document only mentions that "both sides present". Further, the lower appellate court found that in the interest of justice it is only proper that an opportunity be given to the legal heirs of the deceased original defendant to contest the matter.

6. Of late, the Apex Court has considered the question of condonation of delay in considerable detail and the court has cautioned that a claim should not be thrown out on technical grounds unless there are compelling reasons. The original defendant had given a reason for his non O.P.(C) No.2739/2014 6 appearance before the trial court and the lower appellate court had chosen to accept the same. Moreover, the lower appellate court has exercised a discretion vested it in law. It could not be said that the discretion exercised is either perverse or contrary to the materials on record. Even otherwise no prejudice or harm is caused to the petitioner by having the matter decided on merits. Thus, viewed from that angle, there are no grounds made out to interfere with the impugned order. This original petition is without merits and it is accordingly dismissed. P.BHAVADASAN JUDGE
smp