

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

Arb.A.No. 65 of 2014 ()

(AGAINST THE ORDER/JUDGMENT IN OPARB 232/2011 of II
ADDL.DISTRICT COURT,ERNAKULAM DATED 18-03-2013)

APPELLANT(S)/PETITIONERS:

1. M/S HINDUSTAN HARDWARE STORES
SANDHYA BUILDING, FLOWER JUNCTION, JEWS STREET
ERNAKULAM, 682035, REPRESENTED BY ITS MANAGING PARTNER
2. G. SURESH KAMATH, S/O.A.N. GOVINDA KAMATH,
AGED 45,
PARTNER, M.S.HINDUSTAN HARDWARE STORES
SANDHYA BUILDING, FLOWER JUNCTION, JEWS STREET
ERNAKULAM, 682035.
3. SATHYABHAMA G. KAMATH,
W/O. LATE A.N. GOVINDA KAMATH, AGED 68 YEARS,
SATHYA GOVIND, T.D. ROAD, ERNAKULAM.
4. DR. G. DINESH KAMATH,
S/O. LATE A.N. GOVINDA KAMATH,
SATHYA GOVIND, T.D. ROAD, ERNAKULAM.

BY ADVS.SRI.K.K.CHANDRAN PILLAI (SR.)
SRI.GOPAKUMAR G. (ALUVA)
SRI.UMESH.N.PAI
SRI.BINOY DAVIS
SRI.REJI GEORGE

RESPONDENTS/RESPONDETS:

1. V.UMESH KAMATH, AGED 42 YEARS
S/O LATE A.N. VENKITESWARA KAMATH
40/5150 T.D ROAD NORTH END, ERNAKULAM 682035

2. V. MAHESH KAMATH,, AGED 38 YEARS
S/O LATE A.N. VENKITESWARA KAMATH
40/5150 T.D ROAD NORTH END, ERNAKULAM 682035

R1-R2 BY ADV. SRI.S.R.DAYANANDA PRABHU

THIS ARBITRATION APPEAL HAVING BEEN FINALLY HEARD ON
02-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

(CR)

**P.R. RAMACHANDRA MENON
&
SHAJI P. CHALY, JJ.**

.....
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Dated this the 2nd December, 2015

JUDGMENT

P.R. Ramachandra Menon, J.

Dismissal of the Arbitration O.P., pursuant to dismissal of the application to condone the delay in filing the same, made the appellants to approach this Court by way of this appeal. The first appellant partnership firm, joining hands with two other persons, who were partners , had approached the Court below by filing an O.P. (Arbitration). During the pendency of the proceedings, the second petitioner bid farewell to this world, pursuant to which, the legal heirs were impleaded as additional petitioners, who in turn are shown as the appellants 3 and 4 herein.

2. The dispute is mainly with regard to the return of

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money, to the extent the deceased partner was having interest in the firm. Pursuant to the demise of the concerned partner, the due amount was demanded by the respondents herein, which was refused to be acted upon. After several rounds of negotiations, on finding that there was no other alternative, the respondents approached the District Court, Ernakulam by filing O.P.(Arbitration Request) seeking for appointment of an arbitrator. Pursuant to the orders passed therein, a sufficiently senior lawyer was appointed as Arbitrator, who pursued further steps, leading to award dated 22.06.2009, whereby a sum of Rs.28,88,316.88/- was directed to be paid with interest at the rate of 12% per annum. Some mistakes were noted in the award, which were brought to the notice of the Arbitrator and accordingly, the award was corrected on 26.11.2009. The corrected copy of the award was obtained to the appellants herein on 01.12.2009. Since they were stated as aggrieved of the award, the proceedings challenging the award ought to have been filed before 01.03.2010, to be within 90 days as stipulated

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under Section 34(2) of the Act. It is said that the concerned appellants filed O.S.134 of 2010 before the Sub Court, Ernakulam seeking to set aside the award on 24.02.2010, which was well within the stipulated time of 'three months' under Section 34(2). Subsequently, the Sub Court found, based on the objection raised by the opposite side, that the suit was not maintainable and accordingly, the proceedings were returned on 09.11.2010, to be presented before the appropriate Forum, of course, after making necessary endorsement in this regard.

3. Met with the situation, the appellants applied for a certified copy of the order whereby the plaint was returned. The said copy application was filed on the very next date, i.e. on 10.11.2010. It is stated that such an application was filed as the learned lawyer, who was prosecuting the matter on behalf of the party was under the impression that the proceedings had to be filed before the District Court as an 'O.P', along with the order showing the return of the plaint for want of jurisdiction to sustain the proceedings, without the bar of limitation. It is

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pointed out that, since the copy application was filed for serving copy of the order returning the plaint, the proceedings/plaint were not returned till the certified copy was ready and finally, the certified copy was issued along with the plaint returned on 24.01.2011. Thereafter OP (Arbitration)No.232 of 2011 was filed before the District Court, along with the said proceedings. Pursuant to the notice issued, the respondents herein entered appearance. It is incidentally to be noted that while re-presenting the proceedings as above, there occurred a delay of 22 days in obtaining certified copy of the order returning the plaint, which was sought to be condoned by filing I.A.No.126 of 2013. The prayer was opposed by the respondents herein and ultimately, allegedly without any regard to the relevant provisions of law or the actual facts and circumstances, I.A. seeking to condone the delay was dismissed holding that the proceedings were barred by limitation and as a natural consequence, the Arbitration O.P. as well. This in turn is sought to be challenged by filing this appeal.

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4. Heard the learned Counsel appearing for the appellants as well as the learned Counsel appearing for the respondents.

5. The learned Counsel for the appellants points out that, by virtue of the mandate under Section 43 of the Arbitration Act, the Limitation Act is applicable to Arbitration proceedings as well. Reliance is sought to be placed on Section 14 of the Act, whereby the time taken in prosecuting the matter with due diligence before a wrong Court/Forum is liable to be excluded for computing the period of limitation. It is also stated by the learned Counsel that, time to obtain the certified copy is also liable to be excluded by virtue of Section 12 of the Act; and if this is considered, the delay sought to be condoned is well within the limits of the statutory mandate and as such, the I.A. ought not to have been dismissed by the court below. The learned Counsel also places reliance on the judgment rendered by the Apex court in **Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others**[(2008) **7 SCC 169**], wherein clear distinction was made between Section

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5 and Section 14 of the Limitation Act, holding that Section 14 would be applicable to the Arbitration proceedings as well. The learned Counsel further submits that, almost a similar situation was considered by a learned Judge of this Court with reference to Section 3 and Section 14 of the Act. It was held in paragraph 16 of the decision reported in **2015 (1) KLJ 755 (Ayisu & ors vs. Saidu & ors)** that such period, (as sought to be condoned by the appellant in the instant case) is liable to be condoned.

6. The learned Counsel appearing for the respondents submits that the idea and understanding of the appellant is thoroughly wrong and misconceived. It is asserted that there was absolutely no move on the part of the appellants in prosecuting the matter with due diligence and good faith. The Statute does never envisage filing of 'civil suit', by virtue of the statutory bar and if at all the award passed by the Arbitrator is to be challenged, the only course available is under Section 34 of the Act by filing an O.P.

7. The Act is a special statute with regard to the period of

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limitation. Such period, as mentioned under Section 34 of the Act is 'three months' with a grace period of one month as stipulated under the proviso. Going by the admitted facts and figures, the proceedings were not filed within that time, and it was accordingly that the delay was sought to be condoned, also in respect of the time taken for issuance of certified copy. The learned Counsel for the respondents submits that certified copy of the order returning the plaint was not at all necessary for having the proceedings re-presented before appropriate court, as 'endorsement' is to be made on the plaint/proceedings while returning the same; more so in view of the mandate of Order VII Rule 10/Rule 10A of the Code of Civil Procedure. The course pursued by the appellant was only to protract things and that same was the position right from the beginning, which involves different rounds of litigations at different levels, including the unfruitful steps for settlement of the issue with the involvement of mediators. The learned Counsel further submits that the appeal itself was belated, involving delay of 377 days, which was

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sought to be condoned by filing an application as C.M.Application No.2657 of 2014.

8. A detailed statement of objection was filed by the respondents. It is stated that there is no dispute with regard to the principal amount payable at any point of time and the dispute was more in relation to 'interest'. Making a reference to Clause 14 of the Arbitration Agreement, copy of which has been produced along with the statement of objection in the said C.M.Application, the learned Counsel submits that by virtue of the agreed terms, the respondents were entitled to get interest at the rate of 18% per annum. But on conclusion of the proceedings, the Arbitrator has awarded interest only at the rate of 12% per annum. By this time, because of pendency of the issue for more than 12 years, the money value/purchasing power of the respondents has come down to a quite sizable extent and the respondents are finding it extremely difficult to make both ends meet. It is also asserted that the way in which the portrait is attempted to be projected from the part of the

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appellants does not deserve any sympathy or significance in so far as the very same learned counsel, who was representing the parties in the Arbitration Request filed by the respondents before this Court, was representing the parties before the Arbitrator as well, who himself was appearing for them in the suit filed before the Sub Court and also in the Arbitration O.P filed before the District Court.

9. The stipulation barring the jurisdiction of civil court was incorporated as a part of the statute, way back in the year 1996. It cannot be taken without a pinch of salt, if it is said that the lawyer was totally unaware of the provision of law as to the bar of civil court. The matter was being pursued by filing a civil suit before the Sub Court, later, getting it returned to be re-presented before the appropriate Forum and still, inviting delay in this regard. Even thereafter, in approaching this Court there is a delay of more than one year. This is a clear instance as to the manner in which the proceedings were being pursued, which could never be certified as part of 'due diligence', so as to attract

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the provisions under Section 14 of the Limitation Act or to extend any relief as sought for in the appeal.

10. Coming to the decision of the Apex Court sought to be relied on behalf of the appellants-i.e.[(**2008**) **7 SCC 169**) **(Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others)**], it was a case where an application was filed by the appellant on 06.06.2002 in the concerned court to set aside the award made by the Arbitrator. This was subsequently sought to be returned by filing an application under Order VII Rule 10A, to be presented before the concerned District Court. The circumstances under which Section 14 could be attracted were referred to by the Apex Court in paragraph 21 of the verdict, which reads as follows:

“21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction . On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

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(2) The prior proceedings had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and

(5) Both the proceedings are in a court.”

The observation of the Supreme Court as contained in paragraph 31 are also relevant which hence is reproduced below:

“31. To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this judgment have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essential prerequisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the

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Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard-and-fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith.”

11. Applying the law laid down by the Apex Court to the given set of facts and circumstances in the instant case, it is to be noted that the proceedings filed by the appellants herein were entirely different from the type of proceedings/application which was filed by the party/appellant in the case dealt with by the Apex Court. In the instant case, inspite of the fact that no 'original suit' could have been filed, by virtue of the mandate of the statute stipulating the course of challenge only by filing O.P.,

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as stipulated under Section 34 of the Arbitration and Conciliation Act, 1996, the appellants sought to challenge the award by filing an O.S. It was after the objection raised from the part of the respondents/defendants, as to the maintainability, that the proceedings were got returned. In fact, the same was returned after making the endorsement on the plaint itself on 09.11.2010. So as to proceed with further steps, causing re-presentation of the proceedings before the appropriate court, certified copy of the order, as applied for from the part of the plaintiffs/appellants herein, was not at all necessary, as the circumstance under which the plaint was returned for want of jurisdiction was very much endorsed upon the plaint itself.

12. Coming to the case decided by the learned Single Judge of this Court in **2015 (1) KLJ 755 (cited supra)**, apart from paragraph 16 sought to be relied on by the appellants, paragraph 13 is also relevant, and as such both the paragraphs are reproduced below:

“13. The learned counsel for the appellant would argue

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that in computing the time during which the plaintiff has been prosecuting another civil proceedings in a Court of Appeal with due diligence, the time requisite for obtaining certified copies under Section 12 has to be excluded. It was argued that the certified copy alone would show the result of judgment and only after getting the certified copy, one can decide whether he should take up further steps or to file a fresh suit. Therefore, it was argued that the suit filed on 24.08.1985 is in time. ”

“16. It is crucial to note that Section 14(1) of the Limitation Act makes no reference to the pendency of suit or appeal or other proceedings in a court of law. The Legislature had used the words of general import and of widest amplitude. If only pendency of a proceeding in a court would be deducted in computing the period of limitation, the time taken for issuing certified copies of the judgment which is essential to decide further course of action, has to be disregarded for the purpose of Section 14. It would certainly result in an anomaly. That time covered for taking steps absolutely necessary for initiating proceedings in a court should be included in calculating the period of limitation. The section does not make any distinction between the steps which a

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litigant has to take to initiate proceedings in a court and the actual pendency of those proceedings in the court. In other words, Section 14 of the Limitation Act excludes not only the period of pendency of infructuous proceedings in a court of law, but also the time occupied for taking indispensable and preparatory steps to institute further proceedings like obtaining certified copies of the judgments and orders.”

In paragraph 13, the arguments raised from the part of the appellant are referred to, which is to the effect that only on receipt of certified copy, would the party know about the result of the judgment so as to decide whether he should take up the matter for further steps or to file a fresh suit. Again, in paragraph 16, the necessity to obtain certified copy of the order is referred to, in so far as it is essential to decide the future course of action. In the last sentence of the very same paragraph, it is stated that Section 14 of the Limitation Act excludes, not only the period of pendency of infructuous proceedings in a court of law, but also the time occupied for

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taking indispensable and preparatory steps to institute further proceedings like obtaining certified copy of the judgments and orders. In short, the purpose of obtaining certified copies should be such that, the further course of action, without obtaining certified copy would be obscure/ambiguous and only on receipt of certified copy, would the party be in a position to know as to the such/appropriate further course of action.

13. The position is not similar, when it comes to the factual position in the instant case. The order returning the plaint was for want of jurisdiction and that the same was endorsed on the plaint itself. The course and proceedings under such circumstance, (if a proceedings is filed in a wrong Forum, to be got returned and presented before a proper Forum) are taken care of by virtue of the Order VII Rule 10 and Rule 10A of the CPC, which are extracted below:

“10. Return of plaint: (1) Subject to the provisions of Rule 10-A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

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[Explanation: For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct , after setting aside the decree passed in a suit, the return of the plaint under this sub-rule;

(2) Procedure on returning plaint: On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. ”

10-A: Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return:(1)

Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2)Where an intimation is given to the plaintiff under sub-rule(1), the plaintiff may make an application to the Court-

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and

© requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint

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was made by it on the ground that it has no jurisdiction to try the suit-

(a) fix a date for the appearance of the parties in the court in which the plaint is proposed to be presented, and

(b) give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under sub-rule (3)-

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

In the case of Order VII Rule 10, it is stipulated that the proceedings could be returned at any stage of the proceedings and the parties are at liberty to have the same re-presented before the appropriate Court having jurisdiction, whereupon such

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period could be caused to be exempted from computing the period of limitation. Coming to Order VII, Rule 10-A, it is made applicable with reference to the appearance of the defendant and once the defendant appears, the further course of action for returning the proceedings is stipulated therein, making it open for the party/plaintiff to file an application to get the proceedings returned, upon which an order will be passed making an endorsement as to the Court to which it is to be presented and the time within which it is to be presented. If the proceedings are caused to be returned based on an application preferred by a party, then no further proceedings will lie by way of appeal against such order or proceedings. It is seen that no diligent steps as envisaged by the provisions of law have been pursued by the appellant in the instant case.

14. The learned Counsel for the appellant however made a persuasive attempt to contend that the mistake was more committed by the lawyer, for which the party might not be penalized. We are very much aware of the declaration of law by

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the Apex Court in this regard that the mistake, if any, committed by the lawyer shall not place any hurdle in the way of prosecuting the proceedings by the parties concerned. But here, the proceedings stand on a different footing. Ignorance of law is no excuse for anybody, which is equally applicable to the litigant as well as the lawyer and it cannot be branded as a mistake simpliciter. When the statute specifically bars the proceedings in a civil court, (which provision was incorporated in the statute way back in the year 1996), a lawyer who was representing the party before this Court at the time of filing the Arbitration Request, thereafter before the Arbitrator, when the proceedings of Arbitration was going on and who represented party in the subsequent proceedings as well, ought not to have ventured into filing of any proceedings contrary to the provisions of law before a wrong Forum, by way of wrong proceedings and subsequently crave for indulgence saying that the party is innocent. There is a contention for the respondents that such a course was pursued with a wilful intent to protract the

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proceedings. But we do not intend to make any observation in this regard as it is not necessary, but for considering the legal issue as to whether the proceedings are maintainable or not.

15. After hearing both the sides and after going through the materials on record, we are of the considered view that the proceedings were never being pursued with 'due diligence' and would fail, as asserted and underlined by the Apex Court in paragraph 31 of the decision in **Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and others** ((2008) 7 SCC 169). As such, the appellants are not entitled to have any benefit. It is seen that when the matter was pending before this Court, by virtue of various interim orders passed, the entire liability towards 'principal amount' came to be discharged and the remaining liability is only with regard to the interest payable. It is open for the respondents to pursue appropriate proceedings in accordance with law for realisation of the balance amount if any. The appeal is devoid of any merit and none of the grounds raised in support of the same could be

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held as tenable. Interference is declined. Appeal stands dismissed.

**P.R. RAMACHANDRA MENON,
JUDGE**

**SHAJI P. CHALY,
JUDGE**

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