

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 6TH DAY OF JULY 2015/15TH ASHADHA, 193

FAO.No. 207 of 2005 ()

AGAINST THE ORDER/JUDGMENT IN OS 332/2001 of I ADDL.SUB COURT,ERNAKULAM
DATED 16-12-2004

APPELLANT(S) :

C.D.THOMAS, RESIDING AT 1057,
ORNAGE WOODS, ROCK LEDGE, FLORIDA
3295, USA., REPRESENTED BY POWER OF ATTORNEY HOLDER
C.J.SIMON (RETIRED DISTRICT JUDGE) ADVOCATE,
TC 29/1465-1, PALKULANNGARA, THIRUVANA

BY ADVS.SRI.V.GIRI
SRI.M.P.RAMNATH

RESPONDENT(S) :

1. STATE BANK OF INDIA, NRI (KOCHI),
REPRESENTED BY ITS CHIEF MANAGER, ERNAKULAM, KOCHI-16.

2. M.V.THOMAS, MUKKANANCHERRY HOUSE,
VALAYANCHIRANGARA, PERUMBAVOOR, ERNAKULAM DISTRICT.

3. G.RAJEEV KUMAR,
STATE BANNK OF INDIA, NRI (KOCHI) BRANCH, ERNAKULAM
KOCHI.

R,R2 BY ADV. SMT.M.K.PUSHPALATHA
R,R1 BY ADV. SRI.GEORGE THOMAS (MEVADA)

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
06-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

F.A.O. No. 207 of 2005

Dated this the 6th day of July, 2015

JUDGMENT

Sunil Thomas, J.

The plaintiff in O.S.No.332/2001 of the First Additional Sub Court, Ernakulam, aggrieved by the dismissal of I.A.No.6068/04, which is an application to restore the suit dismissed for default , has preferred this appeal.

2. The plaintiff, who was in USA, laid the suit for recovery of about Rs. 67 Lakhs from the defendants with 12% interest. According to him, he had deposited the above sum in the first defendant bank in fixed deposit. On maturity, it was not returned and on enquiry, it was stated that the amount was appropriated by the bank towards the overdraft account of the second defendant. Contending that the first defendant and the third defendant, who was the officer of the first defendant bank, had not informed about the overdraft facility

availed by the second defendant and that money was appropriated fraudulently, the suit was laid. The defendants appeared and filed the written statement. The case was listed to 2/11/2004 for trial. Hence, he had made arrangements to fly to India in September 2004. In the meanwhile, a devastating hurricane struck his place of residence and damaged his house partially. Since he had to attend the trial in the court, he put temporary cover and left for India in September 2004. After reaching India, it was informed that another hurricane struck the same place, devastating the entire place including his house. Since his household articles were exposed to rain and sun without any roof, he had to rush back to USA. Immediately, his lawyer in Kerala was informed and on their instructions a replication was prepared in answer to the written statement. Along with the application to receive replication, an interlocutory application was filed to produce certain documents by the first defendant. I.A.No.4992/2004 was filed requesting the court not to include the case for trial in the list of November 2004 and if it is already included, to remove it from the list. It was prayed that it may be postponed to July/August 2005. Another application was filed to advance the hearing. However, the court

took up all the applications together on 15/10/2004. Thereafter, the application to direct the appellant to produce the document was allowed and all the remaining applications were listed to the original date when the case stood posted to; i.e. 2/11/2004. On that day, the case was not adjourned and the suit was dismissed. I.A. No.6068/2004 was filed to restore the suit dismissed for default. The court below by the impugned order dismissed the application, which has given rise to this appeal.

3. Heard and examined the records. Since fresh notice to the third respondent was not returned after service and the third respondent was represented by counsel for the first respondent, the notice to the third respondent in this appeal is declared as sufficient.

4. The reason stated by the court below for rejecting the application was that even if the plaintiff was absent for trial, since the suit was filed through a power of attorney, he could have engaged the power of attorney to give evidence. It was also held that since he had been to India and but left, fully knowing that the suit was listed to 2/11/2004, he could have made alternate arrangement for the prosecution, by giving necessary instructions to the power of attorney holder who had

filed the suit. Another reason stated by the court below was that since it was an old suit of 2001 and was in the target of the judicial year, it could not be further delayed.

5. Prima facie, the reasoning of the court below that the plaintiff should have instructed his power of attorney holder to give evidence is without any merit. It is contrary to the settled law that a power of attorney holder can only conduct a case and cannot substitute the plaintiff for the purpose of tendering evidence, unless he himself is aware of the facts in the suit. He could have tendered evidence only as a witness and not in substitution of the plaintiff. Hence, the reasoning given by the court below for rejecting the application is legally not sustainable. The very fact that the plaintiff had flown from USA to India itself indicated that he wanted himself to tender evidence. The court below also failed to note the fact that he had specifically stated about devastating hurricane that struck his place of residence. At least three applications were filed, which cumulatively indicated the circumstance by which he had to return to USA and his bona fides. Evidently, the court below failed to appreciate the entire circumstances in the correct perspective. The entire facts disclosed should have touched the

conscience of the court below, which unfortunately did not.

6. It is also pertinent to note that it is not a case where the plaintiff remained lethargic and adopted delaying tactics. He had remitted the court fee of about Rupees Three Lakhs. He filed the interlocutory applications in advance bringing to the notice of the court the entire facts and the unavoidable circumstances which were beyond his control. The reasoning that it was an old case and targeted one, does not appear to be justifiable. The list system and targeting of the case for the judicial officers are intended only to stream line the judicial work and to facilitate rendering justice to the parties by proper court management. It cannot be tools for denying the justice to the parties. Hence, the impugned order is not legally sustainable and is liable to be set aside.

7. In the result, the appeal is allowed. The impugned order dated 16/12/2004 in I.A.No.6068/2004 is set aside and I.A.No.6068/2004 stands allowed. The court below shall restore the suit to file and after giving a reasonable opportunity to both sides to complete the pre-trial steps, include the suit in the next available list with adequate time to both sides to get ready for trial. Considering the long pendency of the matter, the court

below may endeavour to dispose of the case at the earliest.

The appeal is allowed accordingly.

Sd/-

THOTTATHIL B.RADHAKRISHNAN

Judge

Sd/-

SUNIL THOMAS

Judge

dpk