

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 30TH DAY OF JUNE 2015/9TH ASHADHA, 1937

FAO.No.254 of 2012

I.A NO.444/2011 IN A.S NO.70/2004 OF THE SUB COURT,CHERTHALA).

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APPELLANT/PETITIONER/APPELLANT IN THE COURT BELOW:

**K.VASUDEVA PANICKER,S/O.KRISHNAN NAIR,
AGED 77 YEARS,THAIKKOOTTATHIL,THURAVOOR,
PADINJATTUMKARA-VADAKKUM MURI (NORTH),
KODAMTHURUTH VILLAGE,CHERTHALA TALUK.**

BY ADV. DR.V.N.SANKARJEE

RESPONDENT'S/RESPONDENTS/RESPONDENTS IN THE COURT BELOW:

- 1. SASIKUMAR,S/O.VASU PILLAI,KAKKARA VEETIL,
KODAMTHURUTH MURI,THURAVOOR NORTH VILLAGE,
CHERTHALA TALUK,ALAPPUZHA DISTRICT-688533.**
- 2. SANKARAN NAMBOODIRI,S/O.KESAVAN NAMBOOTHIRI,
SREENIVAS,KANNAMANGALATH HOUSE,KOMANA MURI,
AMABALAPUZHA VILALGE AND TALUK,ALAPPUZHA DISTRICT-688561.**
- 3. THE PRESIDENT,N.S.S.KARAYOGAM NO.761,
CHAKKAMPARAMBIL,KODAMTHURUTH,
KUTHIYATHODE,CHERTHALA TALUK,ALAPPUZHA DISTRICT-688533.**
- 4. PARAMESWARAN NAMBOOTHIRIPAD,
S/O.VASUDEVAN NAMPOOTHIRIPAD,VYPPIN MANA,
CHAMBAKKARA P.O.,KARUKACHAL PANCHAYAT,
KUTHRAPALLY VILLAGE, KOTTAYAM DISTRICT-686540**

**R1-R2 BY ADVS.SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.K.A.BALAN
SRI.PETER JOSE CHRISTO
SRI.S.A.ANAND**

R4 BY ADV.SRI.SAKIR.K.H.

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 30-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

P.B.SURESH KUMAR, J.

F.A.O.No.254 of 2012

Dated this the 30th day of June, 2015

JUDGMENT

The order dismissing an application filed under Order XLI Rule 19 of the Code of Civil Procedure is under challenge in this appeal.

2. The appellant is the second defendant in O.S.No.260 of 1979 on the file of the Munsiff Court, Cherthala. O.S.No.260 of 1979 was a suit for declaration of title and recovery of possession. The suit was decreed on 3.6.2004. The appellant challenged the decision of the trial court in A.S.No.70 of 2004 before the Sub Court, Cherthala. During the pendency of the appeal, the third respondent in the appeal died. When the third respondent was reported dead, the appellate court directed the appellant to take steps to implead his legal representatives. The appellant has not complied with the said direction of the court. Later, on

19.8.2010, when the matter came up for hearing, the appellate court directed the appellant to take steps to implead the legal representatives of the third respondent within seven days. The appellant has not complied with the said direction as well. Consequently, the appeal was dismissed for default on 11.2.2011. Thereupon, the appellant has filed I.A.No.444 of 2011, invoking Order XLI Rule 19 of the Code to restore the appeal which was dismissed for default. In the affidavit filed in support of the application, the appellant has stated, among others, that he did not take steps to implead the legal representatives of the deceased third respondent as the sole legal representative of the deceased third respondent himself had filed an application in the appeal as I.A.No.118 of 2010. He has also stated that the said fact could not be brought to the notice of the court as his counsel was engaged in another court when the case was called on for hearing on 11.2.2011. The court below dismissed I.A.No.444 of 2011, as per the order impugned in this appeal. The appellant is aggrieved

by the said order of the appellate court.

3. Heard the learned counsel for the appellant as also the learned counsel for respondents 1 and 2.

4. The fact that the appellant has not impleaded the legal representatives of the deceased third respondent in the appeal despite the specific directions issued by the appellate court is not disputed. The explanation of the appellant for not impleading the legal representatives of the deceased third respondent is that an interlocutory application was filed by the sole legal representative of the deceased third respondent as I.A.No.118 of 2010 and since the said application was pending consideration before the appellate court, the appellant did not implead the legal representatives of the third respondent. The appellate court took the view that in the absence of any record as to who are the legal representatives of the deceased third respondent, an application submitted by a stranger stating that he is the sole legal representative of the deceased third respondent cannot be allowed and it is on that basis, the

appellate court did not entertain I.A.No.444 of 2011. On the facts of this case, the appellate court cannot be faulted for having taken the said view. It was obligatory for the appellant to take steps to implead the legal representatives of the deceased third respondent to pursue the appeal. It is seen that the appellant was under a mistaken impression that it was not obligatory for him to implead the legal representatives of the deceased third respondent in the light of I.A.No.118 of 2010. As such, in the interests of justice, I deem it appropriate to afford the appellant yet another opportunity to implead the legal representatives of the deceased third respondent in the appeal. In so far as the contesting respondents are not responsible for the dismissal of the appeal for default, I feel that such an opportunity can be given to the appellant only on terms.

5. In the result, the impugned order is set aside and A.S.No.70 of 2004 on the file of the Sub Court, Cherthala is restored to file on payment of a sum of Rs.2,500/- to respondents 1 and 2 towards costs. The costs as directed

shall be paid by the appellant to the counsel appearing for respondents 1 and 2 in the appeal within ten days from today. The parties are directed to appear before the appellate court on 21.7.2015. The appellant shall take steps to cure the defects in the appeal within ten days thereafter. If the appellant prefers an application to implead the legal representatives of deceased third respondent, the same shall be decided on merits untrammelled by the decision on I.A.No.118 of 2010. If the appellant does not pay the costs as directed above, the appeal will stand dismissed.

The appeal is disposed of as above. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

smm