

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 31ST DAY OF AUGUST 2015/9TH BHADRA, 1937

FAO.No. 37 of 2015

**ORDER DTD.30.08.2014 IN I.A.NO.490/2014 AND I.A.NO.491/2014 IN IA.NO.1149/2012 IN
CMA.NO.12/2013 OF SUB COURT, KOCHI**
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APPELLANT(S):

- 1. KOCHI DEVASWOM BOARD,
REPRESENTED BY ITS SECRETARY,
COCHIN DEVASWOM BOARD OFFICE,
ROUND NORTH, THRISSUR.**
- 2. DEVASWOM OFFICER,AZHAKIYAKAVU TEMPLE,
PALLURUTHY NADA, KOCHI - 682 006.**

BY ADV. SRI.KRISHNA MENON, SC

RESPONDENT(S):

- 1. GOPALAKRISHNAN, AGED 67 YEARS,
S/O. NARAYANAN UNNI, NAMBIAR MADOM, EDAKOCHI VILLAGE,
PALLURUTHY - 682 006.**
- 2. SUDHABHASHINI, AGED 54 YEARS,
D/O.LATE VENUGOPALAN, PUNARTHAM,
EDAKOCHI VILLAGE, PALLURUTHY - 682 006.**

R1 BY ADV. SRI.T.K.RAJESHKUMAR

R2 BY ADV. SRI.R.VENUGOPAL

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
31-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

P.B.SURESH KUMAR, J.

F.A.O.No.37 of 2015

Dated this the 31st day of August, 2015

JUDGMENT

The order on I.A.No.491 of 2014 in I.A.No.1149 of 2012 in C.M.A.No.12 of 2013 on the file of the Sub Court, Kochi is under challenge in this appeal. C.M.A.No.12 of 2013 is an appeal preferred challenging the order on I.A.No.2302 of 2010 in O.S.No.131 of 2004 on the file of the Munsiff Court, Kochi. The appellants are the defendants and the respondents are the plaintiffs in the said suit.

2. O.S.No.131 of 2004 is a suit for fixation of boundaries of the properties of the plaintiffs with the property of the first defendant, viz., Kochi Devaswom Board. The suit was decreed ex-parte. Thereupon, the

defendants filed I.A.No.2301 of 2010 seeking orders to set aside the ex-parte decree passed against them along with I.A.No.2302 of 2010 seeking orders to condone the delay of 6 years, 11 months and 3 days in filing I.A.No.2301 of 2010. I.A.No.2302 of 2010 was dismissed by the trial court. As noticed above, the defendants challenged the order on I.A.No.2302 of 2010 in C.M.A.No.12 of 2013 before the appellate court with I.A.No.1149 of 2012 seeking orders to condone the delay of 268 days in filing the appeal. I.A.No.1149 of 2012 was dismissed for default on 11.12.2013. Thereupon the defendants filed I.A.No.491 of 2014 seeking orders to restore I.A.No.1149 of 2012 and I.A.No.490 of 2014 to condone the delay of 70 days in filing I.A.No.491 of 2014. I.A.No.490 of 2014 was dismissed by the appellate court and consequently I.A.No.491 of 2014 was also dismissed. The defendants are aggrieved by the said decisions.

3. Heard the learned counsel for the appellants as also the learned counsel for the respondents.

4. It is seen that the affidavit in support of I.A.No.490 of 2014 was filed by the counsel for the defendants. It is stated in the affidavit by the counsel that he was attending the appellate court on all posting dates through his Associate Adv.Prinsun Philip and that the said Advocate had informed him that the above matter is posted to 14.3.2014. According to him, on 14.3.2014, the matter was not called on for hearing and the enquiries made by him thereupon revealed that I.A.No.1149 of 2012 was dismissed for default on 11.12.2013. It is also stated in the affidavit that Adv.Prinsun Philip ceased to practise as an Advocate with effect from 1.2.2014 for taking up employment elsewhere and it is on account of the mistake committed by him in noting the posting of the case, he was not present when I.A.No.490 of 2014 was called on for hearing. The

averments made in the affidavit filed in support of the application were not controverted by the respondents by filing counter affidavit. It seems that when I.A.No.490 of 2014 was taken up for hearing, there was no representation for the respondents also. Nevertheless, the court below dismissed I.A.No.490 of 2014 having regard to the merits of the contentions raised by the defendants in the appeal. According to me, the approach made by the court below cannot be accepted. I.A.No.490 of 2014 was only an application seeking orders to condone the delay of 70 days in filing I.A.No.491 of 2014. As noticed above, the said application was not opposed by the respondents therein. There was also no representation for the respondents when the application was taken up for hearing. In the circumstances, according to me, the court below should have allowed I.A.No.490 of 2014 and restored I.A.No.1149 of 2012 to file. The court was not justified in dealing with

the merits of the contentions raised by the appellants in the appeal while deciding the said interlocutory application. In the said circumstances, the impugned order is liable to be set aside and I do so.

In the result, the appeal is allowed, the impugned order is set aside and I.A.Nos.490 of 2014 and 491 of 2014 in I.A.No.1149 of 2012 are allowed and I.A.No.1149 2012 is restored to file. The appellate court shall decide I.A.No.1149 of 2012 on merits, after affording the parties an opportunity for hearing. The parties are directed to appear before the court below on 28.10.2015.

P.B.SURESH KUMAR, JUDGE.

smm