

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 13TH DAY OF MARCH 2015/22ND PHALGUNA, 1936

FAO.No. 39 of 2015 ()

(AGAINST THE COMMON ORDER IN I.A.NOS.4557 OF 2014 & 4558 OF 2014
IN AS 58 OF 2011 of PRINCIPAL SUB COURT,
ERNAKULAM, DATED 10-02-2015)

APPELLANT/PETITIONER/APPELLANT/DEFENDANT:-

THE FACT MANAGERIAL STAFF HOUSE CONSTRUCTION
CO-OPERATIVE SOCIETY NO.E 243,
SANTHI NAGAR, SOUTH KALAMASSERY PO, KALAMASSERY
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK
ERNAKULAM REP. BY ITS SECRETARY.

BY ADVS.SRI.S.SHARAN
SMT.JEENA JOSEPH

RESPONDENTS/RESPONDENTS/RESPONDENTS/PLAINTIFFS:-

1. MUHAMMED ALI,, AGED 51 YEARS
S/O.AHAMMUNNI, KUDILIDPARAMBIL
RESIDING AT ETTUKALIPARAMBIL, NJALAKAM KARA
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK
ERNAKULAM DISTRICT-682030.

2. AZEEZ,, AGED 47 YEARS
S/O.AHAMMUNNI, KUDILIDPARAMBIL
RESIDING AT ETTUKALIPARAMBIL, NJALAKAM KARA
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK
ERNAKULAM DISTRICT-682030.

3. K.M.ABOOBACKER,, AGED 57 YEARS
S/O.MOHAMMED, RESIDING AT KALLEPURAM HOUSE
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK-682030.

4. SUNITHA,, AGED 34 YEARS
D/O.K.M.ABOOBACKER AND W/O.SUDHEER
FORMERLY RESIDING AT KALLEPURAM HOUSE
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK
ERNAKULAM DISTRICT
AND PRESENTLY RESIDING AT PEEDIKAKUDI HOUSE
KUTTAMASSERI, THOTTUMMUGHAM PO, VIZ PERUMBAVOOR
ERNAKULAM DISTRICT-683 101.

5. SHAHUL HAMEED,, AGED 34 YEARS
S/O.K.M.ABOOBACKER, RESIDING AT KALLEPURAM HOUSE
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK
ERNAKULAM DISTRICT-682030.

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6. SEMITHA,
D/O.K.M.ABOOBACKER AND W/O.SALIM
FORMERLY RESIDING AT KALLEPURAM HOUSE
THRIKKAKARA NORTH VILLAGE, KANAYANNUR TALUK
ERNAKULAM DISTRICT AND PRESENTLY RESIDING
AT MANNARATH HOUSE
KEEZHUMADU, ERUMATHALA PO, ALUVA
ERNAKULAM-683112.

BY ADV.A.BALAGOPALAN.

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
13-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Kvs/-

P.B.SURESH KUMAR, J.

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F.A.O.No.39 of 2015.
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Dated this the 13th day of March, 2015.

J U D G M E N T

The appellant is the defendant in O.S.No.1925 of 1990 on the file of the Munsiff Court, Ernakulam. O.S.No.1925 of 1990 is a suit for recovery of possession. The suit was decreed on 31.1.2011. The appellant challenged the decision of the trial court in A.S.No.58 of 2011 before the Principal Sub Court, Ernakulam. According to the appellant, one Adv.Innocent Francis Papali was engaged by him on his behalf in the said appeal. The appeal stood posted for hearing on 31.3.2014. It is his case that the counsel for the appellant had to go to Chennai on 31.3.2014 and consequently, his counsel entrusted the matter to one of his colleagues with a request to seek an adjournment of the matter. According to the appellant, the lawyer to whom the matter was entrusted has omitted due

to inadvertence to represent on his behalf when the case was called on for hearing on 31.3.2014. Consequently, the appeal was dismissed for default on that day. It is also his case that the clerk attached to the office of his counsel did not notice the dismissal of the appeal and consequently, he came to know of the dismissal of the appeal only when the plaintiff in the suit filed E.P.No.270 of 2014. According to the appellant, immediately thereupon, he filed I.A.No.4557 of 2014 for readmission of the appeal invoking Order XLI Rule 19 of the Code of Civil Procedure and I.A.No.4558 of 2014 seeking to condone the delay of 176 days in filing I.A.No.4557 of 2014. The said applications were dismissed by the court below as per the common order impugned in this appeal.

2. Copies of I.A.Nos.4557 and 4558 of 2014 were made available to me at the time of hearing. It is seen that the lawyer engaged by the appellant had filed affidavits in support of both the applications. The facts pleaded by the appellant as narrated above are seen stated in the affidavits

filed in support of the aforesaid applications. It is trite that the lawyers appearing for the parties can also file affidavits in support of the interlocutory applications of this nature, especially when the facts stated are the facts which are exclusively within their knowledge. In the light of the averments in the affidavits filed in support of the applications, I am of the view that the court below should have allowed the applications filed by appellant. Instead, the court below has gone too technical in the matter of considering the said applications. The court below has even doubted the authority of the counsel to file affidavits in support of the applications. I do not agree with the view taken by the court below.

In the result, the impugned order is set aside, I.A.Nos.4557 and 4558 of 2014 are allowed and the appellate court is directed to dispose of A.S.No.58 of 2011 on merits. Since the appeal is of the year 2011, I deem it appropriate to direct the appellate court to dispose of the appeal as expeditiously as possible, at any rate, on or before

F.A.O.No.39/2015.

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30th June, 2015. The parties are directed to appear before the court below on 6.4.2015.

Sd/-
P.B.SURESH KUMAR,
(Judge)

Kvs/-

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PA TO JUDGE.