

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

FAO.No. 212 of 2013 ()

AGAINST THE ORDER IN I.A.6641/2012 IN O.S.NO.25/1991 OF the PRINCIPAL
SUB COURT, THRISSUR DATED 12.04.2013

APPELLANT/PETITIONER:

RETNAVALLY
AGED 52 YEARS, D/O KUNNATH KUMARAN, KANIPPAYYUR VILLAGE
THRISSUR TALUK, PRESENTLY IN WOODFIELD ROAD
KENSINGTON MD 20895 USA REPRESENTED BY
POWER OF ATORNEY HOLDER
JAYAPRAKASH NARAYANAN
S/O KOSSERY GANGADHARAN KODUVAMPARAMBIL HOUSE
PERUMBILAVU, THRISSUR DISTRICT.

BY ADVS.SRI.K.RAMACHANDRAN
SRI.P.RAMACHANDRAN

RESPONDENT/RESPONDENT:

VIJAYAN
S/O KUMARAN, KUNNATH HOUSE, KANIPPAYYUR VILLAGE
KANIPPAYYUR DESOM, THALAPPALLY TALUK
PRESENTLY RESIDING AT 803 JAIL AVENUE
TOCK VILLA MARYLAND 20851-USA

R1 BY ADV. SRI.G.SREEKUMAR (CHELUR)
R1 BY ADV. SRI.K.R.ARUN KRISHNAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
03-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

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F.A.O.No.212 of 2013

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Dated this the 3rd day of July, 2015

JUDGMENT

Sunil Thomas, J.

The plaintiff, aggrieved by the dismissal of I.A.No.6638 of 2012 application to condone the delay of 3508 days in filing I.A.No.6641 of 2012 to restore the suit dismissed for default, is the appellant herein.

2. The plaintiff filed O.S.No.25 of 1991 before the Sub Court, Thrissur against the defendant seeking recovery of property with mesne profits. Thereafter, she is claimed to have gone abroad and got stranded there. In the meanwhile, due to her non-appearance the suit was dismissed for default on 17.12.1992. She returned to India on 05.05.1998 and thereafter, the present applications were filed.

3. Court below held that the reason stated by her to condone the long delay could not be believed and hence, dismissed those applications. These are under challenge in this appeal. Heard both sides and examined the records.

4. It is an admitted fact that the plaintiff went abroad on 21.05.1991 and returned only on 05.05.1998. According to her, she had gone under the expectation that she would be able to return within two months. However, it so happened that her Visa was lost and thereby, she got to stranded there. After her return in 1998, her brother had allegedly assured her to return the property in dispute. Thereafter, a document was executed assigning the rights. However, only later she understood that only one half of the right was conveyed and hence, the application was filed to restore the suit along with an application to condone the delay. The court below after a thread bare evaluation of the available materials, accepted the explanation regarding delay upto 1998. However, the Court was of the opinion that the delay for the period after returning to India could not be accepted, since she did not explain as to why even after returning to India in 1998, she waited till 2012.

5. It is true that the explanation suggested by her up to the year 1998 is acceptable, as correctly held by the court below. The delay in approaching the Court after 1998 was sought to be explained by the fact that her brother had agreed to assign the disputed property, which was in fact done. However, she came to know thereafter that only one half of the right was assigned and

hence, to get relief, she approached the Court with an application to restore the suit dismissed for default. Though, the exact details of her knowledge regarding the document, the manner in which she came to know about it, the date when she came to know about it etc., are not pleaded. The evidence given by PW1 regarding that was also found to be shaky. However, there is one fact which cannot be lost sight of. Her brother had assigned the property to her after her return. Viewed from this background, though she has not succeeded fully in explaining the delay for the entire period after 1998 and each day's delay has not been explained, we feel that delay can be condoned by imposing sufficient costs. Thus, after consideration of the entire facts including her age, relation between parties, we feel that this is a fit case in which one last opportunity can be granted to the appellant to pursue her remedies before the court below. The appeal is hence liable to be allowed on terms.

In the result, the appeal will stand allowed and the impugned order and judgment and decree of the court below dismissing the suit will stand set aside and the suit restored to file on the appellant/plaintiff paying a sum of Rs.20,000/- (Rupees twenty thousand only) within a period of four weeks from today, to the learned counsel for the respondent herein as costs and file such

proof before the court below. In the event of the respondent refusing to accept the costs as ordered above, it can be deposited before the court below within the above period. The parties shall appear before the court below on 12.08.2015. In the event of complying with the condition as above, court below shall record it and thereafter, proceed with the suit in accordance with law. In the event of non-compliance of the above condition, the judgment and decree of the court below dismissing the suit will stand confirmed without any further orders.

The appeal is allowed accordingly.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

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