

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

FAO.No. 225 of 2013 ()

AGAINST THE ORDER DATED 28.5.2013 IN IA. NO.65/2008 AND IA.NO.66/2008
IN OS 275/2001 of I ADDL.SUB COURT,TRIVANDRUM

APPELLANTS/PETITIONERS:

1. MARIAMMA ANTONY FERNANDES AGED 53 YEARS
W/O.LATE ANTONY FERNANDEZ, "MAGGIE VILLA"
HOUSE NO.VIII/283, ATTINKUZHI, BEHIND RAILWAY STATION
KAZHAKOOTTAM, THIRUVANANTHAPURAM. PIN - 695582.
2. PETER ANTONY FERNANDEZ, S/O.LATE ANTONY FERNANDEZ,
AGED 28 YEARS, "MAGGIE VILLA", HOUSE NO.VIII/283
ATTINKUZHI, BEHIND RAILWAY STATION, KAZHAKOOTTAM
THIRUVANANTHAPURAM PIN - 695582.
3. TRACY ANTONY FERNANDEZ, D/O.LATE ANTONY FERNANDEZ,
AGED 24 YEARS, "MAGGIE VILLA", HOUSE NO.VIII/283, ATTINKUZHI
BEHIND RAILWAY STATION, KAZHAKOOTTAM
THIRUVANANTHAPURAM PIN - 695582.
4. MAGGIE ANTONY FERNANDEZ, D/O.LATE ANTONY FERNANDEZ,
AGED 32 YEARS, "MAGGIE VILLA", HOUSE NO.VIII/283
ATTINKUZHI, BEHIND RAILWAY STATION, KAZHAKOOTTAM
THIRUVANANTHAPURAM PIN - 695582.

BY ADVS.SRI.G.P.SHINOD
SRI.RAM MOHAN.G.
SRI.MANU V.
SRI.GOVIND PADMANAABHAN

RESPONDENT/COUNTER PETITIONER:

K V VISHWAN, AGED 45 YEARS
S/O.R.P.RAGHAVAN, MAVUNGAL (P.O), ANANDASHRAMAM
KANHANGODU, KASARAGODU NOW RESIDING AT SUPER MARKET
AL SAHAB, PB NO.5249
DUBAI, U.A.E., REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
P.K.SUKUMARAN, CHENNADUKKAN, BEENANDLY VILLAGE
HOSDURG TALUK, KASARAGODU, PIN:671129

R1 BY ADV. SRI.M.SASINDRAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
04-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

**ANTONY DOMINIC &
P.V.ASHA, JJ.**

.....
F.A.O.No.225 of 2013
.....

Dated this the 4th day of November, 2015

JUDGMENT

Antony Dominic, J.

The appellants are the legal heirs of the deceased defendant in O.S.No.275 of 2001. The said suit was filed by the respondent herein seeking for recovery of money. The defendant did not appear or contest the suit, as a result he was set ex-parte and the suit was decreed on 30.9.2003. Subsequently I.A.Nos.65 and 66 of 2008 were filed by the appellants seeking condonation of delay of 4 years, 1 month and 19 days in applying to set aside the ex-parte decree and to set aside the decree. These IAs were dismissed by the trial court as per the common impugned order. It is this order which is under challenge before us.

2. We heard the learned counsel for the appellant and the learned counsel for the respondent/plaintiff.

3. Having considered the rival submissions made at the Bar, we are inclined to think that the court below has erred in dismissing the IAs. Evidence before the court below shows that

the deceased defendant and his family were residing in Dubai since 1991. During that period, he fell ill due to cancer and after prolonged treatment he expired on 8.6.2007 and was buried in Dubai. It is thereafter that his family consisting of the appellants herein returned to India in July 2007. It is still thereafter that they came to know of the suit, the ex-parte decree and an attachment that was obtained by the respondent/plaintiff on the basis of which E.P.No.117 of 2006 was filed before the execution court. It is accordingly that enquiries were made and after obtaining the certified copies, the IAs were filed seeking condonation of delay and to set aside the ex-parte decree.

4. Though the delay is an inordinate one, from the facts noticed, which are substantiated by the oral evidence of PW-1, the first appellant, we are satisfied that the delay has been properly explained. Even otherwise there is also no reason for us to think that despite service of notice and that too in a case where immovable property of the deceased is involved the appellants or the deceased would have kept away from the court meanwhile a decree against them.

In such circumstances, we allow this appeal by condoning

the delay and setting aside the ex-parte decree as prayed for subject to the appellants paying cost of ₹10,000/- (Rupees Ten thousand only) to the respondent. The parties are directed to appear before the First Additional Sub Court, Thiruvananthapuram on 2.12.2015. The court below will thereafter proceed with the suit with due expedition.

The cost shall be paid within two weeks from today.

Sd/-
ANTONY DOMINIC,
JUDGE.

Sd/-
P.V.ASHA,
JUDGE.

rkc