

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

FAO.No.7 of 2011

**(AGAINST THE ORDER IN AS 124/2008 OF ADDITIONAL DISTRICT COURT,
NORTH PARAVUR).**

**(AGAINST THE ORDER IN OS 238/2005 OF PRINCIPAL SUB COURT,NORTH
PARAVUR).**

APPELLANT/RESPONDENT/DEFENDANT:

**THE ORIENTAL INSURANCE COMPANY LTD.,
REPRESENTED BY ITS DEPUTY MANAGER,
REGIONAL OFFICE,ERNAKULAM NORTH,KOCHI -18.**

BY ADV. SRI.GEORGE CHERIAN (THIRUVALLA)

RESPONDENT/APPELLANT/PLAINTIFF:

**K.N.REKHA @ REKHA ROBI,W/O.ROBY,
ASSISTANT PUBLIC PROSECUTOR,
JUDICIAL FIRST CLASS MAGISTRATE COURT,
NORTH PARAVUR,RESIDING AT
MATTAPPILLIL HOUSE,MOOTHAKUNNAM VILLAGE,
NORTH PARAVUR TALUK,ERNAKULAM DISTRICT.**

R1 BY ADV.SRI.SAJU.S.A

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 05-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

pk

P.B.SURESH KUMAR, J.

F.A.O. No.7 of 2011

Dated 5th February, 2015.

J U D G M E N T

The decision in A.S.No.124 of 2008 on the file of the Court of the District Judge, North Paravur by which the suit O.S.No.238 of 2005 on the file of the Court of the Subordinate Judge, North Paravur was remitted for fresh disposal, is under challenge in this appeal. The defendant in the suit is the appellant.

2. O.S.No.238 of 2005 was instituted for realization of money. The plaintiff was the Standing Counsel of the defendant for conduct of their cases in the Motor Accidents Claims Tribunal at North Paravur. During April, 2001, she returned the files entrusted to her on her appointment as the Assistant Public Prosecutor. According to the plaintiff, though she returned the files, her claim for the fees of the cases conducted by her has not been settled. The suit was therefore filed for realization of the unpaid fees.

3. The defendant contested the suit contending inter

alia that the suit is barred by limitation and that the plaintiff has already been paid the entire fees payable to her in accordance with the norms fixed by them.

4. The trial court, on the basis of the pleadings and the evidence on record, came to the conclusion that the suit is barred by limitation. Though the trial court found that the suit is barred by limitation, the trial court proceeded to consider issue No.4 framed for trial, viz., whether the plaintiff is entitled to realise the plaint claim, and found that the plaintiff has not established that she is entitled to recover the plaint claim from the defendant.

5. The plaintiff challenged the decision of the trial court in appeal. The appellate court held that the finding of the trial court that the suit is barred by limitation is unsustainable. On merits, the appellate court held that the materials on record were not properly considered by the trial court in arriving at the conclusion that the plaintiff has not established that she is entitled to the amount claimed in the suit and consequently remitted the matter to the trial court for fresh consideration of

issue No.4, after setting aside the decree and judgment. The defendant is aggrieved by this decision of the appellate court and hence this appeal.

6. Heard the learned Senior Counsel for the appellant/defendant and the learned Senior Counsel for the respondent/plaintiff.

7. Rule 23A of Order 41 of the Code of Civil Procedure provides that the appellate court can order remand of a suit disposed of otherwise than on a preliminary point when it reverses the decree of the trial court and a retrial is considered necessary. Rule 24 of Order 41 of the Code of Civil Procedure provides that where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, the appellate court shall finally determine the suit. There is no finding in the impugned judgment that a retrial is necessary in this case. There is also no finding in the impugned judgment that the evidence on record is not sufficient to enable the appellate court to pronounce the judgment. On the other hand, the finding in the impugned judgment is only that issue

No.4 needs to be re-examined. In the light of the provisions in Rules 23A and 24 of Order 41 of the Code of Civil Procedure, the appellate court cannot order remand of a suit for re-examining an issue. The appellate court is duty bound to decide the suit finally based on the materials on record. The impugned order, in the circumstances, is liable to be set aside and the suit has to be decided finally by the appellate court.

8. As noticed earlier, the appellate court had reversed the finding of the trial court that the suit is barred by limitation. While considering the issue relating to limitation, the trial court found that the relevant Article to be applied is Article 18 of the Limitation Act. The trial court also declined to the plaintiff the benefit of Section 14 of the Limitation Act for the period during which the writ petition filed by the petitioner was pending, on the ground that the claim in the writ petition was different. The appellate court while reversing the said finding did not consider the correctness or otherwise of the finding rendered by the trial court that the claim in the writ petition was different and therefore, the plaintiff is not entitled

to the benefit of Section 14 of the Limitation Act. Likewise, the appellate court has also not referred to the relevant Article applicable to the transaction. In the circumstances, I am of the view that the finding of the appellate court on the issue of limitation is also unsustainable and needs to be reconsidered with reference to the relevant Article in the Limitation Act and on a consideration of the issue as to whether the plaintiff is entitled to the benefit of Section 14 of the Limitation Act.

In the circumstances, the appeal is allowed and the matter is remitted to the appellate court with a direction to dispose of the suit finally after affording the parties an opportunity of hearing. The appellate court shall also consider the issue relating to limitation afresh.

Sd/-

P.B.SURESH KUMAR, JUDGE.

tgs

(true copy)