

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

FAO.No. 256 of 2014 ()

AGAINST THE ORDER DATED 8.2.2013 IN IA 3226/2011 IN OS 691/2007 OF
THE PRL.SUB COURT THRISSUR.

APPELLANTS/LEGAL HEIRS OF THE PLAINTIFF:

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1. E.C MARY
W/O.LATE JOSEPH, RESIDING AT MISSION QUARTERS
CHEMBUKAVU VILLAGE, THRISSUR TALUK.
 2. XAVIER J.MECHERY
S/O.LATE JOSEPH, MISSION QUARTERS, CHEMBUKAVU VILLAGE
THRISSUR TALUK.

BY ADV. SRI.K.PAUL KURIAKOSE

RESPONDENTS/DEFENDANTS & LEGAL HEIR OF THE PLAINTIFF:

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1. RAJAN
S/O.ARANGOTTUKARA VENKITACHALA IYER, VEMBAL HOUSE
VASANTHA NAGAR, PATTURAIKKAL DESOM, THRISSUR TALUK
PIN - 680 022.
 2. ABRAHAM CHERIAN
S/O.THOPPIL ABRAHAM, CONVENT ROAD
OTTAPALAM P.O,OTTAPALAM TALUK, PIN - 679 101.
 3. M.J.GEORGE
S/O.LATE JOSEPH, MISSION QUARTERS, CHEMBUKKAVU VILLAGE
THRISSUR TALUK, NOW WORKING AS TECHNICAL ASSISTANT
DIMS OFFICE, HIMS DEPARTMENT, AL AHMADI HOSPITAL
AL AHMADI, P.B.NO.9758, KUWAIT
PIN -61008.

R1 & 2 BY ADV. SRI.GEORGE POONTHOTTAM

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
07-12-2015, ALONG WITH FAO. 257/2014, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

RKC

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

**F.A.O.Nos.256 & 257 of 2014
&
C.M.Appln.Nos.669 & 670 of 2014**

Dated this the 7th day of December, 2015

JUDGMENT/ORDER

Antony Dominic, J.

C.M.Appln.No.669 of 2014 is filed to condone the delay of 449 days in filing F.A.O.No.256 of 2014. Similarly C.M.Appln.No.670 of 2014 is filed to condone the delay of 438 days delay in filing F.A.O.No.257 of 2014.

2. F.A.O.No.256 of 2014 is filed aggrieved by the order dated 8.2.2013 passed by the trial court dismissing I.A.No.3226 of 2011 in O.S.No.691 of 2007 on the file of the Sub Court, Thrissur, filed under Order IX Rule 13 of CPC seeking to set aside the ex-parte decree passed against the predecessor in interest of the appellants and the 3rd respondent on 8.12.2010. Insofar as F.A.O.No.257 of 2014 is concerned, it is filed aggrieved by the order dated 31.1.2013 dismissing I.A.No.3227 of 2011 filed under order IX Rule 9 of CPC, for restoration of O.S.No.347 of 2007. O.S.No.691 of 2007 on the file of the Sub Court, Thrissur

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was filed by respondents 1 and 2 herein seeking specific performance of an agreement dated 24.1.2007, whereas O.S.No.343 of 2007 was filed by the predecessor in interest of the appellants for a declaration that the aforesaid agreement is vitiated by fraud, undue influence and mistake. The suits were ordered to be tried jointly and on 3.12.2010, on account of the absence of the plaintiff in O.S.No.343 of 2007, the suit was dismissed, while for the same reason defendant in O.S.No.691 of 2007 was set ex-parte and by judgment and decree rendered on 9.12.2010, the suit was decreed, and specific performance of the agreement was ordered. IAs in question were filed for setting aside the aforesaid orders and on the dismissal of which, these appeals are filed, along with the applications for condonation of delay.

3. We heard the learned counsel for the appellants and the learned counsel appearing for respondents 1 and 2 in these appeals. According to the appellants, after the judgments and decrees were passed, their predecessor in interest expired on

4.7.2013 and they came to know of the litigations only in June 2014, when being the legal heirs of the deceased were served with notice on the IA filed by the plaintiffs in O.S.No.691 of 2007 under section 28 of the Specific Performance Act for execution of the sale deed. It is stated that thereupon they got the certified copies of the order and filed these appeals and that the delay has occurred in the meanwhile for reasons which were totally beyond their control.

4. Though the applications made for condonation of delay as aforesaid has been opposed by respondents 1 and 2 in these appeals, by filing counter affidavit, since the appellants were not parties to the proceedings before the Sub Court, we feel that there is no reason to disbelieve the version canvassed by the appellants. Therefore, we are inclined to condone the delay and to examine the merits of the appeals, which of course will be subject to the terms which will be imposed on the appellants.

5. Turning now our attention to the appeals, it is a fact that the suits were listed for trial on many occasions and finally on

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8.12.2010 with an order for the personal appearance of the deceased. On 8.12.2010, admittedly the deceased was absent. It was because of his absence, the suits happened to be decreed in the manner as stated earlier. In the affidavit filed the justification offered by the deceased are mainly two. The first and foremost reason stated is that, the deceased was a cardiac patient and was hospitalised in the ICU of Jubilee Medical Mission Hospital, Thrissur. However, evidence of PW2 whose evidence was recorded in I.A.No.3227 of 2011 shows that, though the deceased was under his treatment for quite some time and was also hospitalised from 30.11.2010, he was discharged from the hospital on 4.12.2010. Therefore, the version that the deceased was hospitalised on 8.12.2010 as rightly found by the court below, does not appear to be factually correct. But fact remains that the deceased was continuously under treatment for heart related ailments. Even if it is accepted that he was discharged from the hospital on 4.12.2010 and therefore his contention that he was under treatment on 8.12.2010 is found to be incorrect,

his advanced age and ailments would have prevented him from appearing in court. Or else in a case when specific performance was sought on the basis of an agreement for an amount of Rs.1.5 crores, which according to the deceased was too low, there is no reason to think that he would have kept away from the court deliberately and invited the judgment and decree against him. In such circumstances, we feel that the court below should have been more compassionate to the deceased and should have given him an opportunity to contest the suit on merits.

6. Learned counsel appearing for the appellants referred us to a statement filed by the deceased in O.S.No.343 of 2007, in which he was the plaintiff, seeking an adjournment by a month and according to him, the reason stated was his ailments. We have gone through the statement, a copy of which was made available by the learned counsel himself. In the statement, to our disappointment, the deceased has chosen to make reckless allegations against the Sub Judge of partiality against him and this allegation certainly is a matter which disturbed us. Even if

that is ignored, what we find that though the deceased has sought an adjournment as contended by the counsel, the reason for such adjournment is not his ailments, but he wanted to make alternate arrangements on account of the withdrawal of his counsel. Therefore this statement though filed, cannot help the appellants to impugn the orders passed by the court.

7. Be that as it may, having regard to the fact that, we are satisfied that the deceased had justifiable reasons for his absence on 8.12.2010, we condone the delay in filing these appeals and allow these appeals by setting aside the orders passed by the Sub Court, Thrissur by dismissing I.A.No.3226 of 2011 in O.S.No.691 of 2007 and I.A.No.3227 of 2011 in O.S.No.343 of 2007 of the same court. However this shall be subject to payment of cost of Rs.5,000/- (Rupees five thousand only) each to respondents 1 and 2 and remittance of a further costs of Rs.15,000/- (Rupees fifteen thousand only) at the Ernakulam Mediation Centre (High Court). The payment of cost to respondents 1 and 2 and remittance of the cost at the Ernakulam

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Mediation Centre (High Court) shall be made within 15 days from today.

8. The appeals are allowed as above.

It is also made clear that respondents 1 and 2 in O.S.691 of 2007 will be entitled to apply for refund of the amount deposited by them, pursuant to the judgment and decree in O.S.No.691 of 2007.

sd/-
ANTONY DOMINIC,
JUDGE.

sd/-
P.V.ASHA,
JUDGE.

rkc

True copy

PA to Judge