

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 6TH DAY OF JULY 2015/15TH ASHADHA, 193

FAO.No. 308 of 2014 ()

(AGAINST THE ORDER IN I.A. NO.856/12 IN O.S.479/2007 OF THE 1ST
ADDITIONAL SUB JUDGE, THIRUVANANTHAPURAM)

APPELLANT(S)/PETITIONERS/PLAINTIFFS:

1. VIJITHA,
D/O.VIJAYAN, KALLANVILA VEEDU, ATTINGAL.
2. VINU,
S/O.VIJAYAN, KALLANVILA VEEDU, ATTINGAL.
3. SUJATHA,
W/O.VIJAYAN, KALLANVILA VEEDU, ATTINGAL.
4. R.RADHA,
D/O.GOURI, KALLARAVILA VEEDU, MARKET ROAD
ATTINGAL.
5. R.VIMALA,
D/O.GOURI, KOVILVILAKOM VEEDU, THOTTAM
ARA-96, MANACKKADU P.O., THIRUVANANTHAPURAM.
6. G.UDAYAN
KALLANVILA VEEDU, MARKET ROAD, ATTINGAL.

BY ADVS.SRI.M.R.ANANDAKUTTAN
SMT.M.A.ZOHRA
SRI.MAHESH ANANDAKUTTAN

RESPONDENT(S)/CR.PETITIONERS/DEFENDANTS:

1. STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY, SECRETARIAT
THIRUVANANTHAPURAM695 001.
2. THE PRINCIPAL
MEDICAL COLLEGE HOSPITAL, THIRUVANANTHAPURAM695 011.
3. PROFESSOR,
DEPARTMENT OF PHYSICAL MEDICINE,
THIRUVANANTHAPURAM - 695 011.

4. DR.RAMASWAMI PILLAI
ASSOCIATE PROFESSOR, MEDICAL COLLEGE HOSPITAL
THIRUVANANTHAPURAM, NOW RESIDING AT NEELA
TRAC 37NEAR AYURVEDA COLLEGE
THIRUVANANTHAPURAM 695 035.

5. Dr. MARTHANDA PILLAI,
NEURO SURGEON, MEDICAL COLLEGE, THIRUVANANTHAPURAM
NOW WORKING AS DIRECTOR, ANANTHAPURI HOSPITAL
NH BYE PASS, CHACKAI, THIRUVANANTHAPURAM 695 025.

R5 BY ADV. DR.S.GOPAKUMARAN NAIR (SR.)
R5 BY ADV. SRI.P.CHANDRASEKHAR
R5 BY ADV. SRI.SOORAJ T.ELENJICKAL

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON
06-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

F.A.O.No. 308 of 2014

Dated this the 6th day of July, 2015

JUDGMENT

Sunil Thomas, J.

The appellants are the plaintiffs in O.S.No.479/2007 of the Sub Court, Thiruvananthapuram who are aggrieved by the dismissal of I.A.No.856/2012 by which the court below refused to restore the suit which was dismissed for default.

2. The appellants laid the suit seeking compensation consequent to the death of one late Vijayan. The third appellant is his wife and the appellants 1 and 2 are their children. The 4th appellant was the mother who died after the institution of the proceedings and additional appellants 5 to 7 are her legal heirs. It is alleged that late Vijayan had undergone treatment and surgery in a hospital run by the defendants 1 to 3, wherein the defendants 4 and 5 were engaged as doctors. Alleging that he died due to the negligence of the doctors and, thereby, casting liability on the defendants, the appellants sought for compensation of

Rs.3,60,000/-. The case was included in the list in November 2011, but it was dismissed for default, on the ground that the plaintiffs were not present for pursuing the suit. The interlocutory application filed by the appellant to restore the suit was dismissed. Hence, this appeal.

3. Heard both sides. The learned Government Pleader took notice for respondents 1 to 3 and the 5th respondent appeared through the counsel . Examined the records.

4. The suit was admittedly listed in November 2011 and the lawyer sought an adjournment. According to the appellants, the third appellant was proposed to be examined and proof affidavit was also filed. The reason for not being present on the date of trial was that the third appellant was out of station and engaged in the raising of money for admission of her daughter to an engineering college.

5. The court below reasoned that though the third appellant could be away, there were six other plaintiffs, any one of whom could have been examined. It was essentially on that premise the petition was dismissed.

6. It is pertinent to note that the third appellant is the

widow of late Vijayan and the first and second appellants were minors at the time of the accident. The 4th plaintiff was the aged mother and the remaining appellants were her children. In the above circumstances, the ideal person who could have been examined was the third appellant. The court below was not justified in holding that others could have been examined. Further it is also on record that the proof affidavit was filed. An application to call for the records was also pending. These facts indicate that the plaintiffs were diligently prosecuting the case, but unfortunately the third appellant could not be present on the day when the suit was listed for trial. There is nothing on record to show that they have been trying to protract the proceedings or to delay the proceedings. Even if there is a delay, it could have been only at the peril of the plaintiffs, since they were seeking compensation for the death of the head of the family. It is also on record that the suit was filed as an indigent one. In the above circumstances, it cannot be expected that the plaintiffs would voluntarily remain absent and invite an adverse order. In the above circumstances, a lenient view ought to have been taken. The appeal is liable to be allowed and the

impugned order, set aside.

The appeal is allowed, the impugned order in I.A.No.856/2012 is set aside and the suit is restored to file. The court below shall take back the suit on file and, after giving reasonable opportunity to both sides to adduce evidence, proceed in accordance with law. Both sides shall appear before the court below on 20/8/2015.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

