

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937

FAO.No. 362 of 2014

**I.A.NO.222 OF 2005 IN A.S.NO.33 OF 2001 OF THE 1ST ADDITIONAL
SUBORDINATE COURT, THIRUVANANTHAPURAM**

**APPELLANT(S) IN F.A.O- CR.PETITIONER IN I.A/2ND APPELLANT/
2ND - DEFENDANT IN SUIT :**

**M. CHANDRAN, AGED 47 YEARS,
S/O.MADHAVAN, "PANAYIL VEEDU", KAITHAVILAKAM,
PERUNTHANNI, THIRUVANANTHAPURAM- 695 008.**

**BY ADVS.SRI.P.B.KRISHNAN
SRI.P.B.SUBRAMANYAN
SRI.SABU GEORGE**

RESPONDENT(S) IN F.A.O- PETITIONER IN I.A/RESPONDENT/PLAINTIFF IN SUIT :

**K. THANKAPPAN, AGED 68 YEARS,
S/O.KESAVAN, T.C. 36/1850, KAMALA BHAVAN,
SUBHASH NAGAR, THIRUVANANTHAPURAM- 695 007.**

BY ADV. SRI.G.S.REGHUNATH

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 08-07-2015, THE COURT ON 21-08-2015 DELIVERED THE
FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' ANNEXURES :

- ANNEXURE A: DATED 31.07.1997, TRUE COPY OF THE PLAINT IN O.S.NO.1450 OF 1997, MUNSIFF'S COURT, THIRUVANANTHAPURAM.
- ANNEXURE B: DATED 09.10.1996, TRUE COPY OF THE SALE DEED NO.4154/1996, S.R.O., THIRUVANANTHAPURAM.
- ANNEXURE C: DATED 05.11.1999, TRUE COPY OF THE WRITTEN STATEMENT IN O.S.NO.1450 OF 1997, MUNSIFF'S COURT, THIRUVANANTHAPURAM.
- ANNEXURE D: DATED 18.09.2000, TRUE COPY OF THE COMMISSION REPORT IN O.S.NO.1450 OF 1997, MUNSIFF'S COURT, THIRUVANANTHAPURAM.
- ANNEXURE E: DATED 14.02.2001, TRUE COPY OF THE JUDGMENT IN O.S.NO.1450 OF 1997, MUNSIFF'S COURT, THIRUVANANTHAPURAM.
- ANNEXURE F: DATED 02.12.2004, TRUE COPY OF THE JUDGMENT IN A.S.NO.33 OF 2001, 1ST ADDITIONAL SUB COURT, THIRUVANANTHAPURAM.
- ANNEXURE G: DATED 14.01.2005. TRUE COPY OF I.A.NO.222 OF 2005 IN A.S.NO.33 OF 2001, 1ST ADDITIONAL SUB COURT, THIRUVANANTHAPURAM.
- ANNEXURE H: DATED 24.01.2014, TRUE COPY OF THE ORDER IN E.A.NO.358 OF 2013 IN E.P.NO.189 OF 2012 IN O.S.NO.1450 OF 1997 1ST ADDITIONAL MUNSIFF, THIRUVANANTHAPURAM.
- ANNEXURE I: DATED 11.03.2014, TRUE COPY OF THE ORDER IN E.A.NO.621 OF 2013 IN E.P.NO.673 OF 2006 IN O.S.NO.1450 OF 1997 1ST ADDITIONAL MUNSIFF, THIRUVANANTHAPURAM.
- ANNEXURE J: DATED 26.03.2014, TRUE COPY OF THE OBJECTION FILED IN O.S.NO.1450 OF 1997.
- ANNEXURE K: DATED 31.10.2014, TRUE COPY OF THE ORDER IN E.A.NO.318 OF 2014 IN E.P.NO.673 OF 2006 IN O.S.NO.1450 OF 1997 1ST ADDITIONAL MUNSIFF, THIRUVANANTHAPURAM.

RESPONDENT(S)' ANNEXURES : NIL

//TRUE COPY//

P.A.TO JUDGE

P.B.SURESH KUMAR, J.

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F.A.O.No.362 of 2014

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Dated this the 21st day of August, 2015.

J U D G M E N T

This appeal is preferred against the order on I.A.No.222 of 2005 in A.S.No.33 of 2001 on the file of the Sub Court, Thiruvananthapuram.

2. A.S.No.33 of 2001 is an appeal preferred by the appellant herein and his father who are the defendants in O.S.No.1450 of 1997 on the file of the Munsiff's Court, Thiruvananthapuram challenging the decision in the said suit. The appellant was the second defendant and his father was the first defendant in the suit. The suit was filed by the respondent herein seeking, among others, a decree for recovery of possession of plaint B schedule property.

3. The case of the respondent in the suit is that he is the owner of plaint A schedule and that the appellant and his father who owns the property on the north of the plaint A

schedule property, demolished the intervening compound wall and annexed a portion of the plaintiff A schedule property to their property by constructing a compound wall. The portion of the plaintiff A schedule property allegedly trespassed upon by the appellant and his father is shown in the plaint as plaintiff B schedule property. The suit was resisted by the appellant and his father contending, *inter alia*, that they neither demolished the compound wall separating the properties, nor trespassed upon any portion of the plaintiff schedule property. The trial court decreed the suit. The appellant and his father challenged the decision of the trial court in appeal and the appellate court allowed the appeal and dismissed the suit, holding that the identity of the property sought to be recovered has not been established in the suit. The respondent has not challenged the decision of the appellate court. Instead, he filed I.A.No.222 of 2005, seeking review of the judgment of the appellate court on the ground that the first appellant in the appeal who is the first defendant in the suit died on 6.1.2003 and since his legal representatives were not brought on record, the appeal was liable

to be dismissed as abated. The appellate court accepted the said case of the respondent and dismissed the appeal as abated, after recalling the judgment. The appellant, who is the surviving defendant in the suit, is aggrieved by the said order of the appellate court and hence this appeal.

4. Though the order impugned in the appeal was passed on 6.10.2005, the appeal is filed only on 16.12.2014 with a petition to condone the delay of 3264 days in filing the appeal. CM.Appln.No.1054 of 2014 filed by the appellant seeking orders to condone the delay was allowed by this Court on 19.12.2014 subject to the right of the respondent to object. As such, the question whether sufficient cause is made out by the appellant for the delay in filing the appeal also needs to be considered in this matter. It is seen that soon after the impugned order, the appellant filed I.A.No.4095 of 2005 before the appellate court seeking orders to set aside the impugned order on the ground that the same was passed without affording him an opportunity of hearing. It is averred in the affidavit filed in support of the said C.M.Application that the said petition, was dismissed by the

appellate court on the ground that the relief prayed therein is in the nature of a review and that an application for review of an order passed on a review petition cannot be entertained. According to the appellant, in the meanwhile, the respondent attempted to execute the decree and consequently he had to resist the Execution Petition. It is stated in the affidavit that the objection filed by the appellant to the Execution Petition was sustained by the Execution Court and the Execution Petition was dismissed. The decision on the Execution Petition was challenged by the respondent before this Court in WP(C).No.5081 of 2008. This Court, however, was pleased to remit the Execution Petition for fresh consideration. It is stated in the affidavit that the property sought to be recovered in the suit belonged to the wife of the appellant also and consequently she filed E.A.No.358 of 2013 before the Execution Court seeking an adjudication of her right in the property before executing the decree. E.A.No.358 of 2013 was allowed by the Execution Court, holding that the decree is not executable as against the wife of the second defendant. It is seen that later the respondent filed E.A.No.621 of

2013 seeking permission of the Execution Court to proceed with the execution petition, alleging that the wife of the second defendant does not have any right in the plaint B schedule property sought to be recovered. According to the appellant, the said application was allowed incorrectly by the Execution Court on 11.3.2014. It is seen that the wife of the appellant had then filed E.A.No.318 of 2014 seeking review of the order on E.A.No.621 of 2013 and the said application was dismissed on 13.10.2014. The appeal was filed thereafter on 16/12/2014 stating that it is on account of the aforesaid reasons, the order impugned in the appeal was not challenged earlier.

5. A detailed counter affidavit has been filed by the respondent in C.M.Appln.No.1054 of 2014. In the counter affidavit filed in C.M.Appln.No.1054 of 2014, it is contended by the respondent that there is no bona fides in seeking condonation of delay in filing the appeal; that the wife of the second defendant has no right in plaint B schedule property sought to be recovered; that I.A.No.4095 of 2005 filed by the appellant seeking review of the impugned order was not dismissed by the

appeallate court as alleged in the affidavit and that the said application was not pressed by the appellant and that the averment in the affidavit that the said interlocutory application was dismissed by the appellate court is incorrect and misleading. On the merits, the contention raised by the appellant is that non impleadment of the legal representatives of the deceased first appellant was not of any consequence and that the appellant was entitled to pursue the appeal on his own. It is also his case that at any rate, in so far as the appeal is filed by one of the legal representatives of the deceased first appellant, there is no abatement of the appeal at all.

6. The issues arise for consideration in this appeal, in the circumstances, are, (1) whether the appellant has shown sufficient cause for the delay of 3264 days in filing the appeal, and (2) whether the impugned order recalling the decision rendered in A.S.No.33 of 2001 dated 2.12.2004 and dismissing the appeal as abated is correct or not.

7. Section 5 of the Limitation Act empowers the court to condone the delay in filing the appeal, if the appellant

satisfies the court that he had sufficient cause for not preferring the appeal within the period prescribed. It is settled that the expression 'sufficient cause' employed by the legislature in Section 5 is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice. In ***Collector, Land Acquisition, Anantnag and Another v. Mst.Katiji and others*** (1987 KHC 911), the Apex Court held that ordinarily a litigant does not stand to benefit by lodging an appeal late and refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. It was also held in the said case that when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties. It was further held by the Apex Court in the said case that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have any vested right in injustice being done because of a non deliberate delay. It is thus clear that in the matter of deciding the sufficiency of the cause

shown in an application for condonation of delay, a justice oriented approach is called for depending on the facts of each case.

8. With the aforesaid principles in my mind, I shall proceed to consider the issue as to whether sufficient cause has been made out by the appellant in this case to condone the delay of 3264 days in filing the appeal. As noticed above, the suit is one for recovery of possession based on title. The contention of the defendants in the suit was that the property sought to be recovered is part of their property. Despite the said contention, the plaintiff has not taken out steps to measure out the properties of the parties with the aid of a Surveyor. It is on that ground that the appellate court allowed the appeal filed by the appellant. True, it was incumbent on the appellate court in the said circumstances to afford the respondent an opportunity to establish that the property sought to be recovered is part of his property. The appellate court, however, did not afford such an opportunity to the respondent. The respondent, in the circumstances, could have taken up the matter before the

appropriate forum. Instead, he chose to adopt a course which is purely technical. As stated above, he filed I.A.No.222 of 2005 praying to review the judgment and dismiss the appeal as abated on the ground that the legal representatives of the first defendant who died during the pendency of the appeal were not impleaded. Since the said application was allowed by the appellate court as per the order impugned in the appeal, the appellant filed an application as I.A.No.4095 of 2005 seeking review of the order in I.A.No.222 of 2005. In the meanwhile, the respondent attempted to execute a decree. The appellant, in the circumstances, proceeded to defend the Execution Petition. It is not disputed that that the Execution Petition was dismissed. Since the Execution Petition was dismissed, the appellant cannot be blamed for having not challenged the impugned order. It is seen that the Execution Petition was though dismissed during 2007, the said decision was interfered with by this court only in the year 2012 as per order in WP(C).No.5081 of 2008. It is also seen that immediately thereafter the wife of the plaintiff filed a claim petition invoking Order 21, Rule 99 of the Code of Civil

Procedure, stating that she has one half right in the property sought to be recovered and the said petition was allowed. The necessity to challenge the impugned order arose in the circumstances only later when E.A.No.621 of 2013 filed by the respondent seeking permission to proceed with the Execution Petition was allowed by the Execution Court. In the said facts and circumstances of the case, it cannot be said that the appellant was not diligent in the matter of pursuing his cause and that the appellant is guilty of any laches or negligence. As noticed above, when the execution petition was revived, the appellant immediately approached this Court challenging the impugned order. As far as the extent of the delay is concerned, a substantial extent of the delay was caused on account of the pendency of OP(C).No.5081 of 2008 before this Court during which period there was no necessity for the appellant to challenge the impugned order.

9. On the merits of the contentions raised by the appellant, as noticed above, the case of the appellant is that non impleadment of the legal representatives of the deceased first

defendant was not of any consequence and that the appellant was entitled to pursue the appeal on his own. It is also his case that at any rate, in so far as the appeal is filed by one of the legal representatives of the deceased first defendant, there is no abatement of the appeal at all. These contentions have not been considered by the court below at the time of passing the impugned order evidently for the reason that the appellant was not heard by the court while passing the impugned order.

10. It is common knowledge that dispensation of justice in our country depends to a greater extent on the efficiency of the lawyers engaged by the parties. Since the parties were fighting tooth and nail, there is no reason to think that the appellant would not have challenged the impugned order at the appropriate time had he been advised to do so. Wrong legal advice is not a ground at all to condone the delay in filing an appeal, but, having regard to the facts and circumstances of the case and the merits of the contentions raised by the appellant, I am of the view that the interest of justice demands that the disputes between the parties to this appeal shall be

decided on merits. In that view of the matter, I am inclined to condone the delay in filing the appeal.

11. Since the impugned order was passed without hearing the appellant, I am inclined to remit the matter to the lower appellate court to decide I.A.No.222 of 2005 afresh on merits.

In the result, the appeal is allowed and the impugned order is set aside and I.A.No.222 of 2005 is remitted to the appellate court for fresh decision.

Sd/-
P.B.SURESH KUMAR,
JUDGE.

Kvs/-

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PA TO JUDGE.