

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 16TH DAY OF JANUARY 2015/26TH POUSHA, 1936

FAO.No. 396 of 2010 ()

**AGAINST THE ORDER IN IA 133/2008 IN CMA 34/2000 of SUB COURT, CHERTHALA
DATED 06-10-2010**

APPELLANT(S)/APPELLANT/PETITIONER:

**EYOCHAN, S/O.JOSEPH,
KUNNEL HOUSE, THURAVOOR PANCHAYAT, WARD NO.II
THURAVOOR.**

BY ADV. SRI.JOBY CYRIAC

RESPONDENT(S)/COUNTER PETITIONER:

**SMT.JOSAFINA, D/O.MARY,
ARUMANCHARRY VEEDU (ANIL BHAVAN)
PATTANAKKAD VILLAGE, FROM VELUTHA MANNUNKAL
KODAMTHURUTH VILLAGE-688 531.**

**R1 BY ADVS. SRI.T.JAYAKRISHNAN
SRI.R.KRISHNAKUMAR (CHERTHALA)**

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
16-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

VPV

P.B.SURESH KUMAR, J.
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F.A.O.No.396 of 2010
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Dated this the 16th day of January, 2015

JUDGMENT

The order on I.A.No.133 of 2008 in C.M.A.No.34 of 2000 on the file of the Court of the Subordinate Judge, Cherthala is under challenge in this appeal.

2. The appellant is the defendant in O.S.No.692 of 1996 on the file of the Court of the Munsiff, Cherthala. The said suit was one for realisation of money. The appellant did not contest the suit. Consequently, the suit was decreed ex parte. Later, an item of property owned by the appellant was brought for sale and purchased by the respondent, who is the plaintiff in the suit, in execution of the said decree. The property sold was 18.5 cents of land with a residential building. After the sale, an application as E.A.No.723 of 1999 was filed by the appellant to set aside the sale, alleging that the sale was vitiated by material irregularities. E.A.No.723 of 1999 was dismissed on merits on 30.5.2000. Challenging the order on E.A.No.723 of 1999, the appellant preferred C.M.A.No.34 of 2000 before the Court of the Subordinate

Judge, Cherthala. On 19.11.2001, C.M.A.No.34 of 2000 was dismissed for default for not taking steps to serve notice on the respondent. Later on 23.1.2008, an application, I.A.No.133 of 2008 was filed by the appellant invoking Order XLI Rule 19 of the Code of Civil Procedure, for re-admission of the appeal which was dismissed for default. Though the application was filed long after the dismissal of the appeal for default, there was no separate application to condone the delay. Instead, a prayer was made in I.A.No.133 of 2008 itself to condone the delay of 2256 days in filing the appeal. The respondent opposed I.A.No.133 of 2008 by filing a counter-affidavit. Since the application was opposed, the appellant gave evidence as PW1 in support of I.A.No.133 of 2008. He had also examined a witness on his side as PW2. The appellate court, on an appraisal of the materials on record, found that the appellant has not shown any cause for condoning the long delay of 2256 days in filing the appeal. Consequently, I.A.No.133 of 2008 was dismissed. As stated above, it is aggrieved by the decision on I.A.No.133 of 2008, the appellant has come up in this appeal.

3. Heard the learned counsel for the appellant and the learned counsel for the respondent.

4. As noticed above, the delay in filing the appeal was 2256 days, which is nearly 7 years. The reason stated in the affidavit filed in support of I.A.No.133 of 2008 for the delay is that the

respondent, who is the decree holder, wilfully avoided the notice issued in C.M.A.No.34 of 2000 and consequently the court ordered him to take out notice to the respondent by publication. According to him, he was in a very bad financial position at the relevant time and consequently he could not take steps for publication of notice to the respondent as ordered by the court. It is stated in the affidavit filed in support of the application that taking advantage of the situation in which the appellant was placed, the respondent who is also a relative of him, approached the appellant and told him that she is willing to settle the matter on payment of Rs.10,000/- and on the basis of said representation made by her, the appellant had paid the said amount to the respondent and left things as it is, on the basis of the assurance made by the respondent that she will do the needful to get the sale held in her favour in execution of the decree set aside. According to the appellant, in the light of the said assurance, he continued to be in possession of the property and while so, during January, 2008, one Remanan, who is a resident of the locality, entered into the property sold in execution of the decree and tried to put up a fence therein. It is stated by the appellant that the consequent enquiries made by him revealed that the respondent had played fraud on him in obtaining the money and she did not take any steps to get the sale set aside, as assured by her. Paragraphs 5 to 11 of the affidavit filed in support of

I.A.No.133 of 2008 read thus:-

- "5. The above appeal was posted for return of notice to the respondent Decree Holder. The Decree Holder who obtained sale of my property and was conducting the execution proceedings till 30.05.2000 before the Munsiff's Court willfully avoided to receive the notice from this Court to the above address and hence this Court ordered to publish notice of this appeal through paper publication.*
- 6. At that time I was in a very bad financial condition. I was a chronic patient of rheumatic fever and was always in hospital. At the instant time I was severely affected by fever and was in death bed. I being the only earning member of the family, we were literally struggling and were unable to raise the amount for affecting paper publication.*
- 7. Taking advantage of the situation in which I was in the respondent herein who is a close relative approached me and told me that she was willing to settle the matter for Rs.10,000/- and will drop all the proceedings against me if the said amount is paid. Considering my plight some of my relatives gathered the said amount and the same were paid to the respondent herein in my presence. On receiving the said amount she assured me and the relatives that she is dropping all the proceedings against me and she will endorse satisfaction of the decree and settle the same.*
- 8. It is submitted that being a staunch believer in god I believed her words. I was bedridden for several days and also because of my pathetic financial situation I was not in a position to approach my counsel and enquire about the stage of the case. Moreover the respondent assured me that she had made all arrangements with her counsel to accord satisfaction of the decree and set aside the sale. I have believed her words to my peril.*
- 9. It is further submitted that no officials of the Court ever came to the property ever since. Hence I was under the staunch belief that after all the respondent being a relative was finally struck with some reason and has kept her words. Hence I didn't make any further enquiries with my counsel. Moreover being unable to raise the funds in time for paper publication I was ashamed to face my counsel also.*

10. Matters being so last week one Remanan who is a resident of the locality entered into my property and tried to put up a fence in the property around my house. When I enquired with him he told me that he was authorized by the respondent herein to do so. On this I approached the respondent herein who told me that she was the owner of the property having obtained the same through court sale and will do as she pleases with the same.

11. When I enquired with the Court I realized that she played a fraud on me and after obtaining the money she did not set aside sale as promised. And that my appeal was dismissed for default for not taking steps on 19.11.2001."

5. The court below noticed that the appellant is not an ordinary layman and that he was an Amin attached to the District Court, Alappuzha. The court below also noticed that the case of the appellant that he was in short of funds to take steps for serving notice on the respondent in the C.M. Appeal cannot be accepted, as his son is employed in a Gulf country and his daughter is working as a Nurse. The court below further noticed that after the dismissal of the appeal on 19.11.2001, the property was delivered to the respondent through court on 4.4.2002 and a portion of the property was sold thereafter by the respondent. It is taking note of the said facts, the court below found that the appellant has not shown any cause for the long delay of 2256 days in filing the appeal.

6. As noticed by the court below, the appellant is not a layman. He was a person working as Amin in a court. It is hard to believe that such a person would keep mum based on the alleged oral assurance given by the respondent that she would get the sale

of the property held in her favour set aside for the appellant. Further, the case set up by the defendant in the application filed for condonation of delay that on account of financial constraints, he could not take steps for service of notice on the respondent by publication, also cannot be believed as it has come out in evidence that the children of the appellant are well employed. Again, the case set up by him that a decree for recovery of a sum of Rs.73,390/- with interest and costs was settled by the respondent after its execution by sale of a property, by accepting a sum of Rs.10,000/-, cannot also be believed. In the aforesaid circumstances, I have no hesitation to hold that no cause, much less sufficient cause was made out by the appellant to condone the long delay of 2256 days in filing the appeal. The impugned decision is, therefore, in order. The appeal is, accordingly, dismissed.

Sd/-

**P.B.SURESH KUMAR
JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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