

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 2ND DAY OF JUNE 2015/12TH JYAISHTA, 1937

RSA.No. 983 of 2006 ()

(AGAINST THE JUDGMENT AND DECREE IN AS.NO. 8/1998 OF DISTRICT COURT, THIRUVANANTHAPURAM DATED 04/07/2001)

(AGAINST THE JUDGMENT AND DECREE IN OS.NO. 1430/1990 OF IST ADDL.MUNSIFF COURT,THIRUVANANTHAPURAM)

APPELLANT/APPELLANT/PLAINTIFF:

**S.CHARULATHA,D/O.SMT. RAJAMMA,
RESIDING AT CHEMPAKASSERY PUTHEN VEEDU, ERAVALLYIL,
CHEMPAKASSERY JUNCTION, THIRUVANANTHAPURAM.**

**BY ADVS.SRI.M.P.SREEKRISHNAN
SMT.M.H.BINDU**

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

- 1. P.MANJU, RESIDING AT ASOKA HOUSE,
CHATHANNOOR, KOLLAM DIST.**
- 2. P.CHANDRIKA, T.C.36/830,
ARAKATHIL, CHEMPAKASSERY,
THIRUVANANTHAPURAM.**
- 3. SUDHA GOPALAKRISHNAN,
RESIDING AT SANKUCHAKRAM VEEDU,
SANKUM MUGHOM, THIRUVANANTHAPURAM.**

**BY ADVS. SRI.K.RAMACHANDRAN
SMT.R.MEERA
SMT.A.R.DIVYA**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 02-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

P.BHAVADASAN, J.

R.S.A. No. 983 of 2006

Dated this the 02nd day of June, 2015

J U D G M E N T

This second appeal is directed against the dismissal of delay condonation petition in filing the appeal before the court below and consequential dismissal of the appeal.

2. The facts absolutely necessary for the disposal of this appeal are as follows:

The appellant before this Court is the plaintiff in O.S.No. 1430/1990 before the First Additional Munsiff Court, Thiruvananthapuram. The suit was one for injunction initially, which was later amended incorporating prayer for declaration and mandatory injunction.

3. The suit went to trial and evidence was adduced by both sides. On consideration of materials before it, the trial court came to the conclusion that the plaintiff had miserably failed to establish her case and therefore dismissed the suit. Appeal was preferred as A.S. No.

8/1998 before the District Court, Thiruvananthapuram. Since there was considerable delay in filing the said appeal, the delay condonation petition was also filed. Unfortunately for the appellant before this Court, the delay condonation petition was dismissed and consequently the appeal was also dismissed.

4. The petitioner approached this Court by way of C.R.P. 3082/2001 challenging the dismissal of delay condonation petition. This Court was gracious enough to allow the C.R.P. and remand the delay condonation petition for fresh consideration after permitting the petitioner to adduce further evidence, if she chose to do so. The matter went back to the District Court and the District Court, after consideration of evidence adduced, formed the opinion that the appellant had not been successful in showing sufficient cause to condone the delay and accordingly, dismissed the delay condonation petition and consequently the appeal was also dismissed. That brings the plaintiff before this Court.

5. Notice was issued on the following questions of law:

“a) Whether the court below was justified in dismissing the application seeking condonation of delay? b) Is not the order passed by the lower appellate court dismissing the application for condonation of delay filed by the appellant, against the findings recorded in the order in C.R.P.No. 3082/2001, of this Hon'ble Court.

c) Whether the appellant can be penalized and her application for condonation of delay rejected, when the delay had occurred because of the mistake that had crept in the office of her counsel.

d) Is not the appellant to get the delay condoned, relying on the decisions reported in AIR 1988 SC 897, AIR\$ 1987 SC 1353, 1998(7) SCC 123, 1998(1) KLT 1008, AIR 1981 SC 1400, AIR 1984 SC 41, AIR 2004 Bombay 8, AIR 1989 Madras 237, AIR 1990 Allahabad 74, AIR 1986 M.P. 236 and 1998 (9) SCC 458.

e) Whether the Trial Court below was justified in dismissing the suit without considering the merits of the case of the defendants and without properly considering the pleadings and documents produced by the

appellant?

f) Whether the alternative plea of the appellant of adverse possession is sustainable?

g) Whether the trial court was justified in holding that the appellant had not discharged her burden and so the evidence of the defendants need not be looked into, in the facts and circumstances of the case?

h) In the light of Ext.A5, is not the appellant entitled to fixity under Section 18 of the Kerala Services Inam Lands (Vesting and Enfranchising Act)?"

6. The learned counsel appearing for the appellant relied on the decision reported in **Collector, Land Acquisition, Anantnag v. Mst. Katiji and others** [AIR 1987 Supreme Court 1353] and contended that the Apex Court has taken a liberal approach in the matter of condonation of delay so as not to deprive the parties their legitimate right of having the case decided on merits. Pedantic and technical approach in the matter of condonation of delay may result in injustice. The learned counsel went on to point out that it could be seen from the

material on record that the delay, if at all there was any, was not due to any fault on the part of the petitioner, but was due to the fact that the case records were misplaced from the office of the counsel. The objection taken by the court below was that no affidavit has been filed by the counsel. According to the learned counsel, to say the least, it is uncharitable. It is too much to expect a counsel to file an affidavit to that effect. It is also pointed out that by having the matter decided on merits, no particular harm is caused to the respondents and it is highlighted that justice should not only be done but also appear to have been done. On these premises, it is prayed that appeal may be allowed and the lower appellate court may be directed to take up the appeal on file and dispose it of on merits.

7. Sri. K. Ramachandran, the learned counsel appearing for the respondents on the other hand pointed out that there is absolutely no merit in the above appeal and it is nothing but an attempt to drag on the proceedings.

Attention of this Court was drawn to the fact that the second appeal itself was filed after a long delay of 4 ½ years though this Court was gracious enough to condone the delay. The learned counsel also reminds this Court that justice is not confined on one side but it should appear to have been rendered for both sides. The lower appellate court on two occasions, had found that there is no justification for the delay in filing the appeal and had dismissed the petition. It is essentially a question of fact based on appreciation of materials before it. It is pointed out that there is no question of law involved.

8. May be the learned counsel for the respondents is justified in his submission that there is no question of law as such involved. It is a matter for appreciation of materials and to satisfy that there are justifiable reasons to condone the delay. But as pointed out by the learned counsel for the petitioner, in the decision reported in **Collector, Land Acquisition, Anantnag v. Mst. Katiji and others** [AIR

1987 Supreme Court 1353] emphasis has been laid on the necessity to have the matter heard and disposed of on merits and not to short circuit that exercise by dismissing the appeals on technical grounds. The Apex Court has also reminded the courts below that by having the matter heard on merits, no particular harm is caused to the parties except they may have to engage a counsel.

9. True, on both the occasions, the court below found that no sufficient cause has been shown to condone the delay. The court below was not impressed with the reason that case records were misplaced and the counsel for the petitioner ought to have filed an affidavit. As rightly pointed out by the learned counsel for the petitioner, it is too embarrassing for the counsel to file an affidavit to that effect and face the consequences. Even otherwise too, the courts do not encourage affidavit by the advocate in such matters. There is nothing to show that the petitioner stands to gain by deliberately delaying the filing of the appeal. The fact

remains that it is difficult to believe that appellant would have deliberately delayed filing of the appeal taking the risk of having the appeal dismissed on the ground of delay.

10. But that does not mean that the appellant can simply walk away with an order. Necessarily, the respondents have been dragged to this Court. Moreover, the suit is of the year 1990. We are in 2015. All this could have been avoided if the lower appellate court at the first instance had condoned the delay and had the matter disposed of on merits. By the act of lower appellate court, the appellant is deprived of an opportunity of having the matter decided on merits.

11. Whatever that be, it seems to be reasonable demand that lower appellate court be directed to hear the appeal on merits and dispose of the same within a time to be fixed by this Court and again, any inconvenience or difficulties caused to the respondents can be compensated by awarding costs.

12. In the result, this appeal is allowed and the impugned order is set aside and lower appellate court is directed to take the appeal on file and dispose it of on merits, in accordance with law, within a period of six months from the date of appearance of the parties on condition that the appellant pays a sum of ₹ 10,000/- to the learned counsel appearing for the respondents before this Court within a period of two weeks from today.

Parties shall appear before the lower appellate court on **01.07.2015.**

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge