

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 11TH DAY OF JUNE 2015/21ST JYASHTA, 1937

OP(C).No. 508 of 2015 (O)

(I.A.NO.469/2015 IN OS.NO.376/2013 OF ADDITIONAL MUNSIF COURT, KOTTAYAM)

PETITIONER(S):

- 1. DR. SANTHOSH VERGIS,
7 SHIRE VILLA, KUDAMALLOOR KARA, KUDAMALLOOR P.O.,
AYMANAM VILLAGE, KOTTAYAM.**
- 2. DR. ANU THOMAS,
W/O. DR.SANTHOSH VERGIS, 7 SHIRE VILLA,
KUDAMALLOOR KARA, KUDAMALLOOR P.O., AYMANAM VILLAGE,
KOTTAYAM.**

**BY ADVS.SRI.M.P.MADHAVANKUTTY
SRI.GOKUL DAS V.V.H.**

RESPONDENT(S):

- 1. SHIRE VILLA OWNERS WELFARE ASSOCIATION,
REG.NO.KTM/TC/537/2012, SHIRE VILLA, KUDAMALLOOR KARA,
KUDAMALLOOR P.O., AYMANAM VILLAGE, KOTTAYAM,
REPRESENTED BY ITS SECRETARY, PIN-686 017.**
- 2. ABRAHAM POTHEN,
S/O. LATE ABRAHAM, RESIDING AT VICTORY HOUSE,
KUDAMALLOOR P.O., KUDAMALLOOR KARA, AYMANAM VILLAGE,
KOTTAYAM-686 017.**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD
ON 11-06-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

sts

OP(C).No. 508 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

- P1 : COPY OF THE PLAINT IN OS NO.376/2013 BEFORE THE ADDITIONAL MUNSIFF'S COURT, KOTTAYAM.
- P2 : COPY OF THE WRITTEN STATEMENT OF THE 2ND DEFENDANT IN OS NO.376/2013 BEFORE THE ADDITIONAL MUNSIFF'S COURT, KOTTAYAM.
- P3 : COPY OF THE SALE DEED DTD. 13.4.2012 BEARING NO.1132/1/2012 OF THE SUB REGISTRAR'S OFFICE, KOTTAYAM.
- P4 : COPY OF THE COMMISSION REPORT DTD. 31.7.2013 IN OS NO.376/2013 BEFORE THE ADDITIONAL MUNSIFF'S COURT, KOTTAYAM.
- P5 : COPY OF IA NO.469/2015 IN OS NO.376/2013 BEFORE THE ADDITIONAL MUNSIFF'S COURT, KOTTAYAM.
- P6 : COPY OF THE OBJECTION IN IA NO.469/2015 IN OS NO.376/2013 BEFORE THE ADDITIONAL MUNSIFF'S COURT, KOTTAYAM.
- P7 : COPY OF THE ORDER DTD. 13.2.2015 IA NO.469/2015 IN OS NO.376/2013 BEFORE THE ADDITIONAL MUNSIFF'S COURT, KOTTAYAM.

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.A.TO JUDGE

sts

B. KEMAL PASHA, J.

.....
O.P.(C) No.508 of 2015
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Dated this the 11th day of June, 2015

J U D G M E N T

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A suit for declaration and injunction was filed. Ultimately, it came up in the list and evidence was recorded. In the course of the hearing, the petitioners, who are the plaintiffs, could note down that the width of the pathway was incorrectly shown in the plaint. Even though the Commissioner's report and other records revealed a different width of the pathway, the amendment was not made to the schedule of the plaint. Over and above it, the plaintiffs could note down that even though an unregistered association was made a party to the suit as one among the defendants and an order was obtained for leave to sue under Order I Rule 8 CPC, notice was not issued as contemplated under Order I Rule 8 CPC. By reason of such formal defects, the petitioners apprehended that the suit

must fail, and therefore, they wanted to withdraw from the suit with leave to file a fresh suit.

2. The court below has dismissed IA.469/2015 by finding that the petitioners have not detailed as to what was the formal defect and further that, the application was too belated. Further, according to the court below, there occurred an error in the width of the pathway mentioned in the plaint and there was no attempt to amend the plaint for correcting the said error. It was on these grounds that the court below dismissed the IA through Ext.P7 order. The said order is under challenge.

3. Even though notice has been served on the respondents, there is no representation for the respondents. Heard learned counsel for the petitioners.

4. It is true that the petitioners have not detailed in I.A No.469/2015 the fact that an application for sue under Order I Rule 8 CPC was filed and an order was obtained from the court; but notice was not issued. According to the

learned counsel for the petitioners, such an order was passed and at the same time, no notice as contemplated under Order I Rule 8 could be issued and in such case, even if a decree is passed, such a decree cannot be executed against the members of the association effectively. It seems that an unregistered association is also made a party. When notices were not issued as contemplated under Order I Rule 8 CPC, it can be treated as a formal defect.

5. It seems that the court below has taken the view that the application is belated as it was filed at the time of the final hearing of the matter. That does not make any difference at all. As per Order XXIII Rule 1 CPC, a withdrawal or abandonment can be made at any stage of the suit. Order XXIII Rule 3 is also governed by Order XXIII Rule 1 with regard to the stage of the suit. An application under Order XXIII Rule 1(3) can be filed at any stage of the suit and, therefore, there is no meaning in saying that the application is belated. On going through the facts and

circumstances of the case, this Court is of the view that Ext.P7 is liable to be set aside.

In the result, this OP(Civil) is allowed. Ext.P7 order is set aside. IA No.469/2015 stands allowed. The petitioner is permitted to withdraw from the suit with liberty to file a fresh suit on the same subject matter.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/11/06

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PA to Judge