

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937

OP(C).No. 1169 of 2015 (O)

PETITIONER(S)/RESPONDENT-DEFENDANT:

SOSAMMA
W/O.MATHEW MATHAI, KALATHIL HOUSE, KATTACHIRA MURI
BHARANIKKAVU VILLAGE.

BY ADVS.SRI.SATHISH NINAN
SRI.SANTHOSH MATHEW
SRI.ARUN THOMAS
SRI.JENNIS STEPHEN

RESPONDENT/PETITIONER-PLAINTIFF(S):

MARIYAMMA
W/O.K.V.VARGHESE, KALEEKATHARAYIL HOUSE
KATTACHIRA MURI, BHARANIKKAVU VILLAGE.

R1 BY SR. ADV. SMT.SUMATHY DANDAPANI
SRI.MILLU DANDAPANI

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 20-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 1169 of 2015 (O)

APPENDIX

PETITIONER(S) ' EXHIBITS

P1:-TRUE COPY OF THE APPLICATION IA NO 2609 OF 2014 IN OS NO 94/2008
FILED BY THE RESPONDENT HEREIN BEFORE THE MUNSIF COURT, KAYAMKULAM.

P2:-TRUE COPY OF THE APPLICATION IA NO 2608 OF 2014 IN OS NO 94/2008
FILED BY THE RESPONDENT HEREIN BEFORE THE MUNSIF COURT, KAYAMKULAM.

P3:-TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER IN IA 2608 OF
2014 IN OS 94/2008.

P4:-TRUE COPY OF COMMON ORDER DTD 31/1/2015 IN IA NO 2608 OF 2014 AND
IA NO 2609 OF 2014 IN OS NO 94/2008 OF THE MUNSIF COURT, KAYAMKULAM.

P5:-A TRUE COPY OF THE JUDGMENT IN OS NO 287 OF 2012 OF THE MUNSIF
COURT, KAYAMKULAM.

RESPONDENT(S) ' EXHIBITS

NIL

[CR]

B. KEMAL PASHA, J.

.....
O.P.(C) No. 1169 of 2015
.....

Dated this the 20th day of August, 2015

J U D G M E N T

(1) When a suit is dismissed as not pressed, can such a decree be set aside under Order IX Rule 9 of the Code of Civil Procedure?

(2) In such a case, when the counter claim is decreed, can such a decree be set aside under Order IX Rule 13 of the Code of Civil Procedure?

(3) Can the approach made by the court below in condoning the delay of 2180 days in filing the IA under Order IX Rule 13 of the Code of Civil Procedure, be termed as exercise of judicial discretion?

2. Ext.P4 common order passed by the court below, by which the court below has chosen to restore the suit and to set aside the decree of dismissal of the suit as well as the decree passed in the counter claim after condoning the

delay of 2180 days, is under challenge.

3. The respondent herein, as plaintiff, had filed O.S.No.94 of 2008 before the court below for getting the settlement deed and the release deed, which were executed in favour of the petitioner herein, set aside. In the written statement, the petitioner herein, who was the defendant in the said suit, had set up a counter claim. The suit ultimately came up in the list on 29.09.2008. At that stage, the learned counsel for the plaintiff filed a memo before the court below stating that the suit was not pressed. In the light of it, the court below had dismissed the suit, and decreed the counter claim.

4. Subsequently, the son of the respondent herein filed O.S.No.287 of 2012 by challenging the aforesaid two documents highlighting the ground that even though his mother had filed a suit as O.S.No.94 of 2008, the said suit happened to be dismissed due to the absence of the plaintiff and counter claim happened to be decreed by declaring the

cancellation deed as null and void. The son further averred in the plaint that his mother, who is the respondent herein, was incapable of filing a suit because of her old age. In the aforesaid suit filed by the son, the present respondent was examined as PW2. The court below found that PW2 was very accurate and vigilant in giving proper answers to the questions put to her and it could not be said that the respondent herein was incapable of filing a suit before court. O.S.No.287 of 2012 was dismissed by the court below through Ext.P5 judgment dated 9.10.2014. Immediately, after that, IA Nos.2609/2014 and 2608/14 in question were filed on 17.10.2014.

5. The court below, after considering the said IAs, has arrived at a conclusion that *“the petitioner lacks bona fides and reasons stated in the petition is not sufficient to allow the petition.”* After making the said observations, the court below has passed the following order. *“Even though in the interest of justice, IA Nos.2609/2014 and 2608/14 are*

allowed on costs of ₹4,000/-, for the inconvenience caused to the respondent.”

6. Heard the learned counsel for the petitioner Sri. Sathish Ninan and the learned Senior Counsel for the respondent, Smt. Sumathy Dandapani.

7. The learned counsel for the petitioner has canvassed mainly two arguments. Firstly, the dismissal of the suit could not have been considered as a dismissal under Order IX Rule 8 of the Code of Civil Procedure and the passing of the decree in the counter claim could not have been treated as an *ex parte* decree within the meaning of Order IX Rule 13, when the suit was dismissed as well as a decree was passed on a specific admission from the plaintiff that the suit was 'not pressed'. Secondly, it has been argued that the court below has found that the respondent herein lacks *bona fides* and the reasons stated in the petition were not sufficient to allow the petition and thereafter the discretion exercised by the court below by

allowing the IAs on cost cannot be treated as an exercise of the discretion judiciously. It is also argued that by filing a memo stating that the suit was 'not pressed', the plaintiff had made a clear admission before the court below that the suit could be dismissed and the counter claim could be allowed and therefore, the plaintiff cannot later withdraw such an admission to the prejudice of the defendant in whose favour such an admission was made.

8. *Per contra*, the learned Senior Counsel has argued that the dismissal of the suit as well as passing of the decree in the counter claim could only be treated as one occurred on default of the plaintiff and therefore, the application filed under Order IX Rule 9 and Order IX Rule 13 is perfectly maintainable. The learned Senior Counsel for the respondent has argued that the court below has exercised the discretion judiciously to undo a mischief to which the respondent was put, on account of the dismissal of the suit and the passing of the decree in the counter claim

and therefore, the impugned common order is not liable to be interfered with.

9. True that, when a memo was filed thereby not pressing the suit, the plaintiff had given a concession to have her suit dismissed. In a case wherein a counter claim has been set up by the defendant, and the plaintiff has not been declared *ex parte* to the counter claim, the decree in the counter claim could not have been treated as an *ex parte* decree within the meaning of Order IX Rule 13 CPC. In the present case, the judgment in O.S.No.94 of 2008 shows that the plaintiff had not filed any answer to the counter claim and further that she was set *ex parte* to the counter claim. Even though any answer to the counter claim was not filed, the court below has not chosen to pass a decree on the counter claim by invoking the power under Order VIII Rule 10 CPC. In such a case, even though the suit was 'not pressed', such a concession was not there for decreeing the counter claim especially when it was not stated in the memo

that the counter claim could be decreed. Matters being so, an application under Order IX Rule 13 is maintainable as against the decree passed in the counter claim and the said decree can only be treated as an *exparte* decree within the meaning of Order IX Rule 13 CPC.

10. At the same time, the same is not the case with the dismissal of the suit on the basis of the memo filed by the plaintiff for not pressing the suit. The learned counsel for the petitioner has invited the attention of this Court to the decision in ***Philomina Joseph v. State Of Kerala*** [2009(1) KHC 575(DB).

“When he says that the suit is 'not pressed,' he is admitting that he has no case and binds himself by way of Order II, Rule 2 CPC and it is certainly an admission and since the suit is decided without any investigation, Section 69 of the Act correctly applies.”

When the plaintiff says that he does not want the suit to be

proceeded with, and the same is not pressed, it is a categorical admission that he does not want any relief as against the defendant.

11. In ***Muhammed Master v. Abu Haji***[1981 KLT 578] another Division Bench of this Court has held in paragraph 4:

“As a result of 'not pressing' certain allegations and grounds raised in a pleading, a litigant submits that the issues arising therefrom may be decided against him and in favour of his opponent; and those issues are decided accordingly. It is virtually a decision by consent, in that the party asserting or disputing, concedes that his assertion or dispute, as the case may be merits no consideration as he cannot substantiate the same.”

12. In ***Mariyam v. Vijayarajan***[2015(1) KHC 324] another Division Bench of this Court has relied on the decision in ***Muhammed Master***(*supra*) and held that where

a suit is dismissed as “not pressed”, the inevitable inference is that the plaintiff offers that the issues arising in the suit as raised may be decided against that party and in favour of the opponent. Here, in this case, the dismissal of the suit was not on account of the default of the plaintiff in appearing before the court below within the meaning of Order IX Rule 8 CPC; whereas, the dismissal was invited by the plaintiff by filing a memo to the effect that the suit was not pressed. At any stretch of imagination, such a dismissal cannot be categorised as one under Order IX Rule 8 CPC, and therefore, an application under Order IX Rule 9 CPC is not maintainable in this case as against the dismissal of the suit.

13. Now the question to be decided is whether the inordinate delay in filing the IA is justifiable and whether there was *bona fides* on the part of the respondent in preferring those applications.

14. The court below in Ext.P4 order has clearly concluded that there was no *bona fides* on the part of the

respondent and the reasons mentioned in the IAs were not sufficient to allow the IAs. Apart from the said findings entered by the court below in Ext.P4, the sequence of events narrated below has also to be considered.

15. At first, the respondent had filed the suit. A counter claim was set up by the petitioner in the said suit. Any answer to the counter claim was not filed by the plaintiff. Thereafter, the suit was 'not pressed' by filing a memo to that effect. After that, for almost four years there were no attempts from the part of the respondent to get the *exparte* decree in the counter claim set aside. Instead of that, it was the turn of her son to have another round of litigation just as an experiment. The subsequent suit OS 287/2012 was filed by the son by making a specific submission that the suit filed by his mother happened to be dismissed for default. In OS 287/2012 the mother, who is the respondent herein, was examined as PW2. In Ext.P5 judgment, the court below has clearly observed that the respondent herein was capable of

filing such a suit and she was very accurate and vigilant in answering the questions put to her.

16. O.S. 287 of 2012 was dismissed on 9.10.2014 through Ext.P5 judgment. It was immediately after that these IAs were filed on 17.10.2014. There was a delay of 2180 days. When the IAs were preferred immediately after the dismissal of the suit filed by the son, no doubt, it has to be inferred that the son is behind the respondent in filing these IAs before the court below. Therefore, the findings entered by the court below in Ext.P4 that the respondent lacks *bona fides*, is correct.

17. The learned counsel for the petitioner has invited the attention of this Court to the decision in ***Pundlik Jalam Patil (D) by Lrs v. Executive Engineering Jalgaon Medium Project and another***[(2008) 17 SCC 448] wherein it was held in paragraph 11:

“That a party taking a false stand to get rid of the bar of limitation should not be

encouraged to get any premium on the falsehood on his part by condoning delay.”

18. It was further held in paragraph 12:

“It is true that the power to condone the delay rests with the court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the court but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior court. The High Court having found that the respondent in its application made incorrect submission that it had no knowledge of the award passed by the Reference Court ought to have refused to exercise its discretion.

The High Court exercised its discretion on wrong principles. In that view of the matter we cannot sustain the exercise of discretion in the manner done by the High Court."

19. It was further held in paragraphs 21 and 22:

"Basically the laws of Limitation are founded on public policy. In Halsbury's Laws of England, 4th Ed., Vol.28,p.266,para 605, the policy of the Limitation Acts is laid down as follows:

"The courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (i) that long dormant claims have more of cruelty than justice in them, (ii) that a defendant might have lost the evidence to dispute the stated claim, (iii) that persons with good causes of actions should pursue them with reasonable diligence."

Statutes of limitation are sometimes described as 'statutes of peace'. An unlimited and perpetual threat of

limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. This court in Rajender Singh and others vs. Santa Singh and others [(1973) 2 SCC 705] has observed : "the object of law of Limitation is to prevent disturbance and deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches". In Motichand vs. Munshi [(1969) 2 SCR 824], this court observed that this principle is based on the maxim "interest republicae ut sit finis litum, that is, the interest of the State requires that there should be end to litigation but at the same time law of Limitation are a means to ensuring private justice suppressing fraud and perjury, quickening diligence and preventing oppression.

It needs no restatement at our hands that the object for fixing time limit for litigation is based on public policy fixing a life span

for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. Salmond in his jurisprudence states that the laws come to the assistance of the vigilant and not of the sleepy.”

20. The attention of this Court has been invited to the decision in ***Basavaraj v. The Special Land Acquisition Officer***[AIR 2014 SC 746]. In paragraph 9 it was held:

“Sufficient cause is the cause for which defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly

examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the Court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the Court should not allow the application 7 Page 8 for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See: Manindra Land and Building Corporation

Ltd. v. Bhootnath Banerjee & Ors., AIR 1964 SC 1336; Lala Matadin v. A. Narayanan, AIR 1970 SC 1953; Parimal v. Veena @ Bharti AIR 2011 SC 1150; and Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai AIR 2012 SC 1629.)”

21. In paragraph 12 it was held:

“It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. “A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation.” The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim “dura lex sed

lex” which means “the law is hard but it is the law”, stands attracted in such a situation. It has consistently been held that, “inconvenience is not” a decisive factor to be considered while interpreting a statute.”

22. In paragraph 15 it was held:

“The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the “sufficient cause” which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an

inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature.”

23. From the decisions noted supra, it has come out that where a party is found to be negligent, or there is want of *bona fides* on his part, or found to have not acted diligently or remained inactive, there cannot be a justifiable ground to condone the delay. In such case, if delay is condoned, it would be an utter disregard to the legislature. In view of the findings entered by the court below in Ext.P5, it is evident that the averments in Ext.P2 IA are false and

devoid of *bona fides*.

24. In Ext.P1 IA the respondent has prayed for getting the suit restored as well as getting the decree in the counter claim set aside. As far as the first part is concerned the same is not permissible as the suit was dismissed on account of the clear admission that the suit was 'not pressed'. In such a case the IA under Order IX Rule 9 CPC is not maintainable.

25. Regarding the next aspect, it has to be considered whether the respondent was justified in forwarding such a demand after a lapse of 2180 days. In the present case it cannot be said that the respondent was not aware of the proceedings in OS No.94 of 2008, till 25.09.2014. It is not correct to say that she came to know about the dismissal of the suit as well as the decree passed in the counter claim on 25.09.2014 only. In the suit filed by her son, in which she was examined as PW2, it was specifically averred that the suit filed by his mother

happened to be dismissed for default. By considering the sequence of events, it is evident that the date of knowledge with regard to the decree in the counter claim as well as dismissal of the suit mentioned by the respondent in Ext.P1 IA is incorrect and without any *bona fides*.

26. From the decisions in ***Pundlik Jalam Patil and Basavaraj(supra)*** it is evident that the so-called exercise of discretion made by the court below in Ext.P4 for condoning the delay is no doubt a casual approach made by the court below, with utter disregard to the law of limitation. The respondent, who was sleeping over her right to file an application under Order IX Rule 13 CPC, has chosen to file such an application after a delay of 2180 days, that too when she realised that the experimental litigation filed by her son ended in failure. There is no *bona fides* on the part of the respondent in filing the said application. In such circumstances, she is not entitled to get the inordinate delay condoned.

27. The court below has not stated any valid or sufficient grounds for condoning the delay. Over and above it, there are clear findings by the court below that there are no grounds in the petition to condone the delay and the respondent herein lacks *bona fides*. The approach made by the court below cannot be termed as an exercise of judicial discretion. Therefore, Ext.P4 is not legally sustainable, and is liable to be set aside. Exts.P1 and P2 IAs are devoid of merits and are liable to be dismissed.

In the result, this Original Petition stands allowed, Ext.P4 common order is set aside and Exts.P1 and P2 IAs are dismissed.

Sd/- B.KEMAL PASHA, JUDGE

ul/-

[True copy]

P.S. to Judge