

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

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

OP(C).No. 1301 of 2015 (O)

C.MA.41/2011 OF ADDITIONAL DISTRICT COURT-II, TRIVANDRUM
E.A.NO.192/2010 IN OS.NO.311/2003 OF ADDITIONAL MUNSIF'S COURT,
THIRUVANANTHAPURAM.

.....

PETITIONER/APPELLANT/CLAIM PETITIONER:

NOORJAHAN ABDUL SATHAR,
D/O.SAINABA BEEVI, TC.2/2085,
ADARSH NAGAR, PATTOM P.O, PATTOM VILLAGE,
THIRUVANANTHAPURAM.

BY ADVS.SRI.DEVAN RAMACHANDRAN
SRI.K.M.ANEESH
SRI.K.SANTHOSH KUMAR (KALIYANAM)
SRI.ADARSH KUMAR
SRI.BIJU VARGHESE ABRAHAM
SRI.DILEEP CHANDRAN

RESPONDENT(S)/RESPONDENTS/DECREE HOLDER AND JUDGMENT DEBTORS:

1. A.AJAYAKUMAR, T.C. IX 848,
JAWAHAR NAGAR, SASTHAMANGALAM VILLAGE,
THIRUVANANTHAPURAM - 695 010.
2. V.K. VIJAYADAS, S/O.RAJAMMA,
T.C.NO.2/1793, PANAVIDA PUTHEN VEEDU,
GOWREESAPATTOM, PATTOM VILLAGE,
THIRUVANANTHAPURAM-695004.
3. AJITHKUMAR, S/O.KOCHUKUNJU,
KAITHARA PANAYIL VEEDU, T.K.DIVAKARAN ROAD,
KOWDIAR VILLAGE. 695 004.

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 11-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

mbr/

OP(C).No. 1301 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS:

- P1 - TRUE COPY OF THE APPLICATION NUMBERED AS E.A.NO.192/2010 IN OS NO.311/2003 ON THE FILES OF THE ADDITIONAL MUNSIFFS COURT, THIRUVANANTHAPURAM.
- P2 - TRUE COPY OF THE ORDER DATED 23.05.2011 IN E.A.NO.192/2010 IN OS NO.311/2003 ON THE FILES OF THE ADDITIONAL MUNSIFFS COURT, THIRUVANANTHAPURAM.
- P3 - TRUE COPY OF THE JUDGMENT DATED 7.02.2015 IN CMA NO.41/2011 OF THE ADDITIONAL DISTRICT COURT, TRIVANDRUM.

RESPONDENTS' EXHIBITS: **NIL.**

//TRUE COPY//

P.S. TO JUDGE

mbr/

B.KEMAL PASHA, J.

.....
O.P.(C) No.1301 of 2015
.....

Dated this the 11th day of June, 2015

J U D G M E N T

The question involved is, whether the claim preferred by the petitioner before the Additional Munsiff's Court, Thiruvananthapuram, by way of E.A.No.192/2010 in execution of the decree in O.S.No.311 of 2003, is one under Order XXI Rule 90 or one under Order XXI Rule 99 of the Code of Civil Procedure, 1908?

2. It seems that in CMA No.41/2011, before the learned District Judge, the learned counsel for the appellant had specifically contended that the matter was one coming under Order XXI Rule 90 CPC. It seems that the learned Additional District Judge has taken the view that this is a

matter coming within the purview of Order XXI Rule 99 of the Code and therefore, the challenge should have been through a regular appeal and not by way of CMA. It was on that ground the CMA happened to be dismissed.

2. Presently, the learned counsel for the petitioner submits that the said decision rendered by the court below may operate as *res judicata* for an independent suit or a proper claim to be proceeded with under Order XXI Rule 99 CPC. The learned counsel for the petitioner seeks for an opportunity to withdraw the CMA in order to file a regular appeal. On hearing the learned counsel for the petitioner, this Court is of the view that as the matter was not considered by the court below on merits, the judgment can be set aside for the limited purpose of enabling the appellant to file an application before the learned Additional District Judge seeking permission to withdraw from the CMA with leave to file an appeal. In such a case, the learned Additional District Judge shall pass appropriate orders, in

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accordance with law.

With the above said observations, this Original Petition
is disposed of.

Sd/- B.KEMAL PASHA, JUDGE

ul/-

[True copy]

P.S. to Judge