

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

RSA.No. 761 of 2010 ()

**(AGAINST THE JUDGMENT IN AS.NO. 131/2009 OF II ADDL.DISTRICT
COURT, ERNAKULAM DATED 08-03-2010)**

OS.NO. 1580/2004 OF I ADDL.MUNSIFF COURT., ERNAKULAM

APPELLANTS/APPELLANTS/PLAINTIFFS:

1. RAMBHA, D/O.KUTTY, THACHERIPARAMBU,AGED 68,
THYKODAM DESOM, POONITHURA VILLAGE,
KANAYANNUR TALUK.
2. VILASINI, D/O.KUTTY AND W/O.MURALI, AGED 64,
THACHERIPARAMBU, THYKODAM DESOM,
POONITHURA VILLAGE, KANAYANNUR TALUK.
3. PADMAVATHY, D/O.KUTTY, AGED 57,
THACHERIPARAMBU, THYKODAM DESOM,
POONITHURA VILLAGE, KANAYANNUR TALUK.

**BY ADVS.SRI.T.B.THANKAPPAN
SRI.T.T.HARIKUMAR**

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

- *1. T.K.SEKHARAN, S/O.KUTTY, AGED ABOUT 60,
THACHERIPARAMBIL HOUSE, THYKODAM,
POONITHURA VILLAGE,KANAYANNUR TALUK. (DIED) (LRS IMPEADED)
2. T.K.GANGADHARAN, S/O.KUTTY, AGED ABOUT 51,
THACHERIPARAMBIL HOUSE, THYKODAM DESOM,
POONITHURA VILLAGE, KANAYANNUR TALUK.

***ADDL.R3 TO R6 IMPEADED**

***ADDL.R3: SMT. RATNAVALLY,W/O.LATE T.K.SEKHARAN,
AGED ABOUT 60, THACHERIPARAMBIL HOUSE,
KUREEKKAD.P.O., ERNAKULAM DISTRICT-682 314.**

***ADDL.R4: TENSION, S/O.T.K.SEKHARAN,AGED ABOUT 40,
THACHERIPARAMBIL HOUSE, KUREEKKAD.P.O.,
ERNAKULAM DISTRICT-682 314**

R.S.A.NO.761/2010

***ADDL.R5: SEENA @ NEENU,
W/O.SANTHOSH, AGED ABOUT 43,
THACHERIPARAMBIL HOUSE, KUREEKKAD.P.O.,
ERNAKULAM DISTRICT-682 314**

***ADDL.R6: BABY, S/O.LATE SEKHARAN, AGED ABOUT 35,
THACHERIPARAMBIL HOUSE, KUREEKKAD.P.O.,
ERNAKULAM DISTRICT-682 314.**

***LRS OF DECEASED 1ST RESPONDENT IMPEADED AS ADDL.R3 TO R6 AS
PER ORDER DATED 5/9/2013 IN IA.NO.1174/2013.**

**R2 BY ADVS. SRI.C.S.YESUDAS
SRI.P.PRAMOD**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 03-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

sts

P.BHAVADASAN, J.

R.S.A. No. 761 of 2010

Dated this the 03rd day of July, 2015

J U D G M E N T

Plaintiffs are the appellants. Their suit for permanent prohibitory injunction was dismissed by the trial court. They preferred an appeal which was admittedly filed out of time and therefore they also filed a petition for condonation of delay. The lower appellate court, finding no reason to condone the delay, dismissed the delay condonation petition and consequently, the appeal also.

2. Plaintiffs and defendants are the children of late Kutty and Narayani. Their parents were residing in seven cents of land comprised in Sy.No. 1233/2 of Poonithura Village. The property was originally owned by late Krishnan who died about 24 years back. Consequent on the death of Krishnan, his son has obtained the said property by way of intestate succession. Kutty, the father of the parties died

about 42 years back and mother Narayani died in the year 1994. The parents of the parties occupied property as kudikidappkars and they continued to be so till their death. The hut was removed and a pakka construction was made in the property with the permission of the landlord. The claim in the plaint is that since Kutty, the father of the parties was the original kudikidappukaran, on his death, the right of Kudikidappu falls equally on all children. It was on that basis, the suit was laid.

3. The suit was resisted by the defendants. It was disputed that the right of Kudikidappu belonged to Kutty and consequent on his death, it devolved on all his children. There was an earlier suit as O.S.No. 127/1998. It was disputed that Kudikidappu was confined to seven cents of property and the allegation in the plaint that parents of the parties were Kudikidappukars of the property, was also disputed. The defendants pointed out that the plaintiffs who are daughters of Kutty and Narayani had been married away

long ago and they were residing with their husbands. When the Kudikidappu, which was initially occupied by Kutty fell into ruins, it is claimed that the first defendant obtained fresh permission from the landlord and on that basis, put up a structure and began to occupy, thereby, Kudikidappu remain confined to him. Pointing out that the plaintiffs had no manner of right whatsoever, the first defendant prayed for a dismissal of the suit.

4. On the above pleadings, issues were raised. The evidence consists of the testimony of PW1 and document marked as Ext.A1 from the side of the plaintiffs. Defendants examined DWs 1 and 2 and had Exts. B1 to B5 marked.

5. The trial court, mainly based on the fact that there was an earlier suit which was dismissed, found that the present suit is almost similar in nature and therefore dismissed the suit. It is also observed that there was no material to show that the property ever was in the occupation of father of parties, namely, Kutty.

6. Aggrieved by the dismissal of the suit, the plaintiffs filed an appeal before the lower appellate court as A.S.No. 131/2009. Since the appeal was filed out of time, they filed I.A.No. 4456/2009 in A.S.No. 131/2009 to condone the delay of 907 days in filing the appeal under Section 5 of the Limitation Act. They pointed out that they were wrongly advised about the further proceedings that will have to be taken after dismissal of the suit and that had caused the delay. According to them, unless the appeal is heard on merits, irreparable loss and injury will be caused to them.

7. The lower appellate court was not persuaded to accept the reason put forward for condonation of delay and holding that no sufficient cause has been shown, dismissed the interlocutory application for condonation of delay. Consequently, the appeal was also dismissed.

8. Notice was issued on the following substantial questions of law:

“1. Whether on facts and circumstances, respondent No.1 could be said to be the owner of the suit property as held by the trial court.

2. Was the lower appellate court justified to make a probe into the merits of the case in considering the application Under Section 5 of the Limitation Act for the disposal of which what is required to be looked into is whether explanation for the delay is bonafide and the delay occurred was on account of sufficient grounds in good faith and not the result of malafides recklessness or ruse.

3. What is required Under Section 5 of the Limitation Act is only proof of “sufficient cause” and that since the judicial principle on the subject is that only a liberal construction will yield the objective of the justice, is there any justification for the lower appellate to dismiss the application taking into account facts to be considered in disposing the appeal on merits.”

9. In the light of the fact that the lower appellate court has not considered the case on merits, it will be imprudent on the part of this Court to consider the case in its entirety at the second appellate stage. One should remember that the first appellate court is the final authority on finding of the facts and when that authority enters its finding on fact, it will not be proper for this Court to interfere with the judgment of that court overlooking the possible

view.

10. The question is whether the delay ought to have been condoned. From the records, it is seen that the plaintiffs put forward a case that the Kudikidappu in question originally belonged to Kutty, the father of the parties and it can be seen from the records that there is almost acceptance of that allegation in the written statement of first defendant also. How far that is binding and how far that is crucial is a matter to be determined. However, the contention would indicate that the initial hut fell into ruins and first defendant then claimed that he got a fresh permission to put up a structure. Whether this is true or not is the question that arises for consideration in this case. The question would be whether the first defendant, who is currently not in possession of the property, continued to be in possession as a legal heir of Kutty.

11. In the light of the fact that the matter has not been decided on merits by the lower appellate court and it is

felt that an opportunity ought to be given to the appellants to have their appeal heard on merits.

12. In the result, this appeal is allowed. The impugned order in I.A.No.4456/2009 in A.S.No. 131/2009 is set aside and the delay condonation petition stands allowed. The lower appellate court is directed to take A.S.No. 131/2009 on file and dispose it of on merits in accordance with law after hearing both parties.

The parties shall appear before the lower appellate court on **04.08.2015**. The lower appellate court shall make every endeavour to dispose of the matter as expeditiously as possible, at any rate, within a period of three months from the date of appearance of the parties.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge