2025:KER:7139

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

THURSDAY, THE 30TH DAY OF JANUARY 2025 / 10TH MAGHA, 1946

RSA NO. 430 OF 2023

AGAINST THE JUDGMENT & DECREE DATED 17.12.2022 IN AS NO.22 OF 2022 OF DISTRICT COURT& SESSIONS COURT,PATHANAMTHITTA ARISING OUT OF THE JUDGMENT&DECREE DATED 15.01.2013 IN OS NO.115 OF 1985 OF MUNSIFF COURT,PATHANAMTHITTA

APPELLANTS/APPELLANTS/PETITIONERS/ RESPONDENTS 1 TO 3:

1 PATHUMUTHUBEEVI
AGED 66 YEARS
W/O. LATE ALIYAR MEERA SAHIB, THOZHUKALAYIL HOUSE, PETTAH VETTIPURAM, PATHANAMTHITTA DISTRICT, PIN - 689645

2 MANJU MEERAN
AGED 37 YEARS
D/O. LATE ALIYAR MEERA SAHIB, THOZHUKALAYIL HOUSE, PETTAH VETTIPURAM, PATHANAMTHITTA DISTRICT, PIN - 689645

3 RANI MEERAN
AGED 66 YEARS
D/O. LATE ALIYAR MEERA SAHIB, THOZHUKALAYIL HOUSE, PETTAH VETTIPURAM, PATHANAMTHITTA DISTRICT, PIN - 689645

BY ADVS.
S.SREEKUMAR (SR.)
ARUN.B.VARGHESE
AISWARYA V.S.

RESPONDENTS/RESPONDENTS 1,2,5&6/COUNTER PETITIONERS 1,2,5&6 AND ADDL.COUNTER PETITIONERS 7 TO 12/PETITIONERS & RESPONDENTS 7&8:

1 AMINAL BEEVI
AGED 70 YEARS
D/O. LATE ALIYAR MOHAMMED, KOIKKALPURAYIDATHILVEEDU, VALANCHUZHI MURI, KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT, PIN - 689645

2 PATHUMMABEEVI
AGED 67 YEARS
D/O. LATE ALIYAR MOHAMMED KOIKKALPURAYIDATHILVEEDU, VALANCHUZHI MURI, KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT, PIN - 689645

3 ABDUL LATHEEF
AGED 59 YEARS
S/O. LATE ALIYAR MOHAMMED, KOIKKALPURAYIDATHILVEEDU, VALANCHUZHI MURI, KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT, PIN - 689645

4 SHAMSUDEEN
AGED 65 YEARS
S/O. ABDUL RAZAK, SHARAF MANZIL, VETIPURAM MURI PETTAH, PATHANAMTHITTA DISTRICT, PIN - 695024

5 MEHABOOBA BEEGUM
W/O LATE A.SHAHUL HAMEED , AGED NOT KNOWN TO THE PETITIONERS KOIKKALPURAYIDATHILVEEDU, VALANCHUZHI MURI, KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT, PIN - 689645

6 ALI AHAMED S
S/O LATE A.SHAHUL HAMEED , AGED NOT KNOWN TO THE PETITIONERS KOIKKALPURAYIDATHILVEEDU, VALANCHUZHI MURI, KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT, PIN - 689645

7 ASEEM. S AHAMED
S/O LATE A.SHAHUL HAMEED , AGED NOT KNOWN TO THE PETITIONERS KOIKKALPURAYIDATHILVEEDU, VALANCHUZHI MURI, KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT, PIN - 689645

8 HAJIRA BEEVI
AGED 62 YEARS
W/O LATE MUHAMMED HANEEFA KOIKKAL PURAYIDATHIL VEEDU, VALAMCHUZHI MURI PATHANAMTHITTA VILLAGE, KOZHENCHERRY TALUK,

PIN - 689645

9 JAFAR,
AGED 42 YEARS
S/O LATE MUHAMMED HANEEFA KOIKKAL PURAYIDATHIL VEEDU,
VALAMCHUZHI MURI PATHANAMTHITTA VILLAGE, KOZHENCHERRY TALUK,
PIN - 689645

10 JASMIN,
AGED 39 YEARS
W/O LATE MUHAMMED HANEEFA KOIKKAL PURAYIDATHIL VEEDU,
VALAMCHUZHI MURI PATHANAMTHITTA VILLAGE, KOZHENCHERRY TALUK,
PIN - 689645

R1 TO R3 & R5 TO R7 BY ADV R RAJASEKHARAN PILLAI

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 30.01.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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JUDGMENT

1. The appellants are the respondents 1 to 3 in I.A.No.241/2011 for passing Supplementary Preliminary Decree in O.S.No.115/1987 on the files of the Munsiff's Court, Pathanamthitta. They were the additional plaintiffs 2 to 4 in the suit, who were impleaded as legal heirs of the Original plaintiff. They challenged the Order dated 15.01.2013, passing Supplementary Preliminary Decree in I.A.No.241/2011 before the First Appellate Court by filing A.S.No.22/2022 with I.A.No.1/2022 to condone the delay of 3277 days in filing the appeal. I.A.No.1/2022 was dismissed by the First Appellate Court. Consequently, A.S.No.22/2022 was also dismissed. This Regular Second Appeal is filed challenging the Judgment and Decree in A.S.No.22/2022, taking grounds against the Order in I.A.No.1/2022 refusing to condone delay.

2. The short facts necessary for the disposal of this Appeal are: O.S.No.115/1987 was filed by one Meera Sahib for a declaration that the cancellation of Ext.A1 Gift Deed as invalid and for partition of plaint schedule properties in accordance with the said Gift Deed. During the pendency of the suit, the original plaintiff died, and the additional plaintiffs, 2 to 4, who are his wife and two daughters, were impleaded as per order dated 06.04.1990 in I.A.No.1338/1989. The plaint schedule properties originally belonged to the first defendant, who was the father of the original plaintiff and defendants 2 to 7 and the husband of the 2nd defendant. The first defendant executed Ext.A1 Gift Deed dated 22.06.1964 in favour of the 2nd defendant wife and their children – the original plaintiff and defendants 3 to 6. The 7th defendant was born subsequent to the execution of Ext.A1, and hence, he was not given anything. Only the original plaintiff and defendants 2 to 6 have the right over the plaint schedule properties as per Ext.A1. The first defendant executed a Deed of Cancellation of Ext.A1 Gift

Deed and thereafter assigned the property in favour of the 8th defendant. The original plaintiff filed the suit for a declaration that the Deed canceling Ext.A1 and subsequent assignment deeds are void and for partition of the plaint schedule properties among the original plaintiff and the defendants 2 to 6 as per Ext.A1 Gift Deed on the ground that Ext.A1 Gift Deed was accepted and acted upon and the first defendant has no right to cancel the Gift Deed or execute the Assignment Deed in favour of the 8th defendant. The Trial Court passed a Preliminary Decree finding Ext.A1 Gift deed is subsisting and allowing partition of the plaint schedule properties into six equal shares and allotting 1/6th share to the plaintiffs. The Trial Court also found that the plaintiffs are entitled to get allotment of the house in item No.1 property as far as possible. Though the Preliminary Decree was challenged before the First Appellate Court by filing A.S.No.16/1991, the said Appeal was dismissed. S.A.No.351/1994 filed before this Court was allowed in part as per judgment dated 19.09.2007, confirming the

Preliminary Decree for partition, but setting aside the reservation with respect to the residential building in item No.1, leaving open the question of reservation to be decided in the Final Decree. The additional plaintiffs filed I.A.No.161/2008 for passing the Final Decree. The additional plaintiffs filed I.A.No.2860/2010 to pass Supplementary Preliminary Decree for variation of shares on account of the death of the second defendant – mother. Defendants 4 and 6 filed I.A.No.241/2011 for passing a Supplementary Preliminary decree for variation of the shares on account of the death of the original plaintiff. As per the common order dated 15.01.2013, the Trial Court dismissed I.A.No.2860/2010 and allowed I.A.No.241/2011. I.A.No.2860/2010 was dismissed, holding that the daughters of the pre-deceased son are not entitled to get any share when the deceased person is survived by sons or daughters. I.A.No.241/2011 was allowed passing a Supplementary Preliminary decree allotting 19/27 shares to the plaintiffs 2 to 4

jointly and 4/27 share each to the first and second defendants out of the 1/6 share allotted to the plaintiffs. The additional plaintiffs filed A.S.No.22/2022 before the First Appellate Court in which the impugned Judgment and Order refusing to condone delay were passed.

3. On the question of admission of this Appeal, I heard the learned Senior Counsel for the appellants, Sri.S. Sreekumar, instructed by Advocate Sri.Arun.B. Varghese and the learned counsel for the respondents 1 to 3 and 5 to 7, Sri. R. Rajasekhara Pillai.

4. The learned Senior counsel for the appellants contended that though the delay for filing an Appeal before the First Appellate Court is 3277 days, the same was sufficiently explained by the appellants in the Application. The appellants and their advocate were under the misconception that, as per the impugned Supplementary Preliminary Decree, the appellants were given 19/27 shares. They did not understand that the appellants are

allowed only 19/27 shares out of 1/6 share allotted to the original plaintiff. The additional plaintiffs were advised by their advocate that there was no need to file an appeal, and hence, an appeal was not filed. The actual share allotted to the additional plaintiffs was understood only on filing the Commission Report by the advocate Commissioner in the year 2022. In support of the Application, the Affidavit of the counsel for the additional plaintiffs before The Trial Court was also filed, explaining the above circumstances under which the appeal was not filed within time. The learned Senior Counsel cited the decisions of the Hon'ble Supreme Court in **Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others 1987(2) SCC 107** in which it is held that refusal to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated; that as against this when the delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties; that when substantial justice and

technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a nondeliberate delay. The learned Senior Counsel contended that in the present case if the delay is not condoned, it would defeat the substantial justice in the matter as the appellants are fully entitled to succeed in the first appeal. The learned counsel cited the decision of the Hon'ble Supreme Court in **N. Balakrishnan v. M.Krishnamoorthi. 1998 (7) SCC 123,** in which it is held that in every case of delay, there can be a lapse on the part of the litigant concerned, but that alone is not enough to turn down his plea to shut the door against him and that if the explanation does not smack of malafide or it is not put forth as a part of a dilatory strategy, the court must show utmost consideration to the suitor. The circumstances clearly reveal that there are no malafides on the part of the appellants, and the appellants filed the appeal out of time, not as a dilatory strategy.

The learned Counsel cited the decision of the Hon'ble Supreme Court in **State (NCT of Delhi) v. Ahamed Jan 2008(14)SCC 582** to elaborate the concept of 'sufficient cause' under S.5 of the Limitation Act. The learned Counsel pointed out the dictum therein that the default in delay was condoned when the litigant was misled and thereby delayed the pursuit of his remedy on account of the negligence of the counsel. It is held that a mistake committed by the counsel bonafide and not tainted with malafide motive is a relevant consideration to condone delay. It is further contended that substantial injustice would be there against the appellants if the order passed by the Trial Court passing Supplementary Preliminary Decree is allowed to stand as there would be a substantial reduction in the share of the appellants granted by the Preliminary Decree, which was confirmed by the First Appellate Court and this Court. The Final Decree Court has no jurisdiction to review or modify the Preliminary Decree, which is confirmed by the First Appellate Court and this Court. I. A No.

241/2011 was filed for passing a Supplementary Preliminary Decree citing the variation in the shares on account of the death of the original plaintiff. The original plaintiff died during the pendency of the suit, and in such a situation, it is an event that occurred during the pendency of the suit, and hence, the defendants ought to have prayed for allotment of the due shares, if any, in the Trial stage. It is not legally permissible to pass a Supplementary Preliminary Decree with reference to an event that took place during the pendency of the suit after passing the Preliminary Decree. At any rate, the defendants could have pointed out the alleged variation required in the shares before this Court when the second appeal was pending and sought for modification of the shares in the Preliminary Decree. The learned Senior Counsel cited the decision of this Court in **Rachel v. George 1984 KHC 100** to substantiate the point that review of a Preliminary Decree is not possible after the Preliminary Decree became final and conclusive consequent to the dismissal of the

Appeal against the Preliminary Decree. The Learned Senior Counsel concluded that there are substantial questions of law qualifying admission of the Second Appeal.

5. On the other hand, the learned Counsel for the contesting respondents contended that the reasons stated by the appellants for condoning the delay before the First Appellate Court are flimsy and unsustainable. The Applicants/appellants have not made out sufficient cause to condone the inordinate delay of 3277 days in filing the appeal. There is no ambiguity in the impugned Order passing Supplementary Preliminary Decree by the Trial Court, which gives room for any misconception. It is specifically stated in the said impugned order that the appellants are given 19/27 jointly out of 1/6 share allotted to the original plaintiff. The learned Counsel invited my attention to the specific pleadings in I. A No. 241/2011 in which the basis for variation of the shares on account of the death of the original plaintiff is specifically stated. The appellants and their counsel understood the pleadings from the

Application and understood the nature and effect of the Supplementary Preliminary Decree from the impugned order passed by the Trial Court during the relevant time itself and the allegations that there was misconception with respect to the share allotted to the appellants is incorrect. Inviting my attention to the substantial questions of law and grounds raised in the Memorandum of Appeal, the learned Counsel further contended that no substantial questions of law arise in the matter requiring admission of the appeal.

6. I have considered the rival submissions.

7. With respect to the decisions cited by the learned Senior Counsel for the appellants, I am of the view that the reasons for the condonation of delay may be identical, but every case has its own unique facts and circumstances. There are several precedents of laying down general guidelines in the matter of condonation of delay. It is well settled by the decisions of this Court as well as the

Hon'ble Supreme Court that there is absolute discretion to the Court while considering an application to condone delay, taking into account the facts and circumstances of each case. There could not be any straight jacket formula for general application. The discretion has to be exercised liberally to advance substantial justice by allowing the *lis* to be considered on merits and the Courts should not stick on to the rigid rule of law in the matter of condonation of delay which is not inordinate, deliberate and actuated with malafides. The Courts shall not allow substantial justice to be defeated on account of delay. The Courts shall adopt a justice oriented approach while considering the question of condonation of delay. The Courts shall adopt a liberal approach in the case of normal delay and a strict approach in the case of inordinate delay. What is normal delay and what is inordinate delay is a matter to be considered depending on the facts and circumstances of each case. It is not the length of delay alone that is relevant to consider whether the delay is inordinate or not. The

question is whether the party has satisfied the court that he had sufficient cause for the delay in the facts and circumstances of the case. The well accepted maxim is that " *Vigilantibus Non dormientibus jura subveniunt*" which means that law comes to the help of only those who are vigilant in prosecuting the rights and not to the help of those who sleep over their rights. If the law goes to help those who sleep over their rights, the law will be forgetting and ignoring the valuable rights of the parties on the other side of the litigation who have been vigilantly prosecuting their rights, spending their valuable time, energy, money, and even life, for the litigation suffering mental tension and sleepless nights. The purpose of the law of limitation is to attain finality of the litigation. If undue lenience and misplaced sympathy are shown in favour of persons who have been sleeping over their rights, it is against the principle underlying the law of limitation.

8. Let me examine whether the appellants have satisfied the First Appellate Court that they had sufficient cause to condone the

delay. In the case on hand, the delay is exorbitant as it takes 3277 days to file the appeal before the First Appellate Court. There should be strong and compelling reasons to condone such an exorbitant delay. Otherwise, substantial prejudice and injury would be caused to the other side, which has prosecuted the proceedings on the basis of the impugned orders, spending a huge amount of time, money, and energy. It is to be remembered that the suit is of the year 1987. The reason stated by the applicants is that there was a misconception on the part of their counsel about their shares in the Supplementary Preliminary decree passed by the Trial Court. It is stated that the counsel was under a bonafide mistaken impression that the share allotted to the additional plaintiffs is 19/27 shares, but in fact it was 19/27 out of 1/6 share. The impugned order of the Trial Court was passed on 15.01.2013. Thereafter, several Commissions were taken in the final decree proceedings. One of the Commission Report was set aside on 23.09.2017. The contention is that only when the Advocate

Commissioner filed Report on 15.07.2022 and when it came up for consideration on 11.03.2022, the Counsel came to know that a reduced share is given to the Applicants. It is very much difficult to believe that when properties are partitioned in the commission reports in the final decree proceedings in accordance with the Preliminary Decree and the Supplementary Preliminary Decree, the additional plaintiffs and their counsel were under a mistaken impression that the share allotted to the additional plaintiffs is 19/27 shares out of 1/6 share. The filing of an Affidavit by the Counsel for the appellant in the Trial Court, along with the application to condone the delay, will not improve the case. On a plain reading of the decretal portion in the Supplementary Preliminary Decree, it is crystal clear that plaintiffs 2 to 4 are allotted 19/27 shares out of 1/6 shares allotted to the original plaintiff. It does not admit any other meaning or interpretation. As rightly pointed out by the learned Counsel for the contesting respondents, the basis for arriving at such shares is specifically

stated in I. A No. 241/2012. The appellants who are the respondents in the said I. A did not file any Objection.

9. In the recent decision **Nitin Mahadeo Jawale v. Bhaskar Mahadeo Mutke [2024 KHC OnLine 6660],** the Hon'ble Supreme Court has deprecated the growing tendency of the part of the litigants in throwing the entire blame on the head of the advocate, the Hon'ble Supreme Court has made a categorical finding that '*even if we assume for a moment that the concerned lawyer was careless or negligent, this, by itself, cannot be a ground to condone long and inordinate delay as the litigant owes a duty to be vigilant of his own rights and is expected to be equally vigilant about the judicial proceedings pending in the court initiated at his instance. The litigant, therefore, should not be permitted to throw the entire blame on the head of the advocate and thereby disown him at any time and seek relief'.* In view of the above dictum of the Hon'ble Supreme Court, the appellants shall not be permitted to

put the blame on the counsel who appeared for them in the Trial Court.

10. The learned Senior Counsel advanced arguments under the misconception that the shares of the appellants are reduced by the impugned Supplementary Final Decree. In fact, the further division of the share of the original plaintiff was not considered in the Preliminary Decree. It could not be said that on account of the impleadment of the additional plaintiffs 2 to 4 as legal heirs of the deceased original plaintiff, they alone are the legal heirs of the deceased original plaintiff entitled to the entire share of the original plaintiff. The other legal heirs of the deceased original plaintiff are already on the party array as defendants 1 and 2, who are his and his mother. The further division of the share of the original plaintiff was made for the first time in the impugned Supplementary Preliminary Decree.

11. It could be seen that a share lower than the 1/6 share of the original plaintiff was allotted to the additional plaintiffs since, as per

Mohammedan Law, the father and mother of the original Plaintiff are entitled to get 1/6 shares each out of the estate of the deceased original plaintiff. Consequently, 4/27 shares each were allotted to defendants 1 and 2, and the remaining 19/27 shares were allotted to plaintiffs 2 to 4 jointly. So the Trial Court correctly arrived at the shares in the Supplementary Preliminary Decree in accordance with Mohammedan Law while making further division of the share of the original plaintiff.

12. The further contention of the learned Senior Counsel is that the Trial Court has no jurisdiction to pass a Supplementary Preliminary Decree on account of the death of the original plaintiff, which occurred before the passing of the Preliminary Decree. The said contention could not be entertained for the reason that the additional plaintiffs did not file any objection to I. A No. 241/2011. No contention was raised before the Trial Court in this regard. Hence, the contention of the Senior Counsel for the appellants that substantial injustice would be worked out to the appellants if the

impugned order passed by the Trial court is allowed to stand is unsustainable.

13. The suit is of the year 1987. Even now, the final decree is not passed. The finding of the First Appellate Court that there is no sufficient reason to condone delay is perfectly justified and is found to be fully sustainable. No substantial question of law arises in this appeal requiring admission. Accordingly this Regular Second Appeal is dismissed *in limine.*

Sd/-

M.A.ABDUL HAKHIM

JUDGE

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