

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

Wednesday, the 12th day of June 2024 / 22nd Jyaishta, 1946

UNNUMBERED.RSA NO. 1276 OF 2012(FILING NO.)

O.S 406/1989 OF THE PRINCIPAL MUNSIF COURT ERNKULAM

A.S. 9/2004 OF THE DISTRICT COURT 11, ERNAKULAM

APPELLANT/SOUGHT TO BE IMPEADED APPELLANTS

1. APPU, (DIED), S/O.THEVAN, POTTEKATTUPADATHU, VADUTHALA DESOM, CHERANALLOOR VILLAGE, KANAYANNUR TALUK.
2. ADDL.APPELLANT: BABU V.A. (SOUGHT TO BE IMPEADED) S/O.V.T.APPU, VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.
3. ADDL.APPELLANT. MAYA THILAKAN (SOUGHT TO BE IMPEADED) D/O.V.T.APPU, AGED 46, VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.
4. ADDL.APPELLANT. SREEKALA SUGATHAN (SOUGHT TO BE IMPEADED) D/O.V.T.APPU, AGED 45, VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.
5. ADDL. APPELLANT. HEMALATHA VINOD (SOUGHT TO BE IMPEADED) D/O.V.T.APPU, AGED 42, VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.
6. ADDL.APPELLANT. JINO KUMAR (SOUGHT TO BE IMPEADED) S/O.V.T.APPU, AGED 40, VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.
7. ADDL.APPELLANT SANTHA VIDYA SAGAR (SOUGHT TO BE IMPEADED) W/O.VIDYA SAGAR (LATE)VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.
8. ADDL.APPELLANT. DIVYA SAGAR V. (SOUGHT TO BE IMPEADED) D/O.VIDYA SAGAR (LATE)VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.
9. ADDL.APPELLANT. DIPU SAGAR (SOUGHT TO BE IMPEADED) S/O.VIDYA SAGAR (LATE)VENGHAT THARA, KORUMKOTTA, VADUTHALA, COCHIN-23.

RESPONDENTS/RESPONDENTS/DEFENDANTS

1. AJAYAN, S/O.LAKSHMI SRINIVASAN, POTTEKATTUPADATHU, VADUTHALA DESOM, CHERANALLOOR VILLAGE, KANAYANNUR TALUK.PIN-682 034.
2. MOHINI, W/O.LATE RAJAPPAN, POTTEKATTUPADATHU, VADUTHALA DESOM, CHERANALLOOR VILLAGE, KANAYANNUR TALUK.PIN-682 034.
3. SUNIL, S/O.LATE RAJAPPAN, POTTEKATTUPADATHU, VADUTHALA DESOM, CHERANALLOOR VILLAGE, KANAYANNUR TALUK.PIN-682 034.
4. SURESH, S/O.LATE RAJAPPAN, POTTEKATTUPADATHU, VADUTHALA DESOM, CHERANALLOOR VILLAGE, KANAYANNUR TALUK.PIN-682 034.
5. SUDHEER, S/O.LATE RAJAPPAN, POTTEKATTUPADATHU, VADUTHALA DESOM, CHERANALLOOR VILLAGE, KANAYANNUR TALUK.PIN-682 034.
6. SANTHA,D/O.LATE RAJAPPAN, POTTEKATTUPADATHU, VADUTHALA DESOM, CHERANALLOOR VILLAGE, KANAYANNUR TALUK.PIN-682 034.

This Unnumbered R.S.A/2012 (Filing No. 1276/2012) having come up for orders on 12.06.2024 and upon hearing the arguments of Adv. M. POLY MATHAI for the petitioners and Advs.P.B.ASOKAN, P.B. AJOY, S.SREEKUMAR (ADUKKATH) for respondents 1 to 6 and Adv.P.B.KRISHNAN (AMICUS CURIAE), the court on the same day passed the following:

(P.T.O)



“C.R.”

K.BABU, J

Unnumbered RSA of 2012 (Filing No.1276 of 2012)

Dated this the 12th day of June, 2024

O R D E R

The short question that arises for consideration is whether the legal representatives of an appellant in a Regular Second Appeal are entitled to re-submit the appeal which was returned for curing the defects.

2. The plaintiff in O.S.No.406 of 1989 on the file of the Principal Munsiff's Court, Ernakulam, lost his case. He challenged the judgment and decree before the District Court, Ernakulam, by filing A.S.No.9 of 2004. The District Court confirmed the decree of the Munsiff's Court and dismissed the appeal. The original plaintiff filed Regular Second Appeal before this Court challenging the decree of the District Court within the period of limitation. The Registry returned the Regular Second Appeal on 31.07.2007 for curing the defects

within 15 days. The time for re-representation of the Regular Second Appeal expired on 15.08.2007. The original plaintiff/the appellant died before re-presenting the appeal. The legal representatives of the original plaintiff/appellant on 26.09.2017 filed CMA No.744 of 2017 seeking to condone the delay of 1932 days in filing the Regular Second Appeal. They also filed I.A.No.1938 of 2017 on 28.07.2017 to set aside the abatement of the appeal along with CMA No.583 of 2017 to condone the delay of 2030 days. On 20.08.2017, the legal representatives of the appellant filed application seeking their impleadment. They also filed an application to condone the re-representation delay.

3. This Court issued notice in the applications filed by the legal representatives of the Original Appellant. Notices were served on the respondents/defendants.

4. I have heard the learned counsel for the appellants, the legal representatives of the original appellant, and the learned counsel appearing for the

respondents/defendants. The Court also sought the assistance of the learned Senior Counsel Shri. P.B.Krishnan,

5. Respondents raised a contention that as the original appellant died after return of the appeal and before re-presentation, his legal representatives are not entitled to continue with the appeal and the remedy available to them is to prefer a fresh appeal.

6. The learned counsel appearing for the legal representatives of the original appellant submitted that they have every right to continue with the proceedings.

7. The learned Senior Counsel Shri. P.B. Krishnan submitted that there is no express provision in the Rules of the High Court of Kerala, 1971, dealing with the re-presentation of an appeal by the legal representatives. The Senior Counsel further submitted that the provisions of the Code of Civil Procedure are applicable in all matters unless any other law prohibits the invocation of any specific provision in the Code.

8. I have no doubt that for the purpose of moving an application by the legal representatives of the deceased appellant, the appeal will be deemed to have been “instituted” though it was returned for curing the defects. Therefore, necessarily, there is ‘institution’ of the appeal in the present case.

9. This takes me to the question of entitlement of the legal representatives to get themselves impleaded and resubmit the appeal.

10. The solution lies in Section 146 of the Code of Civil Procedure which reads thus:-

“146.Proceedings by or against representatives

Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

11. Section 146 which was introduced for the first time in the 1908 Code lays down that where any proceeding is taken or application made by or against any

person, then the proceeding may be taken or the application may be made by or against any person claiming under him unless otherwise provided by the Code or any other law for the time being in force.

12. In ***Smt,Saila Bala Dassi v. Smt.Nirmala Sundari Dassi*** [AIR 1958 SC 394], a four Judge Bench of the Supreme Court observed that Section 146 was introduced in the Code of Civil Procedure, 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision it should be construed liberally and so as to advance justice and not in a restricted or technical sense.

13. The proceedings contemplated by Section 146 include an appeal. This is settled by the decision of the Supreme Court in ***Saila Bala Dassi***. In ***Saila Bala Dassi*** an appeal filed by the judgment debtor against an order directing execution of a mortgage decree was sought to be continued by a person who had purchased

the mortgaged properties from the mortgagor after the suit had been decreed. It was held that he was entitled to prosecute the appeal under Section 146. The Supreme Court observed that whoever was entitled to be but had not been brought on record under Order 22 Rule 10 in a pending proceeding would be entitled to prefer an appeal against the decree or order passed therein, if his assignor could have filed such an appeal and further, the right to file an appeal must be held to carry with it the right to continue an appeal which had been filed by the person under whom the applicant claimed.

14. Following ***Saila Bala Dassi*** in ***Rajkumar Vs. Sardari Lal and Ors.*** [(2004) 2 SCC 601], the Supreme Court held that a lis pendens transferee though not brought on record under Order 22 Rule 10 of the Code of Civil Procedure is entitled to move an application under Order 9 Rule 13 to set aside a decree passed against his transferor - the defendants in the suit. In ***Chothy Theyyathan Vs. John Thomas*** [AIR 1997 Kerala 249]

this Court held that proceedings that may be taken against any person, could be taken against any person claiming under him.

15. Section 146 therefore undoubtedly enables the legal representatives of the deceased appellant to be brought on record by invoking the relevant provisions contained in Order 22 of the CPC and to carry on the proceedings already instituted.

16. The principle emerges is that the right to file an appeal must be held to carry with it the right to resubmit the appeal which had been instituted by the person under whom the applicants claim. No other law including the Rules of the High Court of Kerala, 1971, prohibits the invocation of Section 146 by the present applicants. The question raised is answered in favour of the applicants who are the legal representatives of the original appellant.

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Registry shall post the matter for consideration of the applications moved by the legal representatives of the original appellant.

**Sd/-
K.BABU JUDGE**

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