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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

TUESDAY, THE 19TH DAY OF APRIL 2022 / 29TH CHAITHRA, 1944

OP(C) NO. 1687 OF 2020

(IN EP 42/2018 OF SUB COURT ERNAKULAM)

PETITIONERS/JUDGMENT DEBTORS NO.1,3,4,6 IN E.P.NO.42/2018/DEFENDANTS IN

O.S.NO.133/2013 ON THE FILES OF SUB COURT, ERNAKULAM:

- 1 M/S.ELSTONE TEA ESTATES LIMITED
KALPETTA 673 121, REP. BY ITS MANAGING DIRECTOR, SMT. KUNHIBI
AED 71, W/O. LAE T.B. KUNHIMAHIN HAJI.
- 2 K.M. MUHAMMED SHERIEF,
AGED 53 YEARS
S/O. LATE T.B. KUNHIMAHIN HAJI, PADHOOR HOUSE THEKKIL POST,
KASARGODE, KERALA, DIRECTOR, M/S. ELSTONE TEA ESTATES
LIMIETED, KALPETTA 673 121.
- 3 K.M. MOIDEEN KUNHI
AGED 50 YEARS
S/O. LATE T.B. KUNHIMAHIN HAJI, PADHOOR HOUSE THEKKIL POST,
KASARGODE, KERALA, DIRECTOR, M/S. ELSTONE TEA ESTATES
LIMIETED, KALPETTA 673 121.
- 4 KUNHIBI,
AGED 71 YEARS
W/O. LATE T.B. KUNHIMAHIN HAJI, PADHOOR HOUSE THEKKIL POST,
KASARGODE, KERALA, MANAGING DIRECTOR, M/S. ELSTONE TEA ESTATES
LIMIETED, KALPETTA 673 121.
BY ADVS.
SRI. VARGHESE C.KURIAKOSE
SRI. P.J.JOSE
SRI. SUSANTH SHAJI
SRI. ALBIN A. JOSEPH

RESPONDENTS/DECREE HOLDER & J.D. NO.5 OM E.P.NO.42/2018/PLAINTIFF & ADDL.

D5 IN O.S.NO.133/2013 ON THE FILES OF SUB COURT ERNAKULAM:

- 1 PIUS .C. MUNDADAN
ADVOCATE, MUNDADAN HOUSE, CHURCH NAGAR 37, ANGAMALLY,
ERNAKULAM DISTRICT 683 572.

2 K.M. AHAMMED NIZAR,
S/O.T.B. KUNHIMAHIN HAJI, PADHOOR HOUSE THEKKIL POST,
KASARGODE, KERALA, 671 541.

BY ADVS.

SRI.DINESH R.SHENOY - R1

SRI.S.VINOD BHAT - R2

SRI.EBIN MATHEW

SRI.M.S.IMTHIYAZ AHAMMED

KUM.ANAGHA LAKSHMY RAMAN

SRI.P.ROHIT PREMANANDAN SHENOY

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 01.12.2021, THE COURT ON
19.04.2022 DELIVERED THE FOLLOWING:

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JUDGMENT**Dated this the 19th day of April, 2022**

Petitioners are the judgment debtors in E.P.No.42/2018 and the defendants in O.S.No.133/2013 on the files of the Sub Court, Ernakulam. The suit was filed by the first respondent seeking recovery of an amount of Rs.17,00,000/- with interest and costs. The suit was originally filed against the first petitioner company and its Managing Director. The Managing Director/second defendant expired on 03.12.2013. Thereupon, petitioners 2 to 4 and the second respondent herein were impleaded as additional defendants in their capacity as legal heirs of the deceased second defendant. Failure of the defendants to file written statement resulted in the suit being decreed *ex parte* on 13.06.2016. Thereupon, the first respondent initiated execution proceedings for realisation of the decretal

amount. On being served with notice in E.P.No.42/2018 filed by the first respondent before the Sub Court, Sulthanbathery, the petitioners moved I.A.Nos.4000 and 4001 of 2018 before the Sub Court, Ernakulam seeking to set aside the *ex parte* decree, after condoning the delay of 838 days. Notice sent to the first respondent in those interlocutory applications was returned unserved. The court below therefore directed the petitioners to furnish the first respondent's correct address. Failure to furnish the correct address resulted in I.A.Nos.4000 and 4001 of 2018 being dismissed. The petitioners thereupon moved I.A.Nos.2486, 2487, 2488 and 2489 of 2019 for restoring I.A.Nos. 4000 and 4001 of 2018, after condoning the delay of 102 days in filing the restoration applications. By Ext.P14 order, the court below dismissed I.A.Nos.2486, 2487, 2488 and 2489 of 2019. Hence, this Original Petition.

2. Heard Advocates Varghese C. Kuriakose for the petitioners, Dinesh R. Shenoy for the first respondent and S. Vinod Bhatt for the second respondent.

3. Learned Counsel for the petitioners contended that the first respondent had filed the suit raising an unconscionable claim of Rs.17,00,000/- towards Advocate's fees. The suit was decreed *ex parte* for reasons beyond the control of the petitioners and unless permitted to contest the suit on merits, they will be put to extreme prejudice and loss. It is contended that the first respondent had deliberately evaded the notice issued in I.A.Nos. 4000 and 4001 of 2018. Being a practicing lawyer, the first respondent ought to have accepted the notice, instead of causing the notice to be returned unserved. Since the applications for setting aside the *ex parte* decree and condonation of delay were dismissed without taking into account these crucial aspects, petitioners had filed I.A.Nos.2486, 2487, 2488 and 2489 of 2019. The delay in filing the restoration applications being only 102 days and the petitioners having offered sufficient explanation, the court below committed gross illegality in refusing to condone the delay. Dismissal of the delay condonation

applications is against the settled position that ordinarily a litigation should be adjudicated on merits and not terminated by default, either of the plaintiff or the defendant. Further, it is not necessary to explain every day's delay and the expression 'sufficient cause' employed in Section 5 of the Limitation Act, 1963 is adequately elastic to enable the courts to apply the law in a meaningful manner. In support of the contentions, learned Counsel placed reliance on the following decisions of the Apex court; ***State of Nagaland v. Lipokao [2005 (3) SCC 752]***, ***Subbarayudu K and others v. Special Deputy Collector (Land Acquisition) [2017 KHC 6997]***, ***Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others [1987 (2) SCC 107]***, ***Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others [2013 (12) SCC 649]*** and ***Robin Thapa v. Rohit Dora [2019 (7) SCC 359]***.

4. Learned Counsel for the first respondent took strong

exception to the allegation that the first respondent had raised an unconscionable demand for Advocate's fees and submitted that the suit was filed for realisation of the fees in connection with the acquisition of land belonging to the first petitioner company. The first respondent had contested the case for the defendants at all stages up to the Supreme Court and had succeeded in obtaining a substantial amount as compensation for the acquired land. The suit was filed on 12.02.2013 and the defendants were set *ex parte* on 29.07.2013. At their behest the *ex parte* order was set aside on 05.11.2013. Thereafter the suit was posted for written statement to 14.01.2014. In the meanwhile the second defendant died and the petitioners and second respondent were impleaded. The third petitioner herein/4th defendant in the suit, who had filed sworn to the affidavits filed in support of the restoration applications in the lower court, was set *ex parte* on 22.09.2015. After appearance of the additional defendants, the suit was posted twelve times for written statement and was finally decreed *ex parte* on

13.06.2016. I.A.No. 4001 of 2018, seeking to set aside the *ex parte* decree, was filed with a delay of 838 days, that too only after receiving notice in the execution petition filed by the first respondent. The notice in those applications was sought to be served at the family house of the first respondent in Angamaly, knowing fully well that he had shifted residence to a rented apartment in Aluva. In spite the Court's repeated directions, absolutely no effort was taken to serve notice in the correct address. The first respondent being a practicing lawyer, petitioners could have served notice at his Office in the High Court Advocates Chamber Complex or even on the first respondent's Counsel. Instead of resorting to any of those methods, petitioners persisted with their attempt to serve notice in the wrong address. The court below dismissed the applications, on realising that the attempt is to delay the hearing of the applications endlessly. Even thereafter, the restoration applications were filed with a delay of 102 days. The only explanation offered for the delay was a vague

avermment that the deponent was travelling around India for business purposes. The casual and indifferent manner in which the suit and the interlocutory applications were contested had prompted the court below to dismiss the applications. The extreme prejudice caused to the first respondent was also taken into account. However liberal the approach be towards applications for condonation of delay, that would not justify condonation in the instant case. The trial court having exercised its jurisdiction in a proper manner, this Court shall not interfere with the decision in exercise of the supervisory power under Article 227 of the Constitution of India. To lend support to the contentions, learned Counsel cited the following precedents. ***B Madhuri Goud v. B Damodar Reddy [2012 (12) SCC 693], University of Delhi v. Union of India and others [2020 (13) SCC 745], Sridevi Datla v. Union of India and others [2021 (5) SCC 321].***

5. For arriving at a decision as to whether the court below was justified in refusing to condone the delay of 102

days in filing the restoration applications, the following undisputed facts are to be borne in mind. The suit was filed on 12.02.2013. The original defendants were set *ex parte* on 29.07.2013 and they got the *ex parte* order set aside on 05.11.2013. The second defendant died on 03.12.2013 and the petitioners were impleaded as additional defendants. The third petitioner was set *ex parte* on 22.09.2015. The persistent refusal of the other defendants to file written statement, despite repeated postings, resulted in those defendants being set *ex parte* and later, the suit being decreed *ex parte* on 13.06.2016. The first respondent filed E.P.No.42 of 2018 before the Sub Court, Sulthanbathery on 06.09.2018. I.A.Nos.4000 and 4001 of 2018 were filed by the petitioners only on 30.10.2018. The only explanation offered for the inordinate delay of 838 days in filing the applications was that the records pertaining to the suit had been missing and by the time the records were traced out, time had run out by 838 days. The interlocutory applications were dismissed on 28.03.2019, for failure of the petitioners

to furnish the correct address of the first respondent. Other than the assertion of the petitioners that the first respondent had deliberately evaded notice, no material was placed before the court below to substantiate the allegation or to show that the petitioners had taken effective steps for service of notice. The applications seeking to restore I.A.Nos. 4000 and 4001 of 2018 were filed with a delay of 102 days and this time the explanation offered was that the deponent/3rd petitioner had to travel throughout India.

6. Indubitably, Section 5 of the Limitation Act empowers the courts to condone the delay, so as to do substantial justice to the parties by deciding the matters on merits. In ***Collector, Land Acquisition, Anantnag and another v. Mst. Katiji*** (*Supra*) the Honourable Supreme Court has held the expression 'sufficient cause' to be adequately elastic to enable the courts to apply the law in a meaningful manner to subserve the ends of justice. In ***Madhuri Goud***, while reiterating the same principle, it was held that the discretion to condone delay should not be

based on the length of delay, but on “sufficient and satisfactory explanation”. In ***Subbaraydu K***, it is clarified that the liberal construction of the expression ‘sufficient cause’ should be resorted only when no negligence, inaction or want of *bona fides* is attributable to the applicant. In ***University of Delhi***, it is held that, even though each day's delay need not be explained, a reasonable and acceptable explanation is very much necessary, since the right accrued to the opposite party cannot be dealt with lightly. In ***Sridevi Datla***, the term 'sufficient cause' is held to be relative, fact dependent and having many hues, largely deriving color from the facts of each case and the behaviour of the litigant who seeks condonation of delay. Further, the applicant must display *bona fides*, should not have been negligent and the delay occasioned should not be such that condoning it would seriously prejudice the other party.

7. Even though learned Counsel for the petitioners placed heavy reliance on the principles laid down in ***Esha***

Bhattacharjee, I am of the considered opinion that the principles laid down therein will not aid the petitioners, as discernible from the contextually relevant portion extracted hereunder;

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1.(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2.(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3.(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4.(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5.(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6.(vi) It is to be kept in mind that adherence to

strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7.(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8.(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9.(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10.(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11.(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12.(xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13.(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.”

(underlining supplied)

8. A conspectus of the above decisions leads to the conclusion that, elasticity of the expression ‘sufficient cause’ in Section 5 of the Limitation Act is dependent on factors like, acceptability of the explanation, *bona fides* and behaviour of the applicant and the prejudice that would be caused to the opposite party by the delay being condoned. In short, while taking a decision on an application for condonation of delay, the court cannot focus on the reasons stated or the period of delay alone, but should take into consideration other attendant and relevant aspects also.

9. In the case at hand, the manner in which the petitioners had contested the suit, the causal explanation

offered for the inordinate delay of 838 days in filing the application for setting aside the *ex parte* decree, failure to take timely steps for serving notice on the first respondent and the vague explanation offered for the delay of 102 days in filing the restoration applications, had resulted in the court dismissal of the applications. The lower court having exercised its discretion after considering all relevant aspects, this Court will not interfere with the decision. As held in ***Subbarayudu K***, when the court concerned has exercised its discretion, either condoning or declining to condone the delay, the superior court will not normally interfere in the exercise of such discretion.

10. Having contested the case in a lackadaisical manner and having failed to offer an acceptable explanation for the delay, the petitioners cannot bank upon the elasticity of the term 'sufficient cause' to plead equity or seek permission to contest the suit on merits. The extreme prejudice caused to the first respondent also stands against the petitioners.

For the aforementioned reasons, the original petition is dismissed.

Sd/-

V.G.ARUN

JUDGE

NB

APPENDIX OF OP(C) 1687/2020

PETITIONERS' EXHIBITS:

EXHIBIT P1 TRUE PHOTOSTAT COPY OF THE JUDGMENT DATED 13.06.2016 IN O.S. NO. 133/2013 PASSED EXPARTE.

EXHIBIT P2 TRUE PHOTOSTAT COPY OF THE EXECUTION PETITION E.P. NO. 42/2018 FILED ON 31.07.2018.

EXHIBIT P3 TRUE PHOTOSTAT COPY OF THE I.A. NO. 4000/2018.

EXHIBIT P4 TRUE PHOTOSTAT COPY OF THE I.. NO. 4001/2018.

EXHIBIT P5 TRUE PHOTOSTAT COPY OF THE I.A. NO. 2489/2019 TO RESTORE I.A. NO. 4001/2018.

EXHIBIT P6 TRUE PHOTOSTAT COPY OF THE I.A. NO. 2488/2019 TO CONDONE THE DELAY OF 102 DAYS OCCASIONED IN THE MATER OF FILING THE RESORPTION APPLICATION.

EXHIBIT P7 TRUE PHOTOSTAT COPY OF THE I.A. NO. 2487/2019 TO RESTORE I.A. NO. 4000/2018.

EXHIBIT P8 TRUE PHOTOSTAT COPY OF THE I.A. NO. 2486/2019 TO CONDONE THE DELAY OF 102 DAYS OCCASIONED IN THE MATTER OF FILING THE RESTORATION PETITION.

EXHIBIT P9 TRUE PHOTOSTAT COPY OF THE APPLICATION AS I.A. NO. 2486/2019 IN O.S. NO. 133/2013 ON THE FILES OF SUB COURT, ERNAKULAM.

EXHIBIT P10 TRUE PHOTOSTAT COPY OF THE APPLICATION AS I.A. NO. 2487/2019 IN O.S. NO. 133/2013 ON THE FILES OF SUB COURT, ERNAKULAM.

EXHIBIT P11 TRUE PHOTOSTAT COPY OF THE APPLICATION AS I.A.NO. 2488/2019 IN O.S. NO. 133/2013 ON THE FILES OF SUB COURT, ERNAKULAM.

EXHIBIT P12 TRUE PHOTOSTAT COPY OF THE APPLICATION AS I.A.NO. 2489/2019 IN O.S. NO. 133/2013 ON THE FILES OF SUB COURT, ERNAKULAM.

EXHIBIT P13 TRUE PHOTOSTAT COPY OF THE JUDGMENT IN O.P. CIVIL NO.443/2020 PASSED BY THIS HONOURABLE COURT DATED 05.03.2020.

EXHIBIT P14 TRUE PHOTOSTAT COPY OF THE COMMON ORDER PASSED IN I.A. NO. 2486/2019 , 2487/2019 , 2488/2019 AND 2489/2019 IN O.S. NO. 133/2013 ON THE FILES OF SUB COURT I ERNAKULAM.

RESPONDENTS EXHIBITS: NIL

TRUE COPY
P.A TO JUDGE