



2023:KER:36729

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.SOMARAJAN

THURSDAY, THE 22ND DAY OF JUNE 2023 / 1ST ASHADHA, 1945

OP(C) NO. 2370 OF 2022

AGAINST THE ORDER DATED 22.08.2022 IN I.A.No.26/2022 IN OS 10/2015

OF SUB COURT AMINI, LAKSHADWEEP

PETITIONERS/PETITIONERS/PLAINTIFFS 1 TO 16:

- 1 CHERIYATHODA CHERIYAKOYA
 AGED 69 YEARS
 S/O. CHERIYATHODA SULAIKHA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555

- 2 CHERIYATHODA AYSHOMMA
 AGED 69 YEARS
 S/O. CHERIYATHODA SULAIKHA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555

- 3 CHERIYATHODA RAHMATHULLA
 AGED 52 YEARS
 S/O. CHERIYATHODA AYSHOMMA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555

- 4 CHERIYATHODA FAROOKH
 AGED 49 YEARS
 S/O. CHERIYATHODA AYSOMMA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555

- 5 CHERIYATHODA ABDUL AZEEZ
 AGED 37 YEARS
 S/O. CHERIYATHODA AYSHOMMA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555

- 6 CHERIYATHODA ABDUL RASHEED
 AGED 37 YEARS
 S/O. CHERIYATHODA AYSHOMMA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555

- 7 CHERIYATHODA ABDURAHIMAN
 AGED 31 YEARS
 REPRESENTED BY GUARDIAN(MOTHER) S/O. CHERIYATHODA
 AYSHOMMA, KAVARATTI ISLAND, UT OF LAKSHADWEEP., PIN -
 682555



- 8 CHERIYATHODA HAMEEDA
 AGED 46 YEARS
 (EXPIRED) D/O. CHERIYATHODA AYSHOMMA, KAVARATTI
 ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 9 CHERIYATHODA MOHAMMED JAVAD
 AGED 35 YEARS
 S/O. CHERIYATHODA HAMEEDA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555
- 10 CHERIYATHODA FAHIRA BEEGUM
 AGED 30 YEARS
 D/O. CHERIYATHODA HAMEEDA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555
- 11 CHERIYATHODA SABITH
 AGED 29 YEARS
 S/O. CHERIYATHODA HAMEEDA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555
- 12 CHERIYATHODA SABIRA BEEGUM
 AGED 27 YEARS
 D/OCHERIYATHODA HAMEEDA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555
- 13 CHERIYATHODA MUNEERA BEEGUM
 AGED 24 YEARS
 D/O CHERIYATHODA HAMEEDA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555
- 14 CHERIYATHODA ARIFA BEEGUM
 AGED 22 YEARS
 D/O CHERIYATHODA HAMEEDA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555
- 15 CHERIYATHODA KUNHIBI
 AGED 46 YEARS
 D/O. CHERIYATHODA AYSHOMMA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555
- 16 CHERIYATHODA AFSAL
 AGED 18 YEARS
 S/O KUNHIBI, KAVARATTI ISLAND, UT OF LAKSHADWEEP.,
 PIN - 682555



BY ADVS.
AASHIQUE AKTHAR HAJJIGOTHI
P.M.MOHAMMED SALIH

RESPONDENTS/RESPONDENTS/DEFENDANTS 1 TO 36:

- 1 CHERIYATHODA KUNNI KUNNI
 AGED 63 YEARS, S/O. CHERIYATHODA KADEESHA,
 KAVARATTI ISLAND, UT OF LAKSHADWEEP, PIN - 682555

- 2 CHERIYATHODA JAFFER
 AGED 61 YEARS
 (EXPIRED) S/O. CHERIYATHODA KADEESHA, KAVARATTI
 ISLAND, UT OF LAKSHADWEEP, PIN - 682555

- 3 CHERIYATHODA MUTHUKOYA
 AGED 56 YEARS
 S/O. CHERIYATHODA KADEESHA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555

- 4 CHERIYATHODA AYSHA
 AGED 50 YEARS
 D/O. CHERIYATHODA KADEESHA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555

- 5 CHERIYATHODA IRSHAD
 AGED 30 YEARS
 S/O. CHERIYATHODA AYSHA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555

- 6 CHERIYATHODA NAFEEESABI
 AGED 33 YEARS
 D/O. CHERIYATHODA AYSHA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555

- 7 CHERIYATHODA ABDUL MUTHALIF
 AGED 21 YEARS
 S/O. CHERIYATHODA AYSHA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP., PIN - 682555



- 8 CHERIYATHODA BEEFATHUMMA
 AGED 49 YEARS
 D/O. CHERIYATHODA AASI, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555
- 9 CHERIYATHODA NIYAS
 AGED 29 YEARS
 S/O. CHERIYATHODA BEEFATHUMMA, KAVARATTI ISLAND, UT
 OF LAKSHADWEEP, PIN - 682555
- 10 CHERIYATHODA MOHAMED HUSSAIN
 AGED 24 YEARS
 S/O. BEEFATHUMMA, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555
- 11 CHERIYATHODA RAHMATH BEEGUM
 AGED 26 YEARS
 D/O. CHERIYATHODA BEEFATHUMMA, KAVARATTI ISLAND, UT
 OF LAKSHADWEEP, PIN - 682555
- 12 CHERIYATHODA SADDAN HUSSAIN
 AGED 20 YEARS
 S/O. CHERIYATHODA BEEFATHUMMA, KAVARATTI ISLAND,
 UT OF LAKSHADWEEP, PIN - 682555
- 13 CHERIYATHODA FATHIMATH SUHRA
 AGED 15 YEARS
 D/O. CHERIYATHODA BEEFATHUMMA, KAVARATTI ISLAND, UT
 OF LAKSHADWEEP, PIN - 682555
- 14 CHERIYATHODA FARMISA BEEGUM
 AGED 7 YEARS
 (MINOR), REPRESENTED BY HER MOTHER RAHMATH BEEGUM,
 KAVARATTI ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 15 CHERIYATHODA MOHAMMED SINAN
 AGED 4 YEARS
 (MINOR) REPRESENTED BY HER MOTHER 11TH DEFENDANT
 RAHMATH BEEGUM, KAVARATTI ISLAND, UT OF
 LAKSHADWEEP, PIN - 682555
- 16 CHERIYATHODA MOHAMMED IHSAN
 AGED 3 MONTHS REPRESENTED BY HER MOHTHER 11TH
 DEFENDANT RAHMATH BEEGUM, KAVARATTI ISLAND, UT OF



- LAKSHADWEEP., PIN - 682555
- 17 CHERIYATHODA SAINABA
AGED 47 YEARS
(EXPIRED) S/O. CHERIYATHODA AASI, KAVARATTI ISLAND,
UT OF LAKSHADWEEP, PIN - 682555
- 18 CHERIYATHODA SHAFEEQ
AGED 23 YEARS
S/O.CHERIYATHODA SAINABA, KAVARATTI ISLAND, UT OF
LAKSHADWEEP., PIN - 682555
- 19 CHERIYATHODA SHADIYA
AGED 18 YEARS
D/O. CHERIYATHODA SAINABA, KAVARATTI ISLAND, UT OF
LAKSHADWEEP, PIN - 682555
- 20 CHERIYATHODA SALEEM
AGED 37 YEARS
S/O. CHERIYATHODA AASI, KAVARATTI ISLAND, UT OF
LAKSHADWEEP, PIN - 682555
- 21 BANDAMPALLI SHIHABUDHEEN
AGED 70 YEARS
(EXPIRED), S/O. CHERIYATHODA KIDAVU , KAVARATTI
ISLAND, UT OF LAKSHADWEEP., PIN - 682555
- 22 MELA AVVAPADA SAYED MOHAMMED KOYA
AGED 65 YEARS
S/O. CHERIYATHODA KIDAVU, MELAAVVAPADA, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 23 BANDAMPALLI SAKKARIYA
AGED 58 YEARS
S/O. CHERIYATHODA KIDAVU, VANDAMPALLI, KAVARATTTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 24 BANDAMPALLI SARA
AGED 54 YEARS
D/O. CHERIYATODA KIDAVU, VANDAMPALLI, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 25 CHERIYAPURA SAYEDALI
AGED 53 YEARS
S/O. MUTHUKOYA CHERIYAPURA, KAVARATTI ISLAND, UT OF



- LAKSHADWEEP., PIN - 682555
- 26 CHERIYAPURA CHERIYAKOYA
AGED 47 YEARS
S/O. MUTHUKOYA CHERIYAPURA, KAVARATTI ISLAND, UT OF
LAKSHADWEEP, PIN - 682555
- 27 CHERIYAPURA FAROOK
AGED 35 YEARS
S/O. MUTHUKOYA CHERIYAPURA, KAVARATTTI ISLAND, UT
OF LAKSHADWEEP., PIN - 682555
- 28 CHERIYAPURA KUNHIKOYA
AGED 30 YEARS
S/O. MUTHUKOYA CHERIYAPURA, KAVARATTI ISLAND, UT OF
LAKSHADWEEP., PIN - 682555
- 29 KURINJAKKAL SAFIYA
AGED 56 YEARS
W/O. CHERIYATHODA JAFFER, KURINJAKKAL, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 30 KURINJAKKAL KHALEEL
AGED 41 YEARS
S/O. CHERIYATHODA JAFFER, KURINJAKKAL, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 31 KURINJAKKAL RABIYA BEEGUM
AGED 39 YEARS
D/O. CHERIYATHODA JAFFER, KURINJAKKAL, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 32 KHALEEL MANZIL NIYAS
AGED 33 YEARS
S/O. CHERIYATHODA JAFFER, KURINJAKKAL, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 33 KHALEEL MANZIL KAMARUNNISSA
AGED 29 YEARS
D/O. CHERIYATHODA JAFFER, KURINJAKKAL, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 34 KHALEEL MANZIL FAYSIA
AGED 28 YEARS
D/O. CHERIYATHODA JAFFER, KURINJAKKAL, KAVARATTI



ISLAND, UT OF LAKSHADWEEP, PIN - 982555

- 35 KHALEEL MANZIL RAHILABI
AGED 22 YEARS
D/O. CHERIYATHODA JAFFER, KURINJAKKAL, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555
- 36 NAMBICHAM FAROOKH
AGED 45 YEARS
H/O. SAINABA CHERIYATHODA, NAMBICHAM, KAVARATTI
ISLAND, UT OF LAKSHADWEEP, PIN - 682555

BY ADVS.
NAJAH EBRAHIM V.P.
R.ROHITH
HARISHMA P. THAMPI

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
22.06.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



CR

JUDGMENT

The question came up for consideration is whether an appeal would lie against an order allowing restoration of suit, which was dismissed for non-prosecution or setting aside an ex parte decree. It is against Ext.P4 allowing restoration of the suit, which was dismissed for non-prosecution, the petitioner came up under Article 227 of the Constitution. It is submitted that there is no provision anywhere under Order XLIII C.P.C. enabling an appeal against an order allowing restoration of suit under Rule 9 or setting aside ex parte decree under Rule 13 of Order IX C.P.C. and as such, an appeal will not lie against Ext.P4 order. But, Ext.P4 is a conditional order, by which the trial court imposed a penalty/cost of Rs.10,000/- as a condition precedent to allow the application.

2. The provision for appeal from an order under



Rule 9 or Rule 13 of Order IX C.P.C. is confined only to orders rejecting an application under the abovesaid Rules by virtue of Clause (c) and (d) of Order XLIII C.P.C., which are extracted below for reference:

“(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte.”

3. When there is a conditional order allowing an application either under Rule 9 or Rule 13 of Order IX C.P.C. with a default clause of rejection of application, it would squarely come under either of the abovesaid clauses (c) or (d), hence the order is appealable. The reason behind it is that on account of non-compliance of condition, it will have the effect of rejecting the application under the abovesaid provision. Necessarily, it is an appealable order under Order XLIII C.P.C..

In the instant case, what is challenged is the



reasonability of the amount ordered by way of cost which comes to Rs.10,000/-, that too, with a direction to pay the same within three days. It appears that the time granted and the amount ordered does not reflect the proper application of discretion, if any, vested with the trial court. But, as discussed earlier, since it is an appealable order, larger remedy is available to the party by way of an appeal. The petitioners fairly submitted that the respondent No.2, 17 and 21 passed away during the pendency, but admitted that their respective legal heirs are in the party array of the proceedings. Hence, submission is recorded. At this juncture, the learned counsel for the petitioners pressed for a dismissal without prejudice to the right of exhausting the larger remedy as per *lex fori and lex loci*. Hence, O.P.(C) will stand dismissed as not pressed.

Sd/-
P. SOMARAJAN
JUDGE



APPENDIX OF OP(C) 2370/2022

PETITIONER EXHIBITS

Exhibit P1 A TRUE COPY OF THE O S 10/2015 FILED
BEFORE SUB COURT AMINI LAKSHADWEEP

Exhibit P2 A TRUE COPY OF ORDER DATED 01/02/2022 IN
O S 10/2015 OF SUB COURT AMINI
LAKSHADWEEP

Exhibit P3 A TRUE COPY OF THE I A 26/2022 FOR
RESTORATION OF O S 10/2015. OF SUB COURT
AMINI LAKSHADWEEP

Exhibit P4 CERTIFIED COPY OF THE ORDER PASSED IN I A
26/2022 IN O S 10/2015 SUB COURT AMINI
LAKSHADWEEP PASSED ON 22/80/2022