

**HIGH COURT OF KERALA****Bench: Hon'ble Mr. Justice Sathish Ninan****Date of Decision: 12<sup>th</sup> December 2023**

FAO NO. 142 OF 2023

**MURALEEDHARANUNNI****VS****SUKUMARAN****Legislation:**

Order XXIII Rule (1) (3) of the Code of Civil Procedure, 1908

**Subject:**

Appeal against the refusal of the first appellate court to restore an appeal dismissed for default in a suit for cancellation of document and prohibitory injunction.

**Headnotes:**

Dismissal of Suit and Appeal – Original suit for cancellation of document and prohibitory injunction dismissed by the trial court – Subsequent first appeal dismissed due to failure of the plaintiff-appellant to argue the case [Para 2].

Withdrawal Application Rejected – Plaintiff-appellant's application under Order XXIII Rule (1) (3) CPC to withdraw the suit with liberty to file a fresh suit dismissed – Contributed to the dismissal of the first appeal [Para 2].

Restoration and Readmission Request – Plaintiff-appellant filed RPIA No.3 of 2022 for restoration of the dismissed appeal – Accompanied by I.A.No.2 of 2022 to condone 48-day delay in filing restoration application – Both applications initially dismissed [Para 3].

Court's Observations – Noting the absence of inordinate delay and the importance of adjudicating lis on merits rather than default – Advocate for appellant heard in the absence of respondent's representation [Paras 4-6].

Judgment – Appeal (FAO No. 142 of 2023) allowed, setting aside the impugned order – RPIA No.3 of 2022 and I.A.No.1 of 2022 granted – A.S.No.16 of 2016 restored for de novo disposal by the Sub Court, Tirur [Paras 7-8].

Referred Cases: Not mentioned.

Representing Advocates:

For Appellant/Plaintiff: M.R. Mini, Meena A., Vinod Ravindranath, Anish Antony Anathazhath, K.C. Kiran, M. Devesh, Thareeq Anver K., Nivedhitha Prem. V.

For Respondent/Defendant: Not mentioned.

## **JUDGMENT**

This appeal is by the plaintiff in a suit for cancellation of document and prohibitory injunction. He is aggrieved by the refusal of the first appellate court to restore his appeal that was dismissed for default.

2. The suit was dismissed by the trial court. The plaintiff filed first appeal challenging the dismissal. In the appeal, the plaintiff-appellant filed an application as I.A.No.1 of 2022 under Order XXIII Rule (1) (3) of the Code of Civil Procedure, 1908, seeking leave of the Court to withdraw the suit with liberty to file a fresh suit. On 16.08.2023, the application was dismissed. Consequent to the failure of the appellant to argue the appeal, the appeal was dismissed on that date.

3. The plaintiff-appellant filed an application as RPIA No.3 of 2022, seeking readmission of the appeal F.A.O.No.142 of 2023 along with I.A.No.2 of 2022, seeking to condone the delay of 48 days in filing the application. As per the impugned order, the court dismissed the application.

4. In spite of service of notice on the respondent, there is no appearance. I have heard the learned counsel for the appellant.

5. The first appeal being one of the year 2016 and on the failure of the appellant to argue the appeal when posted for final hearing, it cannot be said that the court was not justified in dismissing the appeal. However, since there was an application pending, seeking permission to withdraw the

suit with liberty to file a fresh suit and the same having been rejected on that date, the appellant could have been given another opportunity to have the appeal argued and adjudicated on the merits.

6. Though the appellant-plaintiff sought for restoration and readmission of appeal, there was a delay of 48 days in filing the same. The extend of delay cannot be said to be inordinate. It is trite that every endeavour is to be made to have the *lis* adjudicated on merits rather than a disposal on default.

7. Considering the entire facts as above, it is deemed appropriate that the appellant be given an opportunity to argue the appeal on its merits and invite a judgment.

8. Resultantly, the appeal is allowed and the order impugned is set aside. RPIA No.3 of 2022 and I.A.No.1 of 2022 are allowed. The appeal, A.S.No.16 of 2016, will stand restored back to the file.

The Sub Court, Tirur shall dispose of the appeal *de novo*.

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