

**IN THE COURT OF THE DISTRICT JUDGE, ALAPPUZHA**

**Present : Sri. K.K.Balakrishnan, District Judge**

Friday the 31<sup>st</sup> day of January, 2025/ 11<sup>th</sup> Magham 1946

**I.A. No.2/2024 in AS No.87/2008**

(Filed on 23.08.2024)

- Petitioners:
1. Somasekharan Nair, Aged 73, H/o Sasikumari, Muttathethu House, Vettuveni P.O, Haripad, Alappuzha
  2. Salini, Aged 43, D/o Sasikumari, Muttathethu House, Vettuveni P.O, Haripad, Alappuzha
  3. Jayakrishnan, Aged 37, S/o Sasikumari, Muttathethu House, Vettuveni P.O, Haripad, Alappuzha

By Adv.G.Harikumar

- Respondents:
1. T.K.Ambujakshi, Aged 72, W/o Late Madhavan Vasudevan, Thekkekandathil House, Thumpoly Muri, Alappuzha
  2. V.Mohanan, Aged 47, S/o Late Madhavan Vasudevan, Thekkekandathil House, Thumpoly Muri, Alappuzha
  3. Jeeja, Aged 49, D/o Late Madhavan Vasudevan, Thekkekandathil House, Thumpoly Muri, Alappuzha
  4. Jameela, Aged 43, D/o Late Madhavan Vasudevan, Thekkekandathil House, Thumpoly Muri, Alappuzha
  5. Jayasree, Aged 46, D/o Late Madhavan Vasudevan, Thekkekandathil House, Thumpoly Muri, Alappuzha
  6. Santhoshkumar, Aged 42, D/o Late Madhavan Vasudevan, Thekkekandathil House, Thumpoly Muri, Alappuzha
  7. Sindhu, Aged 37, D/o Late Madhavan Vasudevan, Thekkekandathil House, Thumpoly Muri, Alappuzha

By Adv.K.S.Hariharaputhran

This is an application filed by one Somasekharan Nair and two children, as they are the husband and children of 2<sup>nd</sup> appellant, who died on 23.08.2023, to condone the delay of 274 days in filing the petition to implead them as legal representatives of deceased in A.S.No.87/2008. This petition having been heard on 27.01.2025 and the court on 31.01.2025 passed the following.

**ORDER**

This petition is filed by one Somasekharan Nair and two children, as they are the husband and children of 2<sup>nd</sup> appellant, who died on 23.08.2023, to condone delay of 274 days in filing the petition to implead them as legal representatives of deceased in AS No.87/2008.

2. The first petitioner in the affidavit stated that petitioners 2 and 3 are the children of himself and deceased wife, as they are the only legal heirs of deceased and they are legally entitled to inherit her properties as she died intestate. It is further contended that delay of 274 days occurred in filing the petition to implead the legal representatives of second appellant and the reason is that he is an age old man suffering from various heart related issues for the past few years and was undergoing treatment for the same. Due to blood pressure variability, the doctor advised him to take rest and not to travel alone. So, he was unable to contact their counsel to discuss the case matters. There was no willful negligence or laches from his side. So, prayed to condone the delay of 274 days in filing the impleading petition in the above matter. If the petition is not allowed, it will cause irreparable injuries and hardships to the petitioners.

3. Against the petition, R5 and R6 filed objections with following contentions; The petition is not maintainable either in law or on facts. The appellants including deceased Sasikumari are following Marumakkathayam system of inheritance, as they are Travancore Nairs. So, first petitioner is not a legal representative of deceased second appellant and therefore is not a competent person to file the present petition. Therefore, the petition is to be dismissed. The second appellant died when the matter was pending before Hon'ble Supreme Court and the judgment was passed by the Hon'ble Supreme Court without impleading her representatives. So, the judgment of the Supreme Court is a nullity as it was passed against a dead person. In that circumstance, the legal representative of deceased second appellant have to move Hon'ble Supreme Court to implead them as legal representatives in the matter. In that circumstance, this court has no jurisdiction or authority to implead legal representatives of deceased second appellant. The petitioners are well aware about the pendency of the case. The so called ailment of the first petitioner is not at all a ground to condone the delay and set aside abatement. The first petitioner has no ailments as alleged. Therefore, prayed to dismiss the petition.

4. Heard the petitioners and the contesting respondents No.5 and 6.

5. The learned counsel for the petitioners emphatically argued that there is no illegality in filing the petition in this court to implead the legal representatives of second appellant even though she was died while Special Leave Petition (SLP) was pending before the Hon'ble Supreme Court. The reason for the delay is clearly stated in the affidavit filed by the first petitioner as he was not able to contact his counsel due to old age and connected ailments. So, the learned counsel prayed to condone the delay in filing the petition to implead the legal representatives of deceased second appellant.

6. The learned counsel appearing for R5 and R6 strongly opposed these contentions by relying the judgment of Division Bench of Hon'ble High Court in **Eswara Iyer v. Vella Muthan (1998 KHC 432)**. The main argument advanced by the learned counsel is that in that judgment Hon'ble High Court well settled that if a party died during the pendency of SLP in Hon'ble Supreme Court and without reporting the death of such party, if judgment is pronounced, the consequential decree is nullity as it is passed against a deceased person. According to the learned counsel, by the judgment, the Hon'ble High Court settled the law and the legal representatives of deceased appellant have to approach Hon'ble Supreme Court to setting aside abatement and to

condone delay if caused in filing such application. Another point raised by the learned counsel is that all the parties in the appeal are not arrayed as the respondents in the petitions. So, also petition is not at all maintainable. The objection against the reasons stated for the delay caused, the learned counsel argued that even if first petitioner is suffering from old age ailments, what prevented the remaining petitioners, who are the children of the first petitioner to approach their counsel and to file the petition. Moreover, according to the learned counsel, as the petitioners are residing in Karthikappally Taluk of Alappuzha, there is no difficulty to contact their counsel. So, the reasons stated by the petitioners to condone delay is not reasonable and only liable to be rejected. Hence, prayed to dismiss the petition with cost.

7. Hon'ble High Court of Kerala in **Easwara Iyer's case** (supra) considered similar facts of the case on hand. It was the suit went up to the Hon'ble Supreme Court with respect to the judgment and orders passed by the trial court and Hon'ble High Court. Finally, Hon'ble Supreme Court by setting aside the dismissal of second appeal directed the Hon'ble High Court to hear the matter afresh. Thereafter, legal heirs of appellant filed petition to set aside the abatement and to condone delay in filing the petition to set aside the abatement. The

appellants died while the SLP was pending before the Hon'ble Supreme Court and petition to condone delay in that petition was filed after 3 years and 137 days. Finally, Hon'ble High Court considered the facts and decided the issue in paragraph:5 and 6 of the judgment as follows;

"5. We find a similar question had arisen in *Jivibeg Lavji Ragagath v. Jadavji Devabanker and Ors.* AIR 1978 Gujarat 32,. In that case the plaintiff died during the pendency of the second appeal filed by him before the High Court. Without being aware of the death of the appellant plaintiff the High Court reversed the judgment and decree of dismissal of the suit passed by the Court below and decreed the suit for possession. Objection was raised in the execution by the judgment debtor contending that the decree in favour of the plaintiff having passed after his death was a nullity and therefore, not executable. This contention was sustained by the High Court. An observation made by the Supreme Court in *Him Lal v. Kali Nath*, AIR 1962 SC 199, was relied on by the learned Judges of Gujarat High Court. The relevant portion of the observation reads as follows: -

"The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed

the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it."

Reference was also made to a decision of the Bombay High Court in *Amarsingji v. Desai Umed*, AIR 1925 Bom. 290, where it has been held that on the death of the sole appellant the Appellate Court had no real jurisdiction to hear the appeals as there was no appellant before it.

6. We are not impressed by the contention raised on behalf of the appellant that even if the petitioner in the special leave petition before the Supreme Court had died during the pendency of the petition the order in the civil appeal will still be binding on this Court and the parties in view of Art.141 of the Constitution of India. The order in the SLP setting aside the dismissal of the second appeal in limine and remanding the matter for fresh consideration on merits by this Court cannot be considered as law' declared by the Supreme Court as

contemplated by Art.141 of the Constitution. In any view of the matter there is no reason for the appellant to refuse to file the petitions for setting aside the abatement, impleading and to condone the delay before the Supreme Court, since the appellant died when the matter is pending before the Supreme Court. We are not able to accept the contention of the appellant that it is for the respondent to move the Supreme Court for appropriate clarification. We, therefore, dismiss C.M.P. Nos. 2266 and 2265 of 1996.”

8. As far considering the parties arrayed in this petition, appellant Nos:1, 3, 6 and 7 are not arrayed as respondents. The appellant Nos:1, 3 and 6 submitted a memo stating that they have no objection to allow the petition to implead the legal representatives of deceased. Both sides submitted that 7<sup>th</sup> appellant already deleted from the party array during the pendency of the case.

9. The petition is submitted by husband and children of the deceased. Affidavit of the first petitioner is silent about what are the inconvenience caused to the second and third petitioners, who are aged 43 and 37 respectively, to approach their counsel and to take appropriate steps to implead them in the appeal. Moreover, the petitioners are residing in Haripad of Alappuzha District. So, the

reasons stated by the petitioners causing delay in filing the petition to set aside abatement is not at all sufficient.

10. Moreover, the dictum laid down by the Hon'ble High Court in **Easwar Iyer's case** is squarely applicable to the facts and circumstances of the case. The judgment is passed in the SLP is against the dead person also, the second appellant. The relief sought in the suit is fixation of northern and western side boundaries of plaint schedule properties, mandatory injunction and perpetual injunction restraining the defendants from obstructing the plaintiffs from putting up walls of fences in the boundary. Thus, appellants are defendants No.1 to 5 and their legal heirs. So, the decree is sought against the deceased appellant also. Without deciding the rights of the deceased appellant a meaningful decree cannot be passed in the subject matter of the suit. Therefore, the death of second appellant affect foundation of the case and as such in the absence of impleadment of her legal representatives the subject matter cannot be decided. So, after the death of second appellant, abatement is affected entire appeal suit, as the rights involved are indivisible. Hence, the conclusion is that this petition is not maintainable applying the dictum laid down by the Hon'ble High Court. It is already found that the delay in filing the petition cannot be condoned as there is no sufficient reason.

In the result, the petition is devoid of any merit and liable to be dismissed. So, the petition is dismissed.

*Dictated to the Confidential Assistant, transcribed and typed by her, revised and corrected by me and pronounced on this the 31<sup>st</sup> day of January, 2025.*

*Sd/-*

**K.K.BALAKRISHNAN  
DISTRICT JUDGE**

**APPENDIX:** Nil

*Id/-*

**DISTRICT JUDGE**