

**IN THE COURT OF ADDL.DISTRICT JUDGE -II
(SPECIAL) KOTTAYAM**

Present:- Sri.Johnson John, B.Sc, LL.M,
Addl. District Judge- II (Special), Kottayam

Tuesday, the 24th day of March, 2020.
4th day of Chaithra, 1942.

I.A.No.1/2020 in A.S.No.19/2020
(O.S.No.66/2016 of Munsiff's Court, Vaikom)

Petitioner/Appellant:-

A. Ramamoorthy, aged 74 years,
S/o Ayya Nadar, Proprietor,
Janaki Matchworks, Bhavatharini,
417 Kamaraj Road, Sivakashi,
Tamil Nadu, Pin- 626 123.

By Adv.Sri.Jojo Thomas & Sri.Luke J.Chirayil.

Respondents/ Original Respondents:-

1. Ajay Matchworks, Manjoor P.O.,
Manjoor Village, Vaikom Taluk,
Kottayam District, a partnership firm
claimed to be registered under the Indian
Partnership Act, represented by its
Managing Partner Mrs.Valsamma Paul,
aged 64 years, W/o Late Paul P. Thengampallil,
Manjoor P.O., Manjoor Village, Vaikom Taluk.
2. Mrs.Valsamma Paul, aged 64 years,
W/o Late Mr.Paul P. Thengampallil, Manjoor P.O.,
Manjoor Village, Vaikom Taluk,
Kottayam District, Managing Partner of
Ajay Matchworks, Manjoor.
3. Don Paul, aged 36 years, S/o Mr.Paul,
Partner of Ajay Matchworks, Manjoor P.O.,
Manjoor Village, Vaikom Taluk,
Kottayam District.

By Adv.Sri.PA.Rabeez, Prasannakumari V.R. &
Shamil Basheer.

This petition having been heard on 24.03.2020 and the court on the same day passed the following:

ORDER

This petition is filed by the defendant in O.S. 66/2016 of the Munsiff's Court, Vaikom to condone the delay of 866 days in filing the above appeal against the judgment and decree dated 31.08.2017.

2. In the affidavit in support of the petition, the appellant/petitioner stated that the appeal ought to have been filed on or before 07.11.2017 and that the delay of 866 days in preferring the appeal was not due to any willful omission or default on his part, but due to an inadvertent omission and over sight in the office of his Advocate. It is stated that the petitioner entrusted the case bundle along with 1/3 Court fee and advocate fees for preferring the appeal to his Counsel and at that time the Counsel informed him that he will prefer the appeal and that it will take more than 2 (two) years for the appeal to be taken up for hearing. Subsequently, during the month of December 2019, he was served with a notice in E.P. No.52/2019 of the

Subordinate Judges Court, Shivakashi in connection with the execution of the judgment and decree in O.S. No.66/2016 of Munsiff's Court, Vaikom and when he contacted his Counsel through telephone and when the Counsel recollected the entrustment of the file to him for filing the appeal, he informed the petitioner that the appeal was not filed and the case bundle is also untraceable. His Counsel also informed him that he will search out the case bundle immediately and file the appeal with the petition to condone the delay. According to the petitioner, he is suffering from cardiac problems and under treatment for cardiac failure and renal dysfunction during 2018 and the Doctor advised not to attempt any strenuous exercises and to avoid travel at least for one year and in that circumstance, he was not able to come over to Kottayam to enquire about the fate of the case. The former Counsel for the petitioner, Advocate Jojo Thomas also filed an affidavit in support of the petition admitting that the petitioner has entrusted the case bundle for preferring the appeal along with 1/3 Court fee and initial fees and that after receiving the case bundle, he had kept the case

bundle on the office table for preparing the appeal. But subsequently, his clerk while clearing the finished case bundles, removed the said case bundle and kept the same along with the disposed cases and only when the petitioner telephoned him during December, 2019, he recollected the entrustment of the file to him and accordingly he made arrangements for a thorough search in his office and thereafter traced out the case file and filed the present appeal along with the petition to condone the delay. It is also stated that the delay in filing the appeal was not due to any omission or latches on the part of the appellant, but due to an inadvertent omission in his office.

3. The respondents filed objection contending that the petition is not maintainable. The petitioner has not stated the relevant dates of entrustment of case bundle and Court fee to the lawyer and the averment that the case file was misplaced from the Advocate's office is a concocted story and it is unbelievable to say that the lawyer has forgotten about the 1/3 Court fee of Rs.35,000/- and the advocate fees and office expenses for about 2½ years. The averment that during December, 2019 the judgment debtor contacted

his Counsel and enquired about the case and the Counsel recollected the entrustment of the case bundle and filed the appeal is totally false and hence denied. The non-filing of the appeal on time is due to the non entrustment of the case file and Court fee to the lawyer. The averments in the petition regarding the cardiac complaints and renal dysfunction of the petitioner is also false and hence denied. The petitioner was not having any ailments or infirmity preventing him from reaching Kottayam during 2018 and the belated preparation and filing of the appeal is not a reason for condoning the delay and therefore, the petition is liable to be dismissed with costs.

4. From the side of the petitioner, PW1 examined and Ext.A1 marked. From the side of the respondents, RW1 examined and Exts.B1 to B3 were marked.

5. Heard both sides.

6. The points that arise for determination are the following:-

1. Whether the petitioner established sufficient cause to condone the delay of 866 days in filing the appeal?
2. Whether the petition is allowable?

7. **Point Nos.1 and 2:-** Advocate Jojo Thomas, who relinquished the vakalath of the petitioner is examined as PW1 and for the purpose of chief examination, he filed an affidavit in accordance with the averments in the affidavit, which he originally filed along with the petition to condone the delay. According to PW1, the petitioner herein entrusted the case file, 1/3 Court fee and the advocate fees to him before the expiry of the appeal period and at that time he agreed to the petitioner that he will file the appeal in time and also told the petitioner that normally it will take at least two years for considering the appeal. PW1 stated that he placed the lower Court records and connected documents on his table, but subsequently, his clerk removed the same along with disposed case records and kept the same in the shelf, where the disposed case files are kept. According to PW1, the appellant/petitioner is residing at Shivakashy and he is under the bonafide belief

that the appeal was filed in time and during 2019, the petitioner contacted him through phone and only then he recollected the entrustment of the case file to him for filing the appeal and thereafter he conducted a thorough search in his office and traced out the case file and prepared the appeal along with the petition to condone the delay. PW1 also stated that it was only because of the inadvertent omission in his office, the delay occurred and otherwise there was no necessity for him to support the petitioner and if the appeal happened to be rejected for the omission in his office that will cause irreparable loss and hardship to the witness and the appellant.

8. The evidence of PW1 in cross examination shows that his junior Adv. Luke J. Chirayil is now conducting the case of the appellant and he denied the suggestion that he is still conducting the case of the petitioner/appellant. PW1 also stated that the petitioner entrusted the case file to him about 15 days prior to 07.11.2017 along with the advocate fee and Court fee and that the same was subsequently misplaced in his office. In another part of the cross examination PW1 stated that normally he used to keep the

money entrusted by the clients in a cover, till the same is used for filing the case and in this case also he kept the cover containing money in the chest along with several other covers. In cross examination PW1 categorically stated that he appeared as a witness for the petitioner only for the reason that the delay in filing the appeal was because of the omission in his office and otherwise he will never have supported the petitioner at the risk of his profession. In cross examination PW1 also stated that the petitioner informed him that he is suffering from many ailments including cardiac problems and as per his advice, the petitioner produced a medical certificate and the medical certificate dated 03.05.2018 is marked as Ext.A1. The evidence of PW1 in cross examination and Ext.A1 medical certificate shows that the petitioner was advised complete bed rest for six months and to avoid strenuous exercise or tiresome travel from 01.04.2018 to 31.03.2019. Ext.A1 medical certificate is seen issued on 03.05.2018 by Dr. K. Mahendra Sekar M.D., and it shows that the petitioner have symptoms of cardiac failure and mild renal dysfunction.

9. The 3rd respondent is examined as RW1 and for the purpose of chief examination, he also filed an affidavit in accordance with the contentions in the objection. According to RW1, the petitioner herein has appeared in Munsiff's Court, Ettumanoor during 2018 in O.S. No.183/2015 and I.A. No. 1363/2017. It is stated that the petitioner filed vakkalath in the said case before the Munsiff's Court on 07.03.2018 and filed objection on 26.03.2018. Ext.B1 is the case details of I.A. No.1363/2017 and Ext.B2 is the copy of the objection filed by the petitioner herein and Ext.B3 is the certified copy of the Order of the Munsiff's Court, Ettumanoor in I.A. No.1363/2017 dated 13.04.2018.

10. The learned Counsel for the petitioner argued that there is no reason to disbelieve the evidence of PW1, who categorically stated that the petitioner has entrusted the case file along with 1/3 Court fee and the advocate fee about 15 days prior to the expiry of the period of limitation for filing the appeal and that subsequently records were misplaced in his office and PW1 recollected the entrustment of the case file to him for filing the appeal only

when the petitioner subsequently contacted him after receiving notice in the E.P. The evidence of PW1 and Ext.A1 medical certificate also shows that the petitioner, who is residing at Shivakashy is suffering from cardiac complaints and renal dysfunction. Further, the evidence of PW1 shows that at the time when the petitioner entrusted the case file, the witness informed him that the appeal will normally be taken up for hearing only after 2 (two) years and that he will inform him regarding the further developments and it was in that circumstance, the petitioner failed to contact him, till he received the notice in the E.P.

11. The learned Counsel for the respondents argued that the petitioner has not mentioned the date on which he entrusted the case file to the Counsel in the petition and further the petitioner has not chosen to enter the witness box and he also failed to examine the doctor, who issued Ext.A1 medical certificate. But the Counsel for the petitioner pointed out that when this petition was posted for evidence, the petitioner was in Malasia and he came back only on 14.03.2020 and because of corona virus he

was advised to be on house quarantine for a minimum period of 14 days and accordingly he was not in a position to appear as a witness in this case. It is also pointed out that the reason for the delay in filing the appeal was not because of the ailments of the petitioner, as he has already entrusted the case file to his Counsel before the expiry of the period of limitation and the petitioner produced Ext.A1 medical certificate only to explain the fact that he was unable to travel to Kottayam to contact his Counsel during the relevant period after the entrustment of the case file.

12. As per the judgment of the Hon'ble High Court of Kerala in O.P.(C) No.496/2020 dated 20.02.2020, this Court was directed to dispose this petition in accordance with law as expeditiously as possible and at any rate within 30 days from the date of receipt of a copy of the judgment and this Court received the copy of the judgment of the Hon'ble High Court on 02.03.2020 and accordingly the petition was posted for evidence. Therefore, considering the facts and circumstances of the case, I find merit in the submission of the learned Counsel for the petitioner that the non-examination of the petitioner as a witness is not a ground

to reject the evidence of PW1, who categorically admitted before the Court regarding the entrustment of the case file to him before the expiry of the period of limitation for filing the appeal and the fact that the delay occurred only because of the mistake and omission on his part. In **Rafiq and another v. Munshilal and another 1981 SC 1400** the Hon'ble Supreme Court held as follows:-

“The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then rest the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the

advocate that the latter appears in the matter when it is listed.”

13. It is well settled that the expression ‘sufficient cause’ must receive a liberal construction so as to advance substantial justice and generally delay's in preferring the appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bonafides is imputable to the party seeking condonation of delay. The learned Counsel for the respondents argued that the evidence of PW1 is not sufficient to condone the long delay of 866 days in filing this appeal. But the learned Counsel for the appellant pointed out that the expression “every days delay must be explained” does not mean that a pedantic approach should be made and that when substantial justice and technical considerations are pitted against each other cause of substantial justice deserves to be preferred. It is also pointed out that the appeal is against a decree for realisation of Rs.8,30,000/- and the appeal involves a substantial question of law as to whether a suit by a partner who is not shown as a partner in the register

maintained by the Registrar of Firms is maintainable. On a careful consideration of the evidence of PW1, I am satisfied that his evidence is reliable and the explanation offered for the delay does not smack off malafides and further there is no reason to believe that PW1 supported the petitioner as part of a dilatory strategy. However, considering the long delay and the inconvenience and expenses suffered by the respondents, I am of the view that the respondents are to be compensated by allowing cost. Therefore, on a careful consideration of the facts and circumstances of the case, I find that the delay can be condoned subject to cost. Points are answered accordingly.

14. In the result, the petition is allowed subject to payment of cost of Rs.10,000/- to the other side within 3 (three) days. Pay or deposit cost and file memo within 3 (three) days. The petition is allowed as above.

Dictated to the Confdl. Assistant, transcribed and typed by her, corrected by me and pronounced in the open Court on this the 24th day of March, 2020.

Sd/-
Johnson John,
Addl. District Judge - II(Spl.)
Kottayam.

APPENDIX

Exhibits marked for the petitioner:

A1 03.05.2018 Medical Certificate

Exhibits Marked for the repondents:

B1 Case details of I.A.No.1363/2017

B2 Copy of the objection filed by the petitioner

B3 13.04.2018 Certified Copy of the Order of
the Munsiff's Court, Ettumanoor
(I.A.No.1363/2017)

Witness examined for Petitioner:-

PW1 16.03.2020 Jojo Thomas

Witness examined for respondents:-

RW1 20.03.2020 Don Paul

Id/-
Addl. District Judge - II (Spl.)

Copied By:
Compared By:

**Copy of Order in
I.A. No.1/2020 in
A.S.No.19/2020
Dated: 24.03.2020**