

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

TUESDAY, THE 22ND DAY OF NOVEMBER 2022 / 1ST AGRAHAYANA,

1944

EX.FA NO. 15 OF 2020

ORDER DATED 02.08.2017 IN EA 64/2013 IN EP 148/.2006 IN

OS 267/2005 OF PRINCIPAL SUB COURT, PALAKKAD

APPELLANT/PETITIONER/THIRD PARTY (CLAIM PETITIONER) :

MUHAMMED SHANAVAS, AGED 39 YEARS
S/O.SALAHUDEEN, RESIDING AT NEHRU COLONY,
KUNNATHURMEDU, PALAKKAD TALUK - 678 013,
REPRESENTED BY POWER OF ATTORNEY HOLDER
A.SALAHUDHEEN, S/O.ATHAR RAVUTHER, NEHRU COLONY,
KUNNATHURMEDU, PALAKKAD TALUK - 678 013.

BY ADVS.
AVM.SALAHUDIN
SMT.A.D.DIVYA
SMT.M.P.SEETHA
SMT.EMIL STANLEY

RESPONDENTS/RESPONDENTS 2-5 IN EA/JUDGMENT DEBTORS/DECREE

HOLDER & AUCTION PURCHASER:

- 1 RADHAKRISHNAN, S/O.THANKAPPAN PILLAI, RESIDING
AT KULASEKHARAPURAM, KARUNAGAPPALLY.P.O., KOLLAM
DISTRICT -690 544.
- 2 ANIL BABU,
S/O MURALEEDHARAN PILLAI, KALLIYAKKAL VEEDU,
KIRIKKADU, RAMAPURAM P.O.ALAPUZHA-688 001.

FAO No.23/2020 & Ex.FA No.15/2020

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- 3 ARUN MATHEW,
S/O LATE K.T.J. MATHEW, EXECUTIVE PRODUCER, BIG
SINARJI MEDIA LIMITED, ASIANET COMPLEX,
PULIYARAKKONAM, THIRUVANANTHAPURAM-695 001.

- 4 ROHITH MATHEW,
S/O LATE K.T.J MATHEW, SALES MANAGER, THAJ
WESTEND, RACE COURSE ROAD, BANGALORE-560 001.

THIS EXECUTION FIRST APPEAL HAVING COME UP FOR ADMISSION
ON 22.11.2022, ALONG WITH FAO.23/2020, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

FAO No.23/2020 & Ex.FA No.15/2020

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

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&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

**TUESDAY, THE 22ND DAY OF NOVEMBER 2022 / 1ST AGRAHAYANA,
1944**

FAO NO. 23 OF 2020

**ORDER DATED 26.09.2019 IN EA 114/2018 IN EA 64/2013 IN EP
148/2006 IN OS 267/2005 OF PRL.SUB COURT, PALAKKAD**

APPELLANT/PETITIONER IN EA/CLAIM PETITIONER:

MUHAMMED SHANAVAS,
S/O. SALAVUDHEEN, RESIDING AT NEHRU COLONY,
KUNNATHURMEDU, PALAKKAD TALUK-678 013,
REPRESENTED BY POWER OF ATTORNEY HOLDER
SALAVUDHEEN, AGED 71 YEARS, S/O. ATHAR RAVUTHAR.

BY ADVS.
AVM.SALAHUDIN
SMT.A.D.DIVYA
SMT.M.P.SEETHA
SMT.JUHI A SALAHUDEEN

RESPONDENTS/RESPONDENTS IN EA/JUDGMENT DEBTOR:

- 1 RADHAKRISHNAN, S/O. THANKAPPAN PILLAI, RESIDING
AT KULASEKHARAPURAM, KARUNAGAPPALLY P.O., KOLLAM
DISTRICT-690 518.
- 2 ANIL BABU, S/O. MURALEEDHARAN PILLAI,
KALLAYIKKAL VEEDU, KIRIKKADU, RAMAPURAM P.O.,
ALAPPUZHA-690 507.

FAO No.23/2020 & Ex.FA No.15/2020

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- 3 ARUN, S/O. LATE K.T.J. MATHEW, EXECUTIVE PRODUCER, SINARJI CREATIONS, ASIANET STUDIO COMPLEX, THIRUVANANTHAPURAM-695 001.
- 4 ROHITH MATHEW, S/O. LATE K.T.J. MATHEW, SALES MANAGER, THAJ WESTEND, RACE COURSE ROAD, BANGALORE-560 001.

BY ADV SRI.RAJESH SIVARAMANKUTTY - R1

THIS EXECUTION FIRST APPEAL HAVING COME UP FOR ADMISSION ON 22.11.2022, ALONG WITH Ex.FA.15/2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Ex.FA No.15 of 2020 & FAO No.23 of 2020

JUDGMENT

A. MUHAMED MUSTAQUE, J.

These appeals are filed by the execution applicant, who filed a petition under Order XXI Rule 99 of the Code of Civil Procedure against the delivery effected pursuant to a suit for decree for money. This application has been dismissed on default vide order dated 02.08.2017, which is under challenge in Ex.FA No.15/2020.

2. The appellant appears to have filed another application to restore the above petition with an application to condone the delay, which were also dismissed, holding that they are not maintainable. It is challenging this, FAO

FAO No.23/2020 & Ex.FA No.15/2020

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No.23/2020 has been filed.

3. The fate of FAO No.23/2020 would depend upon the outcome in Ex.FA No.15/2020. Therefore, we take Ex.FA No.15/2020 as a lead case for the purpose of disposal.
4. It appears that on a day the case was listed, there was no representation for the appellant/petitioner. It is noted by the execution court that steps were not taken and the petitioner was called absent. Accordingly, the application was dismissed for default.
5. On mere absence of a counsel or party, the court ought not have dismissed an application unless it was listed for their appearance. It is not a case, where the court recorded continuous absence of the parties before the execution court. The courts are created to adjudicate substantial interest of the parties rather than to dispose the cases in a numerical quantity. The court should be very

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sensitive in dealing with the cases of litigants, especially, many of the cases are remained non represented due to laches or negligence on the part of the counsel.

6. We are of the view that the court committed a serious error in dismissing the petition without noting that there was negligence in prosecuting the application. A solitary instance cannot be a reason to dismiss the application. It is to be noted that in execution, there is no procedure of listing the cases for a trial with an advance list and there was no direction of the court for the appellant/petitioner to be present for hearing of the case. Therefore, the execution court could not have dismissed the application for non appearance.

7. The learned counsel for the respondent relied on the judgment of the Apex Court in **Damodaran Pillai & Ors. v. South Indian Bank Ltd.** [2005

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(6) SCC 178] to canvass that once an application in executing petition is dismissed for default, the application for restoration accompanied by delay condonation application is not maintainable inasmuch as Section 5 of the Limitation Act does not empower the court to condone any delay. We are not going into those aspects inasmuch that we have already taken the view in execution first appeal that the dismissal for default itself was improper.

8. In that view of the matter, we are of the view that the impugned order can be set aside for fresh consideration in accordance with law. Accordingly, Ex.FA No.15/2020 is disposed of. The impugned order is set aside.

9. Consequent to the disposal of Ex.FA No.15/2020, FAO No.23/2020 has become infructuous. Accordingly, FAO No.23/2020 is dismissed as infructuous.

Parties are directed to appear before the

VERDICTUM.IN

FAO No.23/2020 & Ex.FA No.15/2020

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execution court on 14.12.2022. The execution court shall conclude the proceedings within three months thereon.

SD/-

A. MUHAMED MUSTAQUE

JUDGE

SD/-

SHOBA ANNAMMA EAPEN

JUDGE

bka/-