



2024:KER:87298

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 20<sup>TH</sup> DAY OF NOVEMBER 2024/29TH KARTHIKA, 1946

R.P. NO. 125 OF 2021

AGAINST THE JUDGMENT DATED 03.09.2014 IN MFA NO.9 OF 2004  
OF HIGH COURT OF KERALA

REVIEW PETITIONERS/LEGAL REPRESENTATIVES OF R3 IN MFA:

- 1 NISHA VINCENT  
AGED 42 YEARS  
D/O.K.V. VINCENT, RESIDING AT CHERAMANTHURUTHIL  
HOUSE, NRA 67, KAPPATHOTTAM, KONAM-KOLLASSERY  
ROAD, PALLURUTHY, PIN - 682006,
- 2 NIXOM VINCENT  
AGED 39 YEARS  
S/O. K. V VINCENT, KANAPILLY HOUSE, THANGAL  
NAGAR, PALLURUTHY, COCHIN, PIN - 682006.
- 3\* K.V.VINCENT  
AGED 77 YEARS, S/O.VAREED, KANAPILLY HOUSE,  
THANGAL NAGAR, PALLURUTHY, COCHIN, PIN-682006.

\*HUSBAND OF DECEASED 3RD RESPONDENT IN  
MFA(ANNIE) IS IMPEADED AS ADDITIONAL  
PETITIONER NO.3 IN RP AS PER ORDER DATED  
20/07/22 IN IA 3/2021.



2024:KER:87298

2

R.P.No.125 of 2021 in  
MFA No.9 of 2004

BY ADVS.  
P.B.KRISHNAN  
SRI.P.B.SUBRAMANYAN  
SRI.SABU GEORGE  
SMT.B.ANUSREE  
SRI.MANU VYASAN PETER

RESPONDENTS/APPELLANT NO.1, RESPONDENTS 1 & 2 AND LR.OF  
APPELLANT NO.2:

- 1      MARIYADAS  
RESIDING AT PANDARAPARAMBIL HOUSE, PADIKUDY P  
O, ERNAKULAM DISTRICT, PIN -682002.
- 2      BENJAMIN (DIED)  
AGED 70 YEARS  
S/O. RAPHAEL, PANDARAPARAMBIL HOUSE,  
CC.14/1352A, KARUVELIPADY, COCHIN- 682005.
- 3      REETHA  
AGED 70 YEARS  
W/O.K.X. MATHEW, KONNOTH HOUSE,  
KURUPATHUPARAMBIL, 14/689, NAZARETH, COCHIN -  
682002.
- 4      SINDHU,  
AGED 47 YEARS  
CHEMPPLAYIL HOUSE, PALA, PIN - 686575.
- 5\*\*    RUSSEL,  
AGED ABOUT 69 YEARS, W/O.LATE BENJAMIN,  
PANDARAPARAMBIL HOUSE, C.C.NO.14/1352A,  
KARUVELIPADY, COCHIN - 682005.
- 6\*\*    BLESSY,  
AGED ABOUT 32 YEARS, W/O.LATE BENJAMIN,  
PANDARAPARAMBIL HOUSE, C.C.NO.14/1352A,  
KARUVELIPADY, COCHIN - 682005.



2024:KER:87298

3

R.P.No.125 of 2021 in  
MFA No.9 of 2004

**\*\*ADDITIONAL RESPONDENTS 5 AND 6 ARE IMPEADED  
AS THE LEGAL REPRESENTATIVES OF DECEASED 2ND  
RESPONDENT AS PER ORDER DATED 20/07/22 IN IA  
1/2022.**

**BY ADVS.  
SRI.S.SREEKUMAR (SR.)  
SHRI LUIZ GODWIN D'COUTH, CGC  
SRI.P.MARTIN JOSE  
T.H.ARUN KUMAR  
SRI.MANUEL THOMAS**

**THIS REVIEW PETITION HAVING COME UP FOR FINAL  
HEARING ON 25.09.2024, THE COURT ON 20.11.2024 DELIVERED  
THE FOLLOWING:**



2024:KER:87298

4

R.P.No.125 of 2021 in  
MFA No.9 of 2004

**ANIL K. NARENDRAN & P.G. AJITHKUMAR, JJ.**

-----  
**R.P.No.125 of 2021  
in  
MFA No.9 of 2004**  
-----

**Dated this the 20<sup>th</sup> day of October, 2024**

**O R D E R**

P.G.Ajithkumar, J.

This is a petition filed under Section 114 and Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 (Code).

2. The petitioners were not parties to MFA No.9 of 2004. They are the legal representatives of the 3<sup>rd</sup> respondent, who expired during the pendency of the appeal, i.e., on 04.07.2009. Without impleading them and ignoring the fact that the appeal was already abated owing to the death of the 3<sup>rd</sup> respondent, the appeal was allowed as per the judgment dated 30.09.2014. That judgment and the consequent decree are nullity and an error apparent on the face the record. On those grounds the petitioners seek to review and recall the judgment in the appeal.



3. There was a delay of 1968 days in filing the review petition. The delay was condoned as per the order dated 01.11.2022 in C.M.Appl.No.2 of 2021.

4. Heard the learned Senior Counsel, appeared on instructions, for the petitioners, the learned Senior Counsel, appeared on instructions, for respondents No.1 and 2, and also the learned counsel for the 4<sup>th</sup> respondent.

5. Smt.Eliswa expired on 20.07.1998. Claiming that she had executed her last Will on 18.12.1995, LA(OP) No.12 of 1999 was filed by the legatee under that Will for issuance of a letters of administration attaching therewith a copy of the Will. The 1<sup>st</sup> defendant, who is the 1<sup>st</sup> respondent in the appeal, filed a written statement disputing the Will. Therefore, the original petition was converted into a suit invoking Section 295 of the Indian Succession Act, 1925.

6. The suit, O.S.No.8 of 2002 was contested by the 1<sup>st</sup> respondent alone. Other defendants, who are respondents No.2 and 3 in the appeal, did not contest. The legacy under the Will dated 18.12.1995 was in favour of the testator's



grandson, the 1<sup>st</sup> plaintiff. The 2<sup>nd</sup> plaintiff is his father/next friend. The 2<sup>nd</sup> plaintiff and defendants No.1 to 3 are the children of Smt. Eliswa. After trial, the trial court (II Additional District Judge, Ernakulam) dismissed the suit. The plaintiffs preferred MFA No.9 of 2004. While respondents No.1 and 2 entered appearance and contested the appeal, the 3<sup>rd</sup> respondent remained absent. During pendency of the appeal, the 3<sup>rd</sup> respondent/3<sup>rd</sup> defendant Smt.Annie expired on 04.07.2009. Neither her death was recorded nor her legal representatives were impleaded. The petitioners, who are the legal representatives of Smt.Annie, in the above circumstances seek to review the judgment in MFA No.9 of 2004 and recall the same.

7. The learned Senior Counsel for the petitioners would submit that for the mere reason that the decree is against a dead person, it is a nullity and can no way be sustained in law. In that regard, the learned Senior Counsel places reliance on **Gopalan K. v. V.Nandini Narayanan [2015 (1) KLJ 732]** and **N.K.Mohammad Sulaiman v.**



**N.C.Mohammad Ismail [AIR 1966 SC 792]**. There can be no doubt about the proposition that ordinarily a decree passed against a dead person is a nullity. When that is the general rule, there are exceptions. As pointed out in **Gopalan [2015 (1) KLJ 732]**, there is an ocean of difference between a case where judgment is passed against or in favour of a dead person, who was alive at the time when the lis commenced and a judgment passed against or in favour of a person, who was dead on the date on which the lis commenced. In the latter case, the court had no jurisdiction on the dead person. If there is instant want of jurisdiction over person or subject matter of lis or if the court loses its jurisdiction over either during the pendency of lis the judgment is treated as void and treated as void collaterally also. Smt.Annie expired pending MFA No.9 of 2004. That, in view of the above principle, would not automatically render the judgment and decree a nullity.

8. In **Mohammad Sulaiman [AIR 1966 SC 792]**, the Apex Court observed that ordinarily the court does not regard a decree binding upon a person, who was not



impleaded eo-nominee in the proceedings. The said rule is subject to certain exceptions. Therefore, the question is whether or not the judgment and decree in MFA No.9 of 2004 are nullity on account of the death of Smt.Annie or would come within any of the exceptions. The plea for review has to be decided based on the answer to the above question.

9. In the counter-affidavit filed on behalf of respondents No.1 and 4 in the C.M.Appl.No.2 of 2021, it was averred that Smt.Annie received the benefit provided in the Will and executed Annexures 1 and 2, receipts. It is further asserted that the notice issued in LA(OP) No.12 of 1999 was received by the 1<sup>st</sup> petitioner herein for and behalf of Smt.Annie on 29.12.1999, a copy of which is Annexure-5. However, Smt.Annie remained exparte. In the appeal also, Smt.Annie did not enter appearance. Pointing out those aspects, the learned Senior Counsel appearing for the respondents would submit that the judgment and decree in MFA No.9 of 2004 cannot be termed as nullity. It is also submitted that in the light of the provisions of sub-rule (4)





Rule 4 of Order XXII of the Code, the appellants were exempted from impleading the legal representatives of Smt.Annie in the appeal.

10. As stated, Smt.Annie (3<sup>rd</sup> defendant) despite due service of summons did not appear before the trial court in LA(OP) No.12 of 1999. In MFA No.9 of 2004 also, Smt.Annie did not choose to appear before the Court. Pending consideration of the appeal, she expired on 04.07.2009. Long thereafter on 30.09.2014 the appeal was allowed, without impleading her legal representatives.

11. Sub-rule (4) of Rule 4 of Order XXII of the Code reads,-

“(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.”



12. It was explained by the Apex Court in **Zahirul Islam v. Mohd.Usman [(2003) 1 SCC 476]** as follows:

“6. A perusal of sub-rule (4), extracted above, shows that a plaintiff may be exempted from the necessity of substituting the legal representatives of a defendant who has failed to file a written statement or who, having filed it, failed to appear and contest the suit at the hearing and that, in such a case, the judgment may be pronounced against the said defendant notwithstanding the death of such defendant and it shall have the same force and effect as if the judgment has been pronounced before the death took place.”

13. It was further explained that the party prosecuting the proceedings is obliged to get exemption from impleading the legal representatives of the deceased defendant in the suit or the respondent in the appeal. The Apex Court in **T.Gnanavel v. T.S.Kanagaraj [(2009) 14 SCC 294]** reiterated the said principle.

14. The objective of sub-rule (4) of Rule 4 of Order XXII of the Code was explained by the Apex Court while considering the scope and ambit of the said sub-rule in **Mata Prasad Mathur (dead) by LRs. v. Jwala Prasad Mathur**



**[(2013) 14 SCC 722]**. It was held that the Legislature incorporated sub-rule (4) of Order XXII Rule 4 with a specific purpose of expediting the proceeding in cases where substitution of the legal representatives of non-contesting defendants is required. It was held that in the absence of any compelling reason to the contrary the courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant.

15. In MFA No.9 of 2004, the appellants did not obtain exemption from the court from substituting the legal representatives of Smt.Annie. Although it is insisted that such an exemption should be obtained from the court, no written application seeking such a permission is insisted. It may be noted that since Smt.Annie did not appear and contest LA(OP) No.12 of 1999 (O.S.No.8 of 2002), her pleadings did not come on record. She never had participated in the trial also. Even if she appeared in the appeal, she, for that matter, her legal



2024:KER:87298

12

R.P.No.125 of 2021 in  
MFA No.9 of 2004

representatives could not resist the appeal based on any pleadings. In the circumstances, this is a fit case where the provisions of sub-rule (4) of Rule 4 Order XXII of the Code could have squarely applied. It is true that no formal order of exemption as enjoined in the said rule was obtained by the appellants. However, in the aforementioned facts and circumstances, we are of the view that this review petition filed at such a belated stage is not liable to be allowed. We take such a view also for the reason that even if the judgment in the appeal is recalled, that would not serve any purpose in the aforementioned circumstances.

The review petition is accordingly dismissed.

Sd/-

**ANIL K. NARENDRAN, JUDGE**

Sd/-

**P.G. AJITHKUMAR, JUDGE**

dkr