

Kerala High Court

Kesavan Viswambharan vs Nandi Granites Pvt.Ltd. on 13 July, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

WP(C).No. 18265 of 2010(0)

1. KESAVAN VISWAMBHARAN,
... Petitioner

Vs

1. NANDI GRANITES PVT.LTD., REPRESENTED BY
... Respondent

2. SUGUNAN, CHITHIRAKAILASAM KUNNU,

For Petitioner :SRI.M.R.RAJESH

For Respondent :SRI.P.R.VENKETESH

The Hon'ble MR. Justice THOMAS P.JOSEPH

Dated :13/07/2010

O R D E R

THOMAS P.JOSEPH, J.

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W.P(C) No.18265 of 2010

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Dated this the 13th day of July, 2010

J U D G M E N T

Respondent No.1 is served on this Writ Petition. Respondent No.2 appears through counsel.

2. Grievance of petitioner, appellant in A.S. No.129 of 2005 is that on 22.05.2010 counsel made an oral request for further time for argument. But that request was rejected and the appeal was taken up for judgment and posted on 26.05.2010. In the meantime petitioner filed I.A. No.922 of 2010 requesting to review the order taking up the appeal for judgment. That application was dismissed by the learned Sub Judge by Ext.P2, order on 26.05.2010 stating that sufficient opportunity was given

to the petitioner for argument. Following that learned Sub Judge on the same day dismissed the appeal on merit vide Ext.P3, order. That is under challenge in this Writ Petition. Learned counsel for petitioner contends that there was no wilful laches on the part of petitioner or counsel in not getting ready for argument of the case and at any rate learned Sub Judge was not correct in dismissing the appeal.

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3. Mere physical presence of party or counsel without preparedness to proceed with the case does not amount to presence of party or counsel. Request for time made on 22.05.2010 for argument is not a case of presence of party or counsel before the learned Sub Judge. That can only be taken as absence of party or counsel in so far as the appeal is concerned in which case learned Sub Judge could only dismiss the appeal for default as provided in Order XLI Rule 17 of the Code of Civil Procedure (for short, "the Code"). Explanation to the said Rule makes it clear that in the absence of party or counsel the court is not empowered to dismiss the appeal on merit. Hence learned Sub Judge was not correct in dismissing the appeal on merit in the 'absence' of petitioner and counsel. Though dismissal of the appeal is on merit it can only be taken as a dismissal for default. Then remedy available to the petitioner is to request learned Sub Judge to re-admit the appeal under Order XLI Rule 19 of the Code. There is no reason why petitioner should come to this Court seeking relief under Article 227 of the Constitution of India. He has the statutory remedy provided under the Code. Hence without prejudice to the right of petitioner under Order XLI Rule 19 of the Code, this Writ Petition is closed. W.P(C) No.18265 of 2010 I direct that interim stay granted by this Court against delivery of property in O.S.No.402 of 1999 of the court of learned Munsiff, Attingal will continue to be in force for a further period of three weeks from this day.

THOMAS P. JOSEPH, JUDGE.

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