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**(1992) 01 KL CK 0044**  
**In the High Court Of Kerala**  
**Case No : C.M.A. No. 166 and 210 of 1983**

Damiyan Louis

APPELLANT

Vs

Noohukannu and Others

RESPONDENT

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**Date of Decision :** 09-01-1992

**Acts Referred:**

Evidence Act, 1872 — Section 115

**Citation :** (1992) 1 KLJ 269

**Hon'ble Judges :** P.K. Shamsuddin, J

**Bench :** Single Bench

**Advocate :** P. Sukumaran Nayar, for the Appellant; M. Abraham for Respondents 4 to 6, for the Respondent

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## Judgement

P.K. Shamsuddin, J.—These appeals arise out of O. S. Nos. 539 & 524 of 1976 respectively on the file of the Munsiff's Court, Neyyattinkara. Both suits were tried together and disposed of by a common judgment. Both suits were for redemption of two mortgages evidenced by Exts. A7 and A10. The contesting defendants resisted the suit on the following grounds : The plaint schedule properties are portions of a larger extent of property having a total area of 25.12 acres. The original acquirer was one Meeran Pillai Sulthan Pillai. Aliyarukunju Pillai was one of the executants and one of the children of Meeran Pillai Sulthan Pillai. Meeran Pillai had inherited only 31.036 percentage of the original extent of the property and as such what could have been mortgaged by Aliyarukunju Pillai was far less an extent than that is shown in Exts. A7 and A10. Before execution of sale deed marked as Ext. A8, Aliyarukunju Pillai had parted with his right over 50 cents of property as per Exts. B13 and B14 dated 2-1-1121 and 15-7-1121 respectively. At the time of execution of Ext. A8; Aliyarukunju Pillai had right and possession over only 2 acres and 8 cents, but what was really conveyed as per Ext. A8 to 1st plaintiff was the right over an extent of the property measuring 2 acres and 58 cents. There is a direction in O. P. No. 33 of 1973 of the Munsiff's Court, Neyyattinkara that the rights of the parties would be adjudicated only in a suit for partition. Other heirs of Meeran Pillai had executed various mortgage

documents and from the mortgagees, 1st defendant obtained assignment deeds. On the strength of the assignment deeds, 1st defendant filed O. A. No. 321 of 1974 in the Land Tribunal and obtained a certificate of purchase in respect of the properties as evidenced by Ext. B5. By virtue of Ext. B5, mortgagee's right became merged in the superior title, which the 1st defendant acquired. The suit is bad for non-joinder of necessary parties. A receiver was appointed in respect of the entire extent of the property and in the circumstances, the suits filed without leave of the court are not maintainable.

2. The trial court dismissed both the suits accepting the contentions of defendants and also holding that suits are not maintainable for want of leave of the court to sue the receiver.

3. Aggrieved by the judgment and decree of the trial court, the 2nd plaintiff filed A.S. Nos. 357 and 358 of 1981 before the District Court, Thiruvananthapuram. Appellate court held that 1st defendant is incompetent to challenge the title of the mortgagor as disclosed in Exts. A7 and A10 by reason of bar of estoppel contained in Section 115 of Evidence Act. It further held that both the suits are however bad for the reason that plaintiffs did not obtain the leave of court to sue the receiver. Finally, the appellate court remitted back the matter to trial court holding that permission to sue the receiver is a necessary requirement in both the suits and that an opportunity ought to have been given to plaintiffs to obtain such permission and produce the same in both the suits. There was also a direction to give a reasonable time to plaintiffs in both the suits to produce permission to sue the receiver and if permission is so produced, the court below will proceed to dispose of the other issues involved in the suits in accordance with law and in the light of the observations contained in the judgment.

4. In these appeals, filed by 1st defendant, learned counsel for appellant strenuously contended that the lower appellate court having found that the suits are bad for want of leave of court permitting the plaintiff to sue the Receiver, it went wrong in deciding other issues and remanding the matter to the trial court. Learned counsel submitted that once it is found that no leave was obtained to sue the Receiver in a case where such leave was necessary, the court cannot proceed with the matter.

5. As pointed out by the Supreme Court in Everest Coal Company (P) Ltd. Vs. State of Bihar and Others, , there is no statutory provision which requires a party to take the leave of the court to sue a receiver, but the rule has come down to us as a part of rules of equity binding upon all courts of justice in this country. However, prior permission is not a condition precedent. If, before the suit terminates, the relevant court is moved and permission is obtained, the requirement is satisfied. Failure to obtain leave till the determination of the suit would, however, be fatal. Division Bench of the Calcutta High Court in Banku Beharu Dev v. Harendra Nath Mukerjee (15 Calcutta Weekly Notes 54) has considered the question as to what the court should do if it was found that suit was filed without leave of court. It was held in that case that where a suit is

instituted against a Receiver without previously obtaining the leave of the court, the court need not dismiss the suit and it is open to the court to stay proceedings for a reasonable time so as to enable the plaintiff to apply for leave to proceed with the suit. The above observation was upheld in Everest Coal Company's case (supra). The Supreme Court quoted with approval the following observation of the Calcutta High Court:

But we are unable to appreciate upon what intelligible principle the position can be defended that because the suit has been instituted without leave previously obtained, it must necessarily be dismissed and that it is not open to the court to stay proceedings in the suit with a view to enable the plaintiff to obtain the leave of the court to proceed with the suit against the Receiver.

It follows that without obtaining the leave, the court cannot proceed with the suit once it is found that leave to sue receiver was not obtained in a case where such a leave is essential. The appellate court went wrong in proceeding with the matter and remanding the matter after being satisfied that this is a case where leave of the court to sue the receiver is essential. In the circumstances, I set aside the judgment and decree of the lower appellate court and direct the lower appellate court to stay the hearing of appeals for six months. The court can proceed with the hearing of appeals on production of leave by plaintiff in both the suits within the said period and dispose of the appeals in accordance with law, untrammelled by any observations contained in the impugned judgments of the lower appellate court. On failure to produce such leave within the period, it would be open to the lower appellate court to dismiss the appeals.

C. M. Appeals are disposed of as above. The parties will bear their respective costs.