

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

CRP.No. 82 of 2014 ()

**AGAINST THE JUDGMENT IN CMA 18/2011 of ADDL. D.C. & SESSIONS COURT -IV,
THRISSUR DATED 23-09-2013**

**AGAINST THE ORDER IN IA 826/10 IN OS 3/2008 of PRL.SUB COURT,THRISSUR DATED
08-06-2010**

REVISION PETITIONERS/APPELLANTS/DEFENDANTS:

**1. SASIKUMAR, AGED 42 YEARS
S/O.THANKAM AMMA, PANIKKATH HOUSE, VELAPPAYA P.O
THRISSUR.**

**2. GEETHA SATHYAN
D/O.THANKAM AMMA, PANIKKATH HOUSE, VELAPPAYA P.O
THRISSUR.**

**BY ADVS.SRI.G.SREEKUMAR (CHELUR)
SRI.K.R.ARUN KRISHNAN**

RESPONDENT/RESPONDENT/PLAINTIFF:

**ICICI BANK LTD, FIRST FLOOR, DELMA COMPLEX,
SHORNOOR ROAD, THRISSUR 680 001,
REP. BY COLLECTION MANAGER BABU SREEJITH.**

**BY ADVS. SRI.LAL K.JOSEPH
SRI.A.A.ZIYAD RAHMAN
SRI.A.K.MOHAMED ALI
SRI.P.MURALEEDHARAN (THURAVOOR)
SRI.V.S.SHIRAZ BAVA**

**THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 19-10-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

vpv

P.N.RAVINDRAN, J.

C.R.P.No.82 of 2014

Dated this the 19th October, 2015

ORDER

The petitioners are the defendants in O.S.No.3 of 2008 on the file of the Court of the Principal Subordinate Judge of Thrissur, a suit instituted by the respondent bank for realisation of the sum of Rs.1,15,779/- from the defendants with interest and costs. The defendants had, on receipt of summons, entered appearance through counsel and filed their written statement on 5.8.2008. The suit stood posted for trial on 2.12.2009. The defendants were not present. There was also no representation on their behalf. Consequently, they were set ex-parte by order passed on that day. Thereafter, the suit was adjourned to 4.12.2009. On that day the evidence on the side of the plaintiff was recorded and learned counsel appearing for the plaintiff was heard. By judgment delivered on 21.12.2009, the suit was decreed allowing the plaintiff bank to realise the sum of Rs.1,16,079/- (the amount claimed in the plaint and notice charges, viz. Rs.300/-) with interest and costs. The court below also awarded to the plaintiff the sum of Rs.11,736/- as costs.

2. Within thirty days therefrom, to be exact on 20.1.2010, the defendants filed I.A.No.826 of 2010 with a prayer that the ex-parte

decree passed against them on 21.12.2009 may be set aside. The defendants had, in the affidavit filed in support of the said application, averred that though their counsel had instructed his junior lawyer to represent them, he did not represent when the case was called and consequently they were set ex-parte. It was contended that there was no willful laches or omission on their part and therefore, the ex-parte decree may be set aside. The plaintiff opposed the said application contending inter-alia that no sufficient grounds have been made out to set aside the ex-parte decree. The trial court considered the rival contentions and dismissed I.A.No.826 of 2010 by order passed on 8.6.2010. Aggrieved thereby, the defendants filed C.M.A. No.18 of 2011 on the file of the Court of the IVth Additional District Judge of Thrissur. By judgment delivered on 23.09.2013, the appellate court dismissed the appeal. The defendants have, aggrieved thereby, filed this revision petition.

3. Heard learned counsel on both sides. Perused the records. It is evident from the materials before me that the defendants had entered appearance through counsel and filed their counter statement on 5.8.2008. However they were set exparte for the reason that when the suit was called on for trial, they were not present and there was no representation on their behalf. The evidence on the side of the plaintiff was recorded on 4.12.2009 and thereafter an exparte decree followed on 21.12.2009. The application to set aside the exparte decree was

filed on 20.1.2010 within the period of limitation.

4. The defendants had in the affidavit filed in support of the application contended that defendants went unrepresented on 2.12.2009 for the reason that the junior lawyer who had been instructed to represent the defendants, did not represent them when the suit was called on for trial. The plaintiff opposed the application contending inter alia that the defendants have all along been adopting delaying tactics and that there is no sufficient ground to allow the application. The trial court considered the rival contentions and dismissed I.A.No.826 of 2010 by a cryptic order passed on 8.6.2010. The order passed by the trial court reads as follows:

"Heard. No valid reason is not stated. Only ground alleged is not sustained. The I.A. is filed on the 30th day of decree. Hence I.A. is dismissed with cost."

5. The trial court dismissed the application on two grounds. The first is that the ground alleged is not tenable. The second is that the application is filed on the 30th day. Though an appeal was taken, the appellate court declined to interfere with the order passed by the trial court on the ground that the defendants filed their written statement only on 5.8.2008 though they ought to have filed it before 30.4.2008 and that this conduct discloses that the defendants were all along protracting the trial. The appellate court also held that the defendants have also not shown sufficient cause and therefore, no grounds have

made out to set aside the impugned order. In my considered opinion, the reasons put forward by the trial court and the appellate court cannot be sustained. The only grounds stated by the trial court to decline the prayer for setting aside the *exparte* decree are that the application is filed on the 30th day and that the ground alleged is not tenable. The appellate court had added one more ground namely there was delay in filing the written statement.

6. The Apex Court has in **G.P.Srivastava v. R.K.Raizada and Others** (AIR 2000 SC 1221) held that in a case where the defendant approaches the court immediately and within the statutory time specified, the discretion under Order IX Rule 13 is normally exercised in his favour if his absence was not *mala fide* or intentional. The Apex Court also held that the inconvenience caused to the plaintiff on account of the absence of the defendant can be compensated by adequate costs and the *lis* decided on the merits. The Apex Court also held that if 'sufficient cause' is made out for the non-appearance of the defendant on the date fixed for hearing when *exparte* proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and condoned earlier.

7. In the instant case, the appellate court has declined to interfere with the order passed by the trial court on the ground that the appellants had not filed their written statement in time. The appellate court has stated that the defendants filed their written

statement only on 5.8.2008 when as a matter of fact it ought to have been filed on or before 30.4.2008. The written statement filed on 5.8.2008 was received after allowing the application for enlargement of time to file the written statement. Once the written statement was thus received, the courts below could not have in my opinion held out the delay in filing the written statement against the defendants. The fact that the case stood listed for trial only one year after the defendants filed their written statement also justifies the said conclusion. The courts below have not held that it was on account of the delaying tactics adopted by the defendants that the case was not posted for trial after 5.8.2008 and before 2.12.2009. It is also not in dispute that the suit stood first posted for trial only on 2.12.2009. It was not necessary for the defendants to be personally present on 2.12.2009. They had not been called upon to lead the evidence. It was the plaintiff bank which was to adduce evidence on that day. Necessarily therefore, the presence of the defendants' counsel alone was required on that day. The case put forward in the affidavit filed in support of the application was that the counsel appearing for the defendants had instructed a junior lawyer to represent him when the case was called on for trial but that junior lawyer omitted to represent. Assuming for the sake of arguments that there was some default on the part of the counsel for the defendants in not being present on 2.12.2009, even if the defendants had been present, they would not

have been in a position to cross-examine the plaintiff. In such circumstances, I am of the opinion that the court below ought to have afforded the defendants an opportunity to have the suit tried and decided on the merits instead of dismissing the application by a cryptic order. The impugned judgment/order are in my opinion therefore liable to be set aside.

I accordingly allow the civil revision petition, set aside the judgment delivered by the Court of the IVth Additional District Judge of Thrissur on 23.9.2013 in C.M.A.No.18 of 2011 and the order passed by the Court of the Principal Subordinate Judge of Thrissur on 8.6.2010 on I.A.No.826 of 2010 in O.S.No.3 of 2008, allow the said application and set aside the exparte decree passed in the suit on 21.12.2009. Consequently, O.S.No.3 of 2008 shall stand restored to file. The parties shall appear through counsel in the court below on 23.11.2015. The Court of the Subordinate Judge of Thrissur shall on that day fix a date for trial and shall try and dispose of the suit before 31.01.2016. The parties shall suffer their respective costs.

Sd/-

**P.N.RAVINDRAN
JUDGE**

kav/vpv