

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

FAO.No. 116 of 2012 ()

(AGAINST THE ORDER DATED 16/2/2012 IN I.A.838/2011 IN OS NO.77/2003 OF
THE COURT OF SUB COURT, SULTHANBATHERY)

APPELLANT(S)/PETITIONER/3RD DEFENDANT:

JOHN DOMINIC,
S/O.DOMINIC, KARIAPPAPARAMBIL, CHIRAKADVU,
KANJIRAPPALLY, KOTTAYAM.

BY ADV. SRI.M.J.THOMAS

RESPONDENT(S)/PLAINTIFFS/DEFENDANTS:

1. RENJITH DOMINIC,
S/O.K.T.DOMINIC, POOVANCHIYIL, KARIPPAPARAMBIL,
KOKKAYAR, PEERMADE, IDUKKI.685531

2. RENDEEP DOMINIC
S/O.K.T.DOMINIC, PLANTER, POOVANCHIYIL
KARIPPAPARAMBIL, KOKKAYAR, PEERMADE
IDUKKI.685 531

3. GEETHAMMA JOSEPH,
D/O.K.T.JOSEPH, PARAMBIL VEETIL,
KANJIRAPPALLY VILLAGE, KANJIRAPPALLY TALUK, KOTTAYAM686 507

4. ROSAMMA JOSEPH,
D/O.K.T.JOSEPH, PARAMBIL VEETIL
KANJIRAPPALLY VILLAGE, KANJIRAPPALLY TALUK, KOTTAYAM 686 507

5. ITTIYAVIRA THOMAS
S/O.THOMAS, NERIAMPARAMBIL, KOLLATUKARA
PANCHIKADU VILLAGE, KOTTAYAM.686 102

RR1 TO 4 BY ADV. SRI.K.JAJU BABU (SR.)
RR1 TO 4 BY ADV. SMT.M.U.VIJAYALAKSHMI
RR1 TO 4 BY ADV. SMT.DHANYA CHANDRAN
R BY SRI.K.JAJU BABU

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
20-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

F.A.O. No.116 of 2012

Dated this the 20th day of July, 2015

JUDGMENT

Sunil Thomas, J.

The third defendant in O.S.No.77/2003 of the Sub Court,Sulthanbathery, is aggrieved by the dismissal of I.A.No.838/2011, which is an application to condone the delay of 602 days in filing the application to set aside the ex parte decree.The plaintiffs are the respondents 1 and 2 respectively. The defendants 1,2 & 4 are respondents 3 to 5.

2. The facts, which are discernible from the files and essential for the purpose of adjudicating the rival contentions, are as follows:

3. The suit was one for specific performance of an agreement for sale allegedly executed by the first and second defendants on 9/1/2001. Item No.1 in the plaint schedule belonged to the first defendant and the second item belonged to the second defendant. The third defendant was claimed to

be a person who had mortgage rights over the property. The third defendant was the power of attorney holder of the first and second defendants.

4. On 11/8/2003, the defendants 1 and 2 were set ex parte. The third defendant was set ex parte on 20/10/2003. Thereafter, in August,2008, the third defendant on behalf of the first and second defendants filed an application to set aside the ex parte order. Subsequently, on 15/10/2009 it was submitted that application was not pressed, since the first and second defendants had cancelled the power of attorney executed in his favour and communicated to him. An ex parte decree was passed by the court below on 29/10/2009, directing the first and second defendants to assign the property. The present I.A.was filed thereafter by the third defendant to condone the delay of about 19 months in filing the application to set aside the ex parte decree. This was accompanied by another application to set aside the ex parte decree.

5. The above I.As. were vehemently opposed by the plaintiffs as well as the defendants 1 and 2. The court below, by the impugned common order dismissed the above applications

which is assailed in this appeal.

6. Heard both sides and examined the records.

7. It is an admitted fact that the title stood in the names of the first and the second defendants. The third defendant was the power of attorney holder, who admittedly was appearing on behalf of the first and second defendants for some time on the strength of the power of attorney. It is seen that the application to set aside the order was not pressed on the specific ground that in the meanwhile the power of attorney was cancelled. It appears that in the present interlocutory application he had taken up an independent title and claimed that he was the owner of the property in possession, though the document of title was in the name of the first and second defendants. He claimed that the property was purchased by him from the father of the first and second defendants and due to various reasons, the assignment deed could not be executed. It was claimed that in that background, the power of attorney was executed in his favour. The case, according to the third defendant, was that after cancellation of the power of attorney, he was advised by a lawyer at Sulthanbathery, that there was no purpose in proceeding with

the application to set aside the ex parte order, since the power of attorney stood cancelled. On his legal advise, a criminal complaint was lodged against the defendants 1 and 2 as CMP.No.3723/2008 before the Chief Judicial Magistrate, Kalpetta, for offences punishable under sections 415,420,405 &468 read with Section 34 IPC. The above case was referred to the police and the FIR was laid. It is on record that this was quashed by the High Court in CrI.M.C.No.1007/2011.

8. It is pertinent to note that initially the third defendant was representing the first and third defendants as a power of attorney holder. After cancellation of the power of attorney, he set up an independent title over the property, contrary to his own earlier stand and admitted title of the first and second defendants. It appears that he is now attributing the entire cause for the delay to an improper legal advice given by a lawyer at Sulthanbathery. Before the court below, he tendered evidence to substantiate the above facts and to contend that the delay occurred due to the wrong legal advice given by the lawyer. However, in the light of the very fact now that the defendants 1 and 2 and the plaintiffs have joined together virtually, the third

defendant appears to have no locus to proceed with the application. The crucial aspect is that though he attributed the entire burden to an improper legal advice regarding the various applications filed and the proceedings initiated, there is absolutely no whisper as to why he remained absent on 11/8/2003 and 20/10/2003, when the defendants were set ex parte and as to why he remained absent on 29/10/2009, when the ex parte decree was passed. There is absolutely no evidence to show as to what prevented him from appearing before the court below on those days.

9. The learned counsel for the contesting respondents submitted before this Court that subsequently fair assignment deed was executed by defendants 1 and 2 in favour of the plaintiffs and the execution petition stood satisfied accordingly. In the above circumstance, the contentions of the third defendant/appellant cannot survive.

10. Hence, the court below was perfectly justified in holding that absolutely no cause has been shown for the delay caused and consequently to set aside the ex parte decree. Improper legal advice cannot be a ground for setting aside the ex

parte decree.

The appeal is without any merits and is dismissed.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.