

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 19TH DAY OF JUNE 2015/29TH JYAISHTA, 1937

FAO.No. 279 of 2012 ()

(AGAINST THE ORDER/JUDGMENT IN I.A.NO.9206/2008 IN OS 480/2006 of
PRINCIPAL SUB COURT,ERNAKULAM DATED 02-12-2010)

APPELLANT(S)/RESPONDENTS:-:

KUMARI V.S.,
W/O.SUKUMARAN, AGED 54 YEARS, STAFF QUARTERS,
TELEPHONE EXCHANGE,
THUKKUPALAM, KALLAR POST, IDUKKI DISTRICT.

BY ADV. SRI.VARGHESE C.KURIAKOSE

RESPONDENT(S)/PETITIONER/PLAINTIFF:-:

VIGNESH KUMAR, AGED 26 YEARS,
S/O.SUBRAMANIYAN, PANIKKER HOUSE, THEKKUMBHAGAM,
NADAMA VILLAGE, TRIPUNITHURA.

R1 BY ADV. SRI.PHILIP T.VARGHESE
R BY ADV. SRI.THOMAS T.VARGHESE
R BY ADV. SMT.ACHU SUBHA ABRAHAM
R BY ADV. SMT.T.M.BINITHA

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
15-06-2015, THE COURT ON 19/6/2015 DELIVERED THE FOLLOWING:

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

F.A.O. No. 279 OF 2012

Dated this the 19th day of June, 2015

JUDGMENT

Sunil Thomas, J.

The defendant in a suit for specific performance of agreement for sale with an alternative prayer for return of money, is aggrieved by the dismissal of the application to condone the delay of 691 days in filing the application to set aside the ex parte decree and the application to set aside ex parte decree.

2. The suit O.S. No.480/2006 was laid by the plaintiff for the specific performance of an agreement for sale. The defendant appeared through an advocate and thereafter remained absent. The suit was decreed ex parte. Subsequently, the defendant filed I.A. Nos. 9206/2008 and 9207/2008 to set aside the ex parte decree and to condone the delay of 691 days that has occurred. It was contended that though an advocate was engaged, the defendant was not aware of the fact that the lawyer did not appear before the

court below. The defendant was undergoing ayurvedic treatment for rheumatic pain and was not in a position to travel. After discharge from the hospital, when she enquired it was informed that the advocate had quit the profession. Further enquiry revealed that ex parte decree was passed on 27/1/2006. Hence, both the applications were filed. The court below refused to entertain both the applications by a common order, which is assailed in this appeal.

3 Heard, Perused the records.

4. It is admitted by the defendant that she received summons and vakalath was filed on 5/10/2006. Since no written statement was filed, she was declared ex parte on 27/1/2006 and the decree was passed. Thereafter, in compliance of the decree I.A. No.5183/2008 under Section 28(3) of Specific Relief Act was filed in which notice was served on the defendant in September 2008. Thereafter, the above applications to set aside ex parte decree and to condone the delay were filed on 9/12/2008.

5. To substantiate the case of the defendant that she was prevented due to medical reason from contesting the

proceedings, Ext.A1 medical certificate issued from an Ayurvedic hospital was relied on. It shows that she was under ayurvedic treatment from 1/9/2008 to 10/11/2008. It is pertinent to note that the suit was decreed ex parte on 27/1/2006. Evidently the period covered by Ext.A1 medical certificate is virtually two years after the ex parte decree. It is also pertinent to note that absolutely no evidence is available on record to show that after filing the vakalath, she was physically incapacitated or that anything prevented her from contesting the proceedings. The long period from 27/1/2006 to 9/12/2008 remained absolutely unexplained. The medical certificate will not help her in any manner. After filing vakkalath, she never contacted the lawyer or enquired about the progress of the case, either by herself or through the husband. Hence, there appears to be no merit in the contention that there was a reasonable cause which prevented the defendant from contesting the proceedings. There is no valid explanation for the long delay.

6. On merits also, it appears that the defendant had no substantial case and could not have set up a valid defence. The suit was for enforcement of an agreement of sale regarding four

cents of land for a total consideration of Rs.4,40,000/-. It is on record that PW1 admitted execution and receipt of entire consideration, and that her liability with the bank was settled with an excess payment of Rs.20,000/-. Hence, the defendant could not have set up any valid defence. It evidently leads to a conclusion that the I.A was filed with the only intention of protracting the proceedings. It is further revealed from the fact that even the appeal was presented before this Court with a huge delay of 445 days.

It is evident that the defendant has been attempting to protract and delay the proceedings and is guilty of gross negligence and laches. The discretionary jurisdiction cannot be exercised in such a case. The court below was justified in dismissing the application. We find no reason to interfere with the appeal, which is accordingly dismissed. No costs.

Sd/-
THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-
SUNIL THOMAS
Judge
/true copy/ PS to Judge.

dpk

