

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN**

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

FAO.No. 316 of 2012 ()

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AGAINST THE ORDER IN IA 889/09 & IA 1380/10 & 1381/10 IN OS 92/2007 of PRINCIPAL
SUB COURT, KOCHI DATED 08-08-2012**

APPELLANT/ PETITIONER/1ST DEFENDANT:

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P.V.JOY,
S/O.VAVACHAN, AGED 46, PAZHAYAKATTU NIKARTHIL
23/282 B, PAMBAYIMOOLA, NEAR KANNANGATTU ROAD
CHAPPEL, EDAKOCHI, KOCHI - 6, PIN 682 010.**

BY ADV. SRI.P.J.JOSEPH PANIKKASSERY

RESPONDENTS/RESPONDENTS/PLAINTIFF & ADDL. 2ND DEFENDANT :

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- 1. ANTONY POOCHATHARA
S/O.AUGUSTINE, AGED 40, CC 11/426
THEKKETHARAPARAMBU DESOM,
FORT KOCHI VILLAGE, PIN - 682 002.**
 - 2. PALLURUTHY MANDALAM SERVICE CO-OPERATIVE BANK,
PALLURUTHY, REP. BY ITS SECRETARY, PIN - 682 006.**

**R1 BY ADVS. SRI.K.L.JOSEPH
SRI.V.NAMADEVA KAMATH
R2 BY ADVS. SRI.T.MADHU
SRI.B.S.SURAJ KRISHNA**

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
05-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

vpv

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

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F.A.O.No.316 of 2012

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Dated this the 5th day of February, 2015

JUDGMENT

P.N.Ravindran, J.

The appellant is the first defendant in O.S.No.92 of 2007 on the file of the Court of the Subordinate Judge of Kochi. The first respondent is the plaintiff and the second respondent is the additional second defendant therein. The first respondent instituted O.S.No.92 of 2007 in the Court of the Subordinate Judge of Kochi on 28.5.2007 seeking specific performance of an agreement dated 26.10.2006 stated to have been entered into between him and the first defendant. It was averred in the plaint that as per the said agreement, the first defendant had agreed to sell 3 cents of land situate in Sy.No.98/3 of Edakochi Village together with the building therein for a sale consideration of Rs.2,35,000/- to the plaintiff and that on the date of the agreement, the defendant had received the sum of Rs.50,000/- towards advance sale consideration.

2. The suit stood posted on 2.7.2007 for return of the summons issued to the first defendant, who, in the suit as filed was the sole defendant. The first defendant was served and he entered

appearance through counsel on 2.7.2007. On that day the suit was adjourned to 2.8.2007 for his written statement and later to 22.9.2007. On that day there was no representation on behalf of the first defendant. He was also not present in person and the written statement had also not been filed. The court below therefore adjourned the suit to 25.9.2007. On 25.9.2007, as no written statement had been filed and the first defendant was also not present in person and as his counsel reported 'no instructions', he was set exparte and the suit was adjourned for exparte evidence to 10.10.2007. Thereafter, on application filed by the plaintiff as I.A.No.1388 of 2007, the second defendant, with whom the first defendant had mortgaged the plaint schedule property was impleaded as the additional second defendant in the suit. The plaint was also amended twice and the suit stood posted on various dates and it ultimately decreed exparte on 29.11.2008 after the proof affidavit of the plaintiff was filed on 7.11.2008.

3. After the first defendant was set exparte and before the suit was decreed exparte, the suit stood posted on following dates namely 25.10.2007, 7.11.2007, 6.12.2007, 1.1.2008, 1.2.2008, 6.2.2008, 12.3.2008, 5.4.2008, 10.4.2008, 16.4.2008, 5.7.2008, 10.7.2008, 16.7.2008, 22.7.2008, 26.7.2008, 12.8.2008, 16.8.2008, 22.8.2008, 28.8.2008, 22.9.2008, 25.9.2008,

27.9.2008, 29.9.2008, 4.10.2008, 13.10.2008, 18.10.2008, 25.10.2008, 28.10.2008, 31.10.2008, 3.11.2008, 5.11.2008 and 7.11.2008. The first defendant did not however file an application to set aside the order setting him exparte which was passed on 25.9.2007. Even after the exparte decree was passed on 29.11.2008, he did not take steps in time to file an application to have the exparte decree set aside.

4. After the exparte decree was passed, the plaintiff filed I.A.No.294 of 2009 for permission to deposit the sum of Rs.2,30,000/-, the amount payable towards the balance sale consideration in court. The said application was heard and allowed by order passed on 22.6.2009. The plaintiff thereafter took steps to execute the decree by filing E.P.No.30 of 2009. Notice was issued to the appellant by the execution court and it was received by his wife on 31.6.2009 for and on his behalf. The appellant also entered appearance in E.P.No.30 of 2009 through Sri.Thomas Michael, Advocate. He thereafter filed I.A.Nos.886 and 889 of 2009 on 7.7.2009. The relief sought in I.A.No.889 of 2009 was to set aside the exparte decree passed in the suit on 29.11.2008. The relief sought in I.A.No.886 of 2009 was to condone the delay of 198 days in filing I.A.No.889 of 2009. In the affidavit filed in support of I.A.No.886 of 2009, the appellant had averred as follows:-

- "2. *The above case was decreed on 29-11-08 as it was represented by my then Counsel 'no instruction'. I was not able to meet my counsel to give proper instruction that I was not keeping well.*
3. *The suit was decreed on 29-11-08 I have come to know that the case was decreed against me when I was served with notice from the execution side on 30/6/09.*
4. *As the above suit was decreed on 29-11-08 the petition to set aside the decree ought to have been filed on or before 29-12-08. There is a delay of 190 days in filing the petition to set aside the decree dated 29-11-2008. The delay of 190 days can be condoned. If the petitioner was aware of the decree, the petitioner would have filed the petition to set aside the decree in time. There is no willful latches or negligence from the part of this petition in not filing the petition to set aside the decree dated 29-11-08 in time."*

5. In the affidavit filed in support of I.A.No.889 of 2009, the application to set aside the expart decree passed on 29.11.2008, he had averred as follows:-

"The above case was decreed on 29-11-08. The 1st Defendant ie., myself was set exparte earlier by this Hon'ble Court as my then counsel represented in the Court 'no instruction' from my side. Actually I have not instructed my then Counsel to represent like that. I was not keeping well for some time and I was not able to go out to meet my Counsel during that period. When the notice was sent to me by the Plaintiff through his Counsel, I have even replied to it through my Counsel. I was diligent and prompt in defending my case.

As I was not keeping well, I was not able to give necessary instructions to my Counsel. So he has represented in the Court that he has no instructions. Basing on his representations this Hon'ble Court has

set me exparte.

I have got very serious contentions in the above case. When I have been served with the notice from the execution side on 30/06/09, I came to understand the fate of the case. Eventhough I have tried very much, I could get the details of the case today.

I am filing a petition along with this affidavit to set aside the exparte decree dated 29-11-08 and if the said petition is not allowed I will be put to great loss, inconvenience and irreparable injury."

6. Shorn of details, the substance of the averments in the affidavit filed in support of I.A.No.886 of 2009 was to the effect that the counsel representing him reported 'no instructions' as he was not able to meet his counsel for the reason that he was not keeping well. He had also averred that he came to know about the fact that the suit was decreed when he received notice in the execution side on 30.6.2009. The substance of the averments in the affidavit filed in support of I.A.No.889 of 2009 is that he had not instructed his counsel to report 'no instructions'. He had also averred that as he was not keeping well for sometime, he was not able to go out to meet his counsel. It is relevant in this context to note that summons in the suit was served on the defendant in time before the date fixed for return of summons namely 2.7.2007. The B diary and the proceedings paper show that the defendant had appeared on 2.7.2007 and sought time to file a written statement. The suit was

accordingly adjourned to 2.8.2007 and later to 22.9.2007 for the written statement of the defendant. On 22.9.2007 for the reason that the written statement had not been filed and there was no representation on behalf of the defendant and the defendant was not present in person, the suit was adjourned to 25.9.2007. On that day his counsel reported 'no instructions'. As the defendant was not present in person, he was set *exparte* and the suit was adjourned for *exparte* evidence to 10.10.2007. The suit thereafter stood posted on various dates mentioned above and was ultimately decreed *exparte* on 29.11.2008 after the plaint was twice amended and the additional second defendant was impleaded.

7. Though in the proceedings paper and the B diary it is stated that the defendant appeared on 2.7.2007, on a scrutiny of the records we find that he had not entered appearance through counsel on that day. The appellant has no case that he was not served with summons in the suit. His case is that he had instructed a counsel to appear for him. The counsel however had not filed a vakalath. After I.A.Nos.886 and 889 of 2009 were filed, notices were ordered on 8.7.2009 to the respondents therein returnable on 12.8.2009. On 12.8.2009 both the respondents in I.A.Nos.886 and 889 of 2009 appeared and prayed for time. The applications were accordingly adjourned to 10.9.2009 for the counter affidavit of the

respondents. The first respondent in the aforesaid applications, the plaintiff in the suit filed his counter affidavit on 9.9.2009. When the applications came up for hearing on 10.9.2009, they were adjourned to 29.9.2009 for hearing. On that day, the learned counsel appearing for the first respondent was heard and for hearing the learned counsel appearing for the petitioner, the applications were adjourned to 9.10.2009. On 9.10.2009 they were adjourned to 19.10.2009 for hearing the learned counsel appearing for the petitioner. On that day, as there was no sitting, the applications were adjourned to 4.11.2009 and still later to 30.11.2009. On 30.11.2009, the applications were adjourned to 8.12.2009. On 8.12.2009 there was no representation for the petitioner/first defendant. The first defendant was also not present in person. I.A.No.886 of 2009 was accordingly dismissed by order pass on 8.12.2009. The court below did not however pass a consequential order dismissing I.A.No.889 of 2009. Long afterwards, on 27.9.2010, the appellant filed I.A.No.1381 of 2010 to restore I.A.Nos.886 and 889 of 2009 to file and I.A.No.1380 of 2010 to condone the delay of 162 days in filing I.A.No.1381 of 2010. In the affidavit filed in support of the aforesaid applications he had averred that upon receipt of summons from the court, he had engaged Sri.Thomas Michael, Advocate to appear for him, that he

was thereafter laid up and consequently exparte orders were passed. He had also averred that his counsel failed to intimate him about the proceedings in time, but later an application to set aside the exparte decree was filed on 7.7.2009, that unfortunately his counsel again failed to appear in court when the application to set aside the exparte decree was called on for hearing and consequently I.A.No.886 of 2009 was dismissed. The deponent had further averred that he and his counsel had failed to take note of the date of the posting and that was the reason why they were not present on 8.12.2009 when I.A.No.886 of 2009 was dismissed for default. Upon receipt of notice in I.A.Nos.1380 and 1381 of 2010, the first respondent entered appearance and filed written objections. The trial court after considering the rival contentions dismissed I.A.No.1380 of 2010 by a detailed order passed on 8.8.2012. Consequently, by a separate order passed on 8.8.2012, I.A.No.1381 of 2010, to restore I.A.Nos.886 and 889 of 2009 to file, was dismissed. On the very same day, the trial court passed an order dismissing I.A.No.889 of 2009 as well. The first defendant has aggrieved thereby filed this appeal.

8. We heard Sri.P.J.Joseph Panikkassery, learned counsel appearing for the appellant and Sri.K.L.Joseph, learned counsel appearing for the first respondent. Sri.P.J.Joseph Panikkassery,

learned counsel appearing for the appellant contended that the appellant has in the affidavits filed in support of I.A.Nos.886 and 889 of 2009 and I.A.Nos.1380 and 1381 of 2010 explained the circumstances in which he was set exparte and an exparte decree was passed as also the reason why there was delay in filing the application to set aside the exparte decree, that in the affidavit filed in support of I.A.Nos.1380 and 1381 of 2010 he has also explained the circumstances in which I.A.No.886 of 2009 was dismissed, that the appellant has also satisfactorily explained his omission to appear and file a written statement and therefore, the court below ought to have taken a lenient view and condoned the delay of 162 days in filing I.A.No.1381 of 2010 to set aside the order dismissing I.A.No.886 of 2009 and consequently allowed I.A.Nos.886 and 889 of 2009. The learned counsel appearing for the appellant submitted that the delay in filing the application to set aside the exparte decree passed in the suit was only 198 days, that the delay in filing I.A.No.1381 of 2010 to set aside the order dismissing I.A.No.886 of 2009 was only 162 days and therefore, as the delay was not inordinate, the court below ought to have taken a lenient view and allowed the applications atleast on terms.

9. Per contra, Sri.K.L.Joseph, learned counsel appearing for the first respondent submitted that on account of the dilatory tactics

adopted by the appellant, notwithstanding the fact that the exparte decree passed on 29.11.2008 has attained finality and the claim petition filed by the appellant's wife was dismissed by order passed on 17.1.2012 and Ex.F.A.No.26 of 2012 filed therefrom was dismissed by this Court by judgment delivered on 27.3.2013, the first respondent has not been able to enjoy the fruits of the decree. Inviting our attention to the entries in the B diary, learned counsel appearing for the first respondent submitted that though the appellant was set exparte on 25.9.2007, the suit was decreed only on 29.11.2008, more than one year and two months thereafter, that had the appellant been vigilant he could have applied to have the order setting him exparte set aside, even filed a written statement with the leave of the court and defended the suit and that his failure to do so establishes the fact that his intention is only to protract the proceedings and to delay the execution of the decree. The learned counsel contended that the averments in the affidavit filed in support of I.A.Nos.886 and 889 of 2009 or the affidavit filed in support of I.A.Nos.1380 and 1381 of 2010 are not true or tenable, that they do not inspire confidence and therefore, the court below was perfectly right in dismissing the applications. Referring to Ext.A4 reply notice, the learned counsel appearing for the first respondent contended that the appellant/defendant had in the said

reply notice expressed his readiness and willingness to sell the property to the plaintiff, that the reply notice indicates that he has no defence to the relief sought in the plaint, that the appellant had also failed to inform the plaintiff about the fact that the plaint schedule property had been mortgaged with the second defendant and that as the balance sale consideration has already been deposited and a sale deed has also been executed, if at this distance of time the reliefs sought by the appellant are granted, serious prejudice will be caused to the plaintiff.

10. We have considered the submissions made at the Bar by learned counsel appearing on either side. We have also gone through the pleadings and the materials on record as also the lower court records. As rightly pointed out by the learned counsel for the first respondent, the records disclose that though the appellant was served in the suit, he was set *ex parte* for failure to file a written statement and to appear through counsel/in person on 25.9.2007. The *ex parte* decree was passed only much later namely on 29.11.2008. Had the appellant been vigilant, he could have in the interregnum filed an application to set aside the order setting him *ex parte* and also sought the leave of the court to file a written statement and to participate in the proceedings. Instead, evidently because of the stand taken by him in Ext.A4 reply notice he chose

to keep away and waited till he received notice in E.P.No.30 of 2009 to file I.A.Nos.886 and 889 of 2009. Even in the affidavits filed in support of the aforesaid applications he had no case that he was unaware of the suit or the postings therein. The only explanation given by him was that his counsel had reported no instructions on 25.9.2007, contrary to his instructions. He had no explanation whatsoever in the affidavits filed in support of the aforesaid applications as to the reason why he did not make enquiries regarding the suit after 25.9.2007. The averments in the affidavit filed in support of I.A.Nos.886 and 889 of 2009 as also the averments in the affidavit filed in support of I.A.Nos.1380 and 1381 of 2010 do not refer to this aspect of the matter. Apart from vaguely stating that as he was laid up he could not contact his counsel, there is no acceptable explanation from the side of the appellant as to the reason why he did not make enquiries regarding the progress of the suit though he had received summons well before the date fixed for appearance namely 2.7.2007.

11. From the conduct of the appellant and the attendant circumstances including the fact that his wife had come forward with a claim petition which was dismissed and the order of dismissal has attained finality with the dismissal of Ex.F.A.No.26 of 2012 by this Court by judgment delivered on 27.3.2013, it is evident that the

appellant's intention is only to delay the execution of the decree passed in the suit. That apart, the records disclose that the sale deed was executed on 6.8.2010. More than four years have passed thereafter. It was only long after the sale deed was executed and after notice in E.P.No.30 of 2009 was served on the appellant that his wife came forward with a claim petition, E.A.No.146 of 2010, which was heard and dismissed by order passed on 17.1.2012. In such circumstances, we are of the opinion that the conduct of the appellant disentitles him to any indulgence.

For the reasons stated above, we hold that there is no merit in the instant appeal. The appeal fails and it is dismissed. No costs.

Sd/-

**P.N.RAVINDRAN
JUDGE**

Sd/-

**ANIL K.NARENDRA
JUDGE**