IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 13TH DAY OF FEBRUARY 2015/24TH MAGHA, 1936

FAO.No.370 of 2012
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AGAINST THE ORDER IN I.A.Nos.1465 & 1466 OF 2010 IN OS.No.182/2007 ON THE FILE OF THE COURT OF THE SUBORDINATE JUDGE OF KOCHI DATED 9.7.2012

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APPELLANTS/DEFENDANTS 1 TO 4, 6 AND 7 AND PETITIONERS IN I.A.Nos.1465/2010 AND 1466/2010:

1. SUGU, AGED 61 YEARS,
S/O. AYYAPPAN, SHANGARADI HOUSE, EDAVANAKKADU VILLAGE, EDAVANAKKADU, KOCHI.

2. MURUKAN,
S/O.PARAMESWARAN, PANIKASALAYKKAL HOUSE, EDAVANAKKAD.

3. BABU,
S/O.KESAVAN, THITTETHARA HOUSE, EDAVANAKKAD.

4. SAJU,
S/O. BAHULEYAN, MARAKKAHARAMBIL HOUSE, EDAVANAKKAD.

5. UNNIKRISHNAN, AGED 46 YEARS,
S/O. ASOKAN, PERUMPADAPPIL HOUSE, CHERAI P.O.

6. SANTHOSH,
S/O. GOPALAN, PUNNAKKATTUTHARA, EDAVANAKKAD.

BY ADVS.SRI.JIJI THOMAS
SMT.SMITHA MATHEW
YASH THOMAS MANNULLY

RESPONDENTS/PLAINTIFFS/AND 5TH DEFENDANT IN I.A.Nos.1465/2010 AND 1466/2010:

1. RAVEENDRAN, AGED 62 YEARS,
S/O. GOPALAN, ANJALASSERY HOUSE, ELAMKUNNAPUZHA, KOCHI TALUK.

2. VENUGOPALAN, AGED 58 YEARS,
S/O. GOPALAN, ANJALASSERY HOUSE, ELAMKUNNAPUZHA,
KOCHI TALUK.

3. SUDHI, AGED 43 YEARS,
S/O. PICHAPPAN, ANJUTHIKKAL HOUSE, EDAVANAKKAD,
NOW RESIDING AT KATTICHIRAYIL VEEDU,
TRIKKUNNAPPUZHA P.O., ALAPPUZHA DISTRICT, PIN-690515.

R1,R2 BY ADV. SRI.R.LAKSHMI NARAYANAN
R1,R2 BY ADV. SMT.R.RANJINI
R3 BY ADV. SRI.BECHU KURIAN THOMAS
R3 BY ADV. SRI.S.SREEDEV

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 13-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

FAO.No.370 of 2012

APPENDIX

APPELLANTS' ANNEXURES :-

ANNEXURE No.1	:	COPY OF THE SUIT AS O.S.No.182/2007.
ANNEXURE No.2	:	COPY OF THE WRITTEN STATEMENT FILED BY THE RESPONDENTS 1 TO 4, 6 AND 7 IN O.S.No.182/2007.
ANNEXURE No.3	:	COPY OF THE I.A.No.1465/2010 DTD.14.10.2010.
ANNEXURE No.4	:	COPY OF THE I.A.No.1466/2010 DTD.14.10.2010.
ANNEXURE No.5	:	THE ORIGINAL OF THE COMMON ORDER IN I.A.No.1465/2010 AND 1466/2010 DTD.9.7.2012.
ANNEXURE No.6	:	COPY OF E.P.No.36/2010 PENDING ON THE FILE OF THE SUB COURT, KOCHI.
ANNEXURE No.7	:	COPY OF THE ORDER PASSED BY THIS COURT IN O.P.(C).No.2497/2011(o) DTD.31.8.2011.
ANNEXURE No.8	:	COPY OF THE FRESH DRAFT SALE PROCLAMATION DTD.5.2.2014 IN E.P.No.36/2010 IN O.S.No.182/2007 OF SUB COURT, KOCHI.

RESPONDENTS' ANNEXURES : NIL.

True copy

P.A to Judge

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

F.A.O.No.370 of 2012

Dated this the 13th day of February, 2015

JUDGMENT

P.N.Ravindran, J.

The appellants are defendants 1 to 4, 6 and 7 in O.S.No.182 of 2007 on the file of the Court of the Subordinate Judge of Kochi. Respondents 1 and 2 are the plaintiffs and the third respondent is the fifth defendant therein. Respondents 1 and 2 as plaintiffs instituted O.S.No.182 of 2007 in the Court of the Subordinate Judge of Kochi on 23.10.2007 praying for a decree directing the defendants to pay them the sum of ₹2,88,000/- with interest and costs. The suit was instituted by the first plaintiff on the averment that the defendants had borrowed the sum of ₹1,00,000/- from his brother Venugopal (later impleaded as the supplemental 2nd plaintiff) to purchase fishing equipment and utensils for the fishing boat, Amrithavahini, that the defendants had agreed to return the said amount within six months but inspite of repeated demands, the defendants have not repaid the amount. Along with the plaint the first plaintiff had produced a copy of the agreement stated to have

been entered into by the defendants with Venugopal to prove his contention that the amount borrowed from Venugopal was to be repaid to him.

2. Upon receipt of summons, defendants 1, 2, 4, 6 and 7 entered appearance and prayed for time for filing their written statement. The 3rd defendant did not enter appearance. He was therefore set exparte by order passed on 14.11.2007 and the suit was adjourned to 13.12.2007. On that day defendants 1, 2, 4, 6 and 7 sought further time to file their written statement. The said request was declined, they were set exparte and the suit was adjourned to 1.1.2008 for payment of the balance court fee. In the meanwhile, the 3rd defendant filed I.A.No.1676 of 2007 to set aside the order passed on 14.11.2007 setting him exparte. That application was heard and allowed by order passed on 3.7.2008. Defendants 1, 2 and 4 to 7 had in the meanwhile filed I.A.No.228 of 2008 praying that the order passed by the court below on 13.12.2007 setting them exparte may be set aside. That application was heard and allowed by order passed on 3.7.2008. On that day the court below also allowed I.A.No.236 of 2008, an application filed

by the plaintiff for an amendment of the plaint and the suit was adjourned to 18.7.2008 to carry out the amendment. On 18.7.2008 the defendants were again set exparte and suit was adjourned to 31.7.2008 for payment of the balance court fee and for exparte evidence. Defendants 1 and 4 thereupon filed I.A.No.1363 of 2008 on 31.7.2008 praying that the order passed by the court below on 18.7.2008 setting them exparte may be set aside. The said application was allowed and the order setting the defendants exparte was set aside by order passed on 29.5.2009. On 3.1.2008, Sri.Venugopal, the plaintiff's brother filed I.A.No.21(a) of 2007 praying that he may be impleaded as the supplemental 2nd plaintiff in the suit. That application was heard and allowed by order passed on 9.6.2009. The suit thereafter stood posted for steps to 23.6.2009. On that day it was adjourned to 7.7.2009 for the additional written statement of the defendants. On 7.7.2009 it was adjourned to 28.7.2009 for additional written statement and for payment of the balance court fee. Since no additional written statement was filed, when the suit was called on 28.7.2009, it was adjourned to 15.9.2009 for steps. On 15.9.2009, the suit was

included in the list of 13.11.2009 for trial. On that day, as there was no representation on behalf of the defendants, they were set exparte and acting on the affidavit filed by the first plaintiff in lieu of chief examination, the suit was decreed. Defendants 1 to 4, 6 and 7 thereupon filed I.A.No.1465 of 2010 on 14.10.2010 to set aside the exparte decree and judgment passed in the suit on 13.11.2009 accompanied by I.A.No.1466 of 2010 to condone the delay of 305 days in filing the former application. Later, on 16.11.2010, the 5th defendant filed I.A.No.1608 of 2010 to set aside the exparte decree passed on 13.11.2009 accompanied by I.A.No.1607 of 2010 to condone the delay of 339 days in filing the former application. In the affidavit filed in support of I.A.No.1465 of 2010 the first defendant had averred as follows:-

> *"3. I am an uneducated person engaged in fishing for my livelihood. Other defendants are also uneducated and engaged in fishing. Actually amount stated in the plaint was borrowed by one Dasan, who was headman in the fishing boat "Amrithavarshini" for the fishing team. As the business collapsed the*

fishing vessel was handed over to a team of 14 fishermen including us. The amount stated in the plaint is not the personal liability of us, the other 7 persons are also to be impleaded. I filed a detailed written statement in the above case. Actually no amount is due from us to plaintiffs. In the mean time as the suit was pending the said boat was taken away by the 6th defendant namely Mr.Sudhi and he is conducting fishing and taking the income.

4. When the case was listed we informed the matter to Sudhi and he agreed to meet the counsel and conduct the case. So we have not gone to meet the advocate. But on the listed day as he never met counsel the case was decreed exparte. We came to know about the decree only when we received notice in Execution Petition in September 2010. Immediately we tried to contact Sudhi, but so far we were not able to trace out him. Then we made enquiries and found that the suit had not been defended and had been decreed exparte. Immediately we met Advocate Latha

Kumari.B and have made arrangements for filing this application to set aside exparte decree. But however, since we came to know of the decree only when we received the notice in execution proceedings and as per the date of the decree, the petition to set aside the decree ought to have been filed within 30 days i.e. on or before 13.12.2009, in the circumstances there is delay of 305 days in filing the above petition to set aside the exparte decree and petition is filed for the said relief also. There is no wilful laches or negligence on our part or on the part of our counsel in the failure to appear on 13.11.09 or on the subsequent days. The default and delay occurred in the circumstances stated above. We are having very substantial contentions in the above suit. We are not liable to pay any amount to plaintiffs. If the delay is not condoned and exparte decree set aside and if we are not allowed to contest the suit on merits, placing the true facts before this Honourable court, we will be put to irreparable injury loss and hardships. All

facts stated above are true."

The very same averments were reiterated in the affidavit filed in support of I.A.No.1466 of 2010 as well.

3. In the affidavit filed in support of I.A.No.1608 of 2010 the 5th defendant had averred as follows:-

> *"4. The real fact is that the first defendant was the leader of a fishing boat wherein I was also a share holder. The first defendant managed to obtain the signatures of me and other defendants in blank paper making us believe that it is essential for the purpose of availing loan from Matsya fed. Those stamp papers were misutilised by the plaintiff with the help and connivance of the first defendant.*
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> *5. On the receipt of notice of the above suit I have approached the first defendant then he assured that he will take care of the above case and do the necessary to contest the above suit properly. On the belief of his promise and words I did not sought for any legal advice and did anything to contest the above suit. Moreover for the last more than three years I am working in Thrikkunnappuzha in Alappuzha District and*

was unable to know the further developments in the above suit.

6. Only when I received the notice in the Execution Petition I came to know about the exparte decree passed by this Hon'ble Court against me. I have applied for the certified copies of the judgment and related papers. But unfortunately as part of my job I had to go to Mangalore and came back only by 7.11.2010. As I was not available in station I could not meet with my counsel and give necessary instruction for filing this application. I could meet with my counsel only on 8.11.2010 and gave necessary instructions.

7. This Hon'ble court was pleased to pass an exparte decree against me on 13.11.2009. An application to set aside the exparte decree should have been filed on or before 14.12.2009. I am filing herewith an application to set aside the exparte decree passed by this Hon'ble court dated 13.11.2009.

8. In the above case I have serious objections to the claims in the plaint and evidences to prove the same. My absence on the date fixed by this Hon'ble court was not due to willful negligence or laches from my

> *part but only because of the reasons beyond my control. I would have actively participated in the trial and given evidences before this Hon'ble court if I had knowledge about the same. Unless I am not given an effective opportunity to contest the above case I will be put to irreparable loss and damages. The interest of justice and fairplay also demands the same."*

The very same averments were reiterated in the affidavit filed in support of I.A.No.1607 of 2010 as well.

4. Shorn of details, the substance of averments contained in the affidavits filed in support of I.A.Nos.1465 and 1466 of 2010 filed by the defendants 1, 2, 4, 6 and 7 is that Sudi the 5th defendant had taken away the boat and he is conducting fishing operations and taking the income. It is also stated that after the suit was listed they had informed the 5th defendant about the same, and he agreed to meet the counsel and conduct the case, but he did not meet the counsel. They had also averred that they came to know about the exparte decree only when they received notice in the execution petition in September, 2010. The substance of the averments in the

affidavit filed in support of I.A.Nos.1607 of 1608 of 2010 by the 5th defendant is that upon receipt of summons he had approached the first defendant, who assured him that he would take care of the case and do the needful to contest the suit properly, and believing that promise, he did nothing to contest the case. He had also averred that he came to know about the exparte decree only when he received the notice in the execution petition. The stand taken by defendants 1, 2, 4, 6 and 7 on the one hand and the 5th defendant on the other are conflicting and contradictory. The respondents filed separate counter affidavits contending that the defendants were set exparte on two occasions, namely, on 14.11.2007 and 18.7.2008, that the applications filed by them as I.A.Nos.1676 of 2007 and 1363 of 2008 to set aside the orders setting them exparte were allowed, that it is evident from the averments in the aforesaid applications that the defendants were aware of the suit and therefore the statement that, they became aware of the decree only when they received notice in the execution petition cannot be believed. They also contended that, defendants 1, 2, 4, 6 and 7 have attempted to put the blame on the 5th defendant. The trial

court considered the rival contentions and dismissed both sets of applications by the impugned order passed on 09.07.2012. Hence this appeal.

5. We heard Sri.Yash Thomas Mannully, learned counsel appearing for the 4th appellant and Sri.Lakshmi Narayanan, learned counsel for respondents 1 and 2. Learned counsel for appellants 1 to 3, 5 and 6 and the learned counsel for the 3rd respondent were not present, when the appeal was called for hearing today. We have also gone through the pleadings and the materials on record. The materials on record disclose that defendants 1 and 4 had in the written statement filed by them on 31.7.2008 admitted the fact that the amount due to the plaintiff, if any, was only the balance amount of ₹65,900/- and the interest thereon at the rate of 6% per annum from 21.12.2006 till the date of actual repayment. They had averred that their liability to pay will arise only if the plaintiff proves that he has discharged the liability due to second plaintiff (Venugopalan) and the second plaintiff agrees that he has assigned the right to realize this amount to the plaintiff and is agreeable to discharge the defendants from liability, in case payment is made to the plaintiff.

The case put forward in the affidavits filed in support of I.A.Nos.1465 and 1466 of 2010 and I.A.Nos.1607 of 1608 of 2010 was put forward in the affidavits filed in support of I.A.Nos.1676 of 2007 and 1363 of 2008. Defendants 1, 2, 4, 6 and 7 had in the affidavit filed in support of the aforesaid applications stated that upon receipt of the summons they had entrusted the case with the 5th defendant. It is thus evident from the pleadings and the materials on record that the case now put forward in I.A.Nos.1465 and 1466 of 2010 and I.A.Nos.1607 of 1608 of 2010 is only an afterthought. Defendants 1 and 4 had in the written statement filed on 31.7.2008 admitted their liability to pay ₹65,900/- and interest thereon at 6% per annum from 21.12.2006. The 5th defendant had in his written statement dated 16.11.2010 denied having borrowed any amount from the plaintiff. He had even questioned the validity and genuineness of the documents produced by the plaintiff. He had also contended that no document has been executed as alleged by the plaintiff. The 5th defendant, however, has not chosen to challenge the order dismissing I.A.Nos.1607 and 1608 of 2010 filed by him to have the exparte decree passed on 13.11.2009 set aside.

After hearing learned counsel and on going through the pleadings and the materials on record, more particularly the case set out by defendants 1 and 4 in the written statement filed by them and the plea of total denial put forward by 5th defendant, we are of the opinion that, in the event of the appellants jointly depositing the sum of ₹65,900/- the exparte decree passed in the suit can be set aside and the appellants given opportunity to have the suit tried and disposed of on the merits.

We accordingly allow the appeal, set aside the common order dated 9.7.2012 passed by the Court of the Subordinate Judge of Kochi on I.A.Nos.1465 and 1466 of 2010 and I.A.Nos.1607 and 1608 of 2010 in O.S.No.182 of 2007 and allow the said applications subject to the condition that the appellants shall jointly deposit in the court below the sum of ₹65,900/- on or before **31.3.2015**. Upon such deposit being made, the court below shall transfer the amount to a fixed deposit in a nationalised bank. In the event of failure on the part of the defendants to deposit the sum of ₹65,900/- within the time limit stipulated above, the appeal shall stand dismissed. The parties shall appear in the court below on

31.3.2015. Having regard to the fact that the suit was filed in the year 2007, the court below shall try and dispose of the suit within four months from the date on which the civil courts re-open after the summer vacation of 2015.

P.N.RAVINDRAN, JUDGE

ANIL K.NARENDRAN, JUDGE

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