

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 4TH DAY OF FEBRUARY 2015/15TH MAGHA, 1936

FAO.No. 12 of 2015 ()

I.A.No.679/14 IN O.S.No.354/2013 OF SUB COURT, CHAVAKKAD.

APPELLANTS/DEFENDANTS:

1. RATHEESH KUMAR AGED 41 YEARS
S/O. THACHAPILLY RAMADAS VAIDHYAR, THRITHALLUR DESOM
VADANAPPILLY VILLAGE, CHAVAKKAD TALUK.
2. DR. SEEMA RATHEESH KUMAR, AGED 39 YEARS
W/O. THACHAPILLY RATHEESH KUMAR, THRITHALLUR DESOM
VADANAPPILLY VILLAGE, CHAVAKKAD TALUK.
3. BALASUNDHARAN AGED 46 YEARS
S/O. THACHAPILLY RAMADAS VAIDYAR, THRITHALLUR DESOM
VADANAPPILLY VILLAGE, CHAVAKKAD TALUK.
4. KRISHNAKUMAR AGED 40 YEARS
S/O. THACHAPILLY RAMADAS VAIDYAR, THRITHALLUR DESOM
VADANAPPILLY VILLAGE, CHAVAKKAD TALUK.
5. RAMADAS VAIDHYAR AGED 76 YEARS
THACHAPILLY HOUSE, THRITHALLUR DESOM
VADANAPPILLY VILLAGE, CHAVAKKAD TALUK.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT/PLAINTIFF :

RUDOLF VOLFGANG HAINS
GERMANI, NOW RESIDING AT C/O GOKULDAS, S/O. RAGHAVAN
PACHAMPULLY HOUSE, DOOR NO.15/5A, MUNDATHIKODU
THRISSUR-680 001.

BY ADV. SMT.DHANYA P ASOKAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
04-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

F.A.O.No.12 OF 2015

DATED THIS THE 4th DAY OF FEBRUARY, 2015

JUDGMENT

P.N.RAVINDRAN, J.

The appellants are the defendants in O.S.No.354 of 2013 on the file of the Court of the Subordinate Judge of Chavakkad. The sole respondent, who is a German national, is the plaintiff therein. The suit instituted by the respondent is one for realisation of the sum of Rs.32,50,000/- corresponding to 50,000 Euros with interest and costs. The suit was originally instituted on 21.2.2012 in the Court of the Subordinate Judge of Thrissur as O.S.No.341 of 2012. Summons was issued to the defendants on 23.02.2012 with the hearing date fixed as 10.08.2012. On that day, the defendants appeared through counsel and the suit was adjourned to 6.11.2012 for the written statement of the defendants. On 6.11.2012 the defendants were granted 15 days' further time to file their written statement and the suit was adjourned to 10.01.2013. The defendants filed their written statement on 9.1.2013 resisting the suit. The suit thereafter stood posted on 10.01.2013, 27.3.2013 and 5.8.2013. In the meanwhile, a Sub Court was established at Chavakkad. Thereupon, on 1.8.2013, the suit was transferred to the

Court of the Subordinate Judge of Chavakkad where it was taken on file and re-numbered as O.S.No.354 of 2013.

2. After the suit was transferred, it stood posted on 5.8.2013, 3.9.2013, 5.10.2013 and thereafter to 1.11.2013. On 1.11.2013 as there was no sitting, the suit was re-posted to 30.11.2013 and on 30.11.2013 it was adjourned to 15.2.2014 for hearing the interlocutory applications filed by the plaintiff. Since there was no sitting on 15.2.2014, the suit was re-posted to 19.2.2014. On 19.2.2014, issues were settled and the suit was included in the special list of 6.3.2014. The court below also directed that the defendant has the right to begin evidence. The suit was ordered to be called on 28.2.2014. On that day, the court below allowed I.A.No.367 of 2014, an application filed by the plaintiff under Order XVI Rule 1 of the Code of Civil Procedure to issue summons to the witnesses named therein. On the very same day, it allowed I.A.No.386 of 2014, an application filed while the suit was pending in the Sub Court, Thrissur as I.A.No.1828 of 2012, to issue summons to the Manager, State Bank of India, and the Secretary, Vadanappilly Grama Panchayat, to produce the documents referred to in the application. The suit was thereafter adjourned for evidence to 6.3.2014. On 6.3.2014, the defendants filed I.A.No.408 of 2014 to remove the suit from the list on the averment

that the first defendant who is conducting the case is bed ridden on account of back pain. Along with the said affidavit, the first defendant produced a medical certificate issued by the doctor treating him. The trial court dismissed the said application holding that the intention of the defendants is to prolong the matter so as to vex, annoy and harass the plaintiff. The trial court also held that the alleged illness is not at all a relevant ground to remove the case from the list. Consequently, the defendants were set ex parte. Ex parte evidence on the side of the plaintiff was adduced and the suit was heard. By judgment delivered on 7.3.2014, the suit was decreed with costs.

3. The defendants thereupon filed I.A.No.679 of 2014 under Order IX Rule 13 of the Code of Civil Procedure praying that the ex-parte decree passed on 7.3.2014 may be set aside. The said application was filed on 4.4.2014, within the period of limitation prescribed for the purpose. On the said application, the court below ordered notice to be given to the respondent. Later, when the application was called on for hearing on 11.6.2014, for want of representation on behalf of the petitioners/defendants, it was dismissed for default. On application filed by the defendants as I.A.No.1341 of 2014, I.A.No.679 of 2014 was restored to file by order passed on 24.7.2014. The application thereafter stood posted to

30.7.2014 for counter and hearing. On that day, it was adjourned to 8.8.2014 with a direction to the defendants to give notice to the respondent/plaintiff. However, when the application came up for hearing on 8.8.2014, the trial court ordered notice to the respondent/plaintiff returnable by 14.10.2014. On 14.10.2014 as the respondent plaintiff did not appear in spite of service of notice, he was set ex-parte and I.A.No.679 of 2014 was heard. By order passed on 27.10.2014, the trial court dismissed I.A.No.679 of 2014 holding that no valid reasons have been given in the application. The defendants have aggrieved thereby filed this appeal.

4. We heard Sri G.Sreekumar (Chelur), learned counsel appearing for the appellants and Smt.Dhanya P.Asokan, learned counsel appearing for the respondent. We have also gone through the proceedings paper/the B diary and the lower court records. As stated earlier, the plaintiff is a German national. It is not in dispute that he cannot speak or write any other language including English and Malayalam. The plaint is in Malayalam, a language with which the plaintiff is unacquainted. The verification part of the plaint reads as follows:

“മേൽ പറഞ്ഞ 1 മുതൽ 15 വരെ
ഖണ്ഡികയിലെ പ്രസ്താവനകൾ എന്റെ അറിവിലും
എനിക്ക് ലഭ്യമായ വിവരം അനുസരിച്ചും

സത്യമാണെന്ന് ഉറപ്പു വരുത്തി ടി തിയ്യതിക്ക് ഇതിൽ ഊരകത്ത് വെച്ച് ഒപ്പിട്ടിരിക്കുന്നു.”

5. There is no statement by the learned counsel who has verified the plaint that the contents of the plaint were translated and read over to the deponent and he understood the contents thereof, though in the affidavit accompanying the plaint, the plaintiff's counsel who has attested the affidavit has stated that the affidavit was translated in his presence to the deponent. The plaintiff's counsel has not however certified that it was translated by him or someone else who is familiar with German language in his presence. Apart from that, we find that the verification part of the affidavit filed by the plaintiff in lieu of chief examination is not in accordance with rule 48 of the Civil Rules of Practice, Kerala. Rule 48 of the Civil Rules of Practice, Kerala reads as follows:

“48. Blind or illiterate deponent:-Where an affidavit is sworn or affirmed by any person who appears to the person authenticating the affidavit to be illiterate, blind or unacquainted with the language in which the affidavit is written, the person authenticating shall certify that the affidavit was read, explained or translated by him or in his presence to the deponent, that the deponent seemed to understand it, and made his signature or mark in the presence of the person authenticating as in Form No.15.”

6. On the terms of rule 48 of the Civil Rules of Practice, if the

person swearing to the affidavit is unacquainted with the language in which the affidavit is written, the person authenticating the affidavit has to certify that the affidavit was read, explained or translated by him or in his presence to the deponent, that the deponent seemed to understand it and made his signature or mark in the presence of the person authenticating the document. In the instant case, the certification by the learned counsel appearing for the plaintiff in the affidavit sworn to by the plaintiff in lieu of chief examination is as follows:

“ Solemnly affirmed and signed before me on this the 6th day of March 2014 at my office at Urakam and the deponent is personally known to me and contents of the affidavit is translated to deponent and he has perfectly understood the same.”

7. The person who has authenticated the proof affidavit (namely the plaintiff's counsel) which is in Malayalam has not certified that the contents of the affidavit were translated by him to German language. The plaintiff's counsel is admittedly not acquainted with German language. He has also not certified that the contents of the affidavit were translated and read over or explained to the deponent in his presence by some one else who is acquainted with German language. This fundamental fact appears to have escaped the

attention of the learned trial Judge who set the defendants ex parte on 6.3.2014 and on the very next day (7.3.2014) passed an ex-parte decree as prayed for relying on the aforesaid proof affidavit which did not satisfy the requirements of Rule 48 of the Civil Rules of Practice. The court below has not, when it stated after framing the issues that the defendants have the right to begin the evidence given any reason as to why the defendants should begin the evidence. There is no finding to the effect that the defendants have admitted the facts stated in the plaint and that their only contention is that either in point of law or on some additional facts alleged by the defendants, the plaintiff is not entitled to any part of the relief which he seeks. A reading of the written statement filed by the defendants discloses that they had denied the plaint averments in toto and had prayed for a dismissal of the suit. They had also contended that they are liable to pay only 5000 Euros to the plaintiff. After stating that the plaintiff is unacquainted with Malayalam, they had also contended that the plaint does not appear to have been prepared and filed with the plaintiff's consent and knowledge. After going through the plaint and the written statement filed by the defendants we are of the opinion that instead of calling upon the defendants to begin the evidence without stating any reasons, the court below ought to have called upon the plaintiff to

begin the evidence. If such a course had been adopted, in the absence of an interpreter, the defendants counsel would not have been in a position to cross examine the plaintiff. It would have been imperative for the court below to adjourn the trial of the suit to another day. Even if all the defendants had been present in person on 6.3.2014, if they had submitted that they have no defence evidence to adduce, the court below would have had to call upon the plaintiff to enter the box for the purpose of cross-examination. In that event, the court below would not have been in a position to proceed with the trial of the suit for want of an interpreter. This significant fact also appears to have been lost sight of by the court below. In such circumstances, on an overall view of the matter, we are persuaded to interfere with the order passed by the court below. It is settled law that if an application to set aside an ex parte decree is filed within the period of limitation, except in cases where there is gross negligence or malafides, such an application shall ordinarily be allowed. In the instant case no such reason has been attributed by the court below. We also notice in this context that though the written statement was filed on 9.1.2013, issues were framed only on 19.2.2014, more than an year later. The suit was decreed ex-parte on 6.3.2014, 15 days after issues were framed. It cannot therefore be said that the

defendants alone were responsible for the delay in the disposal of the suit. We are therefore of the considered opinion that the impugned order should be set aside and the appellants afforded an opportunity to have the suit tried and disposed of on the merits.

We accordingly allow the appeal, set aside the order passed by the Court of the Subordinate Judge of Chavakkad on 27.1.2014 on I.A.No.679 of 2014 in O.S.No.354 of 2013, allow the said application, set aside the decree and judgment passed in O.S.No.354 of 2013 and restore the suit to file. The parties shall appear in the court below through counsel on 1.6.2015. No costs.

Sd/-
P.N.RAVINDRAN,
JUDGE

Sd/-
ANIL K.NARENDRA,
JUDGE

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