

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 6TH DAY OF APRIL 2015/16TH CHAITHRA, 1937

FAO.No. 75 of 2015 ()

(AGAINST THE ORDER DTD 25.2.2015 IN I.A.Nos.72/2015&71/2015 IN O.S.NO.150/2012
OF SUB COURT, PERUMBAVOOR)

APPELLANTS/PETITIONERS/DEFENDANT NO. 1 AND 3:

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1. MAKKAR
S/O.KHADER, MEZHUKKATTIL, RESIDING AT KAMBAYIKUDIYIL
AMBUNADU KARA, KIZHAKKAMBALAM VILLAGE
KUNNATHUNADU TALUK.
 2. ASSI
S/O.KHADER, MEZHUKKATTIL, RESIDING AT KAMBAYIKUDIYIL
AMBUNADU KARA, KIZHAKKAMBALAM VILLAGE
KUNNATHUNADU TALUK.

BY ADVS.SRI.G.G.MANOJ
SRI.JAICE JACOB

RESPONDENTS/RESPONDENTS/PLAINTIFF & DEFENDANT NO. 2 & 4:

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1. MAHINKUTTY
S/O.HYDROSE, NEDUNGADAN HOUSE, EDATHALA KARA
ALUVA EAST VILLAGE, ALUVA TALUK, PIN - 683 101.
 2. SAITHU ALIAS SAITHUMUHAMMED
S/O.KHADER, MEZHUKKATTIL, RESIDING AT KAMBAYIKUDIYIL
AMBUNADU KARA, KIZHAKKAMBALAM VILLAGE
KUNNATHUNADU TALUK - 683 562.
 3. ALIKKUNJU
KHADER, MEZHUKKATTIL, KAMBAYIKUDIYIL
AMBUNADU KARA, KIZHAKKAMBALAM VILLAGE
KUNNATHUNADU TALUK - 683 562.

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION
ON 06-04-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

F.A.O. No.75 of 2015

Dated this the 6th day of April, 2015

J U D G M E N T

P.N.Ravindran, J.

The appellants are defendants 1 and 3 in O.S.No.150 of 2012 on the file of the Court of the Subordinate Judge of Perumbavoor. The first respondent is the plaintiff and respondents 2 and 3 are defendants 2 and 4 respectively therein. The first respondent has in the plaint in O.S.No.150 of 2012, which was presented on 6.9.2012, prayed for a decree allowing him to realise the sum of Rs.7,72,794/- (consisting of the principal sum of Rs.5,00,000/- together with interest thereon at 12% per annum from 4.3.2008 till the date of suit) with future interest thereon at 12% per annum from the defendants personally and charged on the plaint schedule properties.

2. In the plaint in O.S.No.151 of 2012 it was alleged that the defendants had entered into an agreement with the plaintiff on 18.8.2008 to sell the plaint schedule property to him for a sale consideration of Rs.49,000/- per cent (the plaint schedule property has an area of 25.50 ares, corresponding to 62.985 cents), that on the date of the agreement the sum of Rs.5,00,000/- was paid as advance, that notwithstanding his readiness and willingness, the

defendants have failed to execute a sale deed.

3. Upon receipt of summons, the defendants entered appearance on 8.10.2012 and sought time to file a written statement. The defendants did not however file a written statement with the result that they were set ex-parte on 5.1.2013 and an ex-parte decree was passed on 15.2.2013. Defendants 1 and 3 thereupon filed I.A.No.72 of 2015 in January, 2015 under Order IX rule 13 of the Code of Civil Procedure praying that the ex-parte decree passed against them may be set aside. They also filed I.A.No.71 of 2015 to condone the delay of 668 days in filing I.A.No.72 of 2015. The first respondent plaintiff opposed the application by filing written objections. The court below considered the rival contentions and dismissed I.A.Nos.71 & 72 of 2015 by a common order passed on 25.2.2015. Defendants 1 and 3 have aggrieved thereby filed this appeal.

4. We heard Sri.G.G.Manoj, learned counsel appearing for the appellants. We have also gone through the impugned order as also copies of I.A.Nos.71 and 72 of 2015, which were made available to us for perusal by the learned counsel appearing for the appellants. The only explanation offered by the appellants for the delay of 668 days in filing I.A.No.72 of 2015, the application to set aside the ex-parte decree passed in the suit, is that as defendants 1 and 3 were out of

station in connection with their employment, they could not engage a counsel or give instructions for preparing the written statement. It is also stated that the failure to file the written statement was not willful or negligent and that they have valid contentions in the suit. The relevant averments contained in paragraph 2 of the affidavit filed in support of I.A.No.71 of 2015 are extracted below:-

“മേൽ നമ്പർ കേസിൽ പ്രതികളെ 15.2.2013-ാം തീയതി എക്സ് പാർട്ടിയാക്കി വിധിയായിട്ടുള്ളതാണ്. ഞങ്ങൾ തൊഴിൽ സംബന്ധമായി ഇവിടെയില്ലാത്തതിനാൽ യഥാസമയം അഡ്വക്കേറ്റിനെ കാണുന്നതിനോ വേണ്ട നിർദ്ദേശങ്ങൾ നൽകുവാനോ കാര്യവിവര പത്രിക സമർപ്പിക്കുവാനോ സാധിക്കാതെ വന്നിട്ടുള്ളതുമാണ്. ആയത് ഞങ്ങളുടെ മനഃപ്പൂർവ്വമായി വീഴ്ചയല്ലാത്തതുമാണ്. മേൽ നമ്പർ കേസിൽ ഞങ്ങൾക്ക് സാരമായ തർക്കങ്ങൾ ഉള്ളതുമാണ്. ഇതൊടൊപ്പം ഞാൻ എക്സ് പാർട്ടി ഡിക്രി അസ്ഥിരപ്പെടുത്തുന്നതിനുവേണ്ടി ഹർജി ഫയൽ ചെയ്തിട്ടുള്ളതാണ്. മേൽ നമ്പർ ഹർജി ഫയൽ ചെയ്യുന്നതിന് 665 ദിവസം കാലതാമസം വന്നിട്ടുള്ളതും ആയത് മാപ്പ് ചെയ്ത് വിധിയുണ്ടാകേണ്ടതുമാണ്. അല്ലാത്തപക്ഷം ഞങ്ങൾക്ക് അപരിഹാര്യമായ കഷ്ടനഷ്ടത്തിനും സങ്കടത്തിനും ഇടവരുന്നതുമാണ്. ഹർജി അനുവദിക്കുമാറാകണം.”

5. More or less similar averments find a place in paragraph 2 of the affidavit filed in support of I.A.No.72 of 2015, the application to set aside the ex-parte decree. The relevant averments are as follows:

“മേൽ നമ്പർ കേസിൽ പ്രതികളെ 5.1.2013-ാം തീയതി എക്സ് പാർട്ടിയാക്കി വിധിയായിട്ടുള്ളതാണ്. ഞങ്ങൾ തൊഴിൽ സംബന്ധമായി ഇവിടെയില്ലാത്തതിനാൽ യഥാസമയം അഡ്വക്കേറ്റിനെ കാണുന്നതിനോ വേണ്ട നിർദ്ദേശങ്ങൾ നൽകുവാനോ കാര്യവിവര പത്രിക സമർപ്പിക്കുവാനോ സാധിക്കാതെ വന്നിട്ടുള്ളതുമാണ്. ആയത് ഞങ്ങളുടെ മനഃപ്പൂർവ്വമായി വീഴ്ചയല്ലാത്തതുമാണ്. മേൽ നമ്പർ കേസിൽ ഞങ്ങൾക്ക് സാരമായ തർക്കങ്ങൾ ഉള്ളതുമാണ്. അല്ലാത്തപക്ഷം ഞങ്ങൾക്ക് അപരിഹാര്യമായ കഷ്ടനഷ്ടത്തിനും സങ്കടത്തിനും ഇടവരുന്നതുമാണ്. ഹർജി അനുവദിക്കുമാറാകണം. ആയതിനാൽ ബഹു.കോടതിയിൽ നിന്നും ദയവുണ്ടായി ഞങ്ങൾക്കെതിരെ 15.2.2013 തീയതിയുണ്ടായിട്ടുള്ള വിധി അസ്ഥിരപ്പെടുത്തി ഉത്തരവുണ്ടാകേണ്ടതും അതിലേക്കുള്ള അപേക്ഷ അനുവദിക്കേണ്ടതുമാണ്.”

6. The first respondent plaintiff filed written objections contending inter alia that the reasons set out to condone the delay and for the failure to file a written statement are not true or tenable. He contended that defendants 1 and 3 have not gone anywhere in connection with their employment, that defendants 2 and 4 have entered appearance through counsel, that appellants have received notice in the execution petition as well but they did not take timely steps to file an affidavit to have the ex-parte decree set aside and that it was only when the property was brought to sale in execution of the decree that they have come forward with the instant applications.

6. As stated earlier, the only reason stated by the appellants for their failure to file a written statement is that as they were away in connection with their employment they could not give instructions to their counsel to file a written statement. Apart from merely stating that as they were away in connection with their employment they could not give instructions to their counsel, the appellants have not disclosed the nature of the employment or the place where they were employed. There is no acceptable explanation in the affidavit filed in support of either of the two applications as regards the failure of appellants to file a written statement. The impugned order discloses that after the ex-parte decree was passed on 15.2.2013, the plaintiff

filed E.P.No.21 of 2013 on 3.4.2013 to execute the decree, that notice of the execution petition was served on the defendants on 20.4.2013, that in spite of receipt of notice, the appellants did not enter appearance in the execution petition and that it was only after the sale was ordered in the execution petition, the instant applications were filed. After going through the averments in the affidavit filed in support of I.A.Nos.71 & 72 of 2015 and the admitted fact that the appellants had received notice on E.P.No.21 of 2013 on 20.4.2013, we are not satisfied that the appellants have made out sufficient cause either for not filing the written statement in time or for not taking timely steps to have the ex-parte decree set aside.

We therefore find no good grounds to interfere with the impugned order. The appeal fails and it is accordingly dismissed.

**P.N.RAVINDRAN,
(JUDGE)**

**ANIL K.NARENDRAN,
(JUDGE)**

vps