

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 21ST DAY OF JULY 2015/30TH ASHADHA, 1937

FAO.No. 144 of 2015 ()

(AGAINST THE ORDER DATED 10/12/2014 IN I.A.NO.1854/2014 IN
O.S.NO.104/2008 ON THE FILE OF THE SUB COURT, OTTAPALAM)

APPELLANT(S)/PETITIONER/PLAINIFF:

SULAIKHA,
AGED 48 YEARS, D/O. KARAT MOIDEEN,
KURUMBATHUR AMSOM DESOM,
TIRUR TALUK AND W/O. MOHAMMED @ BAVA HAJI,
ORAVIL HOUSE, KARAMBATHUR P.O.
MALAPPURAM DISTRICT.

BY ADVS.SRI.SANTHEEP ANKARATH
SRI.ARUN MATHEW VADAKKAN

RESPONDENT(S)/RESPONDENT/DEFENDANT:

GOPINATHA MENON,
AGED 65 YEARS, S/O. VALLIKKAT MELOOR VALAPPIL,
KUNHILAKSHMI AMMA,
KALLADATHUR DESOM & P.O.
KUMARANELLUR DESOM,
OTTAPALM TALUK PALAKKAD DISTRICT,
PIN - 679552.

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON
21-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

F.A.O. No.144 of 2015

Dated this the 21st day of July, 2015

JUDGMENT

Sunil Thomas, J.

The plaintiff in O.S.No.104/2008 of Sub Court, Ottapalam, impugn the order of dismissal of I.A.No.1854/2014, which was filed seeking restoration of the suit dismissed for default.

2. The suit was one for specific performance of the contract, with an alternate relief for return of advance amount. The suit was included in the list and posted to 11/7/2014 for trial. In the meanwhile, it was submitted by the defendant that the property had already been assigned to third parties. Hence, the plaintiff filed applications to implead additional defendants 2 and 3 in the suit and for amendment of the plaint. I.A.No.1534/2014 was also filed for adjournment of the case. All the applications were taken up on 11/7/2014 and were dismissed. The suit was also dismissed for default. Thereafter, I.A No.1854/2014 was filed to restore the suit ,

which was also dismissed. This has given rise to this appeal.

3. Heard both sides and examined the records.

4. The court below, for dismissing the application for restoration of the suit, relied on three grounds. Firstly, it was held that the application was filed only to protract the proceedings, which according to the court, was fortified by the previous conduct of the petitioner in seeking successive adjournments. Secondly, it was held that there was absolutely no material to show that the plaintiff was laid up, as stated in the application for adjournment. Thirdly, the court held that the application for adjournment, was seen attested at the office of her counsel, which proved that, if she could attend the office of the counsel, nothing prevented her from attending the court.

5. Even though the petitioner tried to explain her absence on the listed day on the ground that she was laid up with back pain and was observing Ramzan fasting, there was nothing to prove that she had any medical reason for remaining away from the trial. This is also supported by the fact that the affidavit filed for adjournment was attested at the office of the counsel. Further, the application for adjournment was filed only on

10/7/2014, on the eve of the listed day, along with I.A.Nos.1535/2014 and 1536/2014, which were to implead the second and third defendants and for amendment of the plaint.

6. However, the previous conduct of the appellant herein is liable to be taken note of. The court below has recorded that the suit was originally filed in 2008. In the meanwhile, by order of this Court in FAO No.149/2008, this Court had directed for expeditious trial of the case. It was included in the list on 7/6/2010. An application was then filed to remove the case from the list and also to appoint an advocate commissioner. The application was allowed and the commissioner thereafter filed the report on 13/3/2012. The case was again listed on 8/11/2012. On the previous day, an application was filed to remove the case from the list. However, that was dismissed and consequently the suit was also dismissed. The plaintiff filed I.A.No.3437/2012 to restore the suit, which was allowed on payment of cost of Rs.10,000/-. The case was thereafter listed on 11/7/2014, on which day also the suit met with same fate as that happened on the previous listed day

7. The above narration of facts eminently discloses that the

Court below was perfectly justified in arriving at a reasonable conclusion that the plaintiff was not interested in going for trial. The court has opined that the sole intention of the plaintiff was to keep the suit alive. However, it cannot be forgotten that the case was being adjourned at the risk of the plaintiff herself. The dismissal of the suit and the consequent proceedings cannot be used as a handle for further protracting the proceedings. Considering the entire facts, we feel that one more last opportunity can be granted to the appellant/plaintiff to contest the proceedings strictly on the following conditions:

i). The appeal and I.A.No.1854/2014 will stand allowed and the suit restored to file, on condition that the appellant/plaintiff pays a sum of Rs.20,000/-(Rupees Twenty Thousand only) as costs to the respondent/defendant payable through learned counsel for him before this Court, within four weeks from today. Memo/receipt evidencing payment of money shall be produced before the trial court.

ii). Both parties shall appear before the court below on 20/8/2015. It is made clear that both the parties shall complete all their pre-trial steps including filing of appropriate application

in the meanwhile. The court below shall also consider the pending impleading petition and amendment petition filed and pass such orders as are necessary. It is also made clear that further granting of adjournment shall be within the discretion of the court.

iii). On production of record regarding payment of money as directed above, the court below shall proceed to include the case in the next available list for trial and shall adjudicate the suit. The court below shall endeavour to dispose of the suit at the earliest.

iv). In the event of non-compliance of the condition mentioned as No. 'i' above, the impugned order will stand confirmed and the suit will stand dismissed without any further order.

Appeal is allowed subject to the above directions.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

/true copy/ PS to Judge

dpk

