

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

FAO.No. 206 of 2015 ()

AGAINST THE COMMON ORDER DATED 27.6.2015 IN IA NOS.1008/2014 AND
1009/2014 IN OS NO.268/2012 ON THE FILE OF THE PRINCIPAL SUBORDINATE
JUDGE, PALAKKAD.

APPELLANT/PETITIONER/2ND DEFENDANT:

ANNAPOORNI, W/O.LATE NACHIMUTHU AGED 60 YEARS
VELANTHAVALAM VEEDU, VELANTHAVALAM POST
CHITTUR TALUK PALAKKAD DISTRICT.

BY ADV. SRI.RAJESH SIVARAMANKUTTY

RESPONDENTS/RESPONDENTS/PLAINTIFF & 1ST DEFENDANT:

1. APPUNNI, S/O.PAZHANIYANDI
AGED 53 YEARS, NEELIPARAYIL, KOZHIPARA POST
VADAKARAPATHY CHITTUR TALUK, PALAKKAD DISTRICT.

2. NARAYANASWAMY, S/O.LATE RAMASWAMY CHETTIYAR
AGED 54 YEARS, VELANTHAVALAM VEEDU
VELANTHAVALAM POST OZHALAPATHY, CHITTUR TALUK
PALAKKAD DISTRICT.

R- BY ADV. SRI.T..MADHU (CAVEATOR)

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION
ON 02-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

**ANTONY DOMINIC &
P.V.ASHA, JJ.**

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F.A.O.No.206 of 2015
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Dated this the 2nd day of November, 2015

JUDGMENT

Antony Dominic, J.

The 2nd defendant in O.S.No.268 of 2012 on the file of the Principal Sub Court, Palakkad is the appellant. The suit in question was filed by the first defendant seeking a decree for the specific performance of an agreement executed by the 2nd respondent, who was the Power of Attorney Holder of the appellant. The appellant and the 2nd respondent remained absent and therefore on 11.9.2012 the suit was decreed ex-parte. Subsequently on 22.3.2014 the appellant filed I.A.Nos.1008 of 2014 and 1009 of 2014 praying to condone the delay of 558 days in applying to set aside the ex-parte decree. On that application evidence of the appellant was recorded as PW1. By the impugned common order the court below declined to condone the delay and as a consequence, the IAs were dismissed. It is aggrieved by the common order, this appeal is filed.

2. We heard the learned counsel for the appellant and the

learned counsel for the first respondent decree holder. There is no appearance or representation for the 2nd respondent. According to the learned counsel, the appellant did not receive notice or summons from the court at any stage of the proceedings and she came to know of the decree only in 2014, when she went to the concerned Village Office for payment of land tax, when she was informed that the property was already transferred into the name of the first respondent decree holder. According to the appellant immediately thereupon, she made enquiries and submitted applications which lead to the impugned order. She therefore says that the common order is illegal and is liable to be set aside. These submissions made on behalf of the appellant were refuted by the learned counsel appearing for the first respondent decree holder.

3. We have considered the submissions made. Admittedly the suit was decreed ex-parte on 11.9.2012. This ex-parte decree was sought to be set aside by the appellant and the reason stated in both the IA's is that the appellant who is a resident of Pollachi was not served notice or summons at any

stage of the proceedings and that she came to know of the decree only when she approached the concerned Village Office for payment of land tax. This assertion made by the appellant, if proved to be correct, would certainly justify her prayer for condonation of delay and to set aside the ex-parte decree passed.

4. However from the impugned order we find that though summons in the suit and notice in E.A.No.84 of 2013 filed by the decree holder for execution of sale deed in his favour were served on the 2nd respondent, the Power of Attorney Holder of the appellant, documents revealed that notice in I.A.No.84 of 2013 was served on the appellant and that she had accepted the said notice on 4.7.2014 which was sent by registered post. During the arguments the learned counsel contended that even this finding is factually incorrect inasmuch as according to him the documents referred to by the court below itself would reveal that there is wide disparity in the signature of the appellant on the postal acknowledgement card and the Power of Attorney executed by her in favour of the 2nd respondent.

5. However we are unable to accept this contention for more reasons than one. We find that this contention was not raised by the appellant in the proceedings before the lower court. Secondly not even a specific ground in this respect is raised in the appeal memorandum. Therefore we reject this contention. Yet another reason stated by the trial court is that in the delivery warrant the Amin has reported that he has directly given notice to the appellant and the 2nd respondent on 13.2.2014 and that thereafter the appellant and the 2nd respondent were evicted from the plaint schedule property, before the same was delivered to the first respondent. The delivery warrant revealed that both the appellant and the 2nd respondent had signed in it. This factual finding of the court below, would again, prove the assertion of the appellant that she did not have any notice from the court below, incorrect.

Even apart from all these, we find that the appellant has filed these IAs in question long after the decree was passed, the sale deed was executed in favour of the first respondent, the property was delivered to him and even mutation was effected in

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his favour. For all these reasons, the finding of the court below that the factual assertions made by the appellant were incorrect disentitling her for an order in the IAs, does not merit interference.

The appeal fails and is dismissed.

Sd/-
ANTONY DOMINIC,
JUDGE.

Sd/-
P.V.ASHA,
JUDGE.

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