

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 14TH DAY OF DECEMBER 2015/23RD AGRAHAYANA, 1937

FAO.No. 219 of 2015 ()

AGAINST THE ORDER IN IA NOS.147/2015 & 148/2015 IN OS 482/2013 of II
ADDL.SUB COURT,ERNAKULAM DATED 9.7.2015

APPELLANT/PETITIONER/DEFENDANT:

RAJU T.B AGED 41 YEARS
S/O.T.P.BALAKRISHNAN, VADAYAZHATH HOUSE
PANANGAD DESOM, KUMBALAM VILLAGE, KANAYANNUR TALUK
ERNAKULAM, KERALA.

BY ADV. SRI.P.B.PRADEEP

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

1. P.A.RADHAKRISHNAN, AGED 54 YEARS
S/O.MR.APPU, VALAYANAZHATH HOUSE, PANANGAD
KUMBALAM, ERNAKULAM DISTRICT - 682 506.

2. N.M.HASHIM, AGED 38 YEARS
S/O.KUNJUMOHAMMED, NAGAPPADI VEEDU, MADAVANA
PANANGAD, KUMBALAM VILLAGE, ERNAKULAM DISTRICT 682 506.

R1,R2 BY ADV. SRI.T.K.RADHAKRISHNAN
R1,R2 BY ADV. SMT.S.SREEDEVI (ALP)
R1,R2 BY ADV. SRI.K.J.GLADIS

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
14-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

FAO 219/2015

APPENDIX

RESPONDENTS' EXHIBITS

EXT.R1 (A) : COPY OF IA NO.147/15 DT.8.1.2015

EXT.R1 (B) : COPY OF IA NO.148/15 DT.8.1.2015

EXT.R1 (C) : COPY OF THE OBJECTION IN IA NO.147/15 DT.23.1.15

EXT.R1 (D) : COPY OF OBJECTION IN IA NO.148/15 DT.23.1.15

RKC

TRUE COPY

PA TO JUDGE

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

F.A.O.No.219 of 2015

Dated this the 14th day of December, 2015

JUDGMENT

Antony Dominic, J.

The defendant in O.S.No.482 of 2013 on the file of the Sub Court, Ernakulam is the appellant. The suit was filed by the respondents seeking a decree for specific performance of an agreement for sale dated 2.7.2014. On 27.6.2014, the suit was decreed exparte. Subsequently, the appellant filed I.A.Nos.147 of 2015 and 148 of 2015 seeking to condone the delay of 165 days and to set aside the exparte decree passed against him. By a common order passed by the Sub Court in I.A.No.147 of 2015 prayer for condonation of delay was dismissed. Consequently, I.A.No.148 of 2015 seeking to set aside the ex parte decree was also set aside. It is aggrieved by these orders the appeal is filed.

2. We heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents. According to the learned counsel appearing for the appellant, the suit in question was filed on 5.10.2013. On receipt of the summons

from the court the appellant entered appearance through counsel. Subsequently, due to the financial constraint, the appellant could not contact his Advocate or file his written statement. It is stated that it was in such circumstances, that the ex parte decree happened to be passed on 27.6.2014 due to his absence. According to the appellant only when he got notice in I.A.No.3694 of 2014 he came to know of the exparte decree and immediately thereafter filed I.A.No.148 of 2015 to set aside the exparte decree along with the application for condonation of delay of 165 days. It is stated that this delay has occurred due to reasons totally beyond his control and ought to have been condoned by the court below.

3. On the other hand, the learned counsel for the respondents pointed out that the fact that before the defendant was set exparte, he had already engaged a counsel to appear for him would itself show that it was not financial constraints that prevented him from prosecuting the suit with earnestness. According to them, the explanation offered by the appellant for condonation of the delay is totally insufficient and therefore was rightly rejected by the court below. It is stated that in pursuance

to the decree that was passed the respondents have already deposited balance sale consideration of Rs.4,00,000/- (Rupees Four lakhs only) on 22.8.2014 and it is long thereafter that the applications in question were filed. It is stated that the intention of the appellant is only to prolong the litigation and that therefore this Court should not interfere with the order impugned.

4. We have considered the submissions made. It is true that the prayer sought in the suit is for specific performance of the agreement for sale of a plot of land. From what is contended before us, it would appear that the case of the appellant is that the agreement dated 2.7.2013, the specific performance of which is sought, itself is a forgery. It is stated that this plea has been reiterated in the written statement that is filed along with the IAs in question. It was in a case of such a nature that the appellant, though had entered appearance in response to the summons that was issued from the court, had remained absent and invited an exparte decree against him.

5. Insofar as this appeal is concerned, as we have already stated, the prayer in IA No.147 of 2015 is to condone delay of

165 days. It was on the dismissal of the said IA that I.A.No.148 of 2015 also was dismissed. Therefore primarily the question that is to be examined is whether the prayer for condonation of delay ought to be allowed or not.

6. Before we proceed to consider that issue, one contention that was raised at the Bar with regard to the maintainability of the appeal need to be addressed. According to the learned counsel for the respondents there should have been a separate appeal filed against the order in I.A.No.148 of 2015 and in the absence of which this appeal is not maintainable. In our view this contention cannot be sustained in the light of the binding precedents of this Court itself. First is the judgment of this Court in ***Kunhiraman Vs. Rossy*** (1979 KLT 718), where the very same issue was considered by the learned single Judge of this Court and the contention was negatived by holding thus:

According to me when the petitioner to excuse delay is dismissed and the appeal is dismissed on the ground that it is barred, the remedy of the person aggrieved is to file an appeal against the decree, if that is allowed by law and take a ground in the appeal that the lower court was wrong in not excusing the delay in filing the appeal. This will be the main and the only ground in the appeal, that is

the only point to be urged in the appellate court also; and if the appellate court is satisfied that the reasons given for not allowing the application to excuse delay cannot be sustained the appeal has only to be allowed and case sent back. In such a situation it is unnecessary to file a revision petition against the order refusing to excuse the delay in filing the appeal. The same is the case when an application to excuse the delay in applying for setting aside an ex parte decree is dismissed. The order dismissing the application to set aside the decree on any ground is appealable. On filing an appeal a ground can be and has to be taken that the application to excuse the delay was wrongly dismissed. If a revision is to be filed that will lie before this Court only whereas the appeal against the order on the main petition may very often be to the District Court or Sub Court. If the correctness of the order dismissing the delay petition cannot be questioned in such appeals, appeals to the lower courts become ineffective and useless. That is not the law. When a petition to excuse the delay in filing an appeal or an application to set aside the ex parte decree is dismissed and the consequent decision of the latter appeal or application is appealable the proper remedy is to appeal and take a ground regarding the incorrectness of the order on the delay petition. On facts the order can be challenged. In revision against the order dismissing the delay petition, the correctness of

the order cannot be considered except on grounds provided for under S.115 CPC which are limited. This is an added reason to hold that revision in such case is not the proper remedy.

The judgment of the learned single Judge was later approved by the Full Bench of this Court in its judgment in **Thambi V. Mathew** (1987 (2) KLT 848). Therefore this preliminary objection raised by the learned counsel for the respondents is only to be rejected and we do so.

7. Coming to the main issue as to whether the delay of 165 days ought to be considered, law seems to be settled that the length of the delay is not material and what is material is whether sufficient cause has been made out by the litigant who applied for condonation. This principle seems to be the common thread that is available in the judgments in **Plantation Corporation of Kerala Ltd. V.Hussain** (1998 (1) KL 1008), **Esha Bhattacharjee V. Managing Committee of Raghunathpur Nafar Academy and Others** (2013 (12) SCC 649) and **Sosamma Vs. Mariyamma** (ILR 2015 of Kerala 290) that were cited before us.

8. Insofar as this case is concerned, the reason which

according to the appellant that had contributed to the ex-parte decree and the delay in making application is the financial stringency. As we have already stated the consequence of his absence in the suit is a decree against the appellant directing conveyance of a property owned by him and that too in a case where he contends that the agreement on the basis of which the suit itself is presented is forgery. Unless there are compelling reasons which prevented a person to be absent from court, there cannot a conceivable reason for a litigant to keep away from the court. The respondents have apart from denying the claim of the appellant, had not produced any materials to prove the claim of the appellant untrue. In such circumstances, we are inclined to think that the appellant should be given an opportunity to contest the suit on merits.

9. According to the plaintiffs, they have already paid substantial sums to the appellant and deposited Rs.4,00,000/- (Rupees Four lakh only) in the court in August 2014 and also having spent almost two years in court, are entitled to be suitably compensated.

10. Taking note of all these, we set aside the order passed

by the Sub Court, Ernakulam dismissing I.A.No.147 of 2015 and 148 of 2015 in O.S.No.482 of 2013, subject to the appellant paying a cost of Rs.10,000 (Rupees Ten thousand only) to the respondents which shall be paid within three weeks from today. Subject to payment of the cost, the suit will stand restored to file and the parties shall appear before the Sub Court, Ernakulam on **11.1.2016**. Since the appellant has already filed written statement, we direct that the court shall proceed to try the suit and dispose of the same, as expeditiously as possible, and at any rate within nine months thereafter.

Sd/-
ANTONY DOMINIC,
JUDGE.

Sd/-
P.V.ASHA,
JUDGE.

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