

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

FAO.No. 269 of 2013 ()

(AGAINST THE ORDER DATED 3/6/2013 IN I.A.NO.1320/2012 AND
I.A.NO.1321/2012 IN OS 135/2011 of SUB COURT, QUILANDY)

APPELLANT(S)/PETITIONER/1ST DEFENDANT:

RAMAKRISHNAN,
S/O. CHERIYEKKAN, AGED 51 YEARS, CHERUVATHKANDI HOUSE,
SWASTHAM, MOODADI AMSOM DESOM, KOYILANDY TALUK.

BY ADVS.SRI.A.K.SRINIVASAN
SRI.C.ANILKUMAR (KALLESSERIL)
SRI.A.S.BENOY

RESPONDENT(S)/RESPONDENTS/PLAINTIFF & 1ST DEFENDANT:

1. CHANDRI,
D/O. CHERIYEKKAN, AGED 55 YEARS, SWASTHAM,
CHERUVATHKANDI HOUSE, MOODADI AMSOM DESOM
KOYILANDI TALUK.673 305

2. BHASKARAN,
S/O. CHERIYEKKAN, AGED 61 YEARS, PENSIONER,
KURUNAM THAROL, PALLUR AMSOM, THRIKOTTU DESOM
KOYILANDY TALUK.673 305

R2 BY ADV. SRI.SUNIL NAIR PALAKKAT
R2 BY ADV. SRI.K.N.ABHILASH
R2 BY ADV. SMT.R.LEELA
R2 BY ADV. SMT.N.K.SHEEBA
R2 BY ADV. SRI.K.K.ANIL KUMAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
15-06-2015, THE COURT ON 18/6/2015 DELIVERED THE FOLLOWING:

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

F.A.O. No. 269 OF 2013

Dated this the 18th day of June, 2015

JUDGMENT

Sunil Thomas, J.

The first defendant in a suit for partition, who filed application for setting aside the ex-parte decree and to condone the delay of 182 days in preferring the above application, aggrieved by the dismissal of the application has preferred this appeal.

2. The first respondent in the appeal laid the suit for partition before the court below. The first defendant appeared and sought time for filing the written statement. I.A. No.1385/2011 was thereafter filed seeking further time to file the written statement, which was allowed and the time was granted up to 26/3/2012. Thereafter, he was set ex parte and the suit was decreed ex parte on 12/4/2012. Challenging the exparte decree, I.A. No.1321/2012 was filed to set as the ex parte decree and I.A. No.1320/2012 was filed to condone the delay of 182 days that has occurred in the meanwhile.

3. The court below, after giving an opportunity of being heard to both sides, by the impugned common order dismissed both applications, holding that the petitioner did not succeed in proving sufficient cause to condone the delay. Consequently, I.A. No.1321/2012 to set aside the ex parte decree was also dismissed. This is under challenge in this appeal.

4. Heard and examined the records.

5. In the applications it was claimed that the first defendant was suffering from rheumatic pain and had been under treatment. Consequently, he could not meet the lawyer and give necessary instructions. To substantiate it, a medical certificate was produced before the court below. The court below refused to accept the above medical certificate on the ground that it only showed the treatment from 20/3/2012 to 16/11/2012. The name of the ailment was not discernible from the document and there was nothing to show that the petitioner was under actual physical restraint making it impossible for him to contact even the lawyer.

6. It is pertinent to note that the reason for remaining absent and the inability to contact the lawyer is seen specifically

mentioned in the affidavit. To support it, the medical certificate was produced. It is true that there is no other supporting document except the averments in the petition and the medical certificate. The genuineness of the above medical certificate is not seen doubted by the court below. On the other hand, the only reason for discarding it was that it was illegible and it did not prima facie indicate that the petitioner was physically incapacitated or bed ridden.

7. Evidently, the court below went wrong in not appreciating the above document in the light of the averments in the affidavit. The court below should have evaluated the document in the light of the averments in the affidavit and the objections raised. The ailment was the rheumatic pain, which appears to have been indicated in the medical certificate. The period mentioned in the medical certificate covers the period on which the first defendant was set ex parte. There is nothing on record to show that the first defendant was willfully protracting or delaying the process of law. In fact, the very filing of I.A. No.1385/2011 seeking time to file the written statement, which the court itself allowed, shows that the first defendant was

diligent and serious in prosecuting the matter. The delay is also not very substantial.

8. On an overall assessment of the facts, it appears that in the absence of anything to show that the first defendant was guilty of laches, gross negligence or that application to set aside ex-parte was filed as a means for protracting the proceedings, the court below should have preferred to render substantial justice than relying on technicalities. In the light of the above, the impugned order is not legally sustainable. We are inclined to set it aside. The appeal is liable to be allowed.

9. In the result, the appeal is allowed. The impugned order is set aside and the matter is remanded to the court below subject to the following conditions:

i). The appellant/first defendant shall pay a sum of Rs.2000/- (Rupees Two Thousand only) to the counsel appearing for the contesting respondents before this Court within a period of three weeks from today. A memo regarding payment shall be filed before the trial court.

ii). Parties shall mark their appearance before the trial court on 28/7/2015. After recording the payment of costs in

this court, the trial court shall give a reasonable opportunity to the first defendant to file a written statement and thereafter shall proceed to try the suit in accordance with law untrammelled by any of the observations made above.

iii). In case of non compliance of condition regarding cost, as stipulated above, the court shall record it and consequently the impugned orders shall revive without any further order and the right of the first defendant to contest the proceedings before the court below shall stand forfeited.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

