

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&**

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

FAO.No. 300 of 2013 ()

**I.A. NO.23/2013 AND 24/2013 IN OS. NO.96/2010 OF SUB COURT, THODUPUZHA
DATED 30/07/2013.**

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APPELLANT/PETITIONER/DEFENDANT:

**MATHEW, AGED 73 YEARS, S/O.VARGHESE,
VANIYAKIZHAKKEL (H), VANDAMATTOM KARA,
KODIKKULAM VILLAGE, THODUPUZHA TALUK.**

**BY ADVS.SRI.K.S.HARIHARAPUTHRAN,
SRI.M.D.SASIKUMARAN,
SRI.GEORGE MATHEW,
SRI.P.A.ISMAIL,
SRI.DIPU JAMES.**

RESPONDENT/RESPONDENT/PLAINTIFF:

**SATHEESH @ GEORGE MATHEW,
S/O.MATHEW, AGED 44 YEARS,
VANIYAKIZHAKKEL HOUSE, VANDAMATTOM KARA,
KODIKKULAM VILLAGE, THODUPUZHA TALUK, PIN-685 582.**

**BY ADVS. SRI.M.B.SANDEEP,
SMT.R.PRIYA,
SRI.V.VISAL AJAYAN,
SMT.B.DHANYA**

**THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION
ON 03-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

rs.

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

F.A.O.No. 300 of 2013

Dated this the 3rd day of July, 2015

JUDGMENT

Sunil Thomas, J.

This appeal challenges the common order dated 30/7/2013 in I.A.No.23/2013 & I.A.No.24/2013 in O.S.No.96/2010 of Sub court,Thodupuzha. The defendant, who is the petitioner in the application to condone the delay of 450 days in filing the application to set aside the ex parte decree is the appellant herein.

2. The suit was instituted by the plaintiff/respondent who is the son of the appellant herein. He sought for recovery of money of Rs.2,49,397/- with 12 % interest claimed to be the amount paid by him, to discharge the liability of the father. In spite of the summons served, the defendant did not appear and hence it was decreed ex parte. Thereafter, I.A.No.23/2013 was filed to set aside ex parte decree along with I.A.No.24/2013 to condone the delay of 450 days in preferring the application to set aside the ex pare decree. The reason

stated in the application to condone the delay was that though the wife had received the summons, she did not inform the defendant, which disabled him from appearing before the Court. The court below allowed I.A.No.24/2013, subject to payment of cost. Contending that the cost imposed is onerous, the defendant has approached this Court challenging the above order.

4. Heard both sides and examined the records.

5. Though the IA was allowed on terms, one of the reasons stated by the court below for not taking a lenient view in favour of the appellant was that he did not adduce any evidence to support his application to condone the delay. However, in the appeal memorandum, the appellant had mentioned that though the proof affidavit was filed, the respondent/plaintiff did not insist for cross examination of the petitioner. According to the appellant, the court below, in the above circumstance, should have relied on the proof affidavit. However, regarding the actual cause of the delay, the explanation of the defendant was that though the wife received the summons, she did not convey it to the husband. The appellant had no case that they were not living together. It is true that no reliable cause was set up by the

appellant to condone the delay. However, considering the fact that the dispute was between the father and the son, the court below took a lenient view and correctly proceeded to allow the application on terms. However, the reasoning of the court below for fixing the cost as a condition for allowing the application is evident from para 7 of the impugned order, which reads as follows;

“7. Considering the reasonable compensation, Rs.100/- per day is too trivial. The respondent who got decree could not reap the fruits till this time. Therefore, he is in a desperate stage. However, setting aside the decree for the fault and irresponsible attitude of the petitioner, his desperation reaches its culmination. Thereby it should be reasonably compensated. Therefore Rs.100/- per day to be given for condoning each days delay to compensate the petitioner. But., Rs.100/- per day appears too exorbitant. Therefore, Rs.50/- per day appears too reasonable.”

6. Evidently, the court below proceeded on a wrong premise that the cost was liable to be imposed for providing

compensation for the desperation caused to the person, who obtained an ex parte decree. Another wrong premise on which the court proceeded was that while fixing the quantum of cost, it fixed an amount on a per day basis. Both the above do not appear to be correct.

7. The cost payable on the basis of the direction of the court below on the per day basis, will come to Rs.22,500/-. We feel that a sum of Rs.2000/- payable to the learned counsel for the respondent herein would satisfy the interest of justice. Hence, the appeal is liable to be allowed as follows:

i). The appellant shall pay a sum of Rs.2000/- (Rupees Two Thousand only) to the learned counsel for the respondent appearing before this court on or before 3/9/2015 and in case he refuses to accept it, the amount shall be deposited before the court below within the above time. Receipt/memo evidencing the above payment shall be produced before the court below.

ii). Both sides shall appear before the court below on 7/9/2015 without any further notice.

iii) The appellant shall file written statement on 7th September 2015, if not filed earlier.

iv). On the date of appearance, if the court below is satisfied that the above conditions regarding the payment of costs and filing of the written statement are complied with, it shall be recorded and I.As will stand allowed and the judgment an decree of the court below set aside, without any further order. In case of default of any of the above conditions, the judgment and decree of the court below will stand confirmed without any further order.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

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