

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 20TH DAY OF MAY 2015/30TH VAISAKHA, 1937

FAO.No. 289 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN I.A.NO.2236/2010 IN OS 7/2005 of
PRINCIPAL SUB COURT,ATTINGAL DATED 29-06-2011

APPELLANT/PETITIONER IN I.A.:

SHYLA BEEGUM AGED 44 YEARS
D/O.JAMEELA BEEVI, RESIDING AT AKBAR MANZIL
EDAVA VILLAGE, CHIRAYINKIL TALUK, THIRUVANANTHAPURAM

BY ADVS.SRI.VAKKOM N.VIJAYAN
SRI.R.SURESH
SMT.V.RENJU
SRI.P.ANIYAN
SMT.M.A.RAMITHA

RESPONDENTS/RESPONDENTS/2nd PETITIONER:

1. NAZEERKHAN AGED 50 YEARS
S/O.ABDUL SAMAD, RESIDING AT NASI MANZIL
CONT.SOUTH WARD, KOLLAM EAST VILLAGE
KOLLAM DISTRICT 691 001.

2. NASEEMA, AGED 40,
W/O.NASEERKHAN, RESIDING AT NASI MANZIL
CONT.SOUTH WARD, KOLLAM EAST VILLAGE
KOLLAM DISTRICT 691 001.

3. NASARULLAH, AGED 42
S/O.MUHAMMED HANEEFA,
RESIDING AT NAVAS GARDEN, EDAVA VILLAGE
CHIRAYINKIL TALUK, THIRUVANANTHAPURAM 695 615.

R2 BY ADV. SRI.ARUN BABU
R3 BY ADV. SRI.P.B.SAHASRANAMAN
R3 BY ADV. SRI.T.S.HARIKUMAR
R3 BY ADV. SRI.K.JAGADEESH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
20-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

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F.A.O.No.289 of 2011

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Dated this the 20th day of May, 2015

JUDGMENT

Thottathil B. Radhakrishnan, J.

Heard.

2. This appeal is against an order refusing to set aside an ex parte preliminary decree passed in a suit for declaration and for consequential reliefs. The defendants remained ex parte. A preliminary decree was passed. Thereafter, it appears that when the final decree proceedings were carried, one of the three defendants came forward with an application seeking to set aside the ex parte preliminary decree. It was contended that another defendant, who is her father, is no more and yet another one on the array was in London. She pleaded that she had been residing at Coimbatore taking care of her son who is undergoing education. The appeal memo proceeds also to state that she is a deserted Muslim woman. She tendered evidence before the court below as PW1. The court below took the view that she had visited her home

town many times during the currency of the litigation and also that she possessed a mobile phone. We are of the view that in the absence of contra evidence, the court below ought to have appreciated the evidence of the petitioner/defendant and ex parte decree granted in relation to immovable property ought to have been set aside atleast on terms to pave way for an adjudication.

3. We may also note that from the admission of this appeal by this Court on 18.10.2011, proceedings before the court below stands stayed.

4. On the totality of the facts and circumstances and weighing materials on record, we are of the view that this appeal is entitled to succeed on terms.

In the result, this appeal is allowed setting aside the impugned order and consequently, allowing I.A.No.2236 of 2010 in O.S.No.7 of 2005 of the Sub Court, Attingal on condition that the appeallant pays the counsel appearing for the contesting 3rd respondent an amount of Rs.5,000/- (Rupees five thousand only) as costs within a period of three weeks from today. Receipt or memo evidencing payment of costs shall be presented before the court below. Parties are directed to mark appearance before the court

below on 29th of July 2015.

Appeal ordered accordingly.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

Sbna

The words “counsel appearing for the contesting 3rd respondent” occurring in the 4th and 5th lines in the operative portion of the judgment at page 2 are corrected as “counsel for the 2nd respondent” vide order dated 16.06.2015 in I.A.No.590/2015 in F.A.O.No.289/2011.

Sd/-

Registrar (Judicial)