

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.N. RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K. NARENDRAN

MONDAY, THE 19TH DAY OF JANUARY 2015/29TH POUSHA, 1936

FAO.No. 53 of 2014 ()

I.A.No.390 of 2012 in O.S.No.21 of 2008 OF SUB COURT, THIRUVALLA

APPELLANTS/PETITIONERS-DEFENDANTS 2 TO 5:

1. ANNAMMA CHERIAN
VETTUPURACKAL HOUSE, MADATHUMBHAGAM, THEKKEKKARA MURI
PURAMATTAM P.O., PURAMATTAM VILLAGE.
2. VARGHESE CHERIAN (ANNA ROY) AGED 40 YEARS
S/O.ANNAMMA CHERIAN, VETTUPURACKAL HOUSE
MADATHUMBHAGAM, THEKKEKKARA MURI, PURAMATTAM P.O.
PURAMATTAM VILLAGE.
3. RUBY CHERIAN, AGED 37 YEARS
SISTER OF VARGHESE CHERIAN, VETTUPURACKAL HOUSE
MADATHUMBHAGAM, THEKKEKKARA MURI, PURAMATTAM P.O.
PURAMATTAM VILLAGE.
4. RENI @ ABI CHERIAN, AGED 32 YEARS
B/O.VARGHESE CHERIAN, VETTUPURACKAL HOUSE
MADATHUMBHAGAM, THEKKEKKARA MURI, PURAMATTAM P.O.
PURAMATTAM VILLAGE.

BY ADVS.SRI.SATHISH NINAN
SRI.SANTHOSH MATHEW
SRI.ARUN THOMAS

RESPONDENTS/COUNTER PETITIONERS-PLAINTIFFS:

1. ABI T.GEORGE
THOPPIL HOUSE, MADATHUMBHAGAM, THEKKEKKARA MURI
PURAMATTAM P.O., PURAMATTAM VILLAGE-689 543.
2. LEELAMMA GEORGE
W/O.LATE KOSHY GEORGE, THOPPIL HOUSE, MADATHUMBHAGAM
THEKKEKKARA MURI, PURAMATTAM P.O., PURAMATTAM VILLAGE-689 543.
3. SHEEBA SHAJI
D/O.LATE KOSHY GEORGE, KILIYILETHU VEEDU
NEAR KSRTC BUS STAND, KAYAMKULAM-690 502.
4. SIBI SHIBU
D/O.LATE KOSHY GEORGE
PUTHENPEEDIKAYIL THAZHATHEVEEDU, KANDIYOOR P.O.
MAVELIKKARA-689 543.

BY ADV. SRI.P.HARIDAS

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
19-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

F.A.O.No.53 OF 2014

DATED THIS THE 19th DAY OF JANUARY, 2015

JUDGMENT

P.N.RAVINDRAN, J.

The appellants are defendants 2 to 5 in O.S.No.21 of 2008 on the file of the Court of the Subordinate Judge of Thiruvalla. The respondents as plaintiffs instituted the suit impleading Joy, the husband of the first appellant and father of appellants 2 to 4 as the sole defendant. The relief sought in the suit was to realise a sum of ₹2,50,000/- with interest and costs. Upon receipt of summons, the sole defendant entered appearance and filed a written statement resisting the suit. He, thereafter, passed away on 31.10.2009. Since steps were not taken on I.A.No.1605 of 2009 to implead his legal heirs, the suit was dismissed for non prosecution by order passed on 16.2.2010. Later, on application filed by the plaintiffs, the suit was restored to file by order passed on 22.11.2010. Thereafter, the application filed by the plaintiff as I.A.No.1605 of 2009 was allowed and the appellants were impleaded as supplemental defendants 2 to 5, as per order passed on 25.7.2011. The appellants entered appearance and filed a written statement adopting the contentions raised by the sole defendant in the written statement filed by him. The suit thereafter stood posted for trial on 9.1.2012. On that day, the defendants filed an application seeking an adjournment of the trial on the ground that the

second defendant who is the power of attorney holder of the other defendants and is defending the suit on their behalf is laid up with jaundice and therefore she is not in a position to appear in court and to give evidence. On that application, the court below adjourned the trial of the suit to 17.1.2012. On that day, it was again adjourned to 19.1.2012. As the defendants were not present on 19.1.2012, they were set ex parte and on 14.2.2012, an ex parte decree was passed allowing the plaintiffs to realise the sum of ₹2,50,000/- with 6% interest from the assets of the first defendant in the hands of additional defendants 2 to 5. The appellants thereupon filed I.A.No.390 of 2012 on 14.3.2012 to have the ex parte decree passed in the suit set aside.

2. In the affidavit filed in support of I.A.No.390 of 2012, the second defendant who is the power of attorney holder of the other defendants had averred that as she was laid up with jaundice, she was not in a position to be personally present before court to tender evidence and that was the reason why an application for adjournment of the suit by 6 weeks was filed when the suit was listed for trial on 9.1.2012. She has averred that notwithstanding the said request, the trial of the suit was adjourned to 17.1.2012 and thereafter to 19.1.2012, but on account of her ailment, she was not in a position to

be present in court to tender evidence. The respondents resisted the application by filing written objections. It was contended that there is no evidence to prove the averment that the second defendant was laid up due to jaundice, that the application is bereft of bonafides and that the attempt of the appellants is to protract the trial of the suit. The trial court considered the rival contentions and dismissed I.A.No.390 of 2012 by order passed on 8.7.2013. Defendants 2 to 5 have aggrieved thereby filed this appeal.

3. We heard Sri Sathish Nainan, learned counsel appearing for the appellants and Sri P.Haridas, learned counsel appearing for the respondents. We have also gone through the pleadings and materials on record. The appellants were impleaded as supplemental defendants 2 to 5 only by order passed on 25.7.2011. The suit was earlier dismissed for default by order passed on 16.2.2010 for not taking steps on I.A.1605 of 2009, the application filed by the plaintiffs to implead the legal heirs of the sole defendant who passed away on 31.10.2009 as additional defendants. The suit was restored to file on 22.11.2010 and it was only thereafter the supplemental defendants 2 to 5 were impleaded as per order passed on 25.7.2011 on I.A.1605 of 2009. The defendants were thus joined as parties to the suit only on 25.7.2011. Their predecessor-in-interest passed away on 31.10.2009.

The suit thereafter stood posted for trial on 9.1.2012. Though the defendants applied for an adjournment of the trial by 45 days on the ground that the second defendant who is the power of attorney holder of the other defendants and was defending the suit on their behalf is laid up due to jaundice, the trial court adjourned the suit to 17.1.2012 and thereafter to 19.1.2012. On that day, the defendants were set ex parte. Nearly a month thereafter, to be exact on 14.2.2012, the suit was decreed ex parte. Though the learned counsel appearing for the respondents/plaintiffs submitted that the suit stood posted on 7.1.2012 and thereafter on 9.1.2012 and the defendants were set ex parte on that day, the statements in the impugned order do not support the said submission. In the impugned order, it is stated that the appellants were set ex parte on 19.1.2012 and the suit was decreed ex parte on 14.2.2012. From the judgment decreeing the suit, it would appear that the suit was decreed ex parte more than 26 days after the defendants were set ex parte. In such circumstances, on an overall view of the matter, we are of the opinion that the court below ought to have allowed I.A.No.390 of 2012 and afforded the defendants an opportunity to cross examine the witnesses examined on the side of the plaintiffs and also to let in defence evidence. The ex parte judgment passed on 14.2.2012 discloses that apart from the first

plaintiff who had filed affidavit in lieu of chief examination, no other independent witness was examined on the side of the plaintiffs. In such circumstances and having regard to the fact that the ex parte decree was passed about a month after the defendants were set ex parte, we are inclined to allow the appeal and to set aside the order passed by the Court of the Subordinate Judge of Thiruvalla on 8.7.2013 in I.A.No.390 of 2012 in O.S.No.21 of 2008.

We accordingly allow the appeal, set aside the order passed by the Court of the Subordinate Judge of Thiruvalla on 8.7.2013 in I.A.No.390 of 2012 in O.S.No.21 of 2008, allow the said application and set aside the ex parte decree passed in the suit. Consequently, the suit shall stand restored to file. The parties shall appear in the court below through counsel on 2.2.2015. The court below shall dispose of the suit afresh expeditiously and in any event within an outer limit of four months from 2.2.2015, after affording both sides an opportunity to adduce evidence in support of their rival contentions.

SD/-
P.N.RAVINDRAN,
JUDGE

SD/-
ANIL K.NARENDRA,
JUDGE

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