

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THURSDAY, THE 19TH DAY OF MARCH 2015/28TH PHALGUNA, 1936

FAO.No. 350 of 2011 ()

AGAINST THE ORDER IN I.A.NO.1312/2011 & 1313/2011 IN OS 413/2008 of ADDL.SUB
COURT, NORTH PARAVUR DATED 24-10-2011

APPELLANT/PETITIONER.:

YACOB, S/O.THOMA, MANNUPARAMBIL,
AZHAKAM KARA, MOOKKANNUR KARA, MOOKKANNUR VILLAGE
ALUVA TALUK, REPRESENTED BY, POWER OF ATTORNEY HOLDER TENSING
S/O.MATHAI, MANNUPARAMBIL, EZHATTUMUGHAM KARA
MOOKKANNUR VILLAGE, ALUVA TALUK

BY ADVS.SRI.DINESH R.SHENOY
SRI.R.V.RAHUL
SRI.LIJIN THAMBAN

RESPONDENT/RESPONDENT:

KUNJUMOL, W/O.VARGHESE,
AREKKAL, MEKKAD KARA, NEDUMBASSERY VILLAGE
ALUVA TALUK-683 101.

BY ADV. SRI.BABU KARUKAPADATH
BY ADV. SMT.M.A.VAHEEDA BABU
BY ADV. SRI.JAGAN GEORGE
BY ADV. SRI.K.A.NOUSHAD
BY ADV. SRI.P.G.PRAMOD

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
19-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

F.A.O.No.350 OF 2011

DATED THIS THE 19th DAY OF MARCH, 2015

JUDGMENT

P.N.RAVINDRAN, J.

The appellant is the defendant in O.S.No.413 of 2008 on the file of the Court of the Additional Subordinate Judge of North Paravur. The sole respondent is the plaintiff therein. The respondent instituted the suit on 15.9.2008 seeking specific performance of an agreement for sale stated to have been entered into between her on the one hand and the appellant on the other on 30.6.2007. Though the summons issued to the appellant was served in time, the appellant did not appear, with the result that when the suit was called on for hearing on 10.11.2008, he was set ex parte and the suit was decreed ex parte by judgment delivered on 1.12.2008. The appellant thereupon filed I.A.No.5960 of 2008 on 20.12.2008 to set aside the ex parte decree. The said application was allowed by order passed on 28.5.2009 on payment of ₹500/- as costs. The appellant did not however file a written statement even thereafter and the suit was adjourned for ex parte evidence on 23.9.2009. On that date the appellant was absent. Consequently, an ex parte decree was passed directing him to receive the balance consideration in terms of the sale agreement and to execute a sale deed in favour of the plaintiff, within one month.

2. The appellant did not take steps in time to file an application to have the ex parte decree set aside. The plaintiff thereafter filed I.A.No.74 of 2010 on 6.1.2010 for permission to deposit the sum of ₹2,25,000/- in the Mookkannur Service Co-operative Bank and to adjust it against the balance sale consideration payable. The said application was filed on the averment that the plaint schedule property is mortgaged in favour of the Mookkannur Service Co-operative Bank as security for a loan availed by the defendant. Notice on the said application was served on the defendant by paper publication pursuant to order passed on 12.8.2010 and the said application was allowed by order passed on 18.10.2010. The plaintiff thereafter filed I.A.No.257 of 2011 on 19.1.2011 under section 28(3) of the Specific Relief Act, 1963 to cause the plaint schedule property to be measured and demarcated and to execute a sale deed in her favour. She had in the meanwhile deposited the balance sale consideration of ₹3,07,000/-and produced the lodgment schedule in court on 3.2.2011. The court below ordered notice on I.A.No.257 of 2011 to the appellant. He thereupon entered appearance through counsel on 08.3.2011. He later filed a counter affidavit dated 6.6.2011 resisting the application. In the said objections, he contended that he has filed I.A.No.1312 of 2011 to set aside the ex parte decree, that it is pending and therefore the relief prayed for in

I.A.No.257 of 2011 cannot be granted. The court below overruled the the said contention and allowed I.A.No.257 of 2011 by order passed on 24.10.2011.

3. In the affidavit filed in support of I.A.No.1312 of 2011, the application to set aside the ex parte decree passed in the suit, the appellant had averred that after he was set ex parte on the first occasion, he had filed an application to set aside the ex parte decree and it was set aside, that thereafter he left for Australia and therefore he could not file the written statement. The stand taken by him in the said affidavit is that the failure to file the written statement was not deliberate or intentional. He had also blamed the counsel appearing for him for not giving him timely instructions to file the written statement. He had further averred that it was only when he came to know about the application filed by the decree holder to have the sale deed executed, that he came to know about the ex parte decree passed in the suit. In the affidavit filed in support of I.A.No.1313 of 2011 also, more or less similar averments were made. The respondent opposed the applications by filing separate written objections. The court below considered the rival contentions and dismissed I.A.Nos.1312 of 2011 and 1313 of 2011 by a common order passed on 24.10.2011. Consequently, by order passed on 24.10.2011, I.A.No.257 of 2011 filed by the decree holder under

section 28(3) of the Specific Relief Act was allowed. The appellant has aggrieved by the order passed by the court below on 24.10.2011 dismissing I.A.No.1312 of 2011 and 1313 of 2011 filed this appeal.

4. We heard Sri Dinesh R.Shenoy, learned counsel appearing for the appellant and Sri Babu Karukappadath learned counsel appearing for the respondent. Sri Dinesh R.Shenoy, learned counsel appearing for the appellant contended that it was only when the appellant received notice on I.A.No.257 of 2011, that he came to know about the ex parte decree passed in the suit, that the appellant could not file a written statement in the suit in view of the fact that he had gone for employment purposes to Australia immediately after he was set ex parte and while the application filed in the first instance to have the ex parte decree set aside was pending and therefore, as the appellant was not in station, the court below ought to have allowed the application at least on terms. Per contra, Sri Babu Karukappadath, learned counsel appearing for the respondent submitted that it is evident from the appellant's own showing that he was aware of the suit and the fact that he had been set ex parte on an earlier occasion and also the further fact that the ex parte decree was set aside on payment of costs of ₹500/- and in such circumstances, the appellant ought to have taken timely steps at least after the ex parte decree passed in the first instance was set aside, to file a written statement.

Referring to the testimony tendered by power of attorney holder of the appellant who was examined as PW1, learned counsel for the respondent contended that PW1 has admitted in cross examination that the appellant was aware of the ex parte decree passed in the suit two years back and therefore the conduct of the appellant disentitles him to any relief in the matter.

5. We have considered the submissions made at the Bar by learned counsel appearing on both sides. We have also gone through the pleadings and the materials on record. It is evident from the pleadings and the materials on record that the appellant was initially set ex parte on 1.12.2008. That order was set aside on an application filed by him as I.A.No.5960 of 2008, on payment of ₹500/- as costs. The costs awarded was paid, but the appellant did not even thereafter take steps to file a written statement in answer to the averments in the plaint, with the result that later he was again set ex parte and the suit was decreed on 23.9.2009. The application to set aside the ex parte decree was filed only on 26.5.2011 with a delay of 582 days. Apart from vaguely stating that he was in Australia and he became aware of the ex parte decree passed in the suit only when he received notice on I.A.No.257 of 2011, the application filed by the plaintiff under section 28(3) of the Specific Relief Act to have the sale deed executed, the appellant has not explained the reason why he did not

take steps after the ex parte decree passed in the first instance was set aside, to file a written statement and to contest the suit. It is evident from the testimony tendered by the appellant's power of attorney holder, who was examined as PW1 on 15.10.2011 that the appellant was aware of the ex parte decree two years back, namely in the year 2009. PW1 is none other than the appellant's brother's son. PW1 had also deposed that the appellant left for Australia only in June 2009. The appellant ought to have, if he was really interested in defending the suit, taken steps before he went abroad to have the written statement prepared and filed in court. From the materials on record, we are persuaded to take the view that the appellant was not in any way prevented from participating the proceedings in the court below at least after the ex parte decree passed in the first instance was set aside by order passed on I.A.No.5960 of 2008 on 28.5.2009, before he went abroad. The conduct of the appellant in not taking steps to file a written statement notwithstanding the fact that he was aware of the suit cannot in our opinion be countenanced. The court below was therefore perfectly right in holding that no grounds have been made out to set aside the ex parte decree passed in the suit. That apart, the materials on record disclose that with the permission of the court, the plaintiff had discharged the loan availed by the appellant from the Mookkannur Service Co-operative Bank on the security of the

property agreed to be sold and that the plaintiff has also deposited the balance sale consideration. The plaintiff has also furnished the requisite stamp papers for executing the sale deed. The plaintiff has also produced along with the counter affidavit filed by her in I.A.No.3830 of 2011 as Annexure R1(c), a copy of the order issued by the Area Manager of the Food Corporation of India, District Office, Kochi on 21.12.2007 granting her permission to purchase the plaintiff schedule property from the appellant for the sum of ₹7,60,000/-. The said document cuts at the root of the case now put forward by the appellant that the transaction was only a loan transaction and not an agreement to sell the property.

For the reasons stated above, we hold that there is no merit in the instant appeal. The appeal fails and it is dismissed. No costs.

Sd/-
P.N.RAVINDRAN,
JUDGE

Sd/-
ANIL K.NARENDRA,
JUDGE

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