

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THURSDAY, THE 2ND DAY OF JULY 2015/11TH ASHADHA, 1937

FAO.No. 380 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN I.A.NOS.6359/2011 AND 6360/2011
IN O.S. 884/2009 of II ADDL. SUB COURT, ERNAKULAM DATED
06.12.2011

APPELLANT(S) : /PETITIONER/DEFENDANT

SURESH, AGED 36 YEARS
S/O.THANKAPPAN PILLAI, ARAMURYPARAMBIL, KUMBALAM
ERNAKULAM.

BY ADV. SRI.ABRAHAM JOHN

RESPONDENT(S) : /COUNTER PETITIONER/PLAINTIFF

SABU
S/O.PADMANABHAN, THUNDIYIL HOUSE, MARADU P.O.
KANAYANNUR TALUK, ERNAKULAM, PIN - 682 304.

BY ADV. SRI.T.MADHU
BY ADV. SRI.D.M.SAJEEVAN
BY ADV. SMT.ASMI SAJEEVAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY
HEARD ON 02-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN &
SUNIL THOMAS, JJ.

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FAO No.380 of 2011
.....

Dated this the 2nd day of July, 2015.

J U D G M E N T

Thottathil B.Radhakrishnan, J.

1. Heard.

2. This appeal is by the defendant in a suit for specific performance of a contract for sale. He challenges the order by which the court below refused to set aside the ex parte decree by condoning delay of 335 days.

3. The defendant stood to say before the court below that he was not aware of the listing and he was under the impression that his appearance was not necessary. We have looked into the entire case papers. We see that as a consequence of non-appearance of the defendant, he was set ex parte and an ex parte decree of specific performance was passed. Thereafter, it appears that the advocate, who was engaged by the defendant, had been receiving

copies of applications in relation to deposit of balance sale consideration, draft, sale deed etc., and therefore, it could not be taken that the advocate did not inform the client. But, once the defendant is set ex parte, no useful purpose would be served by serving copies of further applications on the advocate who was appearing for the defendant before he was set ex parte. We say all these in the context of the fact that the written statement of the defendant is to the effect that he disputes the plaint claim by contending that the document which is shown as the contract for sale is one executed by him to create a security for loan advanced by the plaintiff to one Sreekumar and the amount shown in the contract for sale is much higher than the amount advanced by the plaintiff to Sreekumar. We may here note that the plaintiff's case is that the total sale consideration is ₹7,00,000/- and ₹6,00,000/- was paid as advance and nine months was fixed for performance of the contract. We caution ourselves that a deeper examination of the real intention of the parties to the contract, if put to trial, might have led the court to conclude on different

attendant issues. While we say that the delay in filing the application to set aside the ex parte decree is 335 days, we think that ends of justice require that the said delay is condoned and the ex parte decree is set aside on stringent terms as to costs.

In the result, this appeal is allowed and the impugned common order is set aside. As a result, I.A.Nos.6359 and 6360 of 2011 in O.S.No.884 of 2009 on the file of II Addl. Sub Court, Ernakulam are allowed setting aside the ex parte decree in that suit on a condition that the appellant pays to the respondent an amount of ₹5,000/- (Rupees five thousand only) as costs payable through the learned counsel appearing for the respondent before this Court, within a period of ten weeks from today. If sale deed has been drafted and any further steps taken, including registration, that will be kept intact to be dealt with in accordance with the result of the adjudication of the suit which would be done as per this judgment. The receipt/memo evidencing payment of costs as ordered above will be produced before the court below. Parties

are directed to mark appearance before the court below on 14.09.2015. The court below will expedite final disposal of the suit and attempt to dispose it of finally preferably before the end of February, 2016. This shall be done untrammelled by any observation made in this judgment.

(THOTTATHIL B.RADHAKRISHNAN, JUDGE)

(SUNIL THOMAS, JUDGE)

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