

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 15TH DAY OF JUNE 2015/25TH JYAISHTA, 1937

FAO.No. 171 of 2014 ()

AGAINST THE ORDER IN I.A.NO.399/2011 IN OS 245/2010 of SUB COURT,
PATHANAMTHITTA DATED 24-02-2012

APPELLANT/PETITIONER/DEFENDANT:

THUSHARA SASI
W/O.SASI KUMAR, KALARINIKKUNNATHIL HOUSE
MUTHUPEZHUNKAL P.O, ARUVAPPULAM VILLAGE
KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT

BY ADV. SRI.V.K.SUNIL

RSPONDENT/RESPONDENT/PLAINTIFF:

ANI KUMAR @ ANIL KUMAR
S/O.RAJENDRAN, AJI SADANAM, MUTHUPEZHUNKAL P.O
ARUVAPPULAM VILLAGE, KOZHENCHERRY TALUK
PATHANAMTHITTA DISTRICT 689 698

R1 BY ADV. SRI.S.MUHAMMED HANEEFF

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
15-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

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F.A.O.No.171 of 2014

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Dated this the 15th day of June, 2015

JUDGMENT

Thottathil B. Radhakrishnan, J.

Heard.

2. This appeal is against an order by which the court below refused to set aside an ex parte decree.

3. The suit was posted to 18.01.2011 for filing written statement. According to the appealing defendant, she could not contact her counsel for filing written statement as she was in the midst of a funeral of a relative. The court below has recorded that since the defendant did not file the written statement, the case was adjourned to 28.01.2011 and on that day, balance court fee was paid by the plaintiff and she was set ex parte on 31.01.2011. The application to set aside the ex parte decree was filed on 01.03.2011, i.e., on the last date within which that could have been filed having regard to the law of limitation. The court below took a view that the petition lacks bona fide and it is only to be dismissed.

4. Looking into the materials, we see that the suit is one for recovery of money based on a cheque. It is worthwhile in this

context to read the elaborate order rendered by the Division Bench of this Court on 06.02.2015 condoning the delay of 670 days and taking up this appeal on file. The delay was condoned noticing that the appeal was initially filed erroneously before the District Court and that happened to be returned at a later point of time after noticing that it did not have jurisdiction to entertain it. The crucial issue that is discernible from that order is that by this time, the appellant, a female, who was prosecuted for offence punishable under Section 138 of the Negotiable Instruments Act on the basis of the stale cheque transaction, stood acquitted by the criminal court by judgment rendered on 25.01.2014. This is taken as an eminently fit case for condonation of delay. We are of the view that having regard to the totality of the facts and circumstances, the defendant who could be faulted only for not filing the written statement on the first date fixed for her appearance, is eligible to further opportunity. That not having been granted by the court below, we are of the view that the impugned order results in miscarriage of justice. The same is only to be set aside and the ex parte decree is also to be set aside.

In the result, this appeal is allowed setting aside the impugned order and the ex parte decree in O.S.No.245 of 2010 of the Sub Court, Pathanamthitta. Parties are directed to mark appearance before the court below on July 30th, 2015.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

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