

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 20TH DAY OF MARCH 2015/29TH PHALGUNA, 1936

FAO.No. 187 of 2014 ()

AGAINST THE ORDER IN I.A.NO.1886/2013 IN OS 256/2008 of SUB COURT, KOCHI
DATED 28.2.2014

APPELLANTS/PETITIONERS/DEFENDANTS:

1. M/S. PEEVES ENTERPRISES, AGED 52 YEARS
REPRESENTED BY ITS PROPRIETOR, M.V. MAHMOOD
S/O. P.V. IBRAHIM, RESIDING AT 37/1094-D
STERLING ESTATE, KUMARANASAN ROAD, KALOOR
KOCHI - 17.
2. M.V. MAHMOOD, AGED 52 YEARS
S/O. P.V. IBRAHIM, RESIDING AT 37/1094-D, STERLING ESTATE
KUMARANASAN ROAD, KALOOR,
KOCHI - 17.

BY ADVS. SRI. A. BALAGOPALAN
SRI. A. RAJAGOPALAN
SRI. M. S. IMTHIAZ AHAMMED
SRI. M. N. MANMADAN

RESPONDENT/RESPONDENT/PLAINTIFF:

MUHAMMED ASHRAF, AGED 50 YEARS
S/O. ABDULLA MOULAVI, CHATHOTH MOOTTUMMAL, PULOPI
KANNADIPPARAMBU AMSOM, KANNUR, PIN 674 338.

BY ADV. SRI. JOHNSON ABRAHAM
BY ADV. SRI. NELSON ABRAHAM
BY ADV. SRI. S. GOPINATHAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
6.2.2015, THE COURT ON 20-03-2015 DELIVERED THE FOLLOWING:

"CR"

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

F.A.O.No.187 OF 2014

DATED THIS THE 20th DAY OF MARCH, 2015

JUDGMENT

ANIL K.NARENDRAN , J.

The appellants are the defendants in O.S.No.256 of 2008 on the file of the Court of the Subordinate Judge of Kochi. The said suit was filed by the respondent herein, initially seeking a decree for specific performance of an agreement for sale dated 26.3.2007, directing the appellants to execute a sale deed in favour of the respondent in respect of the plaint schedule property, having an extent of 53 cents, comprised in survey Nos.200/1 and 1511 of Edakochi Village and to put the respondent in possession of the same, with an alternate prayer for realisation of an amount of ₹1 Crore said to have been paid by the respondent to the appellants towards advance sale consideration together with interest @ 18% per annum and for a decree of permanent prohibitory injunction restraining the appellants from alienating or encumbering the plaint schedule property.

2. On receipt of summons, the appellants entered

appearance and filed a written statement denying the allegations in the plaint and contending that, they had never agreed to sell the plaint schedule property to the respondent and that the respondent had never agreed to purchase the same. According to the appellants, the agreement dated 26.3.2007 happened to be signed as demanded by the respondent on the understanding that the respondent will provide an amount of ₹1 Crore to the second appellant for discharging his liability with the bank, but, the respondent did not pay any such amount to the second appellant. It was also contended that the respondent filed the suit in collusion with the tenants of the building situate in the plaint schedule property, against whom the second appellant had initiated eviction proceedings as R.C.P.No.10 of 2009 before the Rent Control Court, Kochi.

3. The respondent filed I.A.No.101 of 2011 seeking an amendment of the plaint in O.S.No.256 of 2008 by deleting the prayer for specific performance and to convert the suit into one for realisation of the advance amount of ₹1 Crore with interest @ 18% per annum. The said interlocutory application was allowed and the

plaint was amended accordingly.

4. A reading of the memorandum of appeal would show that when the suit stood posted for payment of the balance court fee, the respondent filed I.A.No.1065 of 2011 seeking extension of time and the trial court granted extension upto 30.9.2011. On that day, the respondent filed I.A.No.1136 of 2011 for further enlargement of time for payment of the balance court fee and the same was also allowed by the trial court with a direction to pay the same within fifteen days. But, the respondent, instead of remitting the balance court fee, filed O.P.(Indigent) No.10 of 2011 with a prayer to permit him to continue the suit as an indigent person. The appellants filed objection to the said petition and ultimately, the respondent withdrew the same on 16.7.2013. Later, the respondent filed I.A.No.6 of 2013 with a prayer to permit him to continue the suit as an indigent person. The trial court by order dated 25.6.2013 allowed I.A.No.6 of 2013 and permitted the respondent to proceed with the suit as an indigent person.

5. Thereafter, the suit stood posted to 16.7.2013 for taking steps as a last chance. As there was no sitting on that day, the suit

was adjourned to 2.8.2013 and on that day, the suit was ordered to be included in the list on 1.11.2013. On 1.11.2013, the suit was posted to 7.11.2013 for trial. Since there was no representation for the defendants, they were set ex parte on 7.11.2013 and a decree was passed in favour of the respondent on 22.11.2013.

6. On 21.12.2013 the appellants filed I.A.No.1886 of 2013 under Order IX Rule 13 of the Code of Civil Procedure, 1908 read with section 151 of the Code seeking an order to set aside the ex parte decree passed on 22.11.2013. The respondent opposed the said petition by filing a counter affidavit. The trial court by order dated 28.2.2014 allowed the petition on condition that the appellants shall deposit 25% of the decree amount within 30 days from the date of order as a pre-condition to set aside the ex parte decree and judgment. It was made clear in the said order that if the appellants fail to deposit the amount within the period stipulated above, I.A.No.1886 of 2013 will stand dismissed without any further orders.

7. Aggrieved by the order dated 28.2.2014 of the trial court in I.A.No.1886 of 2013, in O.S.No.256 of 2008 to the extent of imposing a condition that the appellants should deposit 25% of the

decree amount within 30 days from the date of order as a pre-condition to set aside the ex parte decree and judgment, the appellants are before this Court in this appeal.

8. We have heard the arguments of the learned counsel for the appellants and also perused the records produced along with the appeal.

9. The sole question that arises for consideration in this appeal is as to whether the trial court was justified in directing the appellants to deposit 25% of the decree amount as pre-condition for setting aside the ex parte decree.

10. The suit, as we have already noticed, was originally filed as one for specific performance of an agreement for sale dated 26.3.2007 alleged to have been executed by the appellants in favour of the respondents in respect of the plaint schedule property, with consequential reliefs including a decree for permanent prohibitory injunction. After the filing of written statement by appellants, the respondent filed I.A.No.101 of 2011 for amending the plaint in O.S.No.256 of 2008 in order to convert the suit into one for realisation of the advance amount together with interest @ 18% p.a.

The said application was allowed and the plaint was amended accordingly. But when the suit was posted for payment of balance court fee, the respondent filed I.A.No.1065 of 2011 seeking extension of time for payment of the balance court fee, which was followed by I.A.No.1136 of 2011 seeking further enlargement of time. Even within the extended time granted by the trial court, the respondent did not remit the balance court fee. Instead, he filed O.P.(Indigent) No.10 of 2011, seeking permission to continue the suit as an indigent person, which petition was withdrawn on 16.7.2013. Later, he filed I.A.No.6 of 2013 with a prayer to continue the suit as an indigent person, which was allowed on 25.6.2013. Immediately thereafter, the suit was posted to 16.7.2013 for taking steps as last chance and later, it was ordered to be included in the list on 1.11.2013. A reading of the order passed by the trial court would show that the appellants/defendants were absent on 1.11.2013 and 7.11.2013 and there was also no representation on their behalf and in such circumstances, they were set ex parte on 7.11.2013 and an ex parte decree was also passed in favour of the respondent/plaintiff on 22.11.2013.

11. As noticed by the trial court in the impugned order, the main contention taken by the appellants in the affidavit filed in support of the petition to set aside ex parte decree was that the clerk attached to the office of their counsel had mistakenly noted the posting date as 1.12.2013 instead of 1.11.2013 and it was in such circumstances that they could not appear before the court on either of those days and there was also no representation on their behalf. It was further stated in the affidavit that, their counsel came to know about the disposal of the suit only when he made enquiries on 1.12.2013 as the case was not called on that day and on coming to know about the ex parte decree, the application was filed under Order IX Rule 13 of the Code of Civil Procedure.

12. Before the trial court, the prayer sought for in the interlocutory application was strongly opposed by the respondent/plaintiff by filing a counter affidavit and it was contended that the appellants/defendants and their counsel were fully aware of the listing of the case on 7.11.2013 and they remained absent with an intention to delay the final disposal of the case. The learned Sub Judge, after referring to the merits of the

contentions raised in the plaint as well as in the written statement and also taking note of the fact that 1.12.2013 being a Sunday, the averment in the affidavit accompanying the interlocutory application that the counsel for the appellants was present on 1.12.2013 is false, allowed the application on terms.

13. As we have already noticed, though the suit is of the year 2008, the trial of the suit was delayed due to the filing of various interlocutory applications by the respondent/plaintiff seeking amendment of the plaint; for enlargement of time to remit the balance court fee; for permission to sue as an indigent person; etc. Ultimately, it was only on 25.6.2013, the respondent/plaintiff was permitted to continue the suit as an indigent person. Therefore, we are of the opinion that, the appellants/defendants alone cannot be blamed for the delay in the disposal of the suit. We also notice that the interlocutory application for setting aside the ex parte decree was filed in time.

14. In **G.P. Srivastava v. R.K. Raizada and others (2000 (3) SCC 54)**, the Apex Court held that the word "was prevented by any sufficient cause from appearing" occurring in Order IX Rule 13 of

the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') must be liberally construed to enable the court to do complete justice between the parties, particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order IX Rule 13 of the Code has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The Apex Court held further that where defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. Para.7 of the judgment in **G.P. Srivastava's case** (supra) reads thus:

- "7. Under Order 9, Rule 13, C.P.C. an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte

decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. The Courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding ex-parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the Court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."

15. In **Vijay Kumar Madan and others v. R. N. Gupta Technical Education Society and others, (2002 (5) SCC 30)** interpreting the provisions in Order IX Rule 7 of the CPC, the Apex Court held that terms imposed by the court on the defendant assigning good

cause for previous non-appearance should not be too onerous or vague nor should they have the effect of prejudging the controversy involved and automatically decreeing the suit even though the ex parte order is set aside. The Apex Court held further that, costs should be so assessed as would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings to an earlier stage. Paragraphs 7 and 8 of the judgment in **Vijay Kumar Madan's case** (supra) read thus:

"7. Power in the Court to impose costs and to put the defendant-applicant on terms is spelled out from the expression "Upon such terms as the Court directs as to costs or otherwise". It is settled with the decision of this Court in Arjun Singh vs. Mohinder Kumar and Ors., AIR 1964 SC 993, that on an adjourned hearing, in spite of the Court having proceeded, ex parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be relegated back and re-open the proceedings from the date wherefrom they became ex parte so as to convert the ex parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the Court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been if he had not applied under Rule 7. So also the conditions for taking

benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the Court may not in the garb of exercising power of placing upon terms make an order which probably the Court may not have made in the suit itself. As pointed out in the case of Arjun Singh (*supra*), the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation.

8. Costs should be so assessed as would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings to an earlier stage. The terms which the Court may direct may take care of the time or mode of proceedings required to be taken pursuant to the order under Rule 7. For example, keeping in view the conduct of the defendant-applicant, the Court may direct that though the ex-parte proceedings are being set aside, the defendant must file the written statement within an appointed time or recall for cross-examination at his own cost and expenses the witnesses examined in his absence or that the defendant shall be allowed not more than one opportunity of adducing his evidence and so on. How the terms are to be devised and made a part of the order would depend on the facts and circumstances of a given case. In short, the Court cannot exercise its power to put the defendant/applicant on such terms as may have the effect of pre-judging the controversy involved in the suit and virtually decreeing the suit though ex-parte order has been set aside or to put the parties on such terms as may

be too onerous.”

16. On an application filed under Order IX Rule 13 of the Code, the court has to find out whether the erring party has made out sufficient cause for setting aside the ex parte decree. When no negligence or inaction is imputable to the erring party and the absence was not malafide or intentional, the discretion has to be exercised in his favour, especially when the application is within the statutory time limit. In appropriate cases, the plaintiff can be compensated by adequate costs for the loss of time and the inconvenience caused to him. But any such condition shall not be too onerous.

17. In the case on hand, the suit was posted to 16.7.2013 for taking steps as a last chance and thereafter it was ordered to be included in the list for the first time on 1.11.2013. On 1.11.2013 and also on the subsequent posting date, i.e., 7.11.2013, there was no representation on behalf of the appellants/defendants and therefore they were set ex parte on 7.11.2013 and an ex parte decree was also passed on 22.11.2013. Immediately thereafter, within the prescribed time limit, the appellants/defendants filed

I.A.No.1886 of 2013, under Order IX Rule 13 of the Code, to set aside the ex parte decree passed in O.S.No.256 of 2008. The reason stated in the affidavit accompanying the said interlocutory application is the mistake committed by the clerk attached to the office of the counsel for the appellants/defendants in correctly noting down the posting date. The respondent/plaintiff contended that the appellants/defendants and their counsel before the court below were fully aware of the listing of the case to 7.11.2013 and that they remained absent with an intention to delay the final disposal of the case. But, we are unable to draw an inference from the pleadings on record that the absence of the appellants/defendants on those days was either malafide or intentional. There is also no material to indicate that the attempt of the appellants/defendants was intended to protract the suit indefinitely. Considering the facts and circumstances of the case on hand, we find that the condition imposed by the trial court that the appellants should pay 25% of the decree amount as a pre-condition to set aside the ex parte decree for an amount of ₹1 Crore with 6% interest from the date of suit till realisation is too onerous and the trial court ought not to have

imposed such a condition for setting aside the ex parte decree and judgment.

In the result, we allow this appeal and in modification of the condition stipulated in the order dated 28.2.2014 in I.A.No.1886 of 2013 in O.S.No.256 of 2008 direct the appellants/defendants to deposit the sum of ₹25,000/- within a period of two weeks from the date of this judgment, instead of 25% of the decree amount, for payment to the respondent/plaintiff. On the appellants/defendants remitting the said amount within the time limit stipulated above, the court below shall restore the suit to file and proceed with the trial. Taking note of the fact that the suit is of the year 2008, we direct the court below to try and dispose of the suit, as expeditiously as possible and at any rate within a period of six months from the date of production of a certified copy of this judgment.

**P.N.RAVINDRAN,
JUDGE**

**ANIL K.NARENDRAN,
JUDGE**

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