

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 24TH DAY OF JUNE 2015/3RD ASHADHA, 1937

FAO.No. 264 of 2014 ()

(AGAINST ORDERS DATED 19.08.2014 IN I.A.NO.1833 OF 2014 AND
I.A.NO.1834 OF 2014 IN O.S.NO.745 OF 2012 OF THE COURT OF
PRINCIPAL SUB JUDGE, IRINJALAKUDA)

APPELLANT(S)/PETITIONERS/ DEFENDANTS 4 TO 7:

1. MINI, AGED 44 YEARS
W/O LATE UNNI, HOUSE NO 44/118D
EASWARAMANGALATH HOUSE, THIRUVALLOOR DESOM
LOKAMALESWARAM VILLAGE, KODUNGALLUR TALUK.
2. JYOTHSNA, AGED 23 YEARS
D/O LATE UNNI, HOUSE NO. 44/118D
EASWARAMANGALATH HOUSE, THIRUVALLOOR DESOM
LOKAMALESWARAM VILLAGE, KODUNGALLUR TALUK.
3. JYOTHILAKSHMI, AGED 19 YEARS
D/O LATE UNNI, HOUSE NO 44/118D
EASWARAMANGALATH HOUSE, THIRUVALLOOR DESOM
LOKAMALESWARAM VILLAGE, KODUNGALLUR TALUK.
4. HEMA, AGED 41 YEARS
W/O DILEEP KUMAR, PERUMKULATH HOUSE,
PANANGADU DESOM
SREE NARAYANAPURAM VILLAGE, KODUNGALLUR TALUK.

BY ADVS.SRI.BLAZE K.JOSE
SRI.RAHUL SASI
SMT.NEETHU PREM
SRI.ANIL VIJAYAN

RESPONDENT(S)/RESPONDENTS/ PLAINTIFFS:

1. THAMBI,AGED 33 YEARS
S/O KARTHIKEYAN, MADATHINKAL HOUSE
PADINJARE VEMBALLOOR, ANJANGADI DESOM
SREE NARAYANAPURAM, KODUNGALLUR TALUK,
PIN - 680 664.

2. GANESAN, AGED 47 YEARS
S/O LATE SUBRAMANYAN, EASWARAMANGALATH HOUSE
NEAR SHREE BHADRAKALI TEMPLE,
THIRUVALLOOR DESOM
LOKAMALESWARAM VILLAGE, KODUNGALLUR TALUK
PIN - 680 664.

R1 BY ADV. SRI.M.SHAJU PURUSHOTHAMAN
R1 BY ADV. SRI.K.S.RAJESH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY
HEARD ON 24-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN &
SUNIL THOMAS, JJ.

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FAO No.264 of 2014
.....

Dated this the 24th day of June, 2015.

J U D G M E N T

Thottathil B.Radhakrishnan, J.

- 1.This appeal is against an order by which the court below refused to set aside an ex parte decree by condoning the delay of 338 days in instituting that application.
- 2.We have heard the learned counsel for the parties.
- 3.The suit for specific performance was decreed ex parte. Defendant Nos.4 to 7 applied to have it set aside. The second defendant, who also was set ex parte, did not apply for any such relief.
- 4.We have looked into the judgment, which was issued ex parte in the suit. The litigation appears to be centering around a contract for sale allegedly executed by one Subramanian in 2011. He

thereafter died. The suit was laid against Subrahmanian's son Ganesan and daughter Hema and also against wife and children of the predeceased son of Subrahmanian, namely, Unni. Unni's heirs and Hema are the appellants before us.

5. Perusing the materials and looking at the contentions and relevant particulars, we see that the appellants faced a situation where the ex parte proceedings against them went to the extent of having the matter listed for delivery of property following execution of sale through the intervention of court. They, thereupon, filed interlocutory applications from which this appeal arises and moved this Court invoking Article 227 of the Constitution of India. This Court interdicted the execution proceedings and directed consideration of the interlocutory applications on the trial side.

6. We have seen the dates on which the case stood posted before the court below. We have also seen the number of documents offered in support of the applications as documentary evidence.

There is no oral evidence. We think that the learned counsel for the respondents is justified in arguing that the process-server not having been summoned and cross examined, it was not available for the appellants to contend that there was no due service of process. This submission is footed on the presumptions available under Section 114 of the Evidence Act, 1872. Be that as it may, we are of the view that, on the totality of the facts and circumstances, the appellants ought to have had further opportunity to adduce oral evidence by examining themselves and the process-server, even if such adjournments ought to have been granted, on terms. But, the learned Subordinate Judge appears to have been constrained to have preponed the final date for delivery of property, having regard to the directions issued by this Court in supervisory jurisdiction through the original petition noticed above. We think that the proceedings before the court below has resulted in miscarriage of justice and ends of justice require that the appellants are given further opportunity to prosecute I.A.Nos.1834 and 1833 of 2014 in O.S.No.745 of 2012, which are the applications to condone the delay and to set aside

the ex parte decree respectively, by adducing further evidence.

In the result, this appeal is allowed setting aside the impugned orders and remitting I.A.Nos.1834 and 1833 of 2014 in O.S.No.745 of 2012 for reconsideration, in accordance with law, on condition that the appellants pay to the contesting first respondent through his learned counsel appearing before this Court an amount of ₹2,500/- (Rupees two thousand and five hundred only) as costs within a period of two weeks. Parties are directed to mark appearance before the court below on 15.07.2015. The receipt/memo evidencing payment of costs will be produced before the court below. The interim order granted by this Court on I.A.No.1343 of 2014 in this appeal will continue till the disposal of I.A.Nos.1834 and 1833 of 2014 in O.S.No.745 of 2012 by the court below following this judgment.

(THOTTATHIL B.RADHAKRISHNAN, JUDGE)

(SUNIL THOMAS, JUDGE)