

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 2ND DAY OF JUNE 2015/12TH JYAISHTA, 1937

FAO.No. 320 of 2014 ()

(AGAINST COMMON ORDER PASSED IN I.A.NO.899 OF 2014 AND
I.A.NO.900 OF 2014 IN O.S.NO.38 OF 2011 DATED 26.09.2014 ON
THE FILE OF SUB COURT, THODUPUZHA)

APPELLANT(S)/PETITIONER/FIRST DEFENDANT:

ANTONY, AGED 67 YEARS,
S/O.THOMAS, ANATHIL HOUSE, PALLIVASAL ESTATE
NURSERY DIVISION, PALLIVASAL VILLAGE, DEVIKULAM.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT(S)/RESPONDENT/PLAINTIFF:

MUHAMMED ELIAS ISMAIL
S/O.ISMAIL SAIT, SULEKHA MANOR, 49/1876
ELAMAKARA ROAD, ELAMAKARA KARA, EDAPALLY VILLAGE
KANAYANNUR TALUK, ERNAKULAM DISTRICT, PIN - 682 001.

R1 BY ADV. SRI.P.RADHAKRISHNAN (1)
R1 BY ADV. SRI.MADHU RADHAKRISHNAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY
HEARD ON 02-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN &
SUNIL THOMAS, JJ.

.....
FAO No.320 of 2014
.....

Dated this the 2nd day of June, 2015.

J U D G M E N T

Thottathil B.Radhakrishnan, J.

1. Heard.
2. This appeal is against a common order refusing to condone delay of 380 days and to set aside an ex parte money decree. The suit was for specific performance of a contract for sale. The plaintiff alleged that he had paid ₹10,00,000/- to the first defendant and ₹13,50,000/- to first defendant's son who is the second defendant towards sale consideration. He alternatively pleaded for return of advance.
3. The court below granted a decree for return of ₹34,50,000/- (Rupees thirty four lakhs and fifty thousand only) with interest.
4. The first defendant filed an application to set aside the ex parte

decree, along with an application to condone delay of 380 days in its institution, pleading that he had been unwell and had engaged a lawyer. He also pleaded that his son was to take care of the litigation. It appears that the son who is the second defendant was not available to contest the litigation. The appellant tendered evidence as PW1. He is a senior citizen and during cross examination he has stated that he was treated as inpatient and outpatient at Priya Hospital. However, no medical records were produced. Though the court below has stated reasons to dismiss the applications, we are of the view that there was sufficient cause to condone the delay and to allow the applications, on terms, more particularly because, the amount involved in the litigation and the extent of the property covered by the agreement are decisive to indicate that the parties should be given a fair and reasonable opportunity for trial on merits. Hence, we are of the view that the impugned common order should be set aside and the applications can be allowed on terms.

In the result, the appeal is allowed setting aside the impugned

common order. As a consequence, I.A.Nos.899 of 2014 and 900 of 2014 in O.S.No.38 of 2011 on the file of Sub Court, Thodupuzha are allowed and the ex parte decree in O.S.No.38 of 2011 of Sub Court, Thodupuzha is set aside as against both the defendants, having regard to the nature of the agreement. All these will be on terms that the appellant will pay to the respondent, through his learned counsel appearing before this Court, an amount of ₹10,000/- (Rupees ten thousand only) towards costs within a period of three weeks from today. Receipt/memo regarding payment of costs shall be produced before the court below. If costs is not paid in terms of this judgment, the appellant will not be entitled to the benefit of this judgment and this appeal will stand dismissed automatically. Parties are directed to mark appearance before the court below on 02.07.2015.

(THOTTATHIL B.RADHAKRISHNAN, JUDGE)

(SUNIL THOMAS, JUDGE)