

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 30TH DAY OF JUNE 2015/9TH ASHADHA, 1937

FAO.No. 334 of 2014 ()

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(AGAINST THE ORDER IN I.A.NO.47/2012 IN OS 215/2012 of PRINCIPAL SUB COURT,
THALASSERY DATED 23.8.2014)**

APPELLANT(S)/PETITIONER/DEFENDANT:

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K.J.JOSEPH, AGED 47 YEARS,
S/O.JOSEPH, KURIASSERY HOUSE, P.O.CHUNGAKUNNU,
THALASSERY TALUK, KANNUR DISTRICT.**

**BY ADVS.SRI.K.MOHANAKANNAN
SMT.A.R.PRAVITHA**

RESPONDENT(S)/RESPONDENT/PLAINTIFF:

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KALLAKANDY VALSAN, AGED 50 YEARS,
S/O.ANANDAN, 'ANAND', P.O.KAVUMBHAGAM,
THALASSERI, KANNUR DISTRICT - 670 649.**

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
30-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

DG

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

F.A.O.No.334 of 2014

Dated this the 30th day of June, 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 recovery of amount of Rs.15,00,000/-. He challenges an order by which the court below fixed an amount of Rs.5,00,000/- to be deposited as security while setting aside an ex parte decree. For payment of that amount, the application to set aside the ex parte decree has also been dismissed as a consequence.
3. The written statement was not filed in time; nevertheless, the case was posted for issues. Balance court fee was remitted and the suit was listed for trial. The defendant, who himself an Advocate, did not appear on that date. Resultantly, he was set ex parte. Later, the ex parte decree

was passed.

4. The defendant applied to have the ex parte decree set aside by contending that in the course of his official duties as advocate, he was away in Trivandrum and, therefore, could not appear before the Sub Court, Thalassery to contest the suit on that day. The application to set aside the ex parte decree was filed within the time prescribed by law for such application. However, the court below allowed the application, imposing a condition, requiring deposit of Rs.5,00,000/-, i.e., 1/3 of the plaint claim as security. The said direction, in our considered view, is too harsh even if the intention was to impose certain terms while setting aside the ex parte decree.

5. We may, before proceeding, note that this Court had granted an interim order of stay of further proceedings on the application to set aside the ex parte decree on condition that the appellant deposits an amount of Rs.1,00,000/-. It is seen from the proceedings of the court below that the said amount was not deposited and consequentially, the

application to set aside the ex parte decree was dismissed.

6. The suit is of the year 2012. It was taken up for trial on the assumption that the written statement was filed. We see from the proceedings that the case was listed for trial. Obviously, the matter need not have been listed for simple issues, after the written statement was filed. Balance court fee has also been remitted. We think that this is a case where the defendant ought to have been given an opportunity to contest, at least, on terms, in no way so harsh, as has been imposed by the court below. The application ought to have been allowed.

In the result, this appeal is allowed, setting aside the impugned order and also thereby allowing I.A.No.47 of 2012 in O.S.No.215 of 2012 and setting aside the ex parte decree passed in that suit on condition that the appellant pays the respondent an amount of Rs.5,000/- (Rupees five thousand only) as costs through the counsel appearing before the court below or by depositing the said amount before the court below, within three months. Receipt/memo regarding

the payment of costs shall be placed before the court below.

Parties are directed to mark appearance before the court below on 4.8.2015.

THOTTATHIL B. RADHAKRISHNAN, JUDGE

SUNIL THOMAS, JUDGE

“I.A.No.47 of 2012” occurring in the 2nd line of the last paragraph of the judgment is corrected and substituted as “I.A.No.47 OF 2014”, vide order dated 07.12.2015 in F.A.O.No.334/2014.

Sd/-
REGISTRAR (JUDICIAL)

DG