

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 27TH DAY OF MAY 2015/6TH JYAISHTA, 1937

FAO.No. 338 of 2014 ()

(AGAINST THE ORDERS DATED 22/02/2014 IN I.A. NO.3379/2011 AND
I.A. NO.3380/2011 IN I.P. NO.18/2003 ON THE FILES OF THE 1ST ADDITIONAL
SUB JUDGE, THRISSUR)

APPELLANT(S)/PETITIONER/RESPONDENT NO.2:

THAHIR
S/O. KARAPPAMVEETIL MUHAMMED, SAINUDHEEN HAJI
CHETTUVA DESOM, ENGANDIYUR AMSOM, CHAVAKKAD TALUK.

BY ADVS.SRI.A.A.ZIYAD RAHMAN
SRI.LAL K.JOSEPH
SRI.V.S.SHIRAZ BAVA
SRI.JOSEPH KURIAN VALLAMATTAM

RESPONDENT(S)/RESPONDENTS/PETITIONER AND RESPONDENT NO.1:

1. MANZOOR,
S/O. MUHAMMED KUNJIMON,
RESIDING AT PUTHUVEETIL MANINGAYIL VEETIL,
PALAYOOR DESOM, GURUVAYOOR, AMSOM
CHAVAKKAD TALUK.

2. MUHAMMED IQBAL, S/O. KUDILIL VEETTI,
SAIDHU MUHAMMED, RESIDING AT A.K. S.QUARTERS
KECHERY DESOM, CHAVALLUR VILLAGE, THRISSUR DISTRICT.

R2 BY ADV. SRI.SUMODH MADHAVAN NAIR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
20/05/2015 THE COURT ON 27/05/2015 DELIVERED THE FOLLOWING:

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

F.A.O. No.338 OF 2014

Dated this the 27th day of May, 2015

JUDGMENT

Sunil Thomas,J.

The 2nd respondent in I.P.No.18/2003 of the First Additional Sub Court, Thrissur, aggrieved by the dismissal of I.A. Nos.3379/2011 & 3380/2011, challenges the above orders.

2. I.P.No.18/2003 was filed by the first respondent herein seeking a declaration that the 2nd respondent herein is an insolvent and to set aside the sale deed No.3651/2003 of Thrissur SRO, executed by the 2nd respondent in favour of the appellant herein. The allegation of the first respondent in the above I.P. was that the 2nd respondent had borrowed Rs.2,50,0000/- from him, and thereafter a sale deed was executed by the 2nd respondent in favour of the appellant, with an intention to defraud the creditor. Notice on the appellant was effected by publication, since admittedly he was abroad during the relevant time. He remained absent. Hence, the Insolvency

Petition was allowed by the Court below by order dated 30/6/2008, the 2nd respondent was declared as insolvent and the sale deed No.3651/2003 was set aside.

3. Claiming that the appellant came to know about the decree in February 2011, I.A. No.3380/2011 was filed to set aside the ex-parte decision. I.A. No.3379/2011 was also filed to condone the delay of 1112 days in filing such application. It was claimed that the appellant was employed abroad, that notice was not served on him and that the news paper, in which the publication was effected, was one having circulation in Thrissur town only and not in his area where he was permanently residing.

4. Before the court below, the appellant himself was examined as PW1, who deposed in terms of his averments. The Court below dismissed both the applications by the impugned orders, which are the subject matter of appeal.

5. The essential contention of the appellant was that he did not have the notice about the proceedings till February 2011. However, the court below on perusal of the records found that the appellant herein had filed I.A. No. 6048/2004 on 16/12/2004

through his power of attorney, to set aside the order setting him ex-parte. That application was returned with a direction to issue notice to the other side. Thereafter, the said application was neither taken back from the file nor it was re-presented. Along with the above application, the power of attorney executed by the appellant herein in Dubai was also produced. In the above power of attorney there was a recital that the appellant herein was declared ex-parte on 19/11/2004 and he came to know about the I.P. from the paper publication and since he was employed abroad, he could not arrange a counsel to conduct the proceedings.

6. This recital in the power of attorney and the fact that the appellant had filed an earlier application (I.A. No.6048/2004) is diametrically opposite to the contention in the present I.A., that he came to know about the proceedings in the I.A. only in February 2011 and is fatal to his contentions. Evidently, not only the appellant had suppressed the fact that he was aware of the ex -parte proceedings in 2004 itself, but also that after remaining silent till 2011, came up with a false contention that he came to know about the ex- parte proceedings only in 2011.

Hence, the finding of the court below is based on the sound factual basis and no interference is called for. We find no reason to interfere in the impugned orders.

The appeal is hence dismissed at the threshold.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

