

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THURSDAY, THE 26TH DAY OF FEBRUARY 2015/7TH PHALGUNA, 1936

FAO.No. 346 of 2014 ()

(I.A.No.404/2014 IN O.S.No.147/2013 OF SUB COURT, PALA)

APPELLANT/PETITIONER/DEFENDANT:

K.G.RAJAN
AGED 42 YEARS
S/O.GOPALAN, ODANATTU HOUSE, IMKOMBU KARA
KADANADU P.O., VELLAPPILLI VILLAGE.

BY ADVS.SRI.JAISON JOSEPH
SRI.P.S.APPU

RESPONDENT/RESPONDENT/PLAINTIFF:

N.T.THOMAS,
AGED 56 YEARS
S/O.THOMAS, NADUVILE KANGAZHAKKATTU HOUSE,
NEYYUR KARA, PULIYANNOOR VILLAGE-686573.

R1 BY ADV.SRI.M.D.SASIKUMARAN
R1 BY ADV.SRI.K.S.HARIHARAPUTHRAN
R1 BY ADV.SRI.GEORGE MATHEW
R1 BY ADV.SRI.SUNIL KUMAR A.G
R1 BY ADV.SRI.DIPU JAMES

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 26-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

F.A.O. No.346 of 2014

Dated this the 26th day of February, 2015

J U D G M E N T

P.N.Ravindran, J.

The appellant is the defendant in O.S.No.147 of 2013 on the file of the Court of the Subordinate Judge of Pala. The sole respondent is the plaintiff therein. The suit instituted by the respondent for realisation of the sum of Rs.10,65,424/-, the amount stated to have been paid as advance under an agreement for sale, together with interest and costs stood posted for trial on 10.2.2014 after the appellant/defendant had entered appearance and filed his written statement. In the written statement, the appellant had disputed and denied the genuineness of the agreement for sale. On the short ground that when the suit was called on for trial on 10.2.2014, the defendant was not present in person, he was set ex-parte and the suit was decreed ex-parte by judgment delivered on 12.2.2014 allowing the plaintiff to realise the sum of Rs.10,65,424/-with interest and costs from the defendant and his assets. Within the period of limitation prescribed for the purpose, the defendant filed I.A.No.404 of 2014 under Order IX rule 13 of the Code of Civil Procedure to have the ex-parte decree set aside. Along with the application he had also produced a medical certificate to substantiate his contention that he

was not present in person on account of illness. The trial court after entering a finding that the defendant was prevented by sufficient cause from being present in person on 10.2.2014 and therefore an opportunity should be given to him to contest the suit on the merits, allowed the application by order passed on 26.6.2014 on payment of Rs.1500/- as costs to the respondent on or before 11.7.2014. Since costs was not paid on 11.7.2014, I.A.No.866 of 2014 was dismissed by order passed on 14.7.2014. Hence this appeal.

2. We heard Sri.P.S.Appu, learned counsel for the appellant and Sri.K.S.Hariharaputhran, learned counsel appearing for the respondent. It is not in dispute that the suit stood posted on 10.2.2014 for examination of the plaintiff. There is no finding entered by the court below to the effect that the learned counsel appearing for the defendant was not present or that there was no representation on his behalf or the learned counsel has reported no instructions. The court below was also satisfied that the appellant defendant was laid up and therefore he should be afforded an opportunity to have the case decided on the merits. In such circumstances, as the application for setting aside the ex-parte decree was filed in time and the physical presence of the defendant was not necessary 10.2.2014, we are of the opinion that the court below ought not have mulcted him with the

liability to pay costs.

We accordingly allow the appeal, set aside the orders dated 26.6.2014 and 14.7.2014 on I.A. No.404 of 2014, allow the said application and set aside the ex-parte decree in O.S.No.147 of 2013 on the file of the Court of the Subordinate Judge of Pala. Consequently, the suit shall stand restored to file. The parties shall appear through counsel in the court below on 16.3.2015. The court below shall on that day fix a date for trial and dispose of the suit within four months from 16.3.2015.

**P.N.RAVINDRAN,
(JUDGE)**

**ANIL K.NARENDRA,
(JUDGE)**

vps