

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 13TH DAY OF JULY 2015/22ND ASHADHA, 1937

Mat.Appeal.No. 455 of 2015 ()

AGAINST THE ORDER IN OP.NO.700/2014 OF FAMILY COURT, NEDUMANGAD

APPELLANT/PETITIONER/RESPONDENT:

D.SASI
TC 41/1535, NEAR SASTHAMKOVIL, MANACAUD P.O,
THIRUVANANTHAPURAM

BY ADVS.SRI.T.M.CHANDRAN
SRI.JOSHI VARGHESE
SRI.S.SUJITH
SRI.V.A.SASIDHARAN
SRI.JOSEPH ALBIN NEDUNTHALLY

RESPONDENT/RESPONDENT/PETITIONER:

YAMUNA.A.G,
D/O.AMBIKAVATHY, TC 24/1484, THYCAUD P.O,
THIRUVANANTHAPURAM 695 014.

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
13-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.K.ABDUL REHIM & K. RAMAKRISHNAN, JJ.

.....
Mat.A.No.455 of 2015
.....

Dated this the 13th day of July, 2015.

JUDGMENT

Ramakrishnan, J:

The petitioner in I.A.No.215/2015 in O.P.No.700/2014 on the file of the Family Court, Nedumangad is the appellant herein. The original petition before the Family Court was filed by the respondent herein against the petitioner for a decree for return of gold ornaments or its value to the extent of ₹2 lakhs and also for ₹6 lakhs being the value of the property sold belongs to the petitioner and the respondent jointly and that petition was allowed ex parte as the petitioner did not appear. Thereafter he filed I.A.No.215/2015 within time to set aside ex parte decree and the court below had allowed that application on condition of depositing ₹2 lakhs being a portion of the decree amount. This order is being challenged by the petitioner by filing this appeal. Though notice was served on the respondent, she remained absent.

2. Heard counsel for the appellant.

3. Counsel for the appellant submitted that he is challenging the capacity of the petitioner to provide so much

gold ornaments and also, according to the appellant, the sale consideration was obtained by the respondent herself and she did not pay the amount and he was not liable to pay any amount to the respondent herein. So, at the most, if the court felt that there was some laches that ought to have been condoned by imposing reasonable amount as cost and an opportunity ought to have been given to the petitioner to meet the case on merit. But the condition now imposed is harsh which is difficult for the petitioner to comply with and thereby prejudice has been caused to him.

4. It is an admitted fact that the appellant and the respondent were husband and wife and there were litigations pending before the Family Court including the one under challenge. The respondent herein filed OP.No.700/2014 for return of 10 sovereigns of gold ornaments or its value at the rate of ₹ 2 lakhs and also ₹6 lakhs being the value of the property sold. It is also an admitted fact that since the appellant was working abroad at that time, he could not appear. There was some mistake in noting the date of posting and that was the

reason for his non appearance before the court and when he came to enquire about the case, he came to understand that the case is decided on ex parte and immediately on knowing the same, he filed the application.

5. There is no case before the court below that there was any delay or laches on the part of the petitioner in filing the application to set aside the ex parte decree. It is specifically mentioned in the affidavit that the advocate clerk of the petitioner was laid up and posting date was wrongly noted and that was the reason why he could not appear and adduce evidence and accordingly, the case was decided on 17.1.2015 as ex parte. According to him, he was in gulf country when the alleged sale was taken place. So there is no possibility for him in realizing the amount as sale consideration as alleged by the petitioner in the lower court. It is true that in the decision reported in **Summer Sand Hill Resort and Ayurvedic Centre v. SBI** (2010 (1) KLT 478), this Court has held that as a condition for setting aside the ex parte decree, a portion of the decretal amount can be directed to be deposited for allowing

the application. The same view has been reiterated by the Hon'ble Supreme Court also in the latest decision. But, at the same the Supreme Court has held that if the parties have controversy regarding the amount payable, then directing the parties to pay major portion of the amount as a condition for setting aside the ex parte decree cannot be passed as a condition to set aside the ex parte order as that will prejudicially affect the right of the parties to meet the case on merits. In that case the Supreme Court has directed the party to deposit the arrears of maintenance as a condition for setting aside the ex parte decree. In this case there is no claim for arrears of maintenance. The question as to whether there was any gold ornaments entrusted and any sale consideration was with the appellant etc are matters to be considered on the basis of evidence. So under the circumstances, relying the dictum laid down in the decision reported in **Summer Sand Hill Resort and Ayurvedic Centre v. SBI** (2010 (1) KLT 478) for imposing a portion of the amount to be deposited as a condition for allowing the application to set aside ex parte decree appears

to be not sustainable in law and the facts of that case is not applicable to the facts of this case as well. But, at the same, if the court felt that there is some laches on the part of the appellant in not conducting the case properly which has caused some inconvenience to the other side, then such laches can be condoned by ordering reasonable cost as a condition for setting aside the ex parte decree. That ought to have been the method which should have been adopted by the court below in the circumstances of the case instead of directing the appellant to deposit a portion of the decree amount as a condition for setting aside the ex parte decree. So, under the circumstances, we feel that the condition imposed by the court below has to be set aside and the application can be allowed on payment of cost of ₹7,500/- to the counsel for the respondent in the lower court within one month from today. If the amount is paid and proof of payment of the same is produced before the court below, then the lower court is directed to set aside the ex parte decree and give an opportunity to file objection if not filed and adduce evidence and dispose of the case afresh in

accordance with law. If the cost is not paid, then ex parte decree passed by the court below will be revived.

With the above directions and observations, this appeal is allowed and the order passed by the court below is set aside and modified to the extent mentioned above and remitted to the court below for fresh disposal.

**Sd/-
C.K.ABDUL REHIM, JUDGE.**

**Sd/
K. RAMAKRISHNAN, JUDGE.**

/true copy/

P.S to Judge

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