

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

Mat.Appeal.No. 707 of 2015 ()

APPELLANT(S)/APPELLANT/PETITIONER:

ANIL KUMAR T.
S/O GANGADHARAN NAIR, ANITHALAYAM, PANDIYADU
PATHAPRIYAM P.O., MALAPPURAM DISTRICT.

BY ADVS.SRI.BABU S. NAIR
SRI.R.RANJITH (K/489/2011)

RESPONDENT(S)/RESPONDENT/RESPONDENT:

REEJA, D/O.NARAYANAN NAIR
SOORYA, KARAPURATH HOSUE, KOTTAKKAL
KAVATHIKALAM P.O., MALAPPURAM DISTRICT, PIN:676503.

BY ADV. REEJA K. (PARTY-IN-PERSON)

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 29-
09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.K.Abdul Rehim & Mary Joseph, JJ.

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Mat.Appeal No.707 of 2015

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Dated this the 29th day of September, 2015.

JUDGMENT

Mary Joseph, J.

1. Appellant herein is the petitioner in I.A No.1558 of 2014 in O.P No.338 of 2012. He is approaching this court seeking to set aside Annexure A order dated 25.3.2015 of the Family Court, Malappuram in I.A No.1558 of 2014 on the reason of it being unjustified, illegal and improper. The facts leading to the filing of this Mat. Appeal are as follows:
2. O.P No.338 of 2012 was filed by the appellant herein as petitioner before the Family Court, Malappuram seeking for a decree of dissolution of marriage with the respondent. On 20.11.2014, the case was posted before the Family Court for obtaining the report of the mediation conducted. Due to non-sitting on the particular date, the

case was adjourned to 28.11.2014. When the case was called on 28.11.2014 neither the counsel nor the appellant was present. The clerk attached to the office of the counsel for the appellant noted the posting date mistakenly as 28.12.2014 and that was the reason for non-representation. Therefore, O.P No.338 of 2012 was dismissed by the Family Court by Annexure A order. The clerk attached to the office of the counsel for the appellant came to know about the dismissal of O.P No.338 of 2012 due to non-appearance of the appellant, from a clerk attached to another office who was present before the court at the time when it was dismissed. I.A No.1558 of 2014 was filed on 12.12.2014 seeking to restore O.P No.338 of 2012, but it was dismissed by the Family Court on the ground that proper reasons are not shown. The said order is assailed in this Mat. Appeal.

3. When the Mat. Appeal came up for admission, notice was ordered to the respondent. On receipt of the notice, the respondent appeared in person.

4. Sri.Ranjith.R, learned counsel appearing for the appellant and the respondent who appeared in person were heard on the matter. The impugned order of Family Court, Malappuram which led to the filing of this appeal by the appellant was also perused.
5. According to the learned Family Court Judge, O.P.No.338 of 2012 was restored to file on an earlier occasion on 30.07.2010 despite the petitioner's absence before him without cogent reasons with a half hearted mind. It was again on 28.11.2014, the petitioner did not turn up and therefore it was dismissed by the court by the impugned order.
6. The reasons stated by the counsel for the appellant was that the hearing date was mistakenly noted by the clerk of his counsel as 28.12.2014. The learned counsel for the respondent refuted the said averment stating that 28.12.2014 being a public holiday, there was no possibility for such a mistake to be happened. Moreover, the petitioner has approached the court on an earlier occasion with the same prayer to restore the original petition dismissed for default and

it was allowed. Citing the instances as aforesaid, the learned counsel for the respondent has argued that the circumstances pointed out by the petitioner glaringly indicate that the petitioner remained absent wilfully and with oblique motives. Accordingly, it was urged by the counsel for the respondent before the Family Court that the petition seeking restoration of the original petition is only liable to be dismissed.

7. Learned Judge of the Family Court found merit in the submissions made by the respondent and lack of *bona fides* in the averments of the petitioner and accordingly dismissed the petition. The learned Judge, Family Court, while passing the impugned order, has observed that, even prior to the dismissal of the application for non-appearance on 28.11.2014 there were previous instances wherein the application seeking restoration was allowed after imposing heavy terms. According to the Family Court Judge, the prayer of the petitioner seeking adjournment made before the Family Court on 30.7.2010 was even allowed by the court with half-hearted mind.

The court observed that, if the petitioner's claim that his clerk has mistakenly noted the posting date as 28.12.2014 was *bona fide*, the interlocutory application would not have been filed prior to the date. If the situation was as stated by the petitioner, there was no chance for him to have come across with the hearing date as 28.11.2014 prior to 28.12.2014.

8. It is borne out from the averments of the petitioner that the case was posted for report of the mediation on 28.11.2014. But it has been observed by the Family Court Judge in the impugned order that the mediation report was obtained as early as on 13.10.2014, i.e., prior to 28.11.2014. On the very reason itself the averment of the petitioner is unsustainable. Had it been a posting for obtaining the report of mediation as submitted by the petitioner, the court would not have seen the absence of the petitioner on the day as a ground for dismissing the petition.
9. It is evident from the impugned order that several previous instances were cited in the impugned order wherein the Family Court had

restored the original petition after dismissal of the same for non-appearance. It seems from the circumstances enumerated in the order that the petitioner was a contumacious litigant and he has been keeping away from prosecuting the case wilfully. However, it is the general rule that the cases should be dealt with on merits rather than dismissing it for default. In the said circumstances, in the interest of justice, this Court feels it appropriate that one more opportunity be provided to the petitioner to prosecute the original petition, O.P.No.338 of 2012 on merits. But, in view of the previous instances of laches on the part of the petitioner, this Court is particular to grant the relief only on terms of heavy costs.

In the result,

- i) The Mat.Appeal is allowed.
- ii) The order in I.A.No.1558 of 2014 is set aside.
- iii) O.P.No.338 of 2012 is restored back to the file of the Family Court, Malappuram on the

petitioner depositing a cost of Rs.10,000/- (ten thousand only) to the respondent directly and filing a memo to that effect before the Family Court, on or before 20.11.2015. The parties are directed to appear before the Family Court on 20.11.2015.

C.K.Abdul Rehim, Judge.

Mary Joseph, Judge.

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