

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

Mat.Appeal.No. 1082 of 2015 ()

**(AGAINST THE ORDER DATED 29-10-2014 IN IA No.241/2014 & 242/2014 IN
OP No.746/2009 OF FAMILY COURT, PALAKKAD)**

APPELLANT/PETITIONER/RESPONDENT:

**SAJITH
S/O. MURUKAN, MANGOTTUKULAM VEEDU, PATTANCHERY
THATHAMANGALAM, CHITTUR, PALAKKAD-678 001.**

BY ADV. SRI.NIRMAL. S

RESPONDENT/RESPONDENT/PETITIONER:

**SATHI
D/O. RAMACHANDRAN, CHILLIKKAL POOVAPPULLY VEEDU,
KONGAD, PALAKKAD-678 001.**

**BY ADVS. SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P**

**THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 04-12-
2015 ALONG WITH OPFC No.542/2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

AMG

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE-A1-	TRUE COPY OF THE OP 746/2009 FILED BEFORE THE FAMILY COURT OF PALAKKAD DATED 30-09-2009.
ANNEXURE-A2-	TRUE COPY OF THE COUNTER STATEMENT DATED 19-02-2011
ANNEXURE-A3-	TRUE COPY OF THE COMMON JUDGMENT DATED 26-04-2012 IN OP No.746/2009 & OP No.766/2009
ANNEXURE-A4-	TRUE COPY OF THE IA No.241/2014 DATED 20-02-2014.
ANNEXURE-A5-	TRUE COPY OF THE IA No.242/2014 DATED 20-02-2014.
ANNEXURE-A6-	TRUE COPY OF THE AUCTION NOTICE IN EP 13/2013 IN OP 746/2009.
ANNEXURE-A7-	TRUE COPY OF THE AUCTION NOTICE IN EA 52/2015 IN EP 13/2013 IN OP 746/2009.

RESPONDENT' EXHIBITS

NIL

True copy

P.A. To Judge

AMG

**C.K. ABDUL REHIM, J.
&
MARY JOSEPH, J.**

**Mat. Appeal No. 1082 OF 2015
&
O.P. (FC) No. 542 OF 2015**

DATED THIS THE 4th DAY OF DECEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

Mat. Appeal No.1082/2015 is filed against the order of the Family Court, Palakkad in IA Nos.241/2014 & 242/2014 in OP No.746/2009, dated 29-10-2014. OP No.746/2009 was filed by the respondent herein before the Family Court seeking return of gold ornaments. The appellant who is respondent before the court below entered appearance and filed written statement. Subsequently the Family Court allowed joint trial of OP No.746/2009 along with OP No.766/2009, which is another case instituted by the respondent herein seeking for dissolution of the marriage. Evidence was let in by treating OP No.766/2009 as the leading case. The respondent herein was examined before the court below as PW1. Documents were marked as Ext.A1 to A3. But the appellant herein failed to cross-examine the

respondent, despite adjournment granted for the said purpose on condition of payment of cost. Hence the court below closed the evidence and proceed further to pronounced the judgment on taking into consideration of the pleadings and evidence, and also taking note of the contentions in the written statement. The original petition was decreed on 26-04-2012. Thereafter the appellant herein filed IA No.242/2014 under Order IX Rule 13 of Code of Civil Procedure to set aside the ex-parte decree, along with IA No.241/2014 seeking for condonation of delay of 365 days occurred in filing the said application. The court below had dismissed IA No.241/2014 through a cryptic order stating that, "since decree is executed, this petition is not maintainable so it is dismissed". Consequently IA No.242/2014 was also dismissed stating that, "since IA No.241/2014 dismissed, this petition is also dismissed". It is aggrieved by the above said order, this appeal is filed.

2. OP (FC) No.542/2015 is filed seeking to set aside Ext.P7 order passed by the Family Court in EA No.52/2015 in EP No.13/2013 in OP No.746/2009. E.A. No.97/2015 is

filed seeking stay of the entire proceedings in the execution petition for enabling the petitioner to obtain stay in Mat. Appeal No.1082/2015. In the affidavit filed in support of the said application it was mentioned that an appeal against the ex-parte decree passed in OP No.746/2009 is filed before this court, along with an application to condone delay in filing appeal. It is stated that the petitioner is expected to get favourable orders in the said appeal and in the meanwhile if the execution is proceeded it will cause irreparable injuries, hardship and loss. Hence it is requested to stay the entire proceedings in the execution petition for a reasonable time for enabling the petitioner to obtain interim order of stay from this court in the appeal.

3. When the E.A. No.97/2015 came up for consideration on 29-10-2015, the Family Court passed the following order; "No stay so far. Heard. Petition cannot be allowed, hence dismissed". According to the petitioner the court below had dismissed the interim application in the execution petition without proper appreciation of the factual circumstances prevailing.

4. When OP (FC) No.542/2015 came up for consideration on 17-11-2015 this court passed an interim order staying further steps in EP No.13/2013 till 02-12-2015, subject to condition of the petitioner making deposit of a sum of Rs.5,00,000/- before the Family Court on or before 28-11-2015. Learned counsel appearing for the petitioner had produced copy of the receipt evidencing deposit of the said amount before the court below on 25-11-2015.

5. Heard; counsel appearing on both side. It is contended on behalf of the appellant/petitioner that the original petition was allowed by the Family Court without affording adequate opportunity to the appellant to contest the case on merits. It is also contended that IA Nos.241/2014 & 242/2014 were dismissed without appreciation of the relevant issues involved. According to the appellant, eventhough he was not declared ex-parte in the judgment in OP No.746/2009, the application filed under Order IX Rule 13 is maintainable. It is also contended that the application for condonation of delay filed along with

the said petition was not also properly considered. Per contra learned counsel for the respondent contended that the appellant was not entitled to file an application to set aside the ex-parte decree, because he was not declared ex-parte in the original petition. The remedy which could have been available to the appellant was only to challenge the decree in appeal on merits, is the contention. Further it is contended that, the applications, IA Nos.241/2014 & 242/2014 were filed only at a highly belated stage when the execution steps were proceeded and when the property attached were sold. It is also contended that, at the stage when I.A No.242/2014 was considered and dismissed by the court below, the execution petition filed before that court stood closed because the decree stood executed by that time. Hence it is contended that the dismissal of IA Nos.241/2014 & 242/2014 was proper and justified. However, this court is of the considered opinion that the rival issues raised before this court need not be considered for the purpose of deciding this appeal. Evidently the interim application filed as IA No.241/2014 was dismissed

stating that, "the decree is executed". But, pendency of an execution application to execute the decree cannot be taken as an impediment to consider an application to set aside the ex-parte decree or to consider an application for condoning the delay in filing such a petition. The court below had dismissed IA No.242/2014 also, merely observing that IA No.241/2014 stands dismissed. We are of the opinion that those orders cannot be sustained legally since it lacks proper application of mind and consideration of the relevant aspects. Hence we are inclined to allow the appeal and to set aside orders impugned. However we are intending to leave the parties open with their rights to take all relevant contentions before the Family Court.

6. Hence Mat. Appeal No.1082/2015 is hereby allowed and the impugned orders passed by the Family Court in IA Nos.241/2014 & 242/2014 in OP No.746/2009, dated 29-10-2014 is hereby set aside. The Family Court is directed to pass fresh orders on both the above interim applications, after affording proper opportunity to both sides to advance their contentions. Considering the fact that

the decree was passed long back and it is being executed, the Family Court is directed to pass fresh orders at the earliest possible, at any rate, within a period of one month from the date of receipt of a copy of this judgment.

7. In OP (FC) No.542/2015 the challenge is against Ext.P7 order passed in EA No.97/2015. It is evident that execution petition was proceeded and the sale of immovable property was already effected. Contention of the respondent is that the decree stands already executed and nothing remains to be executed, especially because the delivery of the property was already effected. On the other hand, learned counsel for the petitioner contended that the court below has not recorded the delivery of possession and the execution petition has not been closed. Whatever that be, in view of disposal of Mat. Appeal No.1082/2015 by setting aside the orders passed in IA Nos.241/2014 & 242/2014, it is to be found that the Family Court is now obliged to consider the question regarding setting aside the decree which is being executed. Further, this court takes note of the fact that the petitioner had deposited a sum of

Rs.5,00,000/- pursuant to interim orders passed by this court. Hence we are of the opinion that, in order to secure interest of justice it is necessary to refrain the execution court from proceeding further with any steps, till the Family Court takes a fresh decision on I.A. Nos.241/2014 & 242/2014.

8. Hence the OP (FC) No.542/2015 is hereby disposed of by directing the Family Court to keep in abeyance all further steps in EP No.13/2013 in OP No.746/2009, till the Family Court disposes IA Nos.241/2014 & 242/2014.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

AMG

True copy

P.A. to Judge