

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 30TH DAY OF NOVEMBER 2015/9TH AGRAHAYANA, 1937

Mat.Appeal.No. 646 of 2014 ()

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(ARISING FROM ORDER DATED 25-04-2014 IN I.A. No.2010/2012 IN
OP 947/2010 of FAMILY COURT, KOTTARAKKARA)**

APPELLANT/PETITIONER:

**ANIL S. PILLAI
S/O. LATE SREEDHARAN NAIR,
RESIDING AT ASOK BHAVAN
VENNIKULAM P.O., PARAMATTOM VILLAGE,
MALLAPPALLY TALUK
PATHANAMTHITTA DISTRICT.**

BY ADV. SRI.A.K.HARIDAS

RESPONDENTS/RESPONDENTS:

- 1. SUDHA S.
D/O. BHASKARAN NAIR,
VRINDAVAN HOUSE, PATHIRIKKAL P.O.
PATHIRIKKAL VILLAGE, PATHANAPURAM TALUK,
KOLLAM-689 695.**
- 2. C.RAJAGOPAL,
PANANGATTU HOUSE, POOVATHOOR, PULLAD
PATHANAMTHITTA TALUK, PIN-689 548.**

R1 BY ADV. SRI.R.GIREESH VARMA

**THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 30-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMG

**C.K. ABDUL REHIM, J.
&
K. RAMAKRISHNAN, J.**

Mat. Appeal No. 646 OF 2014

DATED THIS THE 30th DAY OF NOVEMBER, 2015

J U D G M E N T

K. Ramakrishnan, J:

Petitioner in I.A.2010/2012 in OP 947/2010 on the file of Family Court, Kottarakkara is the appellant herein. The appellant herein filed OP 947/2010 on the file of Family Court, Kottarakkara for dissolution of marriage with the 1st counter petitioner on the ground that she is living in adultery with 2nd counter petitioner. The case was posted for evidence on 29-10-2012. Since he was undergoing treatment at MGM Muthoot Medical Centre, Kozhencherry from 25-10-2012 till 05-11-2012, he could not appear and conduct the case. The Family Court dismissed the original petition with Rs.5,000/- cost to the 2nd counter petitioner. The appellant filed I.A. 2010/2012 for restoration of the original petition dismissed for default and also to review the order directing payment of cost to the 2nd respondent under

Order IX Rule 9 of Code of Civil Procedure stating that since he was undergoing treatment as in-patient he could not attend and he was prevented by sufficient cause for his non-appearance. The 1st respondent appeared and filed counter stating that inspite of opportunities given, he did not appear. So the Family Court was constrained to dismiss the petition for default. They denied the allegation of in-patient treatment as claimed by the petitioner in the petition and prayed for dismissal of application. The court below, after considering the contentions of both parties, dismissed the application. Aggrieved by the same, the present appeal has been preferred by the appellant/petitioner before the court below.

2. Heard.

3. Learned counsel for the appellant submitted that he had produced documents namely the in-patient bills issued by the hospital authorities to show that he was undergoing treatment. The reason stated by the court below

is not sufficient to dismiss the application and he prayed for allowing the application.

4. It is an admitted fact that the appellant herein filed the application for dissolution of marriage between himself and the 1st respondent on the ground of adultery with 2nd respondent. It is also an admitted fact that on 29-10-2012, when the case was posted for evidence, the appellant did not appear and so the court below dismissed the petition for default with cost of Rs.5,000/- to the 2nd counter petitioner. Appellant filed IA 2010/2012 for restoration of that original petition dismissed for default stating that he was undergoing in-patient treatment from 25-10-2012 to 05-11-2012 and that was reason why he could not appear and he had produced treatment certificate issued from MGM Muthoot Medical Centre, Kozhencherry for that purpose. The court below found that though the certificate was signed by Dr.Priya Lisa Babu, but the seal used was one of Dr. Samual Joseph. Since the 1st respondent

had disputed the genuineness of the certificate the Doctor was not examined, the court below did not rely on that document and dismissed the application. It may be mentioned here that it is settled law that court must be liberal in considering the application for restoration of the suit or petition dismissed for default and also the applications to set aside the ex-parte decree. If some reason has been given by the parties for their non-appearance, then the court can take that as sufficient ground for allowing application so as to give an opportunity to the parties to meet their case on merits. Only if the court is satisfied that the application itself was filed without any bonafides and only to protract the proceedings, then only the court can go to the extent of dismissing the application denying opportunity to parties to meet the case on merit. Even in cases where the court is not fully satisfied with the reasons stated, the court can allow the application for setting aside the ex-parte decree or restoration of the

petition dismissed for default on payment of sufficient cost to the other side to compensate the inconvenience caused on account of some laches on the part of the appellant in not prosecuting the case with due diligence. Further the appellant has now produced some documents before this court which show that he was undergoing in-patient treatment from 25-10-2012 till 05-11-2012 due to enteric fever. So it cannot be said that there was no reasons stated by the appellant for non-appearance. So considering the circumstances, we feel that the court below instead of dismissing the application should have exercised discretion in favour of the appellant by awarding reasonable cost to the respondents as compensation for the inconvenience caused to them on account of the laches on the part of appellant in not prosecuting the case diligently and allowed the application. In view of overall circumstances mentioned above, we feel that this is a fit case where opportunity has to be given to the petitioner to meet the case on merit, for

that purpose the petition ought to have been allowed. But at the same time it should be allowed on payment of reasonable cost as compensation for the inconvenience caused to the other side. So we feel the order passed by the court has to be set aside and the application has to be allowed on terms. So the appeal is allowed. The order passed by the court below is set aside and the application filed by the appellant to restore the petition dismissed for default is allowed on condition of payment of cost of Rs.2,500/- each to the respondents within a period of 2 weeks from today. If the appellant pays the amount within 2 weeks and produces the proof of such payment, before that court then the court below is directed to restore the petition dismissed for default and dispose of the case after giving opportunity to both parties to adduce evidence afresh in accordance with law as expeditiously as possible, at any rate, within a period of 3 months from the date of restoration of the petition as directed by this court. If the

amount is not paid as directed, then the order passed by court below will be revived.

With the above directions and observations this appeal is allowed and disposed of accordingly.

Office is directed to communicate this judgment to the court below, at the earliest.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

K. RAMAKRISHNAN, JUDGE.

AMG