

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 7TH DAY OF AUGUST 2015/16TH SRAVANA, 1937

Mat.Appeal.No. 740 of 2014 ()

(IA.NO.279/2014 IN OP.NO.431/2009 OF THE FAMILY COURT,MUVATTUPUZHA

APPELLANT(S)/RESPONDENT IN IA.279/2014 IN OP.431/2009.:

MARY, AGED 52 YEARS
D/O.LATE SRI.P.L.THOMAS
RESIDING AT VELLAKAKUDIYIL HOUSE, KADALIKADU P.O.
MANJALLOOR VILLAGE, MUVATTUPUZHA TALUK
ERNAKULAM DISTRICT.

BY ADVS.SRI.C.S.DIAS
SRI.N.K.SUBRAMANIAN

RESPONDENT(S)/PETITIONER IN IA.279/2014 IN OP NO.431/2009.:

NOBI PAUL,, AGED 51 YEARS
S/O.PAILY, WAS RESIDING AT VELLAKAKUDIYIL HOUSE
KADALIKADU P.O., MANJALLOOR VILLAGE
MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT
AND PRESENTLY RESIDING AT 4100 VISTA RD # 106
PASADENA, TEXAS 77504, UNITED STATES OF AMERICA.

R-R BY ADV. SMT.K.S.SANTHI
R-R BY ADV. SMT.LATHA SUSAN CHERIAN
SRI.GEORGE CHERIAN (SENIOR)

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 07-08-
2015, ALONG WITH MA. 773/2014, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

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

Mat. Appeal Nos.740 & 773 of 2014

Dated this the 7th day of August, 2015

JUDGMENT

Abdul Rehim,J.

MA.No.740/2014 is filed challenging an order of the Family Court, Muvattupuzha in IA.No.279/2014 in OP.No.431/2009, whereas MA. No.773/2014 is filed challenging another order of the same Family Court in IA.No.278/2014 which is passed in the same OP. Appellant in both these cases is the respondent in OP.No.431/2009. The respondent is her former husband, who had instituted OP.No.431/2009.

2. History of the case is that, the appellant filed OP.1778/2009 before the Family Court seeking dissolution of the marriage. The respondent/husband filed OP.431/2009 seeking declaration of exclusive right over the plaint schedule properties. Both the cases were posted together for recording evidence before the Family Court. Meanwhile the respondent failed to prosecute his case and the counsel appearing for him had

submitted no instructions. Accordingly on 20.4.2010 the Family Court had dismissed OP.No.431/2009 for default. Consequently OP.No.1778/2009 filed by the appellant herein was allowed and the marriage was declared as dissolved. The respondent herein filed IA.No.279/2014 seeking restoration of OP.No.431/2009 which was dismissed for default, along with IA. No.278/2014 seeking condonation of delay of 1256 days in filing the said application. The Family Court allowed IA.No.278/2014 and condoned the delay of 1256 days in filing the application for restoration, subject to awarding of cost of Rs.5000/-. On the basis of condonation of delay allowed, restoration of OP.No.431/2009 was ordered in IA.No.279/2014. It is aggrieved by the orders passed in both the above said interim applications these appeals are filed.

3. The appellant raised vehement contentions that the Family Court had totally failed in considering her objections while condoning the delay. It is pointed out that the only reason mentioned in the affidavit filed in support of the delay condonation petition is that the respondent herein was completely upset because the appellant had filed a petition

seeking divorce and therefore he went to USA on 6.4.2009. It is stated that under such circumstances he had failed to instruct his counsel. But it is contended that the respondent herein had not stated any proper explanation as to why he had waited for more than 3 years to seek restoration of OP. 431/2009, despite having knowledge about dismissal of the case for default and knowledge about the decree of divorce granted by the Family Court. It was pointed out by the appellant before the Family Court that the restoration application was filed only as an after thought when the appellant had instituted another case OP.332/2013 praying for partition of the property involved in OP.431/2009. It is further contended that, the Family Court had failed to take note of the contentions raised by the appellant that the affidavit filed in support of the condonation application was not properly executed and attested because the respondent was residing abroad at the relevant time. It is contended that the affidavits were not attested in accordance with the power conferred on authorities of the Consulate, in accordance with the Diplomatic and Consular Officers (Oaths and Fees) Act 1948.

4. Heard counsel appearing for the respondent also. We

take note of the fact that there occurred inordinate delay in filing the application seeking restoration of the OP. No.431/2009. It is also evident that there is no reasonable cause adduced before the Family Court to explain the inordinate delay. The respondent has not put forth any valid reason for not making any enquiries with his counsel regarding the fate of the cases for quite a long period. However, we do not find any reason to hold that the petitions were not technically maintainable because of the alleged defect in execution and attestation of the affidavit. The statutory provision pointed out by the appellant only confers power on the diplomatic or consular authorities to attest affidavit and other documents. It also provides that documents so attested can be approved without examination of that authorities. But that does not prevent some other authorities to authenticate the affidavit, which is acceptable under law.

5. We take note of the fact that, relief sought for in OP.No.431/2009 is with respect to declaration of exclusive ownership of the respondent in the petition schedule properties. It is now evident that another OP filed by the appellant, as OP.No.332/2013, seeking partition of the very same property is

pending before the Family Court. Therefore we are of the opinion that the relief sought for in both these cases has close co-relation with respect to ownership or title over the same property. Considering the larger interest that, if the respondent is denied of an opportunity to contest the case based on claim for declaration of title, it will have an impact on the case instituted by the appellant. On a larger principle we are cautioned that courts should allow causes to be decided on merits, as far as possible, rather than dismissing on technicalities. Hence we are not inclined to have interference with respect to the orders impugned. However, we are convinced that there occurred laches and negligence on the part of the respondent and inordinate delay was caused in prosecuting the matter. Therefore we are of the opinion that the cost awarded by the Family Court while condoning the delay need to be enhanced, with a view to adequately compensate the inconveniences caused to the appellant.

6. Under the above mentioned circumstances the above appeals are hereby disposed of subject to modification of the impugned orders to the extent mentioned hereinabove.

IA.No.278/2014 and IA.No.279/2014 in OP.No.431/2009 on the files of the Family Court, Muvattupuzha will stand allowed subject to the respondent herein paying a cost of Rs.15,000/- including the amount of Rs.5000/- already awarded by the Family Court. If the petitioner pays the balance amount of Rs.10000/- within a period of one month from today, the Family Court will restore OP.No.431/2009 on its files.

7. It is submitted by learned counsel appearing for the respondent that he has already filed an application seeking joint trial of OP.No.431/2009 and OP.No.332/2013. The Family Court will consider such application and shall take all earnest endeavour to dispose of both the cases at the earliest possible, at any rate within a period of 4 months from the date of receipt of a copy of this judgment.

C.K.ABDUL REHIM, JUDGE

K.RAMAKRISHNAN, JUDGE

Pmn/

