

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

&

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 4TH DAY OF FEBRUARY 2015/15TH MAGHA, 1936

Mat.Appeal.No. 944 of 2014

[AGAINST THE ORDER DTD.11.7.2013 OF THE FAMILY COURT, CHAVARA
IN O.P.NO.221/2013 (O.P.NO.180/2010 OF FAMILY COURT, KOLLAM)]

APPELLANT(S)/RESPONDENT:

ANZAR

S/O. IBRAHIM KUTTY, NEDUMTHODATHU VEEDU
MUKUNDAPURAM MURI, CHAVARA VILLAGE, KARUNAGAPALLY
KOLLAM DISTRICT.

BY ADVS.SRI.K.SIJU
SMT.BINDU GEORGE

RESPONDENT(S)/PETITIONER:

HASEENA,
D/O. IBRAHIMKUTTY, AGED 23 YEARS,
PUTHENPURAKKAL VEEDU,
PULIYOORVANCHI THEKKUM MURI, THODIYOOR VILLAGE
KARUNAGAPPALLY, KOLLAM -691 501.

BY ADV. SRI.SUBHASH CYRIAC (CAVEATOR)

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
04-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

(Mat.Appeal No.944 of 2014)

Appellant's Exhibit:

Annexure 1: Copy of common order passed by the Family Court, Chavara in I.A.Nos.725 of 2013 and 726 of 2013 in O.P.No.221 of 2013.

-true copy-

P.S.TO JUDGE.

V.K.MOHANAN & P.D.RAJAN, JJ.

Mat. Appeal No. 944 of 2014

Dated this the 4th day of February, 2015

J U D G M E N T

P.D.Rajan,J:

This appeal is preferred against the order in I.A.Nos.725/2013 and 726/2013 in O.P.No.221/2013 of the Family Court, Chavara. The appellant is the husband and first respondent in O.P.No.221/2013 of the above court, which was filed by the wife for recovery of 808 grams of gold and ₹9 lakhs towards patrimony and ₹92,650/- towards the value of house hold articles.

2. The appellant is working in the B.S.F. as Constable in the State of Gujarat. The above petition was posted for filing objections of the appellant in the year 2013. But, he could not appear in that court since he is working in Gujarat. When Family Court at Chavara was constituted, the case was transferred from Family Court, Kollam to Family Court, Chavara where the case was renumbered. On

11.7.2013, the case was disposed of by the court and he came to know about it only on 28.10.2013. In the circumstances, he filed the above I.A.Nos.725 & 726 of 2013 in the Family Court, Chavara where it was dismissed by the learned Judge. Hence, he has approached this Court with this appeal.

3. The learned counsel appearing for the appellant contended that there is a delay of 81 days in filing the above petition to set aside the ex parte order. For that, I.A.No.726 of 2013 was filed before the Family Court, Chavara. The appellant contended that he has sufficient cause for his non-appearance, since after transferring his case from Family Court, Kollam to Family Court, Chavara, there is no notice about the appearance date. Therefore, he could not appear on that date when the case was posted for filing objection. There is no wilful laches on his side. If his side is not properly heard, it will cause irreparable injury. Hence he prays to condone the delay.

4. The learned counsel appearing for the respondent strongly

resisted the contention and contended that when an ex parte order was passed on 11.7.2013, the petitioner was available in the station and he was not careful about the pendency of the case in the Family Court. Now the appellant is remarried and is residing with another lady. No amount was paid for maintenance to the respondent in this case. The reason stated for condoning the delay is not sufficient and he prays for dismissal of the application.

5. From the above averments put forward by both the counsel, we have perused their specific contention about the marriage, which was solemnised on 8.5.2006 at Rajadhani Auditorium, Edakkulangara as per the customary rites. In the wedlock, one female child was born to them on 1.12.2007. When difference of opinion arose, the respondent filed O.P.No.180/2010 in the Family Court, Kollam. Subsequently, the case was transferred to the Family Court, Chavara. The appellant knew about the disposal of the case only on 28.10.2013. When the case was transferred from Kollam to Chavara, specific

notification was issued at the premises of the Family Court, Chavara. That was also not noticed by the concerned counsel. The appellant contended that no counsel was appointed at Chavara. The counsel, who attended the case at Kollam, did not know about the present posting date at Chavara. Since the appellant is working at Gujarat, he could not know about the above posting date. It is admitted that he was employed in BSF and stationed at Kutch, Bhuj District of Gujarat and he will not get leave as and when he wishes. The explanation given by the appellant has some relevancy since sufficient cause was stated for his non-appearance on the date when the case was called upon for hearing. When sufficient cause is made out for his non-appearance, the appellant is entitled to get reasonable opportunity to submit his case in the trial court.

6. In the decision reported in **G.P.Srivastava v. R.K.Raizada** [(2000) 3 SCC 54, the Supreme Court has held in para 7 as follows:-

“7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any “sufficient cause” from appearing when the suit was called on for hearing. Unless “sufficient cause” is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The “sufficient cause” for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

7. Considering the above law settled by the Apex Court, we are of the view that sufficient cause has been shown by the appellant for

his non-appearance in the trial court. The delay was properly explained that can be condoned and the suit is restored to the original number provided that the appellant has to pay a sum of ₹15,000/- (Rupees Fifteen Thousand only) as cost to the opposite party within fifteen days. If the appellant fails to pay the cost within time as directed above, appeal shall stand dismissed with cost to the opposite party. The matter is remitted to the trial court for fresh consideration according to law. Both parties are directed to appear before the Family Court, Chavara on 27th February, 2015.

The Mat.Appeal is disposed of as above.

V.K.MOHANAN,
Judge

P.D.RAJAN,
Judge.

MBS/

Mat.Appeal No. 944 of 2014

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