

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 19TH DAY OF FEBRUARY 2015/30TH MAGHA, 1936

OP(C).No. 263 of 2015 (O)

**ORDER IN I.A. NO.1480/2014 IN A.S. NO.38/2005 OF SUB COURT, NEDUMANGAD.
COMMON JUDGMENT IN A.S. NO.38/2005, 39/2005 & 40/2005 OF SUB COURT,
NEDUMANGAD.**

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PETITIONER/APPELLANT IN A.S.NO.38/2005, A.S.NO.39/2005, A.S.NO.40/2005.:

**BALACHANDRAN NAIR,
S/O.KRISHNA PILLAI, T.C. 17/527, KOLLARAVILA VEEDU,
CHADIYARA, POOJAPPURA, SASTHAMANGALAM VILLAGE,
THIRUVANANTHAPURAM.**

BY ADV. SRI.S.SOMAN.

RESPONDENTS/RESPONDENTS IN A.S.NO.38/2005:

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- 1. SIMON, S/O.YESU VAIDYAN, ANIL COTTAGE,
KIZHAKKE BUNGLOW LANE,
THEKKUMKARA MURI, FROM ANIL COTTAGE,
MANCHA, NEDUMANGAD VILLAGE, PIN - 695 541.**
 - 2. LEELA SIMON, W/O.SIMON, ANIL COTTAGE,
KIZHAKKE BUNGLOW LANE, THEKKUMKARA MURI,
FROM ANIL COTTAGE, MANCHA, NEDUMANGAD VILLAGE,
PIN - 695 541.**

**R1 BY ADV. SRI.G.S. REGHUNATH.
R2 BY ADV. SRI.ANIL KUMAR M.SIVARAMAN.**

**THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 19-02-2015,
ALONG WITH OP(C). NO. 405 OF 2015, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:**

rs.

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P-1: PHOTOCOPY OF COMMON JUDGMENT IN A.S.NO.38/2005,
39/2005, 40/2005 DATED 03.09.2014 OF THE SUB JUDGE,
NEDUMANGAD.
- EXT.P-2: PHOTOCOPY OF THE DECREE IN A.S. 38/2005 DATED 03.09.2014
OF THE SUB JUDGE, NEDUMANGAD.
- EXT.P-3: PHOTOCOPY OF THE JUDGMENT IN A.S. 67/2002
DATED 24.09.2003 OF THE SUB JUDGE, NEDUMANGAD.
- EXT.P-4: PHOTOCOPY OF THE I.A.NO.1478/2014 DATED 19.11.2014 PETITION
TO RE-HEAR THE APPEAL FILED BY THE RESPONDENTS.
- EXT.P-5: PHOTOCOPY OF I.A..NO.1479/2014 DATED 19.11.2014 PETITION TO
CONDONE THE DELAY FILED BY THE RESPONDENT.
- EXT.P-6: PHOTOCOPY OF I.A.NO.1480/2014 DATED 19.11.2014 PETITION TO
SET ASIDE JUDGMENT FILED BY THE RESPONDENTS.
- EXT.P-7: PHOTOCOPY OF THE OBJECTION FILED AGAINST EXT.P5
PETITION BY THE PETITIONER.
- EXT.P-8: PHOTOCOPY OF OBJECTION FILED AGAINST EXT.P6 PETITION BY
THE PETITIONER.
- EXT.P-9: PHOTOCOPY OF OBJECTION FILED AGAINST EXT.P7 PETITION BY
THE PETITIONER.
- EXT.P-10: PHOTOCOPY OF ORDER DATED 15.12.2014 IN I.A.NO.1480/2014 IN
A.S. 38/2005.

RESPONDENT'S EXHIBITS:-

NIL.

//TRUE COPY//

P.A TO JUDGE

rs.

P.BHAVADASAN, J.

O.P.(C) Nos. 263 & 405 of 2015

Dated this the 19th day of February, 2015

J U D G M E N T

O.P.(C) No. 263 of 2015

Under challenge is Ext.P10 whereby the court below passed an order as follows:

“As pointed out by counter petitioner he is the most aggrieved person. Even then considering the fact that petitioner/respondent has not advanced their argument when appeal was finally posted for hearing. Hence it is only just and proper to give an opportunity to petitioner provided she shall redressing the grievances of Counter Petitioner/appellant by paying cost of Rs.3000/-. Pay cost and call on 18.-12-2014.”

2. The grievance of the petitioner is that the judgment was pronounced and after having pronounced the judgment, the court was not competent to re-open for hearing the case and allowing one of the parties to address argument with regard to the appeal in question. The

remedy, if at all any, available was to file an appeal by the aggrieved party or to file a proper petition to have the exparte decree set aside in accordance with the relevant provisions of the C.P.C.. Having not done so and having filed a petition under Order XLI Rule 19 which does not apply to the fact of the case at all and order being passed on the same, such an order cannot be sustained.

3. The learned counsel appearing for the petitioner also referred to the B Diary and pointed out that the matter was heard on several occasions and since the judgment was not ready, formal postings were made. It is not as if that the respondents before this Court were not heard. They were heard on earlier occasion so that the observation of the court below that the respondents were not heard is also not correct. At any rate, a petition under Order XLI Rule 19 cannot lie and order passed thereon cannot be sustained. It is therefore pointed out that the order is to be set aside.

4. Sri.G.S. Reghunath, the learned counsel appearing for the respondents pointed out that it is true that the petition seems to have been filed under Order XLI Rule 19 whereas it ought to have been filed under Order XLI Rule 21. However, the learned counsel read over the petition filed by the respondents before this Court which contains the ingredients necessary for seeking a relief of setting aside the exparte decree and re-hearing of the appeal on the ground that the petitioner before the court below was not heard. Merely because, a wrong provision of law is quoted, it does not mean that the substance of the petition cannot be looked into. The court below may have committed an error in saying that the petition is allowed for re-hearing. To that extent, the learned counsel fairly conceded that there may be some error in the judgment. But the learned counsel went on to point out that, that shall not deprive the respondents herein from urging their contention in the appeal that they have not been heard by the court below.

This would be evident from order of the court below itself which has observed that on the day on which the matter was posted for re-hearing, though the appellant was heard, the respondents were not represented by the counsel and they were not heard. Therefore, the statement made in the petition though one filed under Order XLI Rule 19 to the effect that the petitioner before the court below was not heard, is justified by the statement in the order of the court below itself.

5. The learned counsel then pointed out that in pursuance to the order in Ext.P10, matter has been re-heard and cost has been deposited before the court below. Nothing more remains to be resolved and this original petition is only to be dismissed.

6. O.P.(C) No. 405/2015 has been filed by the respondent in O.P.(C)No.263/2015 noting the error committed by the court below and directing the appeal to be re-heard on the ground that the petitioner was not heard.

It is stated in the petition that even though the petition was filed under Order XLI Rule 19, which is not applicable at all, the petition ought to have been filed under Order XLI Rule 21 and so also the learned counsel pointed out that the proper procedure would have been to set aside the exparte decree and then re-hear the appeal. The original petition has been filed to rectify the error committed by the lower court in that respect.

7. The learned counsel appearing for the petitioner in O.P.(C)No.263/2015 very vehemently contented that the appeal was heard long ago and both sides were heard by the court below. The subsequent postings were only formal postings after the case was posted for judgment. It is not as if that the respondent herein was not heard by the lower court. That would be evident from the entries in the B diary produced by the petitioner in O.P.(C)No. 263/2015. There was no justification in re-hearing the appeal and if at all any remedy was available, it was either a review or an appeal.

8. In support of their contention, the learned counsel appearing for the petitioner relied on the decision reported in **Arjun Singh v. Mohindra Kumar and others** [AIR 1964 SC 993] wherein it was held as follows:

“If the entirety of the “hearing” of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under O. XX R. 1, there is clearly no adjournment of “the hearing” of the suit, for, there is nothing more to be heard in the suit.”

On going through the above decision, it can be seen that that was a case relating to an application under Order IX Rule 7 and Order IX Rule 13 and it was in that context it was stated that once the matter is taken up for judgment, for all practical purposes, the hearing will be deemed to have been over.

9. It is true that in the case on hand, extract of the B Diary available before this Court shows that on 26.02.2014 the entry is “Heard both sides for judgment. Call on

07.03.2014". On 11.04.2014, the entry is "Re-opened for hearing. Call on 26.05.2014". On 26.05.2014, the entry is "Heard both sides for orders. Call on 05.06.2014". The entry on 05.06.2014 is "for judgment (Not ready) Call on 17.06.2014". Then there are four postings on different date the entries are "call on" etc.. On 07.08.2014, the entry is "Re-opened for hearing Call on 13.08.2014". The entry on 13.08.2014 is "Appellant represented for hearing Call on 26.08.2014". On 26.08.2014, the entry is "Heard the appellant. No representation for respondent. For judgment call on 29.08.2014". On 29.8.2014, the judgment was not ready and it was posted to 02.09.2014. On that day also, the judgment was not ready. So it was adjourned to 03.09.2014. On 03.09.2014, the appeal was allowed.

10. The respondent before this Court in support of his petition though shown as one under Order XLI Rule 19 has specifically stated the reason for his absence and the injury caused to him on account of not being heard.

11. It is true that on two occasions, the court below has stated that both sides were heard. But the entry that is relevant for the present purpose is the entry dated 07.08.2014 when it is recorded that case was re-opened for hearing and was posted on 13.08.2014. The subsequent posting shows that it is again posted to 26.08.2014. The entry on 26.08.2014 is of some significance and relevance. It reads that “Heard the appellant. No representation for the respondent” and the matter was taken up for judgment and the judgment was pronounced.

12. It is not a case where the appeal was taken for judgment and thereafter the judgment was pronounced after several postings. But on the other hand, it would appear that the court needed some clarifications on certain points and therefore matter was re-opened. That is what the entry dated 07.08.2014 suggests. If as a matter of fact, the judgment was not ready, nothing prevented the court from stating so and posting the case to another date. It need not

have re-opened the case for hearing. It is further fortified by the impugned order wherein also the learned judge points out that the case was reopened for seeking certain clarifications and on which day the appellant alone was present. Therefore principle laid down in the decision relied on by the appellant cannot apply to the facts of the present case. As already stated, it would appear that the court entertained certain doubts which needed clarification and for that purpose the appeal was re-opened.

13. One has to necessarily uphold the contention that a petition under Order XLI Rule 19 is not maintainable and the order of the court below to the extent that it simply says the appeal is posted for re-hearing, may not also be justifiable.

14. However, one has to necessarily notice the submission made by the learned counsel appearing for the respondent before this Court and petitioner in the O.P.(C) 405/2015 that subsequently the appeal has been heard

including the petitioner before the court below and the matter is posted for judgment.

15. Certainly, the contention that a petition under Order XLI Rule 19 is not maintainable is fully justifiable. The petition ought to have been filed under Order XLI Rule 21. However, as pointed out by the learned counsel for the respondent, the petition filed one under Order XLI Rule 19 contains all the ingredients necessary to attract Order XLI Rule 21 and if that be so, it could not be said that the petitioner has not made the necessary averments.

16. As already noticed, the court below was not justified in its approach while stating that the appeal will be re-heard and the petitioner before it will be given an opportunity of re-hearing. As rightly pointed out in O.P.(C) No.405/2015, the judgment ought to have been set aside and the matter re- opened for fresh hearing. To that extent, the petitioner in O.P.(C)No.405/2015 is justified in his submission.

17. Whatever that be, further discussion will be only of academic exercise now since the matter has been heard and taken up for judgment. Merely because, the court has committed an error, the parties need not suffer and the matter need not be sent back for that purposes for filing proper petitions and to undergo the exercise all over again.

18. In the light of subsequent events that has occurred, it is felt that no interference is called for with Ext.P10, impugned order in O.P.(C)No. 263/2015. The said petition is dismissed.

As far as O.P.(C)No.405/2015 is concerned, the act of the court below will be deemed to be one under Order XLI Rule 21 and the re-hearing done will be on the basis that the decree has been set aside and a fresh hearing has been ordered.

**P.BHAVADASAN
JUDGE**

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