

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 27TH DAY OF JULY 2015/5TH SRAVANA, 1937

OP (FC).No. 334 of 2015 (R)

PETITIONER

**JALEEL,
S/O.KUNJUMHAMMED,
VAIPADATH VEEDU, KAIPAMANGALAM VILLAGE,
DESOM, KODUNGALLUR TALUK.**

**BY ADVS.SRI.M.R.VENUGOPAL
SMT.DHANYA PASHOKAN**

RESPONDENT:

**RASALATH
D/O. MAJEED, ASRACKAVEETIL VEEDU,
EDASSERY DESOM, VADANAPPILLY, CHAVAKKAD.680 506.**

**BY ADVS. SRI.S.U.NAZAR
SRI.MANSOOR.B.H.**

**THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 27-07-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMG

APPENDIX

PETITIONER'S' EXHIBITS

- P1- TRUE COPY OF THE EXPARTE ORDER DATED 07-07-2012 PASSED IN O.P.NO.303/2011 OF THE FAMILY COURT, THRISSUR.
- P2- TRUE COPY OF I.A.NO.4120/2014 FILED BY THE PETITIONER DATED 29.09.2014 BEFORE THE FAMILY COURT, THRISSUR.
- P3- TRUE COPY OF I.A.NO.4121/2014 FILED BY THE PETITIONER DATED 29.09.2014 BEFORE THE FAMILY COURT, THRISSUR.
- P4- TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENT DATED 23.12.2014.
- P5- TRUE COPY OF THE RECEIPT DATED 14.08.2014 FILED BEFORE THE FAMILY COURT, THRISSUR.
- P6- TRUE COPY OF THE E.A.NO.259/2014 FILED IN E.P. NO.71/2013.
- P7- TRUE COPY OF THE ORDER DATED 20.12.2014 IN E.A.NO.259/2014 IN E.P.NO.71/2013 IN O.P.NO.303/2011.

RESPONDENT'S' EXHIBITS

NIL

True copy

P.A. To Judge

AMG

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

O.P (FC) No. 334 OF 2015

DATED THIS THE 27th DAY OF JULY, 2015

J U D G M E N T

K. Ramakrishnan, J:

The judgment debtor in EP 71/2013 in OP 303/2011 on the file of Family Court, Thrissur had filed this application challenging the order passed in EA 259/2014 under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioner and respondent are husband and wife and due to difference of opinion, now they are living separately. The respondent filed OP 303/2011 before the Family Court, Thrissur for return of 100 sovereigns of gold ornaments and patrimony of Rs.1,00,000/-. The original petition was decided exparte on 07-07-2012. Thereafter the respondent filed EP 71/2013 for execution of the order in OP 303/2011. According to the petitioner, he came to know about the exparte decree only when he came from Mumbai in the year 2014. In the

meantime the property was attached and it was sold in auction and it was purchased by the decree holder herself and the sale was confirmed in her favour and thereafter now posted for delivery of the property on the basis of application filed by the decree holder. Immediately on coming to know about the exparte decree, he filed IA 4120/2014 to set aside the exparte decree along with delay condonation application IA 4121/2014 and those applications are pending. When he came to know about the sale, he filed EA 259/2014 to set aside the sale under Order XXI Rule 90 of Code of Civil Procedure and by the impugned order, Ext.P7 the family court Judge dismissed the application, which is being challenged by the petitioner before this court.

3. Heard the counsel for the petitioner and respondent.

4. The counsel for the petitioner submitted that he had already filed application to set aside the exparte decree along with delay condonation application and while those

petitions are pending, it is not proper on the part of the family court to proceed with the execution proceedings without disposing the application to set aside the exparte decree filed by the petitioner. Further the court below should not have sold the entire property as it worth more than what is payable to the respondent as per the decree and if a portion is sold, the decree amount could have been satisfied. That aspect has not been considered by the court below.

5. On the other hand, the counsel for the respondent submitted that he was set exparte in the original proceedings and though notice was served in the execution proceedings, he did not appear and thereafter the property was sold in auction which was purchased by the decree hold herself and after the sale was confirmed in her favour, it was posted for delivery on the application made by the decree holder for that purpose. No grounds as required under Order XXI Rule 90 of Code of Civil Procedure has been made out in the application filed by the petitioner to

set aside the sale. So the court below was perfectly justified in dismissing the application.

6. It is an admitted fact that an exparte decree has been passed on 07-07-2012 in OP 303/2011 which was filed by the respondent herein against the petitioner for return of 100 sovereigns of gold ornaments or its value and Rs.1,00,000/- being the patrimony amount and the entire claim was allowed in favour of the respondent herein. It is also an admitted fact that the respondent filed EP 71/2013 for execution of the exparte decree passed and in that also notice was served on the petitioner and there was no appearance for the judgment debtor namely, the present petitioner and the court below had ordered attachment and sale of property and the property was sold in auction permitting the decree holder to participate in the auction and accordingly she had bid the property in the auction and the sale was confirmed in her favour. It is when the property was posted for delivery that the petitioner had moved the court below for setting aside the exparte decree

along with delay condonation application as I.A 4120/2014 & 4121/2014 and also filed EA 259/2014 for setting aside the sale under Order XXI Rule 90 of Code of Civil Procedure stating the above grounds.

7. On going through the order passed by the court below, it cannot be said that the court below had committed any illegality in passing the order as no grounds enumerated under Order XXI Rule 90 of Code of Civil Procedure has been made out. However, considering the fact that the application for setting aside the exparte decree is pending and if that application is allowed, then there is a possibility of the decree being reversed and the property has to be redelivered or the sale will have to be set aside, we feel that it is necessary in the interest of justice to keep the delivery in abeyance for a particular period on condition that the petitioner shall deposit Rs.75,000/- over and above the amount already deposited towards the decree amount in two monthly installments and directing the family court to dispose of I.A 4120/2014 & 4121/2014 in OP 303/2011 as

expeditiously as possible at any rate within 2 months from today will be sufficient to meet the ends of justice. So the further proceedings in EP 71/2013 in OP 303/2011 of Family Court, Thrissur is directed to be kept in abeyance for a period of 2 months on condition that the petitioner shall deposit Rs.75,000/- towards the decree amount in two equal monthly installments and the family court is directed to expedite disposal of IA 4120/2014 & 4121/2014 in OP 303/2011 within 2 months from the date of receipt of the judgment. Needless to say if the exparte decree is set aside, then automatically the sale effected by the court below and confirmed in favour of the respondent will also is liable to be set aside under Section 144 of the Code of Civil Procedure and the petitioner is entitled to get restitution as it was prior to the decree. Since the petitioner has got a grievance that he is not liable to pay any amount, the amount in deposit need not be disbursed to the decree holder till the disposal of the exparte set aside, petition filed by the petitioner as directed by this court. If the amount is

not paid within the time directed by this court, then the court below is at liberty to proceed with the EP 71/2013 in accordance with law and if ultimately later the exparte decree is set aside, then the petitioner will be entitled to get the benefit of Section 144 of the Code of Civil Procedure.

With the above directions and observations, this petition is disposed of.

Communicate this judgment to the court below immediately.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

K. RAMAKRISHNAN, JUDGE.

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True copy

P.A. to Judge