IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

THURSDAY, THE 10TH DAY OF APRIL 2025 / 20TH CHAITHRA, 1947

MAT.APPEAL NO. 960 OF 2017

AGAINST THE ORDER IN IA925/2015 & IA 924/2015 IN OP 1453/2011

DATED 11.05.2017 IN OP NO.1453 OF 2011 OF FAMILY COURT, KOTTAYAM

APPELLANT/PETITIONER:

JOHNY JOHN
S/O JOHN,
VALYAKAPPIL VEETTIL, KADANADU VILLAGE,MEENACHIL TALUK,
KOTTAYAM DISTRICT.

BY ADV SRI.DOMSON J.VATTAKUZHY

RESPONDENTS/RESPONDENTS:

1 JAINYMOL SASANKAN @ JAINYMOL K.JOSEPH,
D/O. JOSEPH ANTONY, KIZHAKKEL VEETTIL, POONJAR NADUBHAGOM VILLAGE, MEENACHIL TALUK, KOTTAYAM DISTRICT,NOW RESIDING AT 7334,ELIZABETH WAY, SAN ANTINIO TEXAS 78240, REPRESENTED BY POWER OF ATTORNEY HOLDER SONY JOSEPH,S/O. JOSEPH ANTONY,KIZHAKKEL VEETTIL, POONJAR NADUBHAGOM VILLAGE,MEENACHIL TALUK, KOTTAYAM DISTRICT.

2 SASANKAN @ SASANKAN J. VALIYAPARAMBIL
S/O. JAYACHANDRAN, VALIYAPARAMBIL HOUSE, VADAKKEKARA KARA,POONJAR NADUBHAGOM VILLAGE, MEENACHIL TALUK,KOTTAYAM DISTRICT, NOW RESIDING AT 5055,VAN APARTMENT, 114,SEHEELA DR SAN ANTANIO,TEXAS.

THIS MATRIMONIAL APPEAL HAVING COME UP FOR HEARING ON 10.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SATHISH NINAN &
SHOBA ANNAMMA EAPEN, JJ.
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Mat. Appeal No.960 of 2017
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Dated this the 10th day of April, 2025

J U D G M E N T

***Sathish Ninan, J*.**

The appeal is filed by the second respondent in OP 1453 of 2011 of the Family Court. He challenges the order refusing to set aside the exparte decree on condoning the delay.

2. O.P. 1453 of 2011 was filed by the first respondent in the appeal, against the second respondent and the appellant herein as respondents 1 and 2. The respondents in the appeal are husband and wife. For the sake of convenience the parties are hereinafter referred to as “the appellant”, “the husband” and “the wife”.

3. The wife filed the Original Petition seeking a declaration that she is the absolute owner of the property scheduled to the Original Petition. The appellant was set exparte on 24.09.2012. The husband

2025:KER:31347

also did not appear. The Family Court passed an exparte decree declaring the exclusive title of the wife over the property.

4. The appellant filed an application to set aside the exparte decree and to condone the delay of 946 days in seeking to set aside the exparte decree. It was contended that he was not served with any notice or summons in the case. He contended that he had obtained a decree against the husband in OS 94/2005, for return of the advance sale consideration based on an agreement for sale entered into with him in respect of the property. He holds a charged decree over one-half of the property in question. In the execution proceedings of that decree, the wife filed a claim petition, it was dismissed by the execution court. Challenging the same the wife filed an appeal before this Court as Ex.F.A. 24/2012. It was only when the wife produced a copy of the exparte judgment in the present Original Petition, in the Execution First Appeal on 13.02.2015 that he came

to know about the present exparte decree. Thereupon these applications were filed.

5. The wife filed a counter affidavit contending that, though the appellant was served with notice in the Original Petition he choose to remain exparte resulting in the exparte decree. It was contended that there are no sufficient reasons to condone the delay and to set aside the exparte decree.

6. The Family Court held that the appellant was served with notice and that he has failed to give satisfactory explanation for the delay in seeking to set aside the exparte decree. Accordingly the applications were dismissed.

7. We have heard the learned counsel on either side.

8. On hearing the learned counsel on either side and on perusing the records, the following facts emerge:-

9. In the year 2003 there was an agreement for sale in respect of the property in question between the appellant and the husband. Allegedly the agreement was entered into by the husband on behalf of the wife also since the property belonged jointly to them. In the year 2005, the appellant filed OS 94/2005 against the husband as defendant for return of the advance sale consideration of ₹ 3 lakhs paid under the agreement. On 24.03.2006, the suit was decreed ex parte allowing the appellant to realise ₹ 3 lakhs with interest thereon, charged over the share of the husband over the property. The appellant proceeded for execution of the decree by filing EP 129/2006. The property was sold in execution in the year 2011. The appellant/decree holder was the auction purchaser. He took symbolic delivery of the property.

10. The wife filed OS 10/2011 against the appellant as the first defendant and her husband as the second defendant seeking a declaration that she is the

2025:KER:31347

exclusive title holder of the entire property. The suit was rejected for non-payment of the balance court fee.

11. It appears that there was a divorce proceeding in between the husband and the wife at a District Court in Texas, USA, resulting in a divorce decree on 12.11.2010.

12. In the execution proceedings in EP 129/2006, the wife had filed a claim petition as EA 24/2011 under Order XXI Rule 58 of the Code of Civil Procedure. The claim petition was dismissed after taking evidence. Challenging the same the wife filed Execution First Appeal as Ex.FA 24/2012, before this Court. On 20.11.2017, based on a memo filed by the wife that the disputes have been settled, the appeal was dismissed as, not pressed.

13. In the meanwhile, the wife had filed the present Original Petition as OP 1453/2011 before the Family Court seeking a declaration that she is the absolute owner of the property in question. The husband

2025:KER:31347

was the first respondent and the appellant herein is the second respondent. Both the husband and the appellant were set exparte, and an exparte decree was passed on 24.09.2012. The present applications were filed on 27.05.2015 seeking to set aside the exparte decree, on condoning the delay of 946 days. The reason for the delay is stated to be that he was unaware of the decree and that he came to know about it only when the judgment was produced before this Court in Execution First Appeal and the appeal was got dismissed as not pressed.

14. The wife alleges collusion between the husband and the appellant, while the appellant alleges collusion between the husband and wife.

15. The alleged agreement for sale, upon which the appellant filed OS 94/2005, was in the year 2003. Under the decree, charge is created over one-half share over the property. The EP of the year 2006 culminated in a sale only in the year 2011. The claim petition filed by the wife in the year 2011, was dismissed after taking

evidence. The suit filed by the wife as OS 10/2011 seeking declaration of her title over the entire property, was rejected for non-payment of the balance court fee. The exparte decree in the present Original Petition was produced by the wife in her appeal, Ex.FA 24/2012, before this Court, in the year 2015.

16. On 03.07.2012 ie. pending the present Original Petition, the husband executed a document styled as "Power of Attorney" in favour of the wife. Copy of such power of attorney is produced and marked in the Original Petition as Ext.A19. In the said power of attorney, referring to the property in question the husband has stated thus :-

> *".....Myself is the Respondent and Jainymole Sasnkan is the petitioner in the said case in the District Court 407th Judicial District, Bexar County, Texas USA, 78240 are joint owners of properties mentioned by Document No.234/1998 in Book No.I Volume No.614 pages 29-32 of Sub Registrar Office, Erattupetta, Kottayam, Kerala, India and properties mentioned in Document No.3896/1995 in Book No.1 Volume No.452 pages 389 to 391 Sub Registrar of Poonjar, Kottayam, Kerala, India.*
>
> *I am hereby authorizing and transferring all my rights to the above mentioned properties to Jainymole Sasankan 7334 Elizabeth Way, San Antonio. Texas, USA, 78240 without any considerations."*

It is relevant to notice that, though the divorce decree is stated to be on 12.11.2010, the said “power of attorney” is dated 03.07.2012. Therein it is affirmed that the husband and wife are the joint owners of the property. Under the document, the husband purports to convey all his rights in the property to the wife, without any consideration. The learned counsel for the wife would submit that such document was only in pursuance of the terms of the divorce decree.

17. Considering the entire facts as above, we are of the view that an opportunity is to be granted to the appellant to agitate his contentions in the Original Petition and to invite a judgment on the merits. The Family Court, while refusing to set aside the exparte decree has observed that the service of notice on the appellant is evidenced by his signature in the acknowledgment card and the appellant does not have a

case that the signature in the acknowledgment card is not that of his. The Court omitted to note that the very contention of the appellant was that he was not served with any notice in the Original Petition. A reading of the deposition of the appellant as PW1 reveals that the signature in the acknowledgment card was not put by him. The appellant would not stand to gain by remaining exparte in the Original Petition wherein the wife claimed absolute title over the property, when the appellant had already purchased one-half right over the property in a decree and the execution proceedings against the husband. Incidentally it is to be noticed that the husband remained ex parte in the present Original Petition. Suffice to notice that we find sufficient reasons to grant the appellant an opportunity to contest the Original Petition and seek for a judgment on the merits.

18. The present appeal was dismissed by this Court on 26.08.2019, for failure on the part of the appellant to take steps within the prescribed time. The appellant has sought for restoration of the appeal with a delay of 1790 days. MJC 135/2024 was filed on 19.08.2024 seeking restoration of the appeal. In the meanwhile, the appellant had filed OS 6/2021 for partition and separate possession of his one half share over the property, he being the owner of the one-half share under execution sale in E.P. 129/2006 in OS 94/2005. Therein, though an ex parte decree was passed subsequently the wife sought to set aside the ex parte decree. Thereupon on enquiries he realised that the appeal was dismissed for default. From out of the extent of delay from 15.02.2020 to 28.02.2022 is liable to be excluded due to the Covid-19 pandemic and hence the actual delay involved is (1790-715=1075) 1075 days.

2025:KER:31347

19. Considering the entire facts as noticed supra, we are of the opinion that the appeal is liable to be restored and disposed of on the merits. The inconvenience caused to the first respondent, consequent on the delay in seeking for restoration of the appeal and also in seeking to set aside the ex parte decree, can be compensated by way of costs. We are of the opinion that, costs of ₹ 30,000/- could be awarded.

20. In the result, the Appeal is disposed of as hereunder:

The appeal will stand allowed and the exparte decree set aside on condition that the appellant pays an amount of ₹ 30,000/- as costs to the counsel appearing for the 1st respondent-wife, on or before 21.05.2025. The Family Court shall try and dispose of the Original Petition afresh, after affording opportunity to the parties to adduce evidence. The written statement/

2025:KER:31347

objections if any, of the appellant, shall be filed by him within 60 days from today. On the failure of the appellant to pay the costs as ordered, the appeal will stand dismissed, affirming the impugned order.

Sd/-
SATHISH NINAN
JUDGE

Sd/-
SHOBA ANNAMMA EAPEN
JUDGE

kns/-

//True Copy//

P.S. To Judge