
(2015) 04 KL CK 0137
In the High Court Of Kerala
Case No : FAO No. 89 of 2015

Narikodan Sathyavalli and Others

APPELLANT

Vs

Syndicate Bank, Maloor Branch

RESPONDENT

Date of Decision : 10-04-2015

Acts Referred:

Citation : AIR 2015 Ker 209

Hon'ble Judges : P.N. Ravindran, J;K.P. Jyothindranath, J

Bench : Division Bench

Advocate : Rekha C. Nair, R. Sudheer, P. Saju and R. Pratheesh, for the Appellant; R.S. Kalkura, SC, Advocates for the Respondent

Final Decision : Allowed

Judgement

P.N. Ravindran, J—The appellants are the defendants in O.S. No. 91 of 2011 on the file of the Court of the Principal Subordinate Judge of Thalassery. The sole respondent is the plaintiff therein. The suit instituted by the respondent bank is for realisation of the sum of Rs. 6,11,423/- with interest and costs. Upon receipt of summons, the appellants entered appearance and filed a written statement resisting the suit. Thereafter they were set ex parte on 7.3.2012 and an ex parte decree was passed on 7.3.2012. The appellants defendants thereupon filed I.A. No. 1455 of 2012 to set aside the ex parte decree. By order passed on 2.7.2013, I.A. No. 1455 of 2012 was allowed and the ex parte decree was set aside. The suit thereafter stood posted for trial on 3.12.2013. On that day it was adjourned to 4.12.2013. On 4.12.2013 since the defendants did not appear, they were set ex parte and an ex parte decree was passed on 7.12.2013 relying on the uncontested testimony tendered on behalf of respondent/plaintiff. Within the period of limitation prescribed for the purpose, the defendants filed I.A. No. 35 of 2014 to set aside the ex parte decree passed on 7.12.2013. In the affidavit filed in support of the application it was contended that the defendants could not appear on 3.12.2013 and 4.12.2013 for the reason that the first defendant was undergoing treatment for cancer at Malabar Cancer Centre, Thalassery, that the

second respondent was the bystander and that they were not in a position to be present in court on 3.12.2013 and 4.12.2013. Along with the application, the defendants also produced a treatment certificate dated 3.12.2013 issued by the Doctor who had attended to the first defendant, to the effect that the first defendant was under his treatment at Malabar Cancer Centre since 9.10.2009 and that she had undergone chemotherapy on 3.12.2013 in the hospital.

2. The respondent bank opposed the application by filing a counter affidavit inter alia contending that the defendants had been set ex parte on an earlier occasion and that the attempt of the defendants is to protract and delay the trial of the suit. The trial court considered the rival contentions and held, notwithstanding the treatment certificate, that as the first defendant alone had undergone treatment, the non-appearance of the second defendant cannot be condoned. The trial court also held that the defendants had been set ex parte on an earlier occasion. The court below however directed that the ex parte decree shall stand set aside in the event of the appellants depositing in the court below the sum of Rs. 2,00,000/- within three weeks. The defendants have aggrieved thereby filed this appeal.

3. We heard Sri. P. Saju, learned counsel appearing for the appellants and Sri. R.S. Kalkura, learned counsel appearing for respondent. We have also gone through the pleadings and the materials on record. The appellants are mother and daughter respectively. The treatment certificate referred to by the court below discloses that the first defendant is under treatment for breast cancer at Malabar Cancer Centre, Thalassery ever since 9-10-2009. The treatment certificate also shows that she had undergone chemotherapy on 3.12.2013, the day on which the suit stood posted for trial. In such circumstances it cannot be said that the second defendant, who is none other than the first defendant's daughter, should have given preference to the litigation and should have been present in court on 3.12.2013. The court below has apart from being insensitive to the predicament of the less fortunate among human beings also adopted a hyper technical view as regards the non-appearance of the second defendant on 3.12.2013. The court below has also placed reliance on the fact that the defendants had been set ex parte on an earlier occasion. In our opinion on the facts disclosed, the impugned order cannot be sustained.

4. The Apex Court has in G.P. Srivastava Vs. Shri R.K. Raizada and Others, AIR 2000 SC 1221 : (2000) 2 CTC 27 : (2000) 2 JT 569 : (2000) 125 PLR 544 : (2000) 2 SCALE 198 : (2000) 3 SCC 54 : (2000) 2 SCR 97 : (2000) 1 UJ 594 : (2000) AIRSCW 887 : (2000) 2 Supreme 104 held that 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. It was held that the sufficient cause for the purpose of Order IX, Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed, that if sufficient cause is made out for non-appearance of the defendant on the date

fixed for hearing when ex parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned. The Apex Court also held that 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.

5. In the light of the binding decision of the Apex Court, we are of the opinion that the court below ought not to have placed reliance on the fact that the defendants were set ex parte on an earlier occasion for the reason that the order setting them ex parte on 7.3.2012 was set aside by order passed on I.A. No. 1455 of 2012 after condoning the failure to appear earlier. The court below should not have in our opinion, in the absence of any material to show that the absence of the defendants on 3.12.2013 and 4.12.2013, was intentional or mala fide, held that as a condition for setting aside the ex parte decree, the defendants should be held liable to deposit the sum of Rs. 2,00,000/- towards the decree debt. As first defendant was undergoing treatment for breast cancer and she had undergone chemotherapy on 3.12.2013, the court below ought to have in our opinion set aside the ex parte decree on payment of reasonable amount as costs, instead of directing the appellants to deposit a substantial amount towards the decree debt. We are therefore of the opinion that the impugned order deserves to be set aside. We accordingly allow the appeal, set aside the order passed by the Court of the Principal Subordinate Judge of Thalassery on 15.12.2014 on I.A. No. 35 of 2014 in O.S. No. 91 of 2011 and direct that in the event of the appellants paying to the learned counsel appearing for the plaintiff in the court below the sum of Rs. 2,500/- towards costs on 20.5.2015 and filing a memo in the court below after such payment on 21.5.2015, I.A. No. 35 of 2014 shall stand allowed and the ex parte decree passed in the suit shall stand set aside. The parties shall appear in the court below on 21.5.2015 through counsel. It is clarified that if costs as ordered is not paid and a memo regarding payment of the costs is also not filed, the application shall stand dismissed. We also deem it appropriate to clarify that if the learned counsel appearing for the plaintiff in the court below does not accept the costs when it is tendered to him, it will be open to the appellants to deposit the amount in court on 20.5.2015 itself along with an affidavit explaining the circumstances in which such deposit is made. The court below shall having regard to the fact that the suit was instituted in the year 2011, try and dispose of the suit expeditiously and in any event within two months from the date on which the civil courts reopen after the summer vacation of 2015.