

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN
&
THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR
WEDNESDAY, THE 20TH DAY OF MARCH 2024 / 30TH PHALGUNA, 1945

OP (FC) NO. 417 OF 2023

AGAINST THE ORDER DATED 07.06.2023 IN E.A.13/2023 IN OP
NO.900 OF 2014 OF FAMILY COURT,ERNAKULAM

PETITIONER/PETITIONER:

DR. MINU SUSAN MATHEW
AGED 47 YEARS, D/O. A.C. MATHEW,
RESIDING AT G-126, PANAMPILLY NAGAR,
ERNAKULAM, PIN - 682036

BY ADVS.
SMT. SUMATHY DANDAPANI (SR.)
MILLU DANDAPANI
R.LEELA

RESPONDENT/RESPONDENT:

1 DR. GEORGE ABRAHAM
AGED 50 YEARS, S/O. ABRAHAM (LATE), 11B,
16/53,LUZ AVENUE, 1ST STREET, MYLAPORE,
CHENNAI, PIN - 600004

ADDL. R2 MOLLY ABRAHAM, AGED 68 YEARS,
W/O. (LATE) A.G.ABRAHAM, 16/53,
LUZ AVENUE, MILAPORE, CHENNAI - 600004.

ADDL.R3 PRIZE ABRAHAM,AGED 33 YEARS,
S/O. (LATE) A.G.ABRAHAM, 16/53, LUZ AVENUE,
MILAPORE, CHENNAI - 600 004.

[ADDL.R2 & R3 ARE IMPEADED AS PER ORDER DATED
31.10.2023 IN IA.1/2023 IN OP(FC)417/2023)

BY ADVS.
THOMAS T.VARGHESE
PHILIP T.VARGHESE
ACHU SUBHA ABRAHAM
V.T.LITHA
K.R.MONISHA
VARSHA JEEJO
JIJO PAUL

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION
ON 20.03.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J U D G M E N T

Dated this the 20th day of March, 2024

C. Pratheep Kumar, J.

The decree holder in E.P No.4 of 2023 on the file of Family Court Ernakulam filed this petition, aggrieved by Exhibit P8 order dismissing E.A. No.13 of 2023. The decree holder filed the above OP against her husband and in-laws for realisation of gold and patrimony. Previously, the above OP was decreed *ex-parte* as per judgment dated 18.3.2016 against respondents 1 to 3. Respondents 2 and 3 approached this Court by filing OP(FC) No.541 of 2018 praying for setting aside the *ex-parte* decree. As per judgment dated 25.1.2019, this Court set aside the *ex-parte* decree on condition that respondents 2 and 3 shall deposit a total sum of Rs.1.15 Crores before the Family Court within two months from the date of judgment in OP(FC). It was further observed by this Court that if such deposit is made, the Family Court shall permit the 1st respondent, namely the original petitioner to get release of 50% of such amount deposited, subject to final outcome of the original petition.

2. Accordingly, respondent 2 and 3 deposited a total sum of Rs.1.15 Crores before the Family Court and 50% of the same was released to the original petitioner. Thereafter, respondents 2 and 3 appeared before the Family Court, contested the OP and finally the OP was decreed by the Family Court as per Ext.P2 judgment dated 24.12.2022 against the 1st respondent alone. In short, the prayer against the respondents 2 and 3 was dismissed by the Family Court. The original petitioner has not filed any appeal against Ext.P2 judgment and decree of the Family Court and as such it became final. Thereafter the petitioner filed Exhibit P4 E.P for realising the balance amount due under the decree, which comes to more than Rs.2.1 Crores. In the above E.P, the decree holder filed Exhibit P5 application praying for releasing a sum of Rs.57,50,000/-, the remaining 50% of Rs.1.15 Crores deposited by the respondents 2 and 3 and remaining in the Court, to the decree holder towards part of the decree debt. Respondents 2 and 3 opposed the application contending that there is no decree against them and as such the above Rs.57,50,000/- deposited by them cannot be released to the decree holder. Thereafter, on hearing both sides the learned Family

Court found that the above Rs.57,50,000/- deposited by respondents 2 and 3 is not liable to be released to the decree holder. Aggrieved by the above order, the decree holder approached this Court.

3. It was argued by the learned Senior Counsel appearing for the petitioner that the amount deposited by respondents 2 and 3 before the Family Court is to be treated as security amount deposited to cover the decree and as such respondents 2 and 3 are also liable to discharge the decree debt. Therefore, the learned Senior Counsel would argue that the remaining sum of Rs.57,50,000/- deposited by respondents 2 and 3 is liable to be released to the decree holder towards part of the decree debt.

4. On the other hand, the learned counsel for respondents 2 and 3 would argue that the amount deposited by them is not security amount, but it was deposited only as condition for setting aside the *ex-parte* decree. Therefore, according to him, once the OP is dismissed as against them, they are entitled to get back the amount so deposited.

5. In support of the argument, the learned Senior Counsel relied upon Section 145 of the Code of Civil Procedure, which states

that :

“145. Where any person has furnished security or given a guarantee----

(a) for the performance of any decree of any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed in the manner herein provided for the execution of decrees, namely:

(i) if he has rendered himself personally liable, against him to that extent;

(ii) if he has furnished any property as security, by sale of such property to the extent of the security;

(iii) if the case falls both under clauses (i) and (ii), then to the extent specified in those clauses,

and such person shall be deemed to be a party within the meaning of section 47.

PROVIDED that such notice as the Court in each case thinks sufficient has been given to the surety."

6. She has also relied upon the decision of a Single Bench of this Court in **K. Varghese v. Bhanuvikraman Unnithan** [2007 (2) KHC 211]. In paragraph 8 of the said judgment, the learned Single Judge held that:

“If Section 145 is attracted, such person shall be deemed to be a

party within the meaning of Section 47 and the decree or order, as the case may be, may be executed against him.”

7. Another decision relied upon by the learned Senior Counsel is **Kanakamma v. Raveendranathan** [2010 (1) KLT SN 72]. In paragraph 3 of the above judgment, the learned Single Judge held that:

“The liability of a surety for the purpose of the decree to the extent she has rendered herself personally liable is in the same manner as if the surety was a party to the decree. Section 145 of the Code of Civil Procedure makes it abundantly clear that when the surety has furnished any property as security, the decree passed in the suit can be satisfied by sale of such property with the extent of the security. Security of immovable property was given by the surety in the present case to lift an attachment passed against the defendant in the suit. It is futile on the part of the surety to contend that the bond given by him does not create charge over his property for the suit claim.”

8. Section 145 of CPC deals with enforcement of liability of a surety. The above decisions relied upon by the learned Senior Counsel also relates to the liability of a surety. However, in the instant case, respondents 2 and 3 are not sureties of the 1st respondent. They are co-respondents in the OP along with the 1st

respondent. When an *ex-parte* decree was passed against all respondents, respondents 2 and 3 approached this Court for setting aside the above *ex-parte* decree. At that time, as a condition for setting aside the *ex-parte* decree, this Court directed respondents 2 and 3 to deposit Rs.1.15 Crores, subject to final outcome of the OP. The observation of the Division Bench in paragraph 12 of the judgment in OP(FC).No. 541 of 2018 is relevant for appreciating the context in which respondents 2 and 3 were directed to deposit the above amount, which is as follows:

“12. Under the above mentioned circumstances, the above original petition is hereby disposed of to the extent of setting aside the ex-parte decree passed by the Family Court, Ernakulam in OP No.900/2014 dated 18-03-2016 subject to condition of the petitioners herein along with the 2nd respondent making deposit of a total sum of Rs.1.15 Crores before the Family Court, within 2 months from today. If such deposit is made, then the Family Court shall permit the 1st respondent herein to get release of 50% of such amount deposited, subject to final outcome of the original petition.”

9. In the above judgment, the Division Bench made it clear that the deposit of the amount of Rs.1.15 Crores by respondents 2 and 3 will be subject to the final outcome of the original petition.

When the original petition was originally disposed of, the decree was passed only against 1st respondent and OP as against respondents 2 and 3 was dismissed. In the above circumstances, respondents 2 and 3 have no liability to discharge any part of the decree involved in this EP.

10. In the above circumstances, the amount deposited by respondent 2 and 3 is liable to be refunded to them. Therefore, the impugned order passed by the Family Court rejecting EA.No.13 of 2023 is perfectly valid and does not call for any interference by this Court. Accordingly, this OP (FC) is liable to be dismissed.

In the result, this OP(FC) is dismissed.

Sd/-
ANU SIVARAMAN,
JUDGE

Sd/-
C. PRATHEEP KUMAR,
JUDGE

sou.

APPENDIX OF OP (FC) 417/2023

PETITIONER EXHIBITS

EXHIBIT P1	TRUE COPY OF THE JUDGMENT (FC) 541 OF 2018 DATED 25.01.2019
EXHIBIT P2	THE TRUE COPY THE JUDGMENT DATED 24.12.2022 IN OP NO.900/2014
EXHIBIT P3	THE TRUE COPY OF THE DECREE DATED 24.12.2022 IN OP NO. 900/2014
EXHIBIT P4	THE TRUE COPY OF THE EP 04/2022 IN OP NO. 900/2014 PENDING BEFORE THE COURT
EXHIBIT P5	THE TRUE COPY OF THE EA NO.13/2023 IN EP NO. 04/2023
EXHIBIT P6	THE TRUE COPY OF THE E-COURT PROCEEDINGS IN EP NO.04/2023 ON OP 900/2014 PENDING BEFORE THE COURT
EXHIBIT P7	THE TRUE PRINTOUT OF THE WHATSAPP COMMUNICATION BETWEEN THE PETITIONER AND THE RESPONDENT
EXHIBIT P8	THE TRUE COPY OF THE ORDER DATED 07.06.2023 IN EA 13/2023 IN OP NO. 900/2014 OF THE FAMILY COURT ERNAKULAM