

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ANIL K. NARENDRA

&

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 8TH DAY OF SEPTEMBER 2021 / 17TH BHADRA, 1943

F.A.O. NO. 44 OF 2020

AGAINST THE ORDER DATED 10.07.2019 IN I.A. NO.2002 OF 2018 IN O.S.
NO.24 OF 2018 OF THE FILE OF THE ADDITIONAL SUBORDINATE COURT -II ,
KOZHIKODE.

APPELLANT/S:

JISHA.M.J,
AGED 33 YEARS,
W/O. MAHESH, MEPPANGAD,
KARANNOOR DESOM,
ELATHUR VILLAGE, ERANHIKKAL P.O.,
KOZHIKODE-673 303.

BY ADV T.D.SUSMITH KUMAR

RESPONDENT/S:

- 1 ANIL J.RAO,
AGED 34 YEARS,
S/O. JAIDEV RAO, SWARGHAMADAM,
SAMOOHAM ROAD, CHALAPPURAM ROAD,
KOZHIKODE - 673 002.
- 2 ANITHA BALIGA B,
AGED 29 YEARS,
D/O. JAIDEV RAO, SWARGHAMADAM, SAMOOHAM ROAD,
CHALAPPURAM ROAD, KOZHIKODE - 673 002.

(PRESENTLY RESIDING AT FLAT NO.105,
GAYATHREE PEARL APARTMENT, 2ND MAIN,
2ND CROSS, SABABOUMANAGAR, DELEKAHALI,
BANGALORE, KARNATAKA - 560 076).

BY ADV SMT.VIJAYAKUMARI

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON
08.09.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Anil K. Narendran, J.

The appellant, who is the defendant in O.S. No.24 of 2018 on the file of the Additional Subordinate Judge's Court-II, Kozhikode, has filed this appeal under Order XLIII Rule 1(d) of the Code of Civil Procedure, 1908, challenging the order dated 10.07.2019 of the said court in I.A. No.2002 of 2018 in O.S. No. 24 of 2018, whereby that application filed under Order IX Rule 13 of the Code of Civil Procedure to set aside the ex parte decree dated 04.10.2018 in O.S.No.24 of 2018 stands rejected, on account of non-payment of cost.

2. Though this appeal was filed on 19.09.2019, there occurred some delay in representing the appeal after curing the defects. By the order dated 10.03.2020 in C.M. Application No. 1 of 2020, the delay of 106 days in representing the appeal was condoned. Thereafter on 13.03.2020, this Court issued notice by special messenger to the respondents. On 20.03.2020 in I.A. No.2 of 2020, this Court granted an interim stay of all further proceedings in

execution of the decree in O.S.No.24 of 2018 up to 07.02.2020. The said interim order was further extended for a period of four months on 17.02.2021.

3. Heard the learned counsel for the appellant and also the learned counsel for the respondents.

4. The issue that arises for consideration in this appeal is as to whether any interference is warranted in the order dated 10.07.2019 of the court below in I.A. No.2002 of 2018 in O.S. No.24 of 2018.

5. O.S. No. 24 of 2018 was one filed by the plaintiff for specific performance, with an alternative decree for return of advance sale consideration. Though the defendant entered appearance on 09.03.2018, she has not chosen to file a written statement. During the pendency of that suit, the original plaintiff died and therefore, her legal heirs were impleaded as supplemental plaintiffs 2 and 3 by the order in I.A. No.1070 of 2018. In that suit the trial court passed an ex parte decree dated 04.10.2018, whereby the relief for specific performance was disallowed and the defendant was

directed to pay an amount of Rs.15,00,000/-(Rupees fifteen lakhs only) to the plaintiffs together with six percent interest commencing from 03.02.2017, till the date of realisation. In the judgment, the trial court has made it clear that there shall be a charge in respect of the amount decreed or plaint schedule property under Section 55(6)(b) of the Transfer of Property Act, 1882. The plaintiffs was also found entitled for cost of the suit.

6. The defendant filed I.A. No.2 of 2018, an application under Order IX Rule 13 of the Code of Civil Procedure, seeking an order to set aside the ex parte decree passed against her on 04.10.2018. In the application, it was stated that she could not file written statement within the time limit granted by the court, since she was suffering from back ache problem. She produced a medical prescription dated 18.09.2018 and a medical certificate dated 11.10.2018 to substantiate her contention. That application was opposed by the plaintiff pointing out that the defendant had appeared in the court on 23.03.2018 and availed nine

postings till 24.09.2018. She failed to file written statement, which prompted the court to proceed against her as ex parte. It was also contented that the medical reasons projected in the petition is not just and sufficient to set aside the ex parte decree passed against the defendant.

7. After considering the rival contentions, the trial court found that the medical prescription dated 18.09.2018 and the medical certificate dated 11.10.2018, which are indicating about the back ache problems and surgery advised to the petitioner are not sufficient to hold that she was totally unfit to contact her counsel and file written statement within the time allowed by the court. Though the explanation offered by the defendant was not satisfied, the trial court set aside the ex parte decree on awarding a cost of Rs.3,000/- (Rupees three thousand only) and by directing the defendant to file written statement within 15 days of passing of the order.

8. The condition stipulated in the aforesaid order was not complied with by the defendant. On 10.07.2019, when

I.A. No.2002 of 2018 came up for consideration, there was no representation for the defendant. The defendant has also not paid the cost. It was in such circumstances, that the trial court by the impugned order dated 10.07.2019, dismissed I.A. No.2002 of 2018.

9. The cost ordered by the Rent Control Court, in a suit filed for specific performance of an agreement of property with an advance sale consideration of 15,00,000/- cannot be said to be on the higher side. Though, the trial court has shown indulgence to the appellant-defendant by allowing I.A.No.2002 of 2018 on payment of a cost of Rs.3,000/-, the defendant has not chosen to comply with that condition. She has also not chosen to file written statement in the suit, within the time limit stipulated therein.

In such circumstances, we find that no reason to interfere with the impugned order dated 10.07.2019 of the trial court in dismissing I.A. No.2002 of 2018 in O.S. No.24 of 2018.

In the result, this appeal fails and the same is accordingly dismissed.

Sd/-

**ANIL K.NARENDRA,
JUDGE**

Sd/-

**K. BABU,
JUDGE**

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