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Aleykutty Ouseph Vs. Joseph

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Court : Kerala

Decided On : Jan-02-2014

Judge : Honourable Mr.Justice Thottathil B.Radhakrishnan

Appellant : Aleykutty Ouseph

Respondent : Joseph

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN & THE HONOURABLE MR. JUSTICE P.UBAID THURSDAY,THE2D DAY OF JANUARY201412TH POUSHA, 1935 FAO.No. 99 of 2012 ---------- APPELLANTS / PETITIONERS / DEFENDANTS : ---------- 1. ALEYKUTTY OUSEPH, AGED69YEARS, W/o YOHANNAN, VADAKKEDATHU @KOSSERIL HOUSE, MANCHIKKALLU, CHEENIKUZHY P.O., UDUMBANNOOR VILLAGE, THODUPUZHA TALUK.

2. JOSEPH JOHNY, S/o. KOSSERIL YOHANNAN, KOSSERIL @ VADEKKEDATHU HOUSE, MANCHIKKALLU, CHEENIKUZHY P.O., UDUMBANNOOR VILLAGE.

3. KUNJUMON K.J., S/o K.J.

YOHANNAN, KOSSERIL, REPRESENTED BY HIS ATTORNEY, JAMES, S/o PHILIP,BAISON VALLEY, IDUKKI. BY ADVS.SRI.BINU PAUL SRI.K.RAMACHANDRAN SMT.M.C.BINDUMOL RESPONDENTS / RESPONDENTS / PLAINTIFFS : ---------- 1. JOSEPH, AGED52YEARS, S/o PHILIPPOSE, THONDIYANICKAL HOUSE, MANIYARANKUDY KARA, IDUKKI VILLAGE, PIN - 685 602.

2. KATHREENA @ KUSUMAM, AGED50YEARS, W/o JOSEPH, THONDIYANICKAL HOUSE, MANIYARANKUDY KARA, IDUKKI VILLAGE, PIN - 685 602. R1 & 2 BY ADV.SRI.T.KRISHNANUNNI(SR.) R1 & 2 BY ADV.SRI.JACOB SEBASTIAN THIS FIRST APPEAL FROM

ORDER
S HAVING COME UP FOR ADMISSION ON0201-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: DMR/- THOTTATHIL B. RADHAKRISHNAN & P. UBAID, JJ.

---------- F.A.O. No. 99 OF2012---------- Dated this the 2nd day of January, 2014.

JUDGMENT
Thottathil B. Radhakrishnan J.

This appeal is against an order by which the court below has dismissed an application to set aside an ex parte decree passed in a suit for specific performance of a contract for sale of immovable property.

2. Two plaintiffs sued a couple and a son, pleading that the couple had executed a contract for sale, the woman acting also as the attorney of her son. The plaint further says that the agreement was signed after a telephonic discussion with the son of the couple, who was arrayed as the third defendant. We have seen that agreement. It does not show that the third defendant had signed it. It does not contain any signature as that of the third defendant. Before the trial court, no

document which could be treated as the registered power of attorney by the son in favour of the mother was produced.

3. Summons was duly served on the three defendants. The first defendant filed written statement. The others were set F.A.O. No. 99 OF20122 ex parte.

4. Later, it appears that the third defendant in the suit from which this appeal arises (the son) filed a different suit in the jurisdictional Munsiff's Court for injunction against trespass etc. That was ordered to be transferred under Section 24 of the C.P.C. by the appropriate District Court and ultimately both cases came up in the same Court on 18.06.2010 to be listed in the special list for trial. An application for joint trial of those suits was then filed. The defendants were not present on the date fixed for trial. The trial Judge allowed the application for joint trial, recorded the oral evidence of the PW1 on behalf of the plaintiffs and noted the absence of the defendants. The case was adjourned for judgment and after one posting, the judgment was delivered thereafter without expressly setting the first defendant as ex parte, but essentially passing a decree not on contest. Therefore, that decree would fall within the provisions of Order IX Rule 11 C.P.C. which would make it liable for proceeding in terms of Order IX Rule 13 C.P.C., as an ex parte decree.

5. What we see thereafter is that I.A. No. 996 of 2010 was filed before the court below supported by the affidavit of the first defendant and arraying all the three defendants as F.A.O. No. 99 OF20123 petitioners seeking to set aside the ex parte decree. The plea projected was that they were under the bonafide impression that the court below would allow the joint trial application and thereupon adjourn the case for trial to another day. The order impugned in this appeal also shows that on the previous date, the defendants had filed an application to remove the case from the special list. With this, we may note that the application to set aside the ex parte decree was filed within the time prescribed by law and the first petitioner had tendered evidence as PW1. The court below dismissed the application holding that the version of the petitioners/defendants in support of the application to set aside the ex parte decree was not acceptable and that ex parte decree cannot be set aside.

6. In support of this appeal, the learned counsel for the appellants argued that on the totality of the facts and circumstances, including the nature of the litigation and the rival contentions on their merits, the suit ought not to have been permitted to be concluded without full appropriate trial, more particularly because, the first defendant had in her written statement pleaded specifically that her son had not agreed to the alleged transaction. He further criticized the overzealous F.A.O. No. 99 OF20124 approach adopted by the plaintiffs in obtaining the sale deed through the court below and having it registered through the court below on 11.04.2012, on which day this Court had passed an interlocutory order of stay of operation of the judgment after hearing both sides on I.A. No.532 of 2012.

7. Per contra, the learned senior counsel appearing for the contesting respondents/plaintiffs argued that the conduct of the parties would show that the proceedings under Section 28 of the Specific Relief Act was within the knowledge of the appellants and they did not even file any objection to that, though they mentioned before the court below that an appeal has been instituted before this Court against the order refusing to set aside the ex parte decree. He further argued that on the facts and circumstances of the case, the ex parte decree is only to be permitted to stand. He also pointed that his clients would be put to serious injury in terms of funds if the documentation etc. done in terms of the ex parte decree, get upset if the ex parte decree is set aside.

8. At the outset, we may notice that this appeal was instituted with an application seeking condonation of delay of 50 days in representing the appeal though the appeal was initially F.A.O. No. 99 OF20125 filed in time. That C.M. Application No.231 of 2012 was allowed and the Division Bench admitted the appeal on 21.03.2012 and issued notice to the respondents through special messenger returnable by 27.03.2012. Notice was ordered simultaneously returnable in the same manner on I.A. No.532 of 2012, the application for interlocutory order. Notice was served on the respondents/plaintiffs on or before 26.03.2012, going by the endorsement of the Registry in this file. It was thereafter that on 11.04.2012, the Bench granted the afore-noted interlocutory order of stay of operation of the judgment. That order was passed on I.A. No.532 of 2012. We are told that the court below had passed an order approving the draft sale deed and had

nominated an officer of the Court to present the document for registration before that date, but the document was actually registered through the court below on 11.04.2012 on which day the interlocutory order was passed by this Court.

9. On to the merits of the appeal as against the order refusing to set aside the ex parte decree, we need to note that the extent of land involved in this litigation is 1.36 acres and the balance sale consideration as pleaded by the plaintiffs is Rs.7,78,000/- (Rupees seven lakh and seventy eight thousand F.A.O. No. 99 OF20126 only). We have already noted above the defence set up by the first defendant is that her son is not party to the agreement and there was no agreement to sell his share. She had actually pleaded that though there was some initial understanding between the parents in favour of the plaintiffs, the son has later retracted. We think that this is a case where a trial of the case on its merits needs to be there to render justice in its truest and ultimate sense. At the same time, we also see that a trial Judge cannot be found to be wholly at fault in not having accepted the plea of the appellants that they were under the bonafide belief that the case will be adjourned after allowing the joint trial application. But, in our considered view, the explanation offered by the appellants before the court below in support of their application for setting aside the ex parte decree was a plausible one and in the course and advancements of justice, it was only just and proper that the court below ought to have acted upon it, at least on terms.

10. Having reached the aforesaid conclusions, we also need to take care of the subsequent events which have resulted in a deed being registered on 11.04.2012, the date on which this Court had granted stay of operation of the judgment. We are of the view that ends of justice will be satisfied, if the F.A.O. No. 99 OF20127 application is allowed with an order of costs in favour of the plaintiffs and directing that the document registered on 11.04.2012 in furtherance of the impugned ex parte decree will continue to stand registered, but suspended for all intents and purposes, including mutation, transfer of Registry and other formalities which would have followed even after 11.04.2012. This would be the effect of the judicial order issued on 11.04.2012, though that was not communicated on that day to the court below or the registering authority concerned. We take this view because, that order was issued after prior notice on the interlocutory application and after

hearing both sides.

11. In the result, this appeal is allowed as hereunder: (i) the impugned order is set aside. (ii) I.A. No. 996 of 2010 in O.S. No. 117 of 2008 of the Sub Court, Kattappana, is allowed and as a consequence, the ex parte decree passed by the court below will stand set aside on condition that the appellants pay the respondents an amount of Rs.5,000/- (Rupees five thousand only) as costs within a period of three weeks from today payable through the counsel appearing for the respondents before this Court. Receipt/memo regarding payment of costs will F.A.O. No. 99 OF20128 be produced before the court below. (iii) The document executed through the court below in terms of the ex parte decree that has been set aside as per this judgment will continue to stand as registered, but suspended for all intents and purposes, including mutation, transfer of Registry and other formalities which would have followed even after 11.04.2012. (iv) Parties are directed to mark appearance before the court below on 31.01.2014. THOTTATHIL B. RADHAKRISHNAN JUDGE P. UBAID JUDGE DMR/-

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