

Jayalakshmi Vs. Avara

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Court : Kerala

Decided On : Jun-09-2003

Reported in : 2003(2)KLT901

Judge : S. Sankarasubban and; K.K. Denesan, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : C.M.A. No. 86 of 2000

Appellant : Jayalakshmi

Respondent : Avara

Advocate for Def. : P.G. Parameswara Panicker and; Santheep Ankarath, Adv.

Advocate for Pet/Ap. : V. Chitambaresh,; S. Krishna Prasad and; T.C. Suresh Men

Judgement :

S. Sankarasubban, J.

1. This C.M.A. is filed against the order passed in LA. No. 2508 of 1999 in O.S. No. 696 of 1996 of the Sub Court, Palakkad. That was the suit filed against the present petitioner for return of the advance amount paid by the plaintiff. When the suit came up for hearing on 14th September, 1998 the defendant was absent.

Counsel for the defendant reported 'no instruction'. The defendant was set *ex parte*. Then an *ex parte* order was passed. An affidavit was filed by the plaintiff. The suit was decreed on 14th September, 1998. Thereafter a petition was filed to set aside the *ex pane* decree. There, petitioner stated that she could not contact her lawyer because she was not well due to her heart operation. She also stated that she had developed problems on her right leg which prevented her from undertaking journey and in such circumstances she could not appear before the Court. She came to know about the decree when she received notice in the execution proceedings.

2. There is a delay of 335 days in filing the petition to set aside the *ex parte* decree. The trial court dismissed the application on the ground that the heart operation was performed about nine years before the passing of the *ex parte* decree and she used to visit her doctor at least twice in a month. Since the office of the lawyer is near the residence of the doctor she could have gone to her lawyer and enquired about the fate of her case. It is against the dismissal of I.A.. No. 1508 of 1999 this C.M.A. is filed.

3. Learned counsel for the appellant Shri. V. Chitambareish brought to our notice the decision reported in *Malkiat Singh v. Joginder Singh* ((1998) 2 SCC 206), a case where the counsel reported no instructions and the Court did not issue any notice to the appellants. It was held by the Supreme Court that the counsel should have informed the parties about the representation made before Court. If this is not done, the entire proceedings will be illegal. The Court has cautioned that in cases where there has been negligence or default on the part of the party the Court may take its own view. In this case there is nothing to show that the counsel had written to the party that he is not representing him. Further there is nothing to show that notice has been issued by the Court after the counsel informed to instructions. In such circumstances this case comes squarely within the decision of the Hon'ble Supreme Court. Counsel can report no instructions to the Court when the case comes up for hearing after he previously informs the party. In such a case the party may not be able to wriggle out of the situation and contend that notice should be sent. But in a case where the party is not informed about the action taken by the counsel, then in that case it is the duty of the Court to send

notice. According to us, counsel can inform the Court that a registered notice has been sent and produce a copy of the notice in order to avoid situations like the present one.

4. Counsel for the respondent submitted that there is a delay of 335 days in filing the application. If the counsel has not informed about no instructions and there is no notice to the party about 'no instruction' then the entire proceedings will become illegal. According to us there is nothing to disbelieve the party that she knew about the decree only when she received notice in the execution proceedings. There is sufficient reason to condone the delay in filing the petition to set aside the exparte decree. In the above view of the matter the ex pane order passed by the Court below is set aside and the suit is restored back to file. The parties shall appear before the Court below on 15.7.2003. The defendant/petitioner will file written statement on that day. The Court shall dispose of the matter within three months thereafter.

5. Learned counsel for the respondent submits that after the decree was passed the property has been sold and taken possession of by the plaintiff/decreed holder. If that be so, we make it clear that the property need not be returned to the petitioner now. It will depend upon the decree to be passed in the case. C.M.A. is disposed of as above.