

Thomas P. Abraham Vs. Aleyamma Abraham

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Court : Kerala

Decided On : Aug-26-2003

Reported in : 2003(3)KLT864

Judge : K.S. Radhakrishnan and; Pius C. Kuriakose, JJ.

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

Appeal No. : C.M.A. Nos. 234 and 233 of 2002

Appellant : Thomas P. Abraham

Respondent : Aleyamma Abraham

Advocate for Def. : K.C. John, Sr. Adv. and; K.K. John, Adv.

Advocate for Pet/Ap. : S. Venkatasubramoniya Iyer, Sr. Adv.,; V.Giri and; M.V.S

Judgement :

K.S. Radhakrishnan, J.

1. Appellants and petitioners are the same. They are petitioners in I.A. Nos. 831, 832, 833 and 834 of 1998 in O.S. No. 107 of 1994 on the file of the Sub Court, Thiruvalla, They claim to be legal representatives of deceased original defendant in the suit. Suit was instituted by the respondent daughter for specific performance of an oral agreement for sale against her father.

2. Plaintiff's case is that while she was in U.S.A. she used to send money and with that amount plaint schedule property was purchased and building was constructed in the plaint schedule property. She came to the native place on 20.5.1994 and stayed with the father and at that time father had orally agreed that the plaint schedule property would be sold to her for an amount of Rs. 1 lakh and she had paid Rs. 1 lakh, but no sale deed was executed in spite of repeated requests. Consequently Suit for specific performance was instituted. Defendant could not file written statement and was set ex parte on 1.7.1995 and later an ex parte decree was passed on 13.7.1995.

3. The defendant on 22.12.1995 filed I.A. No. 166 of 1995 for setting aside the ex parte decree and I.A. No. 1668 of 1995 for condoning the delay in filing that petition. However, those petitions were dismissed for default on 13.1.1998. Defendant could not take any steps to set aside those orders and he died on 8.7.1998. First appellant, his son, who was also in the U.S.A. came to attend the funeral of his father got information regarding the suit. He had also noticed that the plaint schedule property was settled in his favour by the father as per settlement No. 462 dated 7.3.1996, and ten cents out of the plaint schedule property was settled in favour of the second appellant as per document No. 475 dated 11.3.1996 and accordingly appellants alone have got right over the plaint schedule property. Appellants then filed I. A. No. 834 of 1998 to get themselves impleaded. They also filed I.A. Nos. 831 and 833 of 1998 for restoration of I.A. Nos. 1666 and 1668 of 1998 respectively. They also filed I.A. No. 832 of 1998 for condoning the delay in filing the application for setting aside the ex parte decree. They explained the circumstances under which the suit happened to be decreed ex parte and also stated the reason for not prosecuting the application for setting the aside the ex parte decree. On the side of the appellants PWs. 1 to 3 were examined and Exts. A1 to A3 were marked. On the side of the defendants R.Ws. 1 to 3 were examined. The court below after considering the oral ,and documentary evidence dismissed all those petitions holding that the appellants have failed to show sufficient cause for setting aside the ex parte order as well as the ex parte decree and also the order dismissing the application for condoning the delay. Aggrieved by those orders, these appeals and revision petitions have been filed.

4. Heard counsel on either side.

5. We have already indicated that the suit was instituted by the daughter against her father on 22.10.1994 for specific performance of an oral agreement for sale. Father could not file written statement and therefore set ex parte on 1.7.1995 and ex parte decree was passed on 13.7.1995 and later the father passed away.

6. Senior Counsel appearing for the appellants Sri. S.V.S. Iyer submitted that the Court below was not justified in decreeing the suit ex parte on the mere fact that no written statement was filed. Counsel submitted that specific performance is an equitable remedy and before decreeing the suit court should have weighed equity between the parties. Counsel placed reliance on the decision of the Apex Court in *Balraj Taneja and Anr. v. Sunil Madan and Anr.* (1999 (8) SCC 396) and submitted that in the case of equitable remedy the courts always have a discretion of either decreeing the suit or not. Senior Counsel appearing for the respondent Sri. K.C. John on the other hand contended that in a case where no written statement has been filed it must be taken that the averments in the plaint stood uncontroverted and there is no illegality or irregularity in decreeing the suit.

7. We are of the view, court exists for dispensation of justice. On the mere fact that written statement is not filed or that the defendant has not controverted the averments in the plaint, court is not expected to blindly follow the averment made by the plaintiff and decree the suit. The court will examine whether the averment made by the party is legal and valid and a specific performance decree be granted which is discretionary. Discretion has to be exercised on sound legal principle and not on the weakness of the defendant's case. In this connection it would be useful to extract the following portion of the judgment in *Balraj Taneja's case*, supra (1999 (8) SCC 396).

'As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule

10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression 'the Court may, in its discretion, require any such fact to be proved' used in Sub-rule (2) of Rule 5 of Order 8, or the expression 'may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order 8'.

In a suit for specific performance court has got considerable discretion to grant decree or not, even in a case where no written statement has been filed: Being a discretionary remedy even when no written statement has been filed the Court has got the duty to examine whether suit can be decreed on the averments made in the plaint alone. In a given case plaintiff had failed to comply with the statutory requirements for the grant of decree for specific performance and the suit could be dismissed. The Court is not bound to decree specific performance merely because it is lawful to do so. The discretion is however to be exercised on sound legal principle. In other words, being a discretionary remedy the fact that defendant has not filed written statement as such is not a ground for passing an ex parte decree.

8. We, may now examine whether defendants had shown sufficient cause within the meaning of Order 9 Rule 13 for setting aside the ex parte decree. The said provision is extracted below for easy reference.

13. Setting aside decree ex parte against defendant.- In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient

cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Time and again Apex Court has reminded that the expression 'sufficient cause' used in Order 9 Rule 13 has to be Construed liberally. The Court has to examine sufficiency of the grounds urged by the defendant for setting aside the ex parte decree. The court is also given discretion to set aside the ex parte decree upon such terms as to costs. Expression 'sufficient cause' and 'upon such terms as to costs', 'otherwise as it thinks fit' gives considerable amount of latitude to the court when defendant comes to court for setting aside the ex parte decree. However, if on facts court finds that attempt of the petitioner is only to delay the claim of the plaintiff deliberately with mala fide intention or ill motive in a given case court could reject it. We have seen in many suits for money, deliberately defendant remains ex parte to gain time and later try to get the ex parte decree set aside and when the suit is ultimately decreed comes up with an appeal along with delay petition and indigent application and thus stall the proceeding. In such situations courts have to be very vigilant so that its medium shall not be abused. Only if sufficient cause has been shown courts must be liberal in setting aside the ex parte decree by imposing such terms as to costs. We may in this connection refer to the decision of the Apex Court in *G.P. Srivastava v. K.K. Raizada* (2000 (3) SCC 54), wherein the Apex Court held as follows:

'Under Order 9, Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the court that either the summons were not duly

served upon the defendant or he was prevented by any 'sufficient cause' from appearing when the suit was called on for hearing. Unless 'sufficient cause' is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. 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. Sufficient cause for the purpose of Order 9, Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The Courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier'.

In this case suit was instituted on 22.10.1994. Defendant could not file written statement. Plaintiff is the daughter and the defendant is the father. Father did not file written statement in time, may be persuading his daughter not to go for litigation. However, an ex parte decree was passed on 13.7.1995. On 13.7.1995 itself counsel submitted an application for adjournment. The defendant father was also sick and could not attend the court. Counsel also filed application for adjournment. Illness of the defendant got aggravated and later he died on 8.7.1998. Appellants have stated that they came to know about the institution of the suit only when they came to India. Under such circumstances, they filed applications to set aside the ex pane decree and also for condoning the delay. When father was alive he had filed an application to set aside the exparte decree and for condoning the delay. But he died on 8.7.1998 and could not prosecute the matter and those petitions were dismissed. Appellants have subsequently filed applications to restore those applications for restoring the suit and also for condoning the delay. They were in U.S.A. and that was the reason why they could not properly defend the suit filed against their father. Considering the facts and circumstances of the case, we are of the view appellants have made out sufficient

cause for setting aside the orders passed dismissing the application for restoration and condonation of delay. Considering the relationship between the parties and the suit is for specific performance of an oral agreement for sale we are inclined to set aside the ex parte decree and restore the suit to file to be decided by the court below on merits. Consequently all the appeals and the revision petitions would stand allowed. Considering the fact that plaintiff had to engage a lawyer and spend considerable amount towards litigation expenses we are inclined to award cost of Rs. 5,000/- to be paid by the appellants to the respondent plaintiff within a period of two months from today. Since suit is of the year 1994, we direct the parties or their counsel to be present before the trial court on 15.9.2003 and the court below will dispose of the suit expeditiously, at any rate within a period of six months thereafter.

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