

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOMAS P.JOSEPH

WEDNESDAY, THE 30TH JUNE 2010 / 9TH ASHADHA 1932

WP(C).NO. 10069 OF 2010(O)

**I.A. NOS.3358, 3359 AND 3360 OF 2009 IN OS.355/2005 OF
PRINCIPAL SUB COURT, PALAKKAD**
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PETITIONER(S):

**NIJAM, S/O.ABDUL GUDDUS,
AGED 37, RESIDING AT THOTHINGAL,
PUTHUPALLI STREET, NOORANI P.O.,
PALAKKAD TALUK.**

BY ADV. SRI.JACOB SEBASTIAN

RESPONDENT(S):

**M.U.BARKKATH, S/O.MOULAVI MOHAMMED
UMMER, RESIDING AT PUTHUPALLI THERUVU,
MALLIKA VEEDU, YAKKARA AMSOM AND DESOM,
PALAKKAD.**

**ADV. SRI.V.CHITAMBARESH, SENIOR ADVOCATE
SRI.T.C.SURESH MENON
SRI.JIBU P THOMAS
SRI.P.S.APPU
SRI.A.R.NIMOD
SRI.C.A.ANOOP**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 30/06/2010, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1 A TRUE COPY OF I.A. NO.3360 OF 2009 ALONG WITH THE
ORDER PASSED ON IT ON 29.01.2010.

EXHIBIT P1 A TRUE COPY OF I.A. NO.3358 OF 2009 ALONG WITH THE
ORDER PASSED BY ON IT ON 29.1.2010.

EXHIBIT P3 A TRUE COPY OF I.A. NO.3359 OF 2009 ALONG WITH THE
ORDER PASSED ON IT ON 29.01.2010.

RESPONDENT'S EXHIBITS:

NIL

TRUE COPY

THOMAS P.JOSEPH, J.

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W.P(C) No.10069 of 2010

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Dated this the 30th day of June, 2010

J U D G M E N T

Defendant in O.S.No.355 of 2005 of the court of learned Sub Judge, Palakkad challenges the orders on I.A.No.3358, 3359 and 3360 of 2009. Respondent filed that suit against petitioner seeking a decree for specific performance of an alleged agreement for sale in respect of 4.50 cents of land belonging to the petitioner. An ex parte decree was passed on 25.11.2008. Petitioner filed I.A. No.4215 of 2008 to set aside that ex parte decree. Though that application was opposed by respondent it was allowed on 10.06.2009 on condition of payment of costs of Rs.3,000/- to the respondent within ten (10) days. Unable to raise the amount within the said time and claiming that on account of Jaundice petitioner was laid up during the relevant time he filed I.A.No.3360 of 2009 for enlargement of time for payment of costs, I.A.No.3358 of 2009 seeking review of the order on I.A.No.4215 of 2008 (fixing date for payment of costs as ten days) and I.A. No.3359 of 2009 to condone delay in filing the review application. Those applications were opposed by the respondent, did not find favour with the

learned Sub Judge and ended in dismissal. Those orders are under challenge in this Writ Petition. Learned counsel for petitioner contends that the only property belonging to the petitioner is the 4.50 cents which is allegedly agreed to be sold to respondent and if petitioner lost that property it will result in irreparable loss and injury to him. He therefore requested for an opportunity to contest the suit on merit and that for the said purpose time for payment of costs may be extended.

2. Learned counsel for respondent raised a preliminary objection regarding maintainability of the Writ Petition. It is contended that dismissal of I.A. 4215 of 2008 is appealable under Order XLIII Rule 1(d) of the Code of Civil Procedure and since statutory remedy is available this Writ Petition is not maintainable.

3. It is not as if in and every circumstances Writ Petition can be said to be not maintainable when there is statutory remedy. Question is whether this court is required to invoke the power under Article 227 of the Constitution of India. True, for its invocation it must be shown that patent injustice or illegality has been committed by the court below. Here is a case where court below was inclined to allow I.A. No. 4215 of 2008 and set aside

the ex parte order on payment of costs. Those matters are within the discretionary jurisdiction of that court. But it is seen that for payment of costs petitioner was granted only ten days' time. It is not disputed that total extent of property of petitioner is only 4.50 cents. In the circumstances learned Sub Judge was not justified in directing petitioner to pay the costs within ten days. It is in the said circumstances and he was not bale to pay the costs within the time stipulated petitioner had to file applications for enlargement of time and for review of the order which were also with the object of seeking time for payment of costs. Learned Sub Judge dismissed the said applications. The challenge in this Writ Petition is not in respect of the order on I.A. No.4215 of 2008 but to the dismissal of I.A.Nos.3358, 3359 and 3360 of 2009. It is true that petitioner did not produce any document showing that he was afflicted with Jaundice. It is not as if in every case there must be a document to prove the illness. Having regard to the facts and circumstances of the case I do not find reason to disbelieve the explanation made by petitioner for the delay that he was laid up due to Jaundice. Hence I am satisfied that this is a case where this Court has to invoke the power under Article 227 of the Constitution of India on petitioner's

challenge to the impugned order so that petitioner is given an opportunity to contest the suit.

Resultantly this Writ Petition is allowed. The impugned orders are set aside and I.A. Nos.3358, 3359 and 3360 of 2009 and consequently I.A. No.4215 of 2008 are allowed on condition that petitioner deposited in the court below Rs.3,000/- (Rupees Three thousand only) within two weeks from this day for payment to the respondent. In case of failure to deposit the amount as above this Writ Petition will stand dismissed in confirmation of the dismissal of the applications referred to above.

THOMAS P. JOSEPH, JUDGE.