

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

AS.No. 63 of 1995 (D)

AGAINST THE JUDGMENT IN OS 720/1992 of IIIRD ADDITIONAL SUB COURT,
KOZHIKODE DATED 25-09-1993

APPELLANT/SECOND DEFENDANT:

KUMARAN
S/O.LATE KUTTAN PURATHANDERI HOUSE
FLORICAN HILL ROAD, VENGARI VILLAGE
NEDUNGATTOOR DESOM, KOZHIKODE.[DIED]

Addl. 2. LAKSHMANAN
S/O.LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA
CALICUT - 673 010.[DIED]

[IT IS RECORDED THAT 2ND APPELLANT DIED AND THE APPELLANTS ADDL.A3 TO
ADDL.A9 ALREADY IN THE PARTY ARRAY ARE HIS LEGAL REPRESENTATIVES AS PER
ORDER DATED 14.09.2015 IN IA 511/12.]

Addl. 3. VISWANATHAN
S/O.LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA, CALICUT - 673 010.

Addl. 4. SAROJINI
D/O.LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA, CALICUT - 673 010.

Addl. 5. SULOCHANA
D/O LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA, CALICUT - 673 010.

Addl. 6. VASANTHI
D/O LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA, CALICUT - 673 010.

Addl. 7. SASINDRAN
S/O.LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA, CALICUT - 673 010.

Addl. 8. LATHIKABABY
D/O.LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA, CALICUT - 673 010.

Addl. 9. MOHANACHANDRAN
S/O.LATE P.KUMARAN, PURATHANDERI HOUSE
FLORICAN HILL ROAD, KARAPARAMBA, CALICUT - 673 010.

ADDL.A2 TO A9 ARE IMPEADED AS THE LEGAL HEIRS OF THE DECEASED
APPELLANT AS PER ORDER DATED 19.09.2003 IN CMP 4951/01.

BY ADVS.SRI.THOMAS ANTONY, P.P.THANASEKHARAN
SRI.K.M.JAMALUDDEEN

/RESPONDENTS/PLAINTIFFS AND 1ST DEFEDANT:

1. P.MADHAVI
D/O.LATE KUTTAN, VENGARI VILLAGE, NEDUNGATTOOR DESOM
KOZHIKODE TALUK.
2. P.KALLYANI
D/O.LATE KUTTAN, VENGARI VILLAGE, NEDUNGATTOOR DESOM
KOZHIKODE TALUK.
3. P.RADHA
D/O.LATE KUTTAN, VENGARI VILLAGE, NEDUNGATTOOR DESOM
KOZHIKODE TALUK.
4. P.KRISHNAN
S/O.LATE KUTTAN, SABHAVATHIPURAM, THIRUPUR -17
THAMIL NADU.[DIED]

Addl.5. SUGATHAN BABU
S/O.LATE P.KRISHNAN, DOOR NO.2/615, SREERAM NAGAR
N.G.O COLONY, COIMBATORE - 641 022.

Addl.6. SIVANANDAN
S/O.LATE P.KRISHNAN, DOOR NO.643, PERIYAR NAGAR
PULIYAKULAM, COIMBATORE - 641 045.

Addl.7. KOMALAVALLY
D/O.LATE P.KRISHNAN, MARAKKOMPOYIL HOUSE
KARAPARAMBA PO., KOZHIKODE - 673 010.

Addl.8. NALI ANAND @ NALINAKSHAN
S/O.LATE P.KRISHNAN, DOOR NO.2/615, SREERAM NAGAR
N.G.O COLONY, COIMBATORE - 641 022.

LEGAL HEIRS OF DECEASED R4 IMPEADED AS ADDL.R5 TO R8 AS PER ORDER DATED 14.09.2015 IN IA 509/15.

R,R4-R7 BY ADV. SRI.V.V.SURENDRAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 03-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
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**P.N. RAVINDRAN
&
BABU MATHEW P. JOSEPH, JJ.**

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A.S. No. 63 of 1995

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Dated this the 3rd day of November, 2015

JUDGMENT

P.N. Ravindran,J.

The appellant is the second defendant in O.S.No.720 of 1992 on the file of the Court of the Subordinate Judge of Kozhikode. Respondents 1 to 3 are the plaintiffs and the fourth respondent is the first defendant therein. After the appeal was filed, the sole appellant (the second defendant) passed away and thereupon, his legal heirs got themselves impleaded as additional appellants 2 to 9 by order passed on 19.09.2003 on C.M.P.No.4951 of 2001. Shortly thereafter, the fourth respondent (the first defendant) expired and thereupon his legal heirs were impleaded as additional respondents 5 to 8 by order passed on 14.09.2015 on I.A. No.509 of 2012.

2. The suit instituted by respondents 1 to 3 is for partition of the plaint schedule property into five equal shares and for allotment of three such shares to them. Respondents 1 to 3 had in the plaint averred that the plaint schedule property along with other properties belonged to late Manikkam who had kanam right over the properties, that later, her son Choyikutty purchased the jenm right over the plaint

schedule property and that on the death of Manikkam, the properties devolved on her sons, Choyikutty and Kuttan. The plaintiffs contended that on the death of Kuttan on 21.12.1950 his share devolved on the plaintiffs, his daughters and the defendants, his sons in equal shares. The plaintiffs contended that though Ext.A3 notice dated 13.7.1992 was issued demanding partition, the second defendant caused a reply notice to be issued contending that Kuttan died on 21.12.1950 before the commencement of the Hindu Succession Act, 1956, that prior to his death, the plaint schedule property and other properties were partitioned and that the plaint schedule property was set apart to the share of Kuttan and his sons, the defendants. The plaintiffs contended that on the death of Manikkam, her rights devolved only on Choyikutty and Kuttan, that Kuttan died only on 21.02.1959 after the commencement of Hindu Succession Act, 1956, and therefore, the plaint schedule property which was set apart to the share of Kuttan and his sons is liable to be partitioned into 5 equal shares and three such shares allotted to them. The plaintiffs had in paragraphs 5 and 7 of the plaint averred that the legal heirs of Manikkam are her sons Choyikutty and Kuttan and that the defendants, who are the sons of Kuttan are not her legal heirs.

3. Upon receipt of summons, the first defendant entered appearance and filed a written statement dated 19.01.1993 admitting the plaint claim. The second defendant filed a written statement dated 28.01.1993 contending that the plaint schedule properties are not partible, that even during the lifetime of Kuttan, the plaint schedule properties were allotted to to the share of Kuttan and his sons, who are the defendants in the suit. They contended that the plaintiffs have no right over the plaint schedule properties and that the plaint schedule properties were further partitioned as per partition deed dated 26.7.1985 registered as document No.2181 of 1985 of Sub Registrar's Office, Kakkodi.

4. After the defendants filed their written statements, issues were framed on 28.07.1993. The suit thereafter stood posted for pre-trial steps to 21.08.1993. On that day it was included in the special list of September 1993 and posted for trial to 10.09.1993. On 10.09.1993, the second plaintiff was examined as PW1 and Exts.A1 to A3 were marked and the plaintiffs' evidence was closed. Learned counsel appearing for the first defendant submitted that he has no oral evidence to adduce. Thereupon, as second defendant and his counsel were absent, cross examination of PW1 by the second defendant was

dispensed with, learned counsel appearing for the plaintiffs was heard and the suit was posted for disposal on 13.09.1993. On 13.09.1993 as the judgment was not ready, it was reposted to 20.09.1993. On that day also, the judgment was not ready and the suit was reposted to 25.09.1993. On 25.09.1993 a preliminary decree for partition was passed declaring the plaintiffs $\frac{3}{5}$ shares over the plaint schedule properties and for partition and recovery possession of their share from the defendants with mesne profits. The court below also declared that the first defendant has $\frac{1}{5}$ share over the plaint schedule property and granted a decree for partition and recovery of possession of his share from the second defendant.

5. The second defendant thereupon filed I.A. No. 3150 of 1993 on 28.09.1993 praying that the ex parte decree passed on 25.09.1993 may be set aside. In the affidavit filed in support of the said application, he had averred that he was laid up and that was the reason why he could not be present on 10.09.1993 and on account of that reason, he could not also give instructions to his counsel. He had also produced a medical certificate issued by Dr.K. Balachandran, Government General Hospital, Calicut to prove the said averments. The plaintiffs opposed the said application by filing written objections.

Before the court below, the second defendant was examined as PW1 and the medical certificate produced by the second defendant was marked as Ext.A1. The court below considered the rival contentions and dismissed I.A. No. 3150 of 1993 by order passed on 18.07.1994 on the short ground that as the disposal of the suit was under Order XVII Rule 3 of the Code of Civil Procedure and on the merits, the application to set aside the ex parte decree is not maintainable. The instant appeal was thereupon filed on 16.12.1994 challenging the preliminary decree for partition passed by the trial court.

6. The main ground raised in the instant appeal is that the appellant/second defendant had shown sufficient cause for his non-appearance in court when the case was called on 10.9.1993, that the second defendant had filed an application for removing the suit from the list on the ground that he is laid up, but that application was rejected and an ex parte decree was passed. It is contended that the court below ought to have, having regard to the request made by the second defendant, adjourned the trial of the suit for another day so as to enable him to cross examine PW1 and to adduce defence evidence.

7. We heard Sri Thomas Antony, learned counsel appearing for the appellant and Sri V.V. Surendran, learned counsel appearing for

the respondents. We have also gone through the pleadings and the materials on record. The proceedings paper and the B diary disclose that issues were framed in the suit on 28.07.1993. The suit was thereafter included in the special list of September 1993 and posted for trial to 10.09.1993. On that day, the second plaintiff was examined as PW1 and Exts.A1 to A3 were marked. On 10.09.1993, the second defendant was admittedly not present. Learned counsel appearing for the first defendant submitted that he has no oral evidence to adduce. The records disclose that the learned counsel appearing for the second defendant was present at the time of the roll call. However, for unexplained reasons, the court below has recorded in the proceedings paper that when the second defendant was called, he was absent and therefore, PW1's cross examination was closed. The suit was thereupon heard and posted for disposal to 13.09.1993. Since the judgment was not ready on 13.9.1993, the case was posted to 20.9.1993. On that day also the judgment was not ready and the suit was posted to 25.9.1993. On 25.9.1993 the impugned judgment was delivered, decreeing the suit for partition as prayed for.

8. It is evident from the materials on record that the suit stood posted on 10.9.1993 for trial. On that day, PW1 was examined,

Exts.A1 to A3 were marked and evidence on the side of the plaintiff was closed. Since the first defendant reported that he has no oral evidence to adduce, the name of the second defendant was called, but as he was absent he was set ex parte notwithstanding the fact that the learned counsel appearing for him was present at the time of roll call. Though the second defendant had filed an application to set aside the ex parte decree passed on 25.09.1993, that application was dismissed on the ground that the disposal of the suit is under Order XVII Rule 3 and not under Order XVII Rule 2 of the Code of Civil Procedure. The court below also held that the disposal of the suit was on the merits. In our considered opinion, the said finding entered by the court below when it dismissed I.A.No.3150 of 1993 cannot be sustained. The proceedings paper and the B diary disclose that no evidence or substantial portion of the evidence of the defendants had been recorded on 10.09.1993 and that the second defendant had not been called upon to adduce evidence or to produce documents. The suit stood posted on 10.09.1993 only for trial and on that day the plaintiffs' evidence was recorded. The court below ought to have, in our opinion, having regard to the request made by the counsel for the second defendant, adjourned the trial of the suit to another day so as to

enable the second defendant to cross examine PW1 and to adduce defence evidence, if any. Instead, he was set ex parte and the impugned decree was passed. The Explanation to Rule 2 of Order XVII of the Code of Civil procedure stipulates that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the court may, in its discretion, proceed with the case as if such party were present. In the instant case, no evidence or substantial portion of the evidence of the second defendant had been recorded. The suit was not posted on 10.09.1993 for recording the evidence of the defendants. In such circumstances, notwithstanding the fact that the court below has in the impugned judgment referred to the pleadings on either side, the evidence adduced by the plaintiffs and also entered a finding on the merits, the disposal of the suit cannot, in our opinion, be said to be a disposal on the merits. In other words, notwithstanding the fact that the impugned judgment deals with the facts of the case and also the evidence adduced by the plaintiffs, the decree passed by the court below can only be treated as an ex parte decree passed under Order IX Rule 13 of CPC. The view taken by the court below that the disposal of the

suit was on the merits and, therefore, the application to set aside the ex parte decree is not maintainable, cannot in our opinion, be sustained having regard to the facts stated above.

9. The next question is whether I.A.No.3150 of 1993 filed by the second defendant to have the ex parte decree passed in the suit is liable to be allowed. The second defendant had in the affidavit filed in support of the petition to set aside the ex parte decree averred that he could not appear on 10.09.1993 for the reason that he was laid up. He had also produced Ext.A1 medical certificate along with I.A.No.3150 of 1993. The court below did not advert to the contents of the said certificate on the short ground that the doctor who issued it has not been examined. The second defendant was represented by counsel and the counsel was present in court at the time of roll call. If the learned counsel for the second defendant was not ready to cross examine the plaintiff, the court below could have adjourned the trial of the suit to another day for cross examination of PW1 to afford the second defendant an opportunity to cross examine her. The records disclose notwithstanding the fact that the second defendant was set ex parte on 10.09.1993 and the suit was posted for judgment on 13.09.1993 and thereafter on 20.09.1993, judgment was delivered

only on 25.09.1993 and not on 13.09.1993 and 20.09.1993. The records do not disclose that the learned counsel appearing for the second defendant had reported no instructions. Having regard to the facts stated above and the attendant circumstances, we are of the opinion that in the interests of justice, the ex parte decree passed by the court below should be set aside and the suit remanded for fresh trial and disposal.

We accordingly allow the appeal and set aside the decree and judgment passed by the Court of Subordinate Judge of Kozhikode (in O.S. No. 720 of 1992) and remand the suit for fresh trial and disposal to the court below. The parties shall appear before the court below through counsel on 28.11.2015. The court below shall on that day fix a date for trial of the suit and shall dispose of the suit expeditiously and in any event before 29.02.2016. The parties shall bear their costs throughout.

Sd/-

**P.N. RAVINDRAN
JUDGE**

Sd/-

**BABU MATHEW P. JOSEPH
JUDGE**

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True copy

P.S. (Hr.Gr.)To Judge

**P.N. RAVINDRAN
&
BABU MATHEW P. JOSEPH, JJ.**
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A.S. No. 63 of 1995
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JUDGMENT

3rd day of November, 2015

