

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRP.No. 556 of 2012 ()

(AGAINST ORDER DATED 22.09.2012 IN I.A.NO.2268/09 IN OS
NO.63/07 OF MUNSIF COURT, PATHANAMTHITTA)

REVISION PETITIONER(S)/RESPONDENT/PLAINTIFF:

THOMAS KOSHY,
KUZHIMANNIL MELATHELIL HOUSE, ELAVUMTHITTA, MEZHUVELI
PATHANAMTHITTA.

BY ADVS.SRI.JACOB P.ALEX
SRI.JOSEPH P.ALEX

RESPONDENT(S)/PETITIONERS/DEFENDANTS:

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- *1. GEORGE KOSHY (DIED)
KUZHIMANNIL VILLA, NALLANIKUNNU,
MUTTATHUKONAM MURI
CHENNEERKKARA VILLAGE,
KOZHENCHERRY, PATHANAMTHITTA - 689 645.
 2. LAILA GEORGE
KUZHIMANNIL VILLA, NALLANIKUNNU,
MUTTATHUKONAM MURI
CHENNEERKKARA VILLAGE, KOZHENCHERRY,
PATHANAMTHITTA - 689 645.

*(IT IS RECORDED THAT R1 IS DEAD AND HIS LEGAL HEIR, HIS WIFE
IS ALREADY IN THE PARTY ARRAY AS R2 AND THERE IS NO NECESSITY
TO IMPEAD THE OTHER LEGAL HERIS VIDE ORDER DATED 29.08.2014
ON MEMO DATED 29.08.2014 WITH C.F.NO.3209/14.)

R2 BY ADV. SRI.VINOY VARGHESE KALLUMOOTTILL

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 15-09-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J.

CRP No.556 of 2012

Dated this the 15th day of September, 2015

O R D E R

- 1.This revision is by the plaintiff in a suit for determining boundary of an item of immovable property and for incidental reliefs.
- 2.Heard the learned counsel for the revision petitioner–plaintiff and the learned counsel for the respondents–defendants.
- 3.The rival parties placed their pleadings following which issues were settled and the suit was listed for trial. The plaintiff adduced evidence. Though the defendants applied for adjournment, the application for adjournment was refused by the trial Judge. The defendants’ counsel did not cross examine the witness of the plaintiff. On the basis of the oral and documentary evidence so adduced, the trial court delivered a judgment adverting to the materials on record and passing of a judgment, as if it is one on merits. The defendants applied to

have that decree set aside by making an application under Order IX Rule 13 of the Code of Civil Procedure on the presumption that what has been passed is only an ex parte decree. The plaintiff objected to that application primarily contending that the decree that has been passed is one on merits and not rendered ex parte to invoke the provisions of Order IX Rule 13 CPC. The court below allowed the application under Order IX Rule 13 CPC holding that what has been passed is only an ex parte decree and that there are sufficient grounds to set it aside on terms as to costs which it has imposed through the impugned order.

4. This revision by the plaintiff is on the fundamental issue as to whether the court below was justified in treating the decree that was sought to be set aside as an ex parte one. The issue is as to whether it was a decree on merits or a decree on default. Order XVII Rule 2 CPC read with the explanation thereto governs that where, the parties fail to appear on the day fixed for hearing, the court may proceed to dispose of the suit in one

of the modes directed in that behalf by Order IX or make such other order as it thinks fit. Explanation to Order XVII Rule 2 CPC is to the effect 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. That explanation clearly indicates that the exercise of discretion in terms of that provision would come into play only when a party, who is absent, has already tendered evidence, and the evidence or the substantial portion of evidence of such absenting party has already been recorded. That explanation read with the principal part of Rule 2 of Order XVII CPC cannot be operated against a party who is absent and has not tendered any portion of evidence at all. This is what emanates out of the judgment of the Honourable Supreme Court of India in B.Janakiramaiah Chetty v. A.K.Parthasarathi and Others [2003(5) SCC 641] as well. The ratio of the decision in Divakara Panicker v. Pathumma [1990(2) KLT 266] is also not

to the contrary.

5. Though the learned counsel for the revision petitioner has made reference to the judgment rendered by the trial court on 25.07.2009, the fact of the matter remains that the result of that judgment has gone against the defendants who have not tendered any evidence whatsoever. The mere fact that the court below did not make an express declaration that the defendants are being set ex parte does not, in any manner, improve the quality of that judgment beyond an ex parte one. Under such circumstances, the impugned order of the court below cannot be criticized as vitiated on any ground warranting visitation under Section 115 CPC. This revision, therefore, fails.

In the result, this revision is dismissed.

(THOTTATHIL B. RADHAKRISHNAN, JUDGE)