

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

CRP.No. 429 of 2014 ()

IA NO. 8650/2010 IN OS 746/1964 of I ADDL. MUNSIFF COURT, NEYYATTINKARA

REVISION PETITIONERS/RESPONDENTS 1,4,5,6,7,9 & 10 (PLAINTIFFS
1,4,5,6,7,9 & 11):

1. P.GOPALAKRISHNAN NAIR
AYIRAKOTTU VEEDU, KALATHUVILAKATHU, MANALLOOR
NEYYATTINKARA.
2. JYOTHISHMATHY AMMA,
-DO- -DO-
3. P.SREEKANTAN NAIR
-DO- -DO-
4. P. RADHAKRISHNAN NAIR
-DO- -DO-
5. B.SUJATHA
-DO- -DO-
6. R.PADMAKUMARI
-DO- -DO-
7. S.NARAYANANKUTTY
-DO- -DO-

BY ADVS.SRI.L.MOHANAN
SMT.LIGEY ANTONY

RESPONDENT(S)/PETITIONER & RESPONDENTS 15,17,19 TO 61
(RESPONDENTS 2,3,8,11,12,13,14,16 & 18 DIED LONG BEFORE):

1. SUKUMARAN NAIR
S/O.NARAYAN PILLAI, P.S.BHAVAN, ALUNINNAVILA
MOONUKALLINMOODU, NEYYATTINKARA 695 121.
2. CHELLAMMA PILLAI RADHAMMA,
AYIRKOTTUVILA VEEDU, MANALLOOR, NEYYATTINKARA.
3. RAMAKRISHNA PILLAI VISWANATHAN NAIR
@ AYYAPPAN PILLAI VISWANATHAN NAIR
KALATHUVILAKATHU VEEDU, MANALLOOR, NEYYATTINKARA.

4. RAMAKRISHNA PILLAI
KARUNAKARAN NAIR, -DO- -DO-
5. RAMAKRISHNA PILLAI
JAGANATHAN NAIR, -DO- -DO-
6. JANAKI PILLAI
SUBHADRAMMA, -DO- -DO-
7. PANKAJAKSHI AMMA
SANTHAMMA, EYAKOTTU KONATHU VEEDU, ATHIYANNOOR.
8. RAMACHANDRAN NAIR VIJAYAN
-DO- -DO-
9. RAMACHANDRAN NAIR BABU
-DO- -DO-
10. SANTHAMMA SATHY
-DO- -DO-
11. SARASAMMA LALITHA BAI AMMA
MURIYANKARATHOTTATHU ARAPPURA VEEDU, PARASSALA.
12. PADMANABHA PILLAI SASIDHARAN NAIR
-DO- -DO-
13. LALITHA BAI AMMA RAJALEKSHMI,
-DO- -DO-
14. LALITHA BAI AMMA JAYALEKSHMI
-DO- -DO-
15. NIRMALA DEVI,
-DO- -DO-
16. LALITHA BHAI AMMA CHANDRIKA DEVI
-DO- -DO-
17. LALITHA BAI AMMA AMBIKA DEVI
-DO- -DO-
18. PADMANABHA PILLAI RADHAKRISHNAN
-DO- -DO-
19. LALITHA BAI AMMA USHA
-DO- -DO-
20. SADASIVAN NAIR RAVEENDRANATHAN
-DO- -DO-
21. LALITHAMMA CHANDRIKA
-DO- -DO-

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22. LALITHAMMA SATHYAKUMARI
-DO- -DO-
23. LALITHAMMA SREELATHA
-DO- -DO-
24. DEVAKI AMMA PRASANNA KUMARY
ROHINI BHAVAN, MARUTHOOR, NEYYATTINKARA.
25. LALITHAMMA, HILL MANDIRAM
ATHIYANNOOR, ARALUMMOODU P.O.
26. SREEKANTAN NAIR
S/O.SREEDHARAN NAIR, -DO- -DO-
27. SREEDHARAN NAIR
SREEKUMARAN NAIR, -DO- -DO-
28. STHANUDEVAN
S/O.KESAVA PILLAI, VADAKKE KALATHUVILAKATHU VEEDU
MANALLOOR DESOM, NEYYATTINKARA VILLAGE
NEYYATTINKARATALUK.
29. MOHANAN
S/O.KESAVA PILLAI, VAZHAVILA VEEDU, MANALOORDESOM
NEYYATTINKARA VILLAGE.
30. MEENAKSHI AMMA
D/O.CHELLAMMA PILLAI, AYIRA KOTTUVILA VEEDU
MANALLOOR DESOM, NEYYATTINKARA VILLAGE.
31. RADHAMMA
D/O.CHELLAMMA PILLAI, -DO- -DO-
32. GOPINATHAN NAIR
S/O.BALAKRISHNA PILLAI, -DO- -DO-
33. AMBIKA KUMARI
D/O.MEENAKSHY AMMA, -DO- -DO-
34. PRASANNA KUMARI
D/O.MEENAKSHI AMMA, -DO- -DO-
35. CHANDRIKA
D/O.MEENAKSHI AMMA, -DO- -DO-
36. MADHUSOODHANAN NAIR
S/O.SUKUMARAN NAIR, -DO- -DO-
37. GOPAKUMAR
S/O.SUKUMARAN NAIR, -DO- -DO-
38. UNNI ALIAS PREMAKUMARAN
S/O.VASUDEVAN PILLAI, AYIRAKOTTUVILA VEEDU
MANALLOOR DESOM, NEYYATTINKARA VILLAGE.

39. SIVAKUMARI
D/O.SARADAMMA, SARADA MANDIRAM, MANALLOOR DESOM
NEYATTINKARA VILLAGE.
40. SARADAMMA
W/O.CHANDRASEKHARAN NAIR
CHANDRALEKHA NIVASOTTASEKHARAMANGALAM DESOM
OTTASEKHARAMANGALAMVILLAGE.
41. MOHANA CHANDRAN
S/O.CHANDRASEKHARAN NAIR, CHANDRALEKHA NIVAS
-DO- -DO-
42. PREMA CHANDRAN
S/O.CHANDRASEKHARAN NAIR, -DO- -DO-
43. CHANDRALEKHA
D/O.SARADAMMA, -DO- -DO-
44. LALITHAMMA
W/O.ANANDAKRISHNAN NAIR, MURUKA NIVAS
VARUTHATTUDHANUVACHAPURAM P.O. NADOORKOLLA DESOM
KOLLAYIL VILLAGE.
45. BIJU KUMAR A.L
S/O.ANANDAKRISHNAN NAIR, -DO- -DO-
46. AJI KUMAR A.L
S/O.ANANDAKRISHNAN, -DO- -DO-

R1 BY ADV. SRI.K.B.PRADEEP
R1 BY ADV. SRI.ASHOK SURESH

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13-08-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

B. KEMAL PASHA, J.

.....
C.R.P. No. 429 of 2014
.....

Dated this the 13th day of August, 2015

ORDER

Petitioners are the dissatisfied plaintiffs in a suit for partition, which they had unfortunately filed in the year 1964. The matter was dragged on, and ultimately a final decree was passed in O.S.No.746 of 1964 on 29.02.2008. Still the matter did not end there. EP had to be filed. E.P.No. 180 of 2010 was filed by the petitioners. On getting notice in the EP, the 126th defendant in the suit, the preliminary decree, as well as the final decree appeared before the court below with a contention that he had not received any summons or notices from the suit and therefore, he was not aware of the decree at all. He filed IA 8650 of 2010 before the court

below at the trial stage for getting the final decree set aside.

2. The 126th defendant filed EA 83 of 2013 in the EP seeking the stay of execution. He contended that 36 cents of property included in the decree schedule exclusively belongs to him and the same is not partible in view of an earlier decree and consequent partition.

3. It seems that even prior to the filing of IA 8650 of 2010, the 126th defendant had sold away the said 36 cents of property to a stranger. It was, thereafter, he filed the IA as well as the aforesaid EA. The execution court has dismissed EA 83 of 2013. Challenging the said dismissal, the 126th defendant filed OP 681 of 2013 before this Court. Vide judgment dated 29.01.2014 this Court directed the court below to dispose of IA No.8650 of 2010 within a period of 2 months. The execution was also ordered to be proceeded with. Through the impugned order, the court below has chosen to allow IA 8650 of 2010.

4. Heard the learned counsel for the revision

petitioners and the learned counsel for the 126th defendant.

5. It seems that there are altogether 395 defendants in the preliminary decree. Even on a bird's eye-view on the impugned order, it can be seen that the impugned order is not useful for any purpose at all. The impugned order reflects utter perversity in passing such an order. Without assigning any reason, the delay has been condoned. On condoning the delay, without assigning any reason, the decree has been set aside. It has to be noted that the court below has gone to the extent of unsettling the decree by setting aside it on the mere assertion of the 126th defendant that he did not receive any summons. It is a matter of concern that the court below had not cared even to peruse the records of the case to ascertain whether any notices or summons were served on the 126th defendant. It is a fact that the petitioner in the IA is not a third party, whereas, he is a party to the suit. In such a case, the burden is on the 126th defendant to prove that he did not receive any notice

or summons. The learned counsel for the said 126th defendant has fairly conceded that he is not challenging the preliminary decree.

6. Of course, being a negative fact, he may not be able to prove that he did not receive any notice or summons. At the same time, he could have called upon the court to examine the case records to satisfy that no such summons or notices were served on him. The court below, without ascertaining any such materials, had merely concluded that the decree is liable to be set aside. The petitioners were clamouring before the court below that the decree was not an *ex parte* decree. It seems that the court below has not even considered the question as to whether the decree in question was an *ex parte* decree. The questions as to whether the 126th defendant was set *ex parte* and an *ex parte* decree was passed against him, ought to have been ascertained by the court below. Even without such an exercise the court below has gone to the extent of setting

aside the final decree which was passed in a suit of 1964, thereby unsettling everything in the decree.

7. 36 cents of property on which the 126th defendant has personally forwarded his claim through the aforesaid IA and EA are the properties allotted to defendants 33 to 35 as per the final decree. When such a final decree is unsettled by setting aside the final decree, as far as the 36 cents of property of 126th defendant is concerned, it is as good as unsettling the entire final decree as such. In such a case it may not be possible at present to direct the court below to proceed with the execution proceedings. At the same time, the impugned order depicts absolute illegality, irregularity, impropriety and perversity, and hence the same is liable to be thrown out. But for the judgment of this Court in OP 681 of 2013, this Court would have dismissed the IA.

8. The 126th defendant is not challenging the preliminary decree. What is under challenge is the Final Decree alone. The 126th defendant has no case that he had

any contention in the suit prior to the passing of the preliminary decree that such a 36 cents of property was not partible. Whether he had any such contention in the suit is a matter that has to be ascertained.

In the result, this Civil Revision Petition is allowed and the impugned order is set aside. The court below shall examine the records so to arrive at a conclusion whether the 126th defendant was set *exparte* and an *exparte* decree was passed as against the 126th defendant. Further, the court below shall examine the records and arrive at a conclusion as to whether notices or summons were served on the 126th defendant. The court below shall bear in mind that what is under challenge through IA 8650 of 2010 is the final decree alone and not the preliminary decree. Even if summons was served in the suit before passing the preliminary decree, that has to be treated as sufficient, because of the fact that the preliminary decree is not under challenge. The court below shall examine whether the 126th defendant had any

contention in the suit prior to the passing of the preliminary decree that the said property was not partible. If there was no such contention, that would be the end of his claim. It is made clear that till the disposal of IA 8650 of 2010, the execution proceedings shall stand stayed. The court below shall dispose of IA 8650 of 2010, as expeditiously as possible, at any rate, before 30th September, 2015.

Sd/- B.KEMAL PASHA, JUDGE

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[True copy]

P.S. to Judge