

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

FAO (RO).No. 237 of 2015

**JUDGMENT DATED 19-08-2015 IN AS 110/2009 of SUB COURT, TIRUR
JUDGMENT DATED 10-07-2009 IN OS 284/2006 OF MUNSIFF COURT,
PARAPPANANGADI**
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APPELLANT(S)/RESPONDENT/APPELLANT:

**M.C. RATNAM,
D/O.KAMALAKSHI AMMA, KALARIKKAL HOUSE, THENNALA P.O.,
THENNALA AMSOM VENNIYUR DESOM, TIRURANGADI TALUK,
MALAPPURAM DISTRICT.**

BY ADV. SRI.JAMSHEED HAFIZ

RESPONDENT(S)/APPELLANT/PLAINTIFF:

**M.C. PRABHAKARAN NAIR,
S/O.KAMALAKSHI AMMA, MANNATHANATH CHEKKINGAL HOUSE,
THENNALA P.O., PIN 676 508,
THENNALA AMSOM VENNIYUR DESOM, TIRURANGADI TALUK,
MALAPPURAM DISTRICT.**

**THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP
FOR ADMISSION ON 13-11-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:**

P.B.SURESH KUMAR, J.

F.A.O.(R.O)No.237 of 2015

Dated this the 13th day of November, 2015

JUDGMENT

The defendant in a suit for partition is the appellant in the second appeal.

2. The plaintiff is the brother of the defendant. Two items of properties were sought to be partitioned in the suit. Plaintiff schedule item No.1 is a property measuring 67 cents and plaintiff schedule item No.2 is a property measuring 25 cents. It is stated in the plaint that plaintiff schedule item No.1 property is part of a larger extent of 94 cents belonged to the mother of the parties namely Kamalakshi Amma, of which 27 cents of property was purchased by the plaintiff as per Ext.A4 sale deed and plaintiff schedule item No.1 property is the balance property remaining after the purchase. The defendant

contested the suit. The contention of the defendant was that out of the 94 cents of property originally held by Kamalakshi Amma, the defendant obtained 21.75 cents by virtue of Ext.B1 will and the entire balance namely, 72.75 cents of property is liable to be partitioned. According to the defendant, Ext.A4 sale deed obtained by the plaintiff in respect of 27 cents of property is vitiated for want of consideration. She also contended that Kamalakshi Amma was not having a steady and disposable state of mind at the time of execution of Ext.A4 sale deed. The defendant had, consequently, raised a counter claim also in the written statement seeking a decree to set aside Ext.A4 document. As regards item No.2 property, there was no dispute. The trial court accepted the case of the defendant and decreed the suit as also the counter claim as prayed for by her. The operative portion of the judgment of the trial court reads thus:

- "1. The 72.25 cents of property and plaint schedule item No.2 shall be divided into 2 equal shares.
2. The plaintiff and defendant are entitled to get $\frac{1}{2}$ share each from 72.25 cents of property and from plaint schedule item No.2.
3. The share of defendant will be separated on payment of necessary court fee.
4. Counter claim allowed. Sale deed No.4331/2000 is ordered to be set aside.
5. The parties may file final decree application.
6. Costs will come out of the estate. Suit adjourned sine-die."

The plaintiff challenged the decision of the trial court in appeal. The appellate court set aside the decision of the trial court and remitted the suit for fresh disposal. The defendant, who is aggrieved by the decision of the appellate court, has thus come up in this appeal.

3. Heard the learned counsel for the appellant.

4. The learned counsel for the appellant contended, at the outset, that the decision of the trial court was a

decision on the suit as also on the counter claim and as such, two appeals should have been filed by the plaintiff before the lower appellate court. According to him, the appeal on which the impugned judgment was rendered, in the circumstances, was incompetent. He relied on the decision of this Court in **Girija v. Rajan** [2015 (1)KLT 695] in support of the said contention. He also contended on facts that the decision of the appellate court in remitting the suit for fresh disposal is illegal.

5. As regards the contention as to the maintainability of the appeal before the lower appellate court, I find that the said contention was not raised by the appellant before the lower appellate court. As such, I do not think that the appellant is entitled to challenge the impugned decision on that ground. Coming to the merits, the appellate court found that Ext.B1 will relied on by the defendant was produced before the court only on the date of the trial. The

appellate court also found that the testator who usually puts thumb impression in documents is seen to have put her signature in Ext.B1 will. The appellate court further found that though the plaintiff caused to issue a lawyer's notice to the defendant prior to the institution of the suit, no reply was sent by the defendant to the lawyer's notice. The appellate court further found that the age of the testator as shown in Ext.B1 does not tally with her age shown in Ext.A1. As regards Ext.A4 sale deed, the same being a registered document, the appellate court found that sufficient reasons are not stated by the trial court in holding that the said document is bad. It is in the said circumstances, the appellate court thought it fit to afford the parties a further opportunity to adduce evidence in support of their respective contentions. Such a power is available to the appellate court under Rule 22 of Order XL1 of the Code of Civil Procedure.

The second appeal, in the circumstances, is devoid of merits and the same is, accordingly, dismissed. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

smm