

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 24TH DAY OF JULY 2015/2ND SRAVANA, 1937

FAO.No. 124 of 2013 ()

(AGAINST THE ORDER/JUDGMENT IN I.A.NO.1162 OF 2012 IN OS 182/2009 of
SUB COURT, TIRUR DATED 30-01-2013)

APPELLANT(S)/DEFENDANTS 19, 20,22, 23 & 24::

1. P.SUNILKUMAR
S/O.LATE PULIYATH KUMARAN, PULIYATH, SOUTH ANNARA
TIRUR, MALAPPURAM - 676 101.

2. P.KRISHNAKUMAR, DO. DO.

3. SUNITHA, D/O.PULIYATH KUMARAN, DO. DO.

4. ANITHA, D/O.PULIYATH KUMARAN, DO. DO.

5. KARTHIYANI,
W/O.PULIYATH KUMARAN, DO. DO.

BY ADVS.SRI.B.RAGUNATHAN
SRI.G.GOPALAKRISHNA PILLAI
SRI.R.SRINATH
SRI.M.M.LALBIND
SRI.VIPIN VARGHESE

RESPONDENT(S)/PLAINTIFF AND DEFENDANTS NO.2 TO 18 & 21::

1. NECHIKATTU DEVAKI,W/O RAJAN,
TRIPRANGODU AMSOM, DESOM, TIRUR - 676 108.

2. BALAN DO. DO.

3. LAKSHMI, DO. DO.

4. PARVATHY @ KUTTAMALU,
W/O.MAMU @ APPU DO. DO.

5. SHEEJA, W/O.NARAYANAN, DO. DO.
 6. SARASWATHY, DO. DO.
 7. SAVITHRI DO. DO.
 8. MANIKANDAN, DO. DO.
 9. UNNIKRISHNAN DO.DO.
 10. PRASEETHA,
TRIKKANDIYOOR AMSOM, ANNARA DESOM,
P.O.TIRUR - 676 101.
 11. KALLERI UNNI,
S/O.KALLERI RAVUNNI, NIRAMARUTHUR AMSOM DESOM
TIRUR - 676 109.
 12. KALLERI VALLY,
W/O.PADATTIL KUTTAN, PACHATTIRI AMSOM DESOM
TIRUR - 676 105.
 13. KALLERI KRISHNANKUTTY, S/O.KALLERI RAVUNNI,
NARAMARUTHUR AMSOM DESOM, TIRUR - 676 109.
 14. KALLERI GOVINDAN DO. DO.
 15. KALLRI RAJAN
DO. DO.
 16. KALLERI BABY,
W/O.KARUTHARA HARIDASAN, PACHATTIRI AMSOM DESOM
TIRUR - 676 105.
 17. THOTTIYUIL NARAYANAN, S/O.THOTTIYIL COPPY,
MANGALAM AMSOM, PULLUNI DESOM, TIRUR- 676 561.
 18. THOTTIYIL KRISHNAN, DO. DO.
 19. SURESH KUMAR, S/O.PULIYATH KUMARAN,
TRIKKANDIYUR AMSOM, ANNARA DESOM, TIRUR - 676 101.
- R1 & 11 -R 18 BY ADV. SRI.T.KRISHNAN UNNI (SR.)
R1 & 11 -R 18 BY ADV. SMT.P.A.SHEEJA
R1 & 11 -R 18 BY ADV. SRI.SAJU.S.A
R6,R8,R10,R19 BY ADV. SRI.P.PRASANTH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
20-07-2015, THE COURT ON 24/7/2015 DELIVERED THE FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

F.A.O. No. 124 of 2013

Dated this the 24th day of July, 2015

JUDGMENT

Sunil Thomas, J.

This appeal is directed against the dismissal of I.A.No.1162 of 2012 in O.S.No.182 of 2009 of Sub Court, Tirur in a suit for partition.

2. The above suit, after completion of the pre-trial steps, was included in the list for trial to 9/2/2011. The appellants herein, who were the defendants Nos.19,20,22,23 & 24 remained ex parte. However, the suit was proceeded with and decreed on 17/2/2012. Thereafter, I.A.No.1162/2012 resulting in the impugned order, was filed by the above defendants seeking to set aside the ex parte decree, on the ground that 19th defendant was laid up due to fever. The court below, after giving an opportunity to the first respondent to file counter affidavit and after hearing both sides, dismissed the

application holding that the plea on medical ground was not satisfactorily proved.

3. The above order is impugned in this appeal. Heard both sides and perused the records.

4. It is admitted that the suit was included in the list to 9/2/2012 and the same was known to the appellants herein. The contention of the appellants before the court below was that the case was being conducted by the 19th defendant on behalf of the remaining defendants, for whom the application to set aside the ex parte was filed. The 19th defendant was laid up from 7/2/2012 till 13/3/2012 due to fever and hence, he could not contact the lawyer. On 13/3/2012, he met the counsel and was informed that the case was decided ex parte. Hence, the application was filed.

5. The respondents/plaintiffs in their counter affidavit denied the above allegation and contended that there was nothing to show that the 19th defendant was laid up. It was also doubted as to why the remaining defendants could not contest the proceedings. It was further stated that there was no reason as to why the above defendants could not file a petition seeking

an adjournment of the case on that ground.

6. The court below accepted the above contentions and held that there was no medical record to prove that the 19th defendant was laid up with fever. Prescription was also not produced. The court below further held that even if he was bed ridden, that was not a reason, since the other defendants could have appeared before the court seeking adjournment. The court held that it was only a tactic to delay.

7. There is no dispute that the plea on medical ground is unsubstantiated. No oral or documentary evidence was produced to show that the 19th defendant was laid up. However, the finding of the court below that any one of the remaining appellants could have appeared before the court does not appear to be on a reasonable ground, since the petition itself disclosed that the 19th defendant was entrusted by the remaining defendants to pursue the proceedings. That being so, the mere presence of the remaining defendants could not have served any purpose. However, what transpired exactly on 17/2/2012 is not available on record, except the fact that the above defendants were not present.

8. However, it cannot be lost notice of that the application to set aside the ex parte decree was filed within the stipulated time. There is nothing on record to show that the conduct of the appellants was tainted with motives or was only an attempt to delay the proceedings. In the absence of anything to show mala fide motives, it cannot straight away be presumed that one would take a calculated risk of remaining absent and invite an adverse order.

9. Considering the above facts, we feel that it will be just and proper and also in the interest of justice, to grant the defendants one more opportunity to contest the proceedings. The impugned order is liable to be set aside and consequently the impugned decree will also stand set aside.

In the result, the appeal is allowed. The impugned order is set aside and the I.A. No.1162/2012 in O.S. No.182/2009 of the Sub Court, Tirur, stands allowed. Consequently, the ex parte decree stands set aside. Parties will appear before the court below on 2/9/2015. Thereafter, the court below shall complete the pre-trial steps, if any remaining, and proceed to list the case for trial in accordance with law. It is made clear that this will be

a final opportunity to the defendants to contest the proceedings on merits.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ P.S to Judge.

