

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 24TH DAY OF JUNE 2015/3RD ASHADHA, 1937

FAO.No. 253 of 2013 ()

AGAINST THE ORDER IN I.A.NO.412/08 AND I.A.413/08 IN OS 104/1997 of SUB
COURT,THODUPUZHA DATED 23.07.2013

AGAINST THE JUDGMENT IN AS 218/2001 of HIGH COURT OF KERALA DATED
01-06-2001

APPELLANT/1ST DEFENDANT:

JOSEPH AGED 73 YEARS
S/O. ANDRAYOSE, PITTANICKAL HOUSE, KANNICKAL KARA
ELAPPUPILLY VILLAGE, ELAPPUPILLY P.O., THODUPUZHA.

BY ADV. SRI.UNNIKRISHNAN.V.ALAPATT

RESPONDENTS/PLAINTIFF AND DEFENDANT NO.4:

1. ANDREWS.P.JOHN AGED 44 YEARS
S/O. LATE JOHN, PITTANICKAL HOUSE, KRRA-1
11/131, CHURCH ROAD, CHAMBAKKARA
POONITHARA VILLAGE, KANAYANNOOR TALUK
ERNAKULAM DIST-682034.

2. GRACY,
W/O. PAPPACHAN, PITTANICKAL HOUSE, KANNICKAL KARA
ELAPPILLY.P.O., THODUPUZHA, RESIDING AT ELVUNKAL HOUSE
EDAKADATHY.P.O., RANNI TALUK
PATHANAMTHITTA DISTRICT-686510.

R2, R1 BY ADV. SRI.K.PAUL KURIAKOSE

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 24-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

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F.A.O.No.253 of 2013

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Dated this the 24th day of June, 2015

JUDGMENT

Thottathil B. Radhakrishnan, J.

This appeal is against an order by which the court below dismissed the application to condone the delay of 2756 days, that is to say, more than 7½ years in filing the application to set aside the ex parte decree as against one of the defendants and also consequentially, dismissed the application under Order IX Rule 13 of the C.P.C.

2. We have heard the learned counsel for the appellant/first defendant and the learned counsel for the contesting respondents/plaintiff and fourth defendant.

3. While the impugned order may tend to indicate that it was decided solely on the question of maintainability on a ground referable to the merger of the trial court's preliminary decree in the appellate decree of this Court, on a deeper examination of the papers, we see that the first appeal by the second defendant who is the wife of the first defendant was dismissed at the threshold, having regard to the fact that she did not have a partible interest

in the suit property. However, an examination of the judgment of the trial court as was rendered following contest from all defendants other than the first defendant reflects that the plea of the second defendant, who is the wife of the first defendant, was that the first defendant's father Anthrayose gave the properties exclusively into the possession of the first defendant and his wife and thereupon, they improved the properties and therefore, other heirs of Anthrayose are not entitled to share. This was found against by the trial court and it was thus that the preliminary decree was passed.

4. Notwithstanding the fact that the court below has decided the issue on the question of maintainability, we thought it appropriate to consider whether there is any ground to interfere with the dismissal of the application. We say this more particularly on the basis of the fact that the application for setting aside the ex parte decree was filed more than 7½ years after it was delivered as against the first defendant ex parte and after contest from the other defendants. We see that the first defendant, who is now before us with this appeal, had engaged an advocate before the trial court in the suit. Adv. George Jacob was

appearing for him, going by the records of the case. The appellant made a superficial stand that the vakalath is fraudulent. The interlocutory application for setting aside the ex parte decree was filed in 2008. The final order was passed on that application (impugned order) only on 20th July, 2013. No steps were taken by the appellant herein to summon the so-called vakalath and show the courage of mounting the box and challenging the vakalathnama. We say this because, the regularity and propriety of official course of business of judicial functions, including the proceedings of due acceptance of vakalathnama as attested by advocates, is a matter which will get the presumption atleast under Section 114 of the Evidence Act. In this view of the matter, with no syllable of support being given to the case attempted to be built up, we see that the second defendant, wife of the appellant, had essentially tried to protect the property from being partitioned on all grounds which were available to the first defendant as well. What she projected even through her appeal before this Court was that Anthrayose had given exclusive possession to defendants 1 and 2 and they had improved the property and thereby they are entitled to exclude the others. There is no material to hold any

case of ouster having been made out. This way, on merits as well, we are not persuaded to upset the preliminary decree passed on 21.12.2000 in a suit instituted in 1997 at this distance of time.

5. For the aforesaid reasons, notwithstanding the fact that the court below answered the application on the issue of maintainability, we see no ground being made out to have had that application allowed at the hands of the court of first instance. The appeal, therefore, fails.

In the result, this appeal is dismissed.

Sd/-
THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-
SUNIL THOMAS
Judge

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