

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. 280 of 2008 ()

AGAINST THE ORDER IN I.AS.1406/04, 726/05 AND 727/05 IN OS 163/1994 of
SUB COURT, MUVATTUPUZHA DATED 30-08-2008

APPELLANT/PETITIONER-11th DEFENDANT:

UNNIKRISHNAN, S/O. BOSE,
ERAMBATHU HOUSE, VADACHERRY KARA, KOTTAPPADY VILLAGE
KOTHAMANGALAM TALUK.

BY ADVS.SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE

RESPONDENT/RESPONDENT-PLAINTIFF:

KRISHNAKUMARI, D/O.LATE EKORAN
KRISHNAN, W/O.DR. V. BALAKRISHNAN, NOW RESIDING
AT INVERNESS, FLORIDA, U.S.A REPRESENTED BY
POWER OF ATTORNEY HOLDER M.P. PRINCE, S/O. PONAPPAN
MANNAMPILLY, THURAVUMKARA, ALUVA.

BY ADV. SRI.P.JACOB VARGHESE (SR.)
BY ADV. SRI.VIVEK VARGHESE P.J.
BY ADV. SRI.P.J.VINOD JOSEPH
BY ADV. SRI.P.G.GOPALAKRISHNAN UNNITHAN
BY ADV. SRI.VARUGHESE M EASO
BY ADV. SRI.GEORGE MECHERIL

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 24-06-2015,
ALONG WITH FAO.324/2008, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

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

=====

F.A.O.Nos.280 and 324 of 2008

=====

Dated this the 24th day of June, 2015

JUDGMENT

Thottathil B. Radhakrishnan, J.

F.A.O.No.280 of 2008 is filed by the 11th defendant and F.A.O.No.324 of 2008 is filed by the 7th defendant in a suit for partition.

2. The 11th defendant was a minor at the institution of the suit. The preliminary decree was passed after he attained majority. However, it appears that his status as major was not recorded and no notice was issued to him.

3. The preliminary decree was passed ex parte the defendants who have filed these appeals. They pleaded that they were not aware of the ex parte decree in as much as the 1st defendant, who is their uncle and the father of the plaintiff, was contesting the suit on behalf of the other defendants as well and he appears to have not appropriately taken the matter otherwise. While it may be true that the 7th defendant ought to have given better explanation for the delay in applying to have the ex parte decree set aside since he himself is an advocate, in so far as the 11th

defendant is concerned, the fact of the matter remains that he was a minor and he was eligible to stand by his contentions. On the totality of the facts and circumstances, we are of the view that if the appellants are not given an opportunity to contest the suit for partition at the preliminary decree stage, that will result in manifest miscarriage of justice having regard to the quality of contentions raised by the 11th defendant and 7th defendant and other persons who are sailing along with him. In this context, we take a lenient view in the matter and hold that the ex parte decree was liable to be set aside at the instance of 7th and 11th defendants. However, that cannot be done in a piecemeal manner and the entire preliminary decree has to go paving way for a de novo consideration. In the nature of the contentions inter se parties, the learned senior counsel for the plaintiff is justified in submitting that in any event, this Court is of the view that the parties have to go for trial after setting aside the preliminary decree, there has to be an expeditious disposal since the suit is of the year 1994.

In the result, the impugned order is set aside and as a consequence, the interlocutory application in which that order was issued will stand allowed, resultantly, setting aside the ex parte preliminary decree in O.S.No.163 of 1994 of the Sub Court,

Muvattupuzha. Parties are directed to mark appearance before the court below on 27.11.2015. Taking into consideration the mere relationship between the parties, we dissuade ourselves from imposing any order of costs and also hope that the parties will take recourse to the areas of mechanisms if possible, to settle this litigation through mediation. Since we are of the view that these are an abundantly fit cases to do so, we also request the court below to finalise the trial and conclude the preliminary decree stage before the end of 2015.

These appeals are ordered accordingly.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

Sbna