

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

OP(C).NO. 1789 OF 2013 (O)

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AGAINST THE ORDER IN OS 129/2009 OF II ADDITIONAL SUB COURT, KOZHIKODE

PETITIONER:

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M.K.FATHIMA, AGED 30 YEARS,  
W/O.FAIZAL, KUNNOTH HOUSE, VILLYAPPALLY AMSOM  
THIRUMANA DESOM, VADAKARA TALUK, KOZHIKODE.

BY ADVS.SRI.A.BALAGOPALAN  
SRI.A.RAJAGOPALAN  
SRI.M.N.MANMADAN  
SRI.M.S.IMTHIYAZ AHAMMED  
SRI.K.SANEESH KUMAR

RESPONDENTS:

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1. ANTHRU, AGED 62 YEARS  
S/O.LATE KUNJAMMED KUTTY MUSALIAR, EDAVANA HOUSE  
CHEMMARATHOOR P.O., CHEMMARATHOOR AMSOM DESOM  
VADAKARA TALUK.
2. KUNJAYISHA, AGED 68 YEARS  
W/O.LATE KUNJAMMEDKUTTY MUSALIYAR, THAZHEKOROTH  
CHEMMARATHOOR P.O., CHEMMARATHOOR AMSOM DESOM  
VADAKARA TALUK.
3. ABDUL KHADER, AGED 48 YEARS,  
S/O.LATE KUNJAMMEDKUTTY MUSALIAR, EDAVANA HOUSE  
VILLYAPPALLY AMSOM, THIRUMANA DESOM, VADAKARA TALUK  
KOZHIKODE, REP. BY POWER OF ATTORNEY HOLDER, ANTHRU.
4. MULLABY, AGED 58 YEARS  
W/O.LATE KUNJABDULLA, KIZHAKKAYIL, CHEMMARATHOOR P.O.  
CHEMMARATHOOR AMSOM DESOM, VADAKARA TALUK.
5. ABDUL SAMAD, AGED 38 YEARS,  
S/O.LATE KUNJABDULLA, KIZHAKKAYIL, CHEMMARATHOOR P.O.  
CHEMMARATHOOR AMSOM DESOM, VADAKARA TALUK.

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6. SEENATH, AGED 33 YEARS,  
D/O.LATE KUNJABDULLA KIZHAKKAYIL, CHEMMARATHOOR P.O.  
CHEMMARATHOOR AMSOM DESOM, VADAKARA TALUK.
7. UMMU HABEEB, AGED 30 YEARS  
D/O.LATE KUNJABDULLA KIZHAKKAYIL, CHEMMARATHOOR P.O.  
CHEMMARATHOOR AMSOM DESOM, VADAKARA TALUK.
8. M.K.FAIZAL, AGED 32 YEARS  
S/O.MOIDU HAJI, KUNNOTH HOUSE, VILLYAPPALLY AMSOM  
THIRUMANA DESOM, VADAKARA TALUK, KOZHIKODE.
9. KUNNOTH MOIDU HAJI, AGED 53 YEARS  
S/O.LATE ABDULLA MUSALIAR, KUNNOTH HOUSE  
VILLYAPPALLY AMSOM, THIRUMANA DESOM, VADAKARA TALUK  
KOZHIKODE.
10. THARAVATTAH MALIYAKKAL HUSSAIN, AGED 59 YEARS  
S/O.T.M.KUNJAMUTTY HAJI, THARAVATTAH MALIYEKKAL  
PADANILAM P.O., MADAVOOR AMSOM, ARAMBRAM DESOM  
KOZHIKODE TALUK.
11. DEEPAK BALACHANDRAN, AGED 37 YEARS  
D/O.BALACHANDRAN, M.R./2/13, K.S.H.B.COLONY  
MALAPARAMBU, KOZHIKODE - 9.
12. JAYAKRISHNAN, AGED 54 YEARS  
S/O.KUNJIRAMAN, THONIPURAIKKAL, ELATHOOR AMSOM DESOM  
KOZHIKODE TALUK.

R1, R2, R4 TO R7 BY ADVS. SRI.N.M.MADHU  
SMT.C.S.RAJANI

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 09-07-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AS

OP(C).NO. 1789 OF 2013 (O)

**APPENDIX**

**PETITIONER'S EXHIBITS:**

**EXHIBIT P1: TRUE COPY OF THE PLAINT IN O.S.NO.129/2009 ON THE FILE OF THE 2ND ADDITIONAL SUBORDINATE JUDGE'S COURT, KOZHIKODE.**

**EXHIBIT P2: TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE 1ST DEFENDANT IN O.S.NO.129/2009.**

**EXHIBIT P3: TRUE COPY OF THE ADDITIONAL WRITTEN STATEMENT FILED BY THE PETITIONER IN O.S.NO.129/2009.**

**EXHIBIT P4: TRUE COPY OF THE ORDER PASSED BY THE 2ND ADDITIONAL SUBORDINATE JUDGE'S COURT, KOZHIKODE ON ISSUE NO.6 IN O.S.NO.129/2009 DATED 30.03.2013.**

**RESPONDENTS' EXHIBITS: NIL**

**/TRUE COPY/**

**P.A. TO JUDGE**

**A.HARIPRASAD, J.**

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**O.P.(C).No.1789 of 2013**  
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Dated this the 9<sup>th</sup> day of July, 2015

**J U D G M E N T**

Ext.P4 order passed by the learned Subordinate Judge, Kozhikode in O.S.No.129 of 2009 is under challenge. The suit is one for partition.

2. First defendant is the petitioner. Plaintiffs are the contesting respondents. An additional issue was raised in the suit at the instance of the petitioner challenging the sufficiency of court fee paid in respect of partition of money shown in D schedule to the plaint. The case of the plaintiffs is that the properties scheduled to the plaint belonged to one Edavana Moidu. After his death, the plaintiffs and defendants as co-owners inherited the assets. First defendant is the daughter of deceased Moidu. According to the plaintiffs, she turned down the request for partition. Therefore, they filed a suit for partitioning the assets belonged to deceased Moidu including the

bank deposit described in D schedule to the plaint.

3. Heard the learned counsel for the petitioner and the respondents.

4. Learned counsel for the petitioner contended that the averments in paragraph 5 to the plaint would show that the plaintiffs/respondents no longer claim joint possession in respect of the cash described in D schedule. In paragraph 5 to the plaint, it is mentioned that the amount, which is belonged to the deceased Moidu, kept in deposit was fraudulently obtained by the first defendant. My attention is also drawn to the relief portion of the plaint wherein it is sought that the share interest of the plaintiffs over D schedule amounts may be permitted to be realised from the first defendant. According to the learned counsel for the petitioner, these two recitals in the plaint will show that the plaintiff should have paid court fee under Section 37(1) of the Kerala Court-Fees and Suits Valuation Act, 1959 ( for short ' the Act').

5. Per contra, the learned counsel for the

plaintiffs/respondents contended that the entire averments in the plaint, if taken together, will show that the plaintiffs never admitted that the petitioner/first defendant is in exclusive possession of any of the items sought to be partitioned. It is well settled that the averments in the plaint will have to be considered for determining the jurisdiction as well as the liability to pay court fee. Ext.P4 order does not show much reason for rejecting the contention of the petitioner. However, though it is bereft of reasoning, I agree with the final conclusion arrived at by the court below for the following reasons.

6. Section 37 of the Act deals with the mode of payment of court fee in a suit for partition. Section 37 (1) of the Act deals with a situation where the plaint averments would go to show that the plaintiffs had been excluded from possession of the property sought to be partitioned. In that event, court fee shall be paid by computing the market value of the plaintiffs' share.

Insofar as Sub Section (2) of Section 37 of the Act is concerned, where the averments in the plaint show that the plaintiffs are in joint possession with the defendants, then they need only pay fixed court fee as shown in the provision. Contention of the petitioner is that the plaintiffs themselves have admitted that they are excluded from the possession at least in respect of the cash sought to be divided. Although in paragraph 5, it is mentioned that the amount kept in deposit was fraudulently withdrawn by the first defendant (petitioner), they have not admitted that the first defendant has exclusively dealt with the money or changed hands to a third person. It is to be remembered that when an amount is sought to be partitioned, it cannot be equated with a right claimed on an immovable property or a movable property. As in the case of immovable and movable properties, the person in possession could have changed hands, but so far as money is concerned, his liability to account for remains. Therefore, the contention that the first defendant is in

exclusive possession on the deposit amount will not be a reason to contend that plaintiff should have paid court fee of Section 37(1).

7. Learned counsel for the petitioner relied on a Full Bench decision of Madras High Court in **C.R.Ramaswami Ayyangar v. C.S.Rangachariar and others** (A.I.R. 1940 Madras 113) to contend a proposition that the plaintiff in this case is liable to pay court fee under Section 37(1) of the Act. Facts in that case will show that a minor filed a suit against his father for alienating property during his minority. The observation of the learned Judges makes it clear that the plaintiff in the suit was asking for recovery of possession of the property after challenging the alienations. The said principles cannot be relied on in a suit for partition wherein cash is involved.

8. Learned counsel for the contesting respondent relied on **Abdul Ratheef v. Musthaf Ali** (1959 KLT 412), a decision by a Division Bench of this Court, to argue that Section 37(1) of the Act applies only when it is pleaded

that the plaintiff is excluded from possession of the property claimed to be partitioned. Mere appropriation of the profits or the property or even exclusive use or possession of the property by one co-sharer, does not amount to exclusion of other co-sharers from possession. This decision was followed in **Thankamma v. Unniamma Anthrjanam** (1964 K.L.T. 529) by a learned Single Judge of this Court.

9. Learned counsel for the respondents relied on a decision in **Neelavathi v. N.Natarajan** (AIR 1980 SC 691). That was a case wherein the trial judge after passing preliminary decree directed the plaintiff to pay court fee under Section 37 (1) of the Tamil Nadu Court Fees and Suits Valuation Act. The provisions in the Act are parimateria to the Kerala Act. The suit was ultimately dismissed for non payment of court fee. In the said decision, the Supreme Court held as follows:

*“Before the plaintiffs could be called upon to pay court fee under Sec. 37 (1) of the Act on the ground that they had been excluded from*

*possession, it is necessary that on a reading of the plaint, there should be a clear and specific averments in the plaint that they had been “excluded” from joint possession to which they are entitled to in law. The averments in the plaint that the plaintiff could not remain in joint possession as he was not given any income from the joint family property would not amount to his exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiff had been excluded from possession.”*

10. It is well settled that the question regarding court fee cannot be raised by a party subsequent to the start of evidence as per Section 12 of the Act; but that embargo does not apply to the court. It is well settled that the court can direct the concerned parties to pay court fee at any time before conclusion of trial. So, I do not find any reason to interfere with the order passed by the court below, when totality of the averments in the plaint are considered. The court below shall expedite the trial of the

case and dispose of the same on merits untrammelled by any of the observations contained in this judgment and in accordance with law.

With these observations, this original petition is dismissed.

Sd/-  
**A.HARIPRASAD, JUDGE.**

AS