

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 1ST DAY OF APRIL 2015/11TH CHAITHRA, 1937

OP(C).No. 914 of 2015 (O)

OS 647/1995 OF SUB COURT, KOZHIKODE - II.

PETITIONER:

GANESH, AGED 43 YEARS,
S/O.LATE VARADARAJ BHAT,
KACHERI AMSOM DESOM,
KOZHIKODE THALUK,
KOZHIKODE DISTRICT, PIN - 673 011.

BY ADV. SRI.E.NARAYANAN

RESPONDENT(S):

1. S.BRAHMANAND, AGED 48 YEARS,
S/O.LATE K.N.SREEDHARA SHENOY,
H.NO.19/1463 (OLD NO.19/1399)
KASBA AMSOM DESOM,
KOZHIKODE THALUK, PIN - 673 020.
2. S.VINOD, AGED 47 YEARS,
S/O.LATE K.N.SREEDHARA SHENOY,
H.NO.19/1463 (OLD NO.19/1399)
KASBA AMSOM DESOM,
KOZHIKODE THALUK, PIN - 673 020.
3. G.RATNA BHAI, AGED 6 YEARS,
W/O.LATE K.N.SREEDHARA SHENOY,
H.NO.19/1463 (OLD NO.19/1399)
KASBA AMSOM DESOM,
KOZHIKODE THALUK, PIN - 673 020.
4. C.RAJAN, AGED 82 YEARS,
S/O.LATE VARADARAJAN CHETTI,
RAJARAJESWARY NAGAR,
PONDICHERI PIN - 605 011.
5. SURESH BHAT, AGED 52 YEARS,
S/O.VARADARAJA BHAT,
KACHERI AMSOM DESOM, KOCHIKODU TALUK,
KOZHIKODE DISTRICT PIN - 673 011

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6. R.NARAYANAN BHAT, AGED 44 YEARS,
S/O.RAGHAVA BHAT, KACHERI AMSOM DESOM,
KOCHIKODU THALUK,
KOZHIKODE DISTRICT, PIN - 673 011
7. LALITHA W/O.RAJAN, H NO.7,
RAJARAJESWARY NAGAR,
PONDICHERI, PIN - 605 011.
8. GEETHA, D/O.RAJAN, C/O.SREENIVASAN,
NO.3, PLAY GROUND VIEW STREET,
NANDHANAM EXTENSION, CHENNAI, PIN - 600035.
9. USHA, AGED 42 YEARS, D/O.RAJAN,
C/O.GUPTA, NO.139, AUROBINDO STREET,
PONDICHERI PIN - 673 060.

BY SRI. P.B.KRISHNAN

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 01-04-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

mbr/

OP(C).No. 914 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS:

- P1- TRUE COPY OF THE I.A.NO.6846/12 IN IA NO.5407/12 IN O.S.NO.647/95 ON THE FILE OF THE SUB COURT II, KOZHIKODE.
- P2- TRUE COPY OF THE COUNTER STATEMENT DATED 31.12.12 IN I.A.NO.6846/12 IN I.A.NO.5407/12 IN OS.NO.647/95 ON THE FILE OF THE SUB COURT II, KOZHIKODE.
- P3- TRUE COPY OF THE I.A.1237/15 IN I.A.6846/12 IN I.A.NO.5407/05 IN O.S.NO.647/95 ON THE FILE OF THE SUB COURT, KOZHIKODE II.
- P4- TRUE COPY OF THE ORDER DATED 27.3.2015 OS NO.647/95 ON THE FILE OF THE SUB COURT, KOZHIKODE II.

RESPONDENT(S)' EXHIBITS: - NIL

/TRUE COPY/

P.S. TO JUDGE

mbr/

P.BHAVADASAN, J.

O.P.(C) No. 914 of 2015

Dated this the 01st day of April, 2015

J U D G M E N T

Aggrieved by Ext.P4 order, the petitioner before the court below has come up with this original petition under Article 227 of the Constitution of India.

2. The petitioner is the third petitioner in I.A.No. 6846/2012 in I.A.No. 5407/2005 in O.S.No. 647/1995 before the Sub Court - II, Kozhikode.

3. The case put forward by the petitioner is that the properties mentioned in the schedule annexed to I.A.No. 6846/2012 along with other properties originally belonged to Varadarajalu Chetti and Muthu Gopalan. On the basis of the partition deed dated 25.12.1925, properties were set apart to the branch consisting of Shri. Rajan, Balaji @ Muthu Venkitaramachetti who were the children of Muthugopalan and Varadarajaluchetti. Muthugopalan had no wife and children. According to the petitioner, the share which Balaji

@ Vengittarama Chetti had over the property was given to Muthuvengitaramachetti @ Muthu who is the son of Muthur Veeranna Chetti by way of sale deed executed on 30.10.1953. The said Balaji died in 1960. On the death of Muthugopalan, his share devolved upon Sri. Rajan. It was therefore pointed out that Rajan is having $5/6^{\text{th}}$ share and Muthu is having $1/6^{\text{th}}$ share in the said properties. After the death of Muthu, his $1/6^{\text{th}}$ share devolved upon Padmavathi, Vijayalakshmi, Jayashri and Sukumaran who are his legal heirs and the children. The share which they had, was sold by them, vide sale executed on 14.10.1977 to Raghavendran Bhat and Varadaraja Bhat and thus they became the joint owners of the property along with said Rajan.

4. It is pointed out that Raghava Bhat died on 16.04.1981. On his death, his property devolved upon his legal heirs. Varadaraj Bhat also expired on 25.09.2000 and his rights devolved upon his wife and children. Thus the petitioner gets right over the properties.

5. It is pointed out that the petitioner and the above co-owners filed O.S.No. 389/2005 against the legal heirs of Raghava Bhat and Rajan claiming rights over the above mentioned properties and also to get it partitioned. The details of that suit are given in this petition which are not very relevant for the present purpose.

6. It is contended that the respondents 1 to 3 filed O.S.No. 647/1995 against respondents 4 to 7 for specific performance and obtained a decree. That according to the petitioner is a collusive decree. In furtherance of the collusion, the respondents 1 to 5 and 7 and 8 along with 6th respondent filed I.A.No. 5407/2005 to have the sale deed executed. It was then that the petitioner and the other co-owners came to know about the fraud played by the above persons.

7. It is claimed that the petitioners in I.A.No. 6846/2012 were not given any information regarding the petition I.A.No. 5407/2005 and the further steps taken in

that regard. It is contended that the respondents 1 to 3 have no manner of right to get the sale deed executed from respondents 4 to 7 as the latter persons had no right over the property at the relevant time. It is under those circumstances, I.A.No.6846/2012 had filed for establishing their rights over the suit property.

8. In the counter statement filed by respondents 1 to 3, they took up a contention that Balaji @ Muthu Venkitaramachetti is not the son of Varadarajaluchetti and they denied the contention of the petitioner that as per the partition deed dated 25.12.1925, property was set apart to Balaji.

9. The petitioner therefore wanted the respondents in the I.A. to be examined to prove the right of Balaji. They filed Ext.P3 petition for the said purpose. That was dismissed by Ext.P4 order. That is assailed in this original petition.

10. The learned counsel appearing for the petitioner pointed out that there are no documents to show about the relationship of Balaji with others and if the respondents are examined, that would reveal the true facts. It was under those circumstances, the petition was filed.

11. Sri. P.B. Krishnan, the learned counsel appearing for the respondents on the other hand pointed out that this is nothing but an exercise in futility in the light of the earlier proceedings. He referred to the counter filed by the respondents produced as Ext.P2 along with the original petition and pointed out that even though in O.S.No.18/1978, the Sub Court, Kozhikode had allotted 1/6th share to Balaji, an appeal was filed as A.S.No.77/1982 before the District Court, Kozhikode in which it was categorically held that Balaji @ Muthu Venkitarama Chetti is not the son of Varadarajaluchetti and that Balaji had no right over the property. The lower appellate court set aside the judgment and decree of the trial court. When second appeal taken

before this Court, it did not succeed and the Apex Court refused to entertain the said petition.

12. The petitioner is fully aware of these facts and if at all he has any right, it is for him to establish and he cannot insist that the respondents should be examined to prove their case.

13. After having heard the learned counsel on both sides, there seems to be considerable force in the submissions made by the learned counsel for the respondents. If the petitioner wants to establish his right, it is for him to do so through independent proceedings and he cannot insist that respondents should be examined to prove his case. Apart from the fact that he cannot insist that the respondents should be examined, the burden is on the petitioner to prove that what he claims is true and he has a sustainable case. Of course, if the court feels it absolutely necessary for the adjudication of the issue and for taking decision, then the court may insist that a particular person

be examined. There is no such contingency arising in the case, in the light of the fact that, in the counter affidavit, respondents before the court below have referred to the earlier suit wherein it was held that Balaji was not the son of Varadarajaluchetti. If that be so, any right claims over the said Balaji cannot survive. Under these circumstances, the court below though has not stated any reason, was justified in declining to grant permission to examine respondents.

This petition is without any merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge