

IN THE HIGH COURT OF KERALAAT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC  
&  
THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 25TH DAY OF NOVEMBER 2015/4TH AGRAHAYANA, 1937

OP(C).No. 1277 of 2015 (O)

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AGAINST THE ORDER/JUDGMENT IN OS 248/2005 of SUB COURT, ATTINGAL  
DATED 26.11.2010

PETITIONER(S)/PETITIONER:

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1. MANJU SURESH KUMAR.  
W/O.SURESH KUMAR, KULANGARA PUTHEN VEEDU  
NEAR GOVT.I.T.I, PIN-695101, CHITTATTINKARA DESOM  
ATTINGAL VILLAGE FROM KATTACHAL VEEDU, T.C.8/1457/1  
SANTHI NAGAR, B.75/1, THIRUMALA  
THIRUVANANTHAPURAM.
  2. SURESH KUMAR, AGED 39 YEARS  
S/O.NARAYANAN NAIR, KULANGARA PUTHEN VEEDU  
NEAR GOVT.I.T.I, PIN-695101, CHITTATTINKARA DESOM  
ATTINGAL VILLAGE.

BY ADV. SRI.P.B.KRISHNAN

RESPONDENT(S)/RESPONDENTS:

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1. SATHYASEELAN  
S/O.KESAVAN, KARTHYAYANI NIVAS, CHITTATTINKARA DESOM  
ATTINGAL VILLAGE, CHIRAYINKEEZHU TALUK  
THIRUVANANTHAPURAM-695311.
  2. RADHAMANY,  
W/O.LEKSHMANAN, KUTTAVILAKOM, KALLUVATHUKKAL  
CHATHANNOOR, KOLLAM DISTRICT, PIN-691572  
NOW RESIDING AT 22, JALAN KEMUNING  
SEMBAWANG SPRING ESTATE, SINGAPORE-769744.
  3. RAHULAN,  
S/O.LEKSHMANAN, KUTTAVILAKOM, KALLUVATHUKKAL  
CHATHANNOOR, KOLLAM DISTRICT, PIN-691572  
NOW RESIDING AT 22, JALAN KEMUNING  
SEMBAWANG SPRING ESTATE, SINGAPORE-769744.
  4. LATHIKA,  
D/O.LEKSHMANAN, KUTTAVILAKOM, KALLUVATHUKKAL  
CHATHANNOOR, KOLLAM DISTRICT, PIN-691572  
NOW RESIDING AT 22, JALAN KEMUNING  
SEMBAWANG SPRING ESTATE, SINGAPORE-769744.

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5. RADHIKA,  
D/O.LEKSHMANAN, KUTTAVILAKOM, KALLUVATHUKKAL  
CHATHANNOOR, KOLLAM DISTRICT, PIN-691572  
NOW RESIDING AT 22, JALAN KEMUNING  
SEMBAWANG SPRING ESTATE, SINGAPORE-769744.

R1 BY ADV. SRI.G.S.REGHUNATH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 12.11.2015, ALONG WITH  
FAO. 107/2015, THE COURT ON 25.11.2015 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

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EXT.P1 DATED 24-9-2008,TRUE COPY OF THE MEMO IN O.S.248 OF 2005,SUB COURT,ATTINGAL  
EXT.P2 DATED 6-4-2009,TRUE COPY OF THE MEMO IN O.S.248 OF 2005,SUB COURT,ATTINGAL  
EXT.P3 DATED 26-11-2010,TRUE COPY OF THE JUDGMENT IN O.S.248 OF 2015,SUB COURT,ATTINGAL  
EXT.P4 DATED 26-11-2010,TRUE COPY OF THE DECREE IN O.S.248 OF 2005,SUB COURT,ATTINGAL  
EXT.P5 DATED 8-10-2012,TRUE COPY OF I.A.2060 OF 2012 IN O.S.248 OF 2005,SUB COURT,ATTINGAL  
EXT.P6 DATED 3-6-2014,TRUE COPY OF THE OBJECTION NO.I.A.2060 IN O.S.248 OF 2005,SUB COURT,ATTINGAL  
EXT.P7 DATED 10-10-2014,TRUE COPY OF I.A.NO.1473 OF 2014 IN O.S.248 OF 2015,SUB COURT,ATTINGAL  
EXT.P8 DATED 8-10-2012,TRUE COPY OF I.A.2061 OF 2012 IN O.S.248 OF 2015,SUB COURT,ATTINGAL  
EXT.P9 DATED 18-1-2014,TRUE COPY OF I.A.133 OF 2014 IN O.S.248 OF 2005,SUB COURT,ATTINGAL  
EXT.P10 DATED 7-4-2015,TRUE COPY OF THE ORDER IN I.A.2060 OF 2012 & I.A.1473 OF 2014 IN O.S.248 OF 2015,SUB COURT,ATTINGAL  
EXT.P11 DATED 7-4-2015,TRUE COPY OF I.A.2061 OF 2012 IN O.S.248 OF 2005,SUB COURT,ATTINGAL.  
EXT.P12 DATED 27.3.2006, TRUE COPY OF TE VAKALATH.  
EXT.P13 DATED 15.7.2008, TRUE COPY OF TE VAKALATH.  
EXT.P14 DATED 17.7.2008, TRUE COPY OF PROOF AFFIDAVIT  
EXT.P15 DATED 6.4.2009, TRUE COPY OF THE DOCKET OF EXT.P2 MEMO WITH DATE STAMP.

RESPONDENT(S)' EXHIBITS

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EXT.R1(a): TRUE COPY OF THE SALE DEED DATED 21.1.2012.  
EXT.R1(b): TRUE COPY OF THE POWER OF ATTORNEY DATED 1.3.2006.  
EXT.R1(c): TRUE COPY OF THE IA IN OS.248/05 FILED THROUGH POWER OF ATTORNEY HOLDER FOR SETTING ASIDE THE EX PARTE ORDER ON THE FILE OF SUB COURT,ATTINGAL DATED 29.3.2006.  
EXT.R1(d): TRUE COPY OF THE COVER SENT THROUGH REGISTERED POST.  
EXT.R1(e): TRUE COPY OF THE ACKNOWLEDGEMENT RECEIPT.  
EXT.R1(f): TRUE COPY OF THE IA.1392/08 FILED BY THIS RESPONDENT.  
EXT.R1(g): TRUE COPY OF THE ACKNOWLEDGEMENT RECEIPT RECEIVED IN COURT FROM 2ND DEFENDANT.  
EXT.R1(h): TRUE COPY OF THE ACKNOWLEDGEMENT RECEIPT RECEIVED IN COURT FROM 3RD DEFENDANT.  
EXT.R1(i): TRUE COPY OF THE ACKNOWLEDGEMENT RECEIPT RECEIVED IN COURT FROM 4TH DEFENDANT.  
EXT.R1(j): TRUE COPY OF THE ACKNOWLEDGMENT RECEIPT RECEIVED IN COURT FROM 5TH DEFENDANT.

/TRUE COPY/

PS TO JUDGE

ANTONY DOMINIC & P.V.ASHA, JJ.

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O.P(C).No.1277 of 2015 &  
F.A.O.No.107 of 2015  
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Dated this the 25<sup>th</sup> day of November, 2015

JUDGMENT

Antony Dominic, J.

1.Issues raised in these proceedings are intrinsically connected and the parties are also common. Therefore, these cases were heard together and are being disposed of by this common judgment. For convenience, we shall be referring to the facts and the documents produced in OP(C).1277/15.

2.On 22.8.2008, by document No.2662/2008 of Sub Registrar Office, Attingal, the first petitioner purchased 43 cents of land for ₹8 lakhs. The land consists of two adjacent plots of 30 cents comprised in survey No.1804 and 13 cents comprised in survey No.1776 of Attingal village. On 7.9.2011, the first petitioner executed document No.2600/11 of SRO, Attingal whereby 10 cents out of 30 cents in survey No.1804 was settled in the name of her husband who is the second petitioner. It is stated that the second petitioner thereafter availed of a loan of ₹24 lakhs from the State Bank of Travancore, Attingal Branch

for putting up a residential house, to which, the first petitioner stood as guarantor. Accordingly, they constructed a residential building for which they claimed to have expended about ₹40 lakhs.

3.It is stated that while they were thus enjoying the property mentioned above, on 27.9.2012, Amin from the Sub Court, Nedumangad came and attempted to deliver the property to the first respondent herein. It is stated that thereupon, petitioners made enquiries, when they came to know that OS.248/05 was filed by the first respondent against one of his brothers, since deceased, seeking specific performance of an agreement dated 22.6.2005, in the schedule of which, the two plots of properties mentioned above were included as item Nos.1 and 2. Despite service of summons from the court, the defendant did not appear and was set ex parte on 16.3.2006.

4.Subsequently, on the strength of Ext.R1(b) power of attorney executed by the first defendant on 1.3.2006, his power of attorney holder submitted Ext.R1(c) application to set aside the ex parte decree.

Ext.P12 is the vakalath executed by the power of attorney holder authorising his advocate. Accordingly, the ex parte order was set aside by the court. Later, on 15.7.2008, the defendant himself executed Ext.P13 vakalath in favour of the very same lawyer who was engaged to appear by Ext.P12 power of attorney. After completing the procedural formalities, the suit was listed for trial on 18.7.2008, when, at the instance of the plaintiff, the suit was adjourned and was posted for trial on 23.7.2008. On that day also, request was made by the plaintiff for an adjournment, but however, the same was declined and the suit was dismissed.

5.It was while so, on 22.8.2008, vide document No.2662/08, the property was purchased by the first petitioner. In the mean while, on 21.8.2008, the plaintiff had filed IA.1392/08, a copy of which is Ext.R1(f), under Order IX Rule 9 of CPC for restoration of the suit. The IA was allowed subject to payment of costs, which was paid as is seen from Exts.P1 and P2 memos filed by the counsel for the

plaintiff. Accordingly, the suit was restored to file by order dated 7.4.2009.

6.Subsequently, on 2.7.2009, the defendant expired. The plaintiff, thereupon, filed IA.1654/09 for impleading additional defendants 2 to 5 being the Legal Representatives of the deceased who were residents of Singapore. Summons was issued to the additional defendants in their residential address at Singapore, but, as is evident from Exts.R1(d) and R1 (e), the summons sent to Singapore were returned unserved.

7.Thereupon, the plaintiff applied for substituted service by paper publication. Accordingly, order dated 12.10.2010 was passed permitting the plaintiff to serve notice on the additional defendants by paper publication in Kerala Kaumudi daily. Accordingly, notice was published in Kerala Kaumudi daily. In spite of the publication carried out, the defendants did not enter appearance and as a result, by order dated 12.11.2010, they were set ex parte and

the suit was decreed ex parte on 26.11.2010. Exts.P3 and P4 are the judgment and decree.

8.It is also revealed that thereafter, the plaintiff had filed IA.1141/11 under section 28(3) of the Specific Relief Act for execution of the sale deed. On this IA also, notice was issued to defendants 2 to 5 in their Singapore address and the same was also returned unserved. In such circumstances, Ext.R1(a) sale deed was executed in favour of the plaintiff on 21.1.2012.

9.Still later, EP.28/12 was filed by the plaintiff on which again notices were issued to the defendants which were also returned unserved. Proceeding sheet of the court, a copy of which was made available by the counsel for the 1<sup>st</sup> respondent, show that the notice was repeated and it is recorded as served. However, when the names were called in court on the ground that the defendants were absent, they were again set ex parte. In this context, it has to be mentioned that Ext.R1(g), (h), (i) and (j) are produced as the acknowledgment cards and these

documents do not contain the signature of anyone of the defendants evidencing that the notices issued from the court were served on them.

10. According to the plaintiffs, thereafter, the EP was posted on 13 occasions and finally, on 15.9.2012, delivery was ordered and the case was posted for report to 28.9.2012. It was accordingly that the Amin visited the property for giving delivery to the first respondent on 27.9.2012 when E.A.195/12 was filed by the petitioners obstructing delivery of the decree scheduled property.

11. It is stated that it was thereafter that on 8.10.2012, the petitioners filed Ext.P5, IA.2060/12, to set aside the ex parte decree and Ext.P8, IA.2061/12, to implead them as additional defendants. On the same day they also filed IA.2062/12 seeking stay of further proceedings by the decree holder against Ext.P5. Subsequently, on 10.10.2014, petitioners filed Ext.P7, IA.1743/14, seeking condonation of delay of 650 days in submitting Ext.P5. These applications were considered by the

Court and Ext.P10 order was passed on 7.4.2015, whereby, Exts.P5 and P7, IA.Nos.2060/12 and 1473/14, were dismissed. On 7.4.2015 itself, Ext.P11 order was passed, whereby, Ext.P8 IA 2061/12 seeking impleadment of additional defendants was also dismissed.

12.It was in these circumstances FAO.107/15 has been filed, in which, Ext.P10, to the extent it dismissed IA.2060/12, is challenged. In OP(C).1077/15, the petitioners challenge Ext.P10 to the extent it dismissed Ext.P7 IA.1473/14 and also Ext.P11 order dismissing Ext.P8, IA.2061/12.

13.Ext.P10 order impugned in the original petition shows that the court has rejected the case of fraud on court pleaded by the petitioners. Thereafter, relying on the principles laid down in Ram Prakash Agarwal v. Gopi Krishnan [ILR 2013 (2) Ker 331], it was held that the application under Order IX Rule 13, being one filed by third parties are not maintainable. It was on these grounds that, without examining the merits of the case canvassed,

I.A.Nos.2060/12 and 1473/14 were dismissed and based on this order, Ext.P11 order was passed, dismissing IA.2061/13.

14.We heard the counsel for the petitioners and also the learned counsel appearing for the decree holder.

15.The first contention raised by the learned senior counsel for the petitioner was that the substituted service on defendants 2 to 5, on the basis of which they were declared ex parte and the suit was decreed on 26.11.2010, was illegal. Second contention raised was that the ex parte judgment rendered by the court did not satisfy the requirements of section 20 of the Specific Relief Act. Thirdly, he contended that the petitioners being transferrees of the property, they were entitled to come on record and that therefore, the court below acted illegally in dismissing the applications filed by them.

16.All these contentions were refuted by the learned counsel for the decree holder. After narrating to us the facts, he contended that impleadment under Order

1 Rule 10 is permitted only during the pendency of the suit. According to him, the transfer in favour of the petitioners being a pendente lite one, is hit by section 52 of the Transfer of Property Act. Therefore, neither the decree holder had any obligation to implead them as a party nor are the petitioners entitled to seek impleadment by themselves. Therefore, according to him, Ext.P7 IA.2061/12 filed under order 1 Rule 10 of CPC was not maintainable. In so far as Ext.P5 IA.2060/12 filed under order IX Rule 13 and section 151 of CPC is concerned, counsel contended that these provisions of CPC permits application only by the defendants and not strangers. He also contended that when specific provisions are made under Order IX Rule 13, the inherent powers under section 151 of the CPC cannot be invoked.

17.It was also contended that along with the plaint, the respondent had filed an interlocutory application seeking temporary injunction. According to the counsel, though no order was passed in the said application, once a suit which was dismissed was

restored, the restoration will relate back to the date of institution of the suit and therefore, the alienation in favour of the petitioners without the permission of the court as contemplated under section 52 of the Transfer of Property Act is of no legal effect. Learned counsel also contended that the facts on record itself would prove that the transfer in favour of the petitioners itself is a sham and fraudulent one and that the petitioners cannot set up any right on the basis of the said transfer.

18.Ext.P10 in O.P(C).1277/15 is a common order passed in I.A.Nos.2060/12 and 1473/14. Reading of this order shows that the Sub Court rejected the case of fraud pleaded by the petitioners and thereafter, proceeded to consider whether the petitioners were entitled to apply for condonation of delay and for setting aside the ex parte decree. While examining this question, the court made reference to the judgment of the Apex Court in Ram Prakash Agarwal (supra), where, it was held that an application under Order IX Rule 13 of CPC cannot be filed by a person who was not initially a party to the proceedings. On

this basis, the court held that since the petitioners were not parties to the proceedings, they were not entitled to apply under Order IX Rule 13. The court accordingly concluded that, in this case, the question of condonation of delay and setting aside of ex parte decree does not arise and on that basis, the IAs were dismissed. Ext.P11 in O.P(C).1277/15 is the order dismissing I.A.2061/12, following the order in I.A.2060/12.

19. We made detailed reference to the orders for the limited purpose of demonstrating that the main reason which persuaded the Sub Court to dismiss I.A.Nos.2060/12 and 1473/14 was that the petitioners, being not parties to the proceedings, were not entitled to apply under Order IX Rule 13 of CPC. It was on that conclusion that these IAs were dismissed, following which, I.A.2061/12 was also dismissed. True the case of fraud was rejected, however, even if the case of fraud was rejected, for other reasons, if the petitioners have made out a case for an order in their favour, the court could not have declined the prayer.

20. In so far as the conclusion of the court that an application under Order IX Rule 13 can be maintained only by a party to the proceedings is concerned, that conclusion is fully justified in the light of the language of order IX Rule 13 which provides that in any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside. The conclusion is also fully supported by the judgment of the Apex Court in Ram Prakash Agarwal (supra), in which, the Apex Court has reiterated the position that an application under the above provision of the CPC cannot be filed by a person who was not initially a party to the proceedings.

21. However, even if the power under Order IX Rule 13 was wrongly invoked by the petitioners in the IA filed by them, according to us, the application made should have been considered by the Sub Court invoking its power under section 146 of the CPC which provides that, save as otherwise provided by the code or by any other law for the time being force, where any proceedings may be taken or application made by or

against any person then, the proceedings may be taken or the application may be made by or against any person claiming under him. This provision reads thus:

**"146. Proceedings by or against representatives-** Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

22. Reading of this provision, therefore, shows that if a proceedings is to be taken or the application is to be made against a person, such proceedings may be taken or the application can be made against any person who is claiming under him. In so far as this case is concerned, we have already seen that the property originally belonged to the deceased defendant from whom it was purchased by the first petitioner, who, thereafter settled a portion thereof in the name of the second petitioner. Therefore, though they are pendente lite transferees, the claim that they can set up can only be under the deceased

defendant. In such a case, they can take advantage of section 146 of the CPC and their application therefore should have been considered under that provision.

23. This view that we have taken is fully supported by the principles laid down in the Apex Court judgment in Rajkumar v. Sardari Lal [(2004) 2 SCC 601]. Facts of that case show that during the pendency of a civil suit relating to an immovable property, the 4<sup>th</sup> respondent therein purchased the property by a registered deed of sale from the other defendants. The 4<sup>th</sup> respondent was unaware of the pendency of the suit and the suit was decreed ex parte thereafter against his transferrors who were the defendants in the suit. Subsequently, 4<sup>th</sup> respondent filed an application under Order IX Rule 13 CPC seeking to set aside the decree and also for an order under Order XXII Rule 10 for being brought on record. He had also made an application for condoning the delay in making the application. The trial court allowed the applications and the order was confirmed by the High Court. In the appeal filed before the Apex Court,

the contention raised was that the application under Order IX Rule 13 CPC can be filed only by a defendant and no one else and that the 4<sup>th</sup> respondent, being a transferee, remains bound by the result of the suit and should suffer the consequences of the adverse decree passed against his vendors. The order passed by the trial court was upheld by the Apex Court placing reliance on section 146 of the CPC. This question was considered and the Apex Court held thus in its judgment.

“6. The present case has a peculiar feature. The transfer took place during the pendency of the suit but the decree passed ex parte in the suit is sought to be set aside not by the defendant on record but by a person who did not come or was not brought on record promptly and hence apparently appears to be a third party. However, as we have already stated hereinabove, the person would be a representative-in-interest of the defendant judgment-debtor.

7. The solution lies in Section 146 of the Code of Civil Procedure, 1908. It provides:

“146. Proceedings by or against representatives.  
—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by

or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

8. A lis pendens transferee from the defendant, though not arrayed as a party in the suit, is still a person claiming under the defendant. The same principle of law is recognized in a different perspective by Rule 16 of Order 21 CPC which speaks of transfer or assignment inter vivos or by operation of law made by the plaintiff decree-holder. The transferee may apply for execution of the decree of the court which passed it and the decree will be available for execution in the same manner and subject to the same conditions as if the application were made by the decree-holder. It is interesting to note that a provision like Section 146 CPC was not to be found in the preceding Code and was for the first time incorporated in CPC of 1908. In Order 21 Rule 16 also an explanation was inserted through amendment made by Act 104 of 1976 w.e.f. 1-2-1977, whereby the operation of Section 146 CPC was allowed to prevail independent of Order 21 Rule 16 CPC.

9. A decree passed against the defendant is available for execution against the transferee or assignee of the defendant judgment-debtor and it does not make any difference whether such transfer or assignment has taken place after the passing of the decree or before the passing of the decree without notice or leave of the court.

10. The law laid down by a four-Judge Bench of this Court in Saila Bala Dassi v. Nirmala Sundari Dassi [AIR 1958 SC394] is apt for resolving the issue arising for decision herein. A transferee of property from the defendant during the pendency of the suit sought himself to be brought on record at the stage of appeal. The High Court dismissed the application as it was pressed only by reference to Order 22 Rule 10 CPC and it was conceded by the applicant that, not being a person who had obtained a transfer pending appeal, he was not covered within the scope of Order 22 Rule 10. In an appeal preferred by such transferee, this Court upheld the view of the High Court that a transferee prior to the filing of the appeal could not be brought on record in appeal by reference to Order 22 Rule 10 CPC. However, the Court held that an appeal is a proceeding for the purpose of Section 146 and further, the expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in Order 22 Rule 10. Whoever is entitled to be but has not been brought on record under Order 22 Rule 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code. A person having acquired an interest in suit property during the pendency of the suit and seeking to be brought on record at the stage of the appeal can do so by reference to Section 146 CPC which provision being a beneficent provision

should be construed liberally and so as to advance justice and not in a restricted or technical sense. Their Lordships held that being a purchaser pendente lite, a person will be bound by the proceedings taken by the successful party in execution of decree and justice requires that such purchaser should be given an opportunity to protect his rights.

11. In Saila Bala Dassi case an earlier decision of this Court in Jugalkishore Saraf v. Raw Cotton Co. Ltd. [AIR 1955 SC 376] was followed. It was a case where during the pendency of a suit for recovery of a debt from the defendant the plaintiff in that suit had transferred to a third person all the books and other debts. This Court held that the position of the transferor vis-à-vis the transferee is nothing more than that of a benamidar for the latter and when the decree is passed for the recovery of that debt, it is the latter who is the real owner of the decree. When the transferee becomes the owner of the decree immediately on its passing, he must, in relation to the decree, be also regarded as person claiming under the transferor. The transferee is entitled under Section 146 to make an application for execution which the original decree-holder could do. The executing court can apply its mind to the simple equitable principle which operates to transfer the beneficial interest in the after-acquired decree under Section 146. As the assignee from the plaintiff of the debt which was the entire subject-matter of the suit the

transferee was entitled to be brought on record under Order 22 Rule 10 and must, therefore, be also regarded as a representative of the plaintiff within the meaning of Section 47 CPC.

**12.** In *Sardar Govindrao Mahadik v. Devi Sahai* [(1982) 1 SCC 237] this Court held that an application not falling under Order 22 Rule 10 CPC *stricto sensu* could yet be held to be maintainable by having recourse to Section 146 CPC.

**13.** The appellant cannot dispute that the decree though passed against Respondents 2 and 3 could be executed even against Respondent 4, he being a *lis pendens* transferee though not having been joined in the suit as a party. Such a person can prefer an appeal being a person aggrieved. Clearly, the person who is liable to be proceeded against in execution of the decree or can file an appeal against in decree, though not a party to the suit or decree, does have *locus standi* to move an application for setting aside an *ex parte* decree passed against the person in whose shoes he has stepped in. In the expression employed in Rule 13 of Order 9 CPC that "in any case in which a decree is passed *ex parte* against a defendant, he may apply ... for an order to set it aside", the word "he" cannot be construed with such rigidity and so restrictively as to exclude the person, who has stepped into the shoes of the defendant, from moving an application for setting aside the *ex parte* decree especially in the presence of Section

146 CPC.

**14.** Incidentally, we may observe that in *Surjit Singh v. Harbans Singh* [(1995) 6 SCC 50] the assignees pendente lite were refused by this Court to be brought on record as they had purchased the suit property after the passing of the preliminary decree and in clear defiance of the restraint order passed by the Court injuncting any alienation/assignment. It was a case of exercising discretion not to grant leave under Order 22 Rule 10 CPC, in the circumstances of the case, as in the opinion of this Court permitting impleadment and recognizing the alienation/assignment would amount to defeating the ends of justice and the prevalent public policy. That case is clearly distinguishable.

**15.** We hold that a lis pendens transferee, though not brought on record under Order 22 Rule 10 CPC, is entitled to move an application under Order 9 Rule 13 to set aside a decree passed against his transferor, the defendant in the suit.

**16.** As to the availability of sufficient cause for setting aside the decree within the meaning of Order 9 Rule 13 CPC and for condoning the delay under Section 5 of the Limitation Act, the finding in favour of Respondent 4 is purely one of fact and well reasoned. The attack against the locus standi of Respondent 4 to maintain the application under Order 9 Rule 13 CPC fails and so does the appeal."

24. In this context, we may also state that the judgment in Ram Prakash Agarwal (supra) was decided only with reference to Order IX Rule 13 and in the course of the judgment, the Apex Court has referred to the judgment of the Patna High Court in Dulhim Suga Kuer v. Deorani Kuer [AIR 1952 Patna 72], where, it dealt with the provisions of section 146 and did not disapprove the principles laid down therein.

25. In such circumstances, we are satisfied that the conclusion of the trial court that the petitioners herein being strangers to the proceedings, I.A.2060/12 was not maintainable cannot be sustained and has to be set aside. Since I.A.Nos.2061/12 and 1473/14 were dismissed following the conclusion in I.A.2060/12, the orders on these IAs also cannot be sustained and are set aside.

26. We have referred to the other contentions raised by the learned counsel for the appellant. However, having regard to the fact that I.A.2060/12 was dismissed on the ground of its maintainability and without going into the merits of the contentions

raised, we are inclined to think that the matter requires to be re-considered on merits by the Sub Court. For that reason, we do not think it proper for this Court to deal with the contentions raised by both sides on the other issues and we leave those contentions open to be agitated before the sub Court which will deal with the same in accordance with law.

27. Accordingly, orders dated 7.4.2015 passed by the Sub Court, Attingal dismissing I.A.Nos.2060/12, 2061/12 and 1473/14 in O.S.248/05 are set aside. The matter will stand remitted to the Sub Court, which will hear the parties and take a fresh decision in accordance with law. Such order shall be passed at any rate within two months of receipt of a copy of this judgment and in the mean while, further proceedings in execution of the decree in O.S.248/05 on the file of the Sub Court, Attingal will stand stayed.

28. Original Petition and the appeal are disposed of accordingly.

Parties will appear before the Sub Court,  
Attingal on 3.12.2015.

Sd/-  
ANTONY DOMINIC, Judge.

Sd/-  
P.V.ASHA, Judge.

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