

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 25TH DAY OF JUNE 2015/4TH ASHADHA, 1937

OP(C).NO. 3773 OF 2013 (O)

**AGAINST THE COMMON ORDER IN I.A.NOS.2188, 2189 AND 2190 OF 2013 IN OS
148/2008 OF SUBORDINATE COURT, TIRUR DATED 09-09-2013**

PETITIONERS:

- 1. SAINUDHEEN,
S/O.MOOSA HAJI, THARAMAL HOUSE**
- 2. AMINA , W/O.SAINUDHEEN, VADAKKATHINAKATH HOUSE.**

**BOTH THE PETITIONERS ARE RESIDING AT
OMACHAPPUZHA AMSOM DESOM
OMACHAPPUZHA P.O., PIN-676 320, TIRUR TALUK
MALAPPURAM DISTRICT.**

BY ADV. SRI.JAMSHEED HAFIZ

RESPONDENTS:

- 1. FATHIMA,
D/O.MOOSA HAJI, THARAMAL HOUSE
OMACHAPPUZHA AMSOM DESOM, OMACHAPPUZHA P.O.
PIN-676 320, TIRUR TALUK, MALAPPURAM DISTRICT.**
- 2. SAINABA
D/O.MOOSA HAJI, THARAMAL HOUSE, PARIYAPURAM AMSOM
PANANGATTOOR DESOM, PIN-676 302, TIRUR TALUK,
MALAPPURAM DISTRICT.**

**R1 BY ADV. SRI. P.K.IBRAHIM
BY ADV. SMT.K.P.AMBIKA
BY ADV. SMT.A.A.SHIBI**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 25-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AS

APPENDIX

PETITIONERS' EXHIBITS:

- EXHIBIT P1 : TRUE COPY OF THE PLAINT IN OS 148/2008 BEFORE THE SUB COURT, TIRUR DT.21-6-2008.
- EXHIBIT P2 : TRUE COPY OF THE WRITTEN STATEMENT IN OS 148/2008 BEFORE THE SUB COURT TIRUR DT.27-11-2008.
- EXHIBIT P3 : TRUE COPY OF THE JUDGMENT IN OPC 172/2013 DT.30-1-2013 BEFORE THIS HONOURABLE COURT.
- EXHIBIT P4 : TRUE COPY OF THE IA 2188/2013 IN OS 148/2008 BEFORE THE SUB COURT TIRUR DT.25-7-2013.
- EXHIBIT P5 : TRUE COPY OF THE IA 2189/2013 IN OS 148/2008 BEFORE THE SUB COURT TIRUR DT.25-7-2013.
- EXHIBIT P6 : TRUE COPY OF THE IA 2190/2013 IN OS 148/2008 BEFORE THE SUB COURT TIRUR DT.25-7-2013.
- EXHIBIT P7 : TRUE COPY OF THE COUNTER IN IA 2190/2013 IN OS 148/2008 BEFORE THE SUB COURT TIRUR DT.7-8-2013.
- EXHIBIT P8 : TRUE COPY OF THE COMMON ORDER DT.9-9-2013 IN IA 2188/2013, 2189/2013 AND 2190/2013 IN OS 148/2008 BEFORE THE SUBORDINATE JUDGE OF TIRUR.

RESPONDENTS' EXHIBITS:

- EXHIBIT R1(A): TRUE COPY OF THE CROSS EXAMINATION OF PW1 IN O.S.148/2008 ON THE FILES OF SUB COURT, TIRUR.
- EXHIBIT R1(B): TRUE COPY OF THE DEPOSITIONS OF PW2 IN O.S.148/2008 ON THE FILES OF SUB COURT, TIRUR.
- EXHIBIT R1(C): TRUE COPY OF THE DEPOSITIONS OF PW3 IN O.S.148/2008 ON THE FILES OF SUB COURT, TIRUR.
- EXHIBIT R1(D): TRUE COPY OF THE DEPOSITIONS OF PW4 IN O.S.148/2008 ON THE FILES OF SUB COURT, TIRUR.
- EXHIBIT R1(E): TRUE COPY OF THE DEPOSITIONS OF PW5 IN O.S.148/2008 ON THE FILES OF SUB COURT, TIRUR.
- EXHIBIT R2(A): TRUE COPY OF THE CROSS EXAMINATION OF THE FIRST DEFENDANT IN O.S.148/2008 ON THE FILES OF SUB COURT, TIRUR.
- EXHIBIT R2(B): TRUE COPY OF THE DEPOSITIONS OF DW2 IN O.S.148/2008 ON THE FILES OF SUB COURT, TIRUR.

/TRUE COPY/

P.A.TO JUDGE

A.HARIPRASAD, J.

O.P.(C).No.3773 of 2013

Dated this the 25th day of June, 2015

J U D G M E N T

Exhibit P8 order, wherein three Interlocutory Applications were dealt with by the learned Subordinate Judge, Tirur in O.S.No.148 of 2008, is the subject matter in this original petition.

2. Heard the learned counsel for the petitioners and the learned counsel for the contesting respondents.

3. Petitioners are the defendants in the suit. The suit is one for setting aside documents and for partition. Ext.P1 is the copy of the plaint. The property originally belonged to father of the contesting parties. They entered into a partition deed in the year 1993. The disputed properties were set apart to one of their brother, by name Hamza. Later, he died without wife or children. Plaintiffs and defendants, who are the brothers and sisters of deceased Hamza, are the legal heirs. The plaintiffs filed a suit for partition demanding share. Petitioners/contesting defendants resisted the suit by contending that deceased

Hamza during his life time had executed certain documents in respect of the properties in favour of them. Those documents are challenged in the suit.

4. It is seen that the parties earlier had come up before this court challenging two orders in OPC.Nos.172 & 378 of 2013. Those petitions were disposed by a common judgment on 30.01.2013. The trial court was directed to reopen the case for further evidence to be adduced by both the parties. Thereafter, the contesting respondents filed Exts.P4, P5 and P6 petitions on which the impugned order was passed. Learned counsel for the petitioners submitted that the court below without application of mind mechanically allowed the applications. His main grievance is against recalling DW1 for further cross examination. Per contra, learned counsel for the contesting respondents submitted that after disposal of the aforementioned original petitions by this court, the originals of the documents under challenge were produced before the court. It is the case of the respondents that deceased Hamza was a mentally challenged person. Of course, this contention is strongly

denied by the petitioners. In order to establish that deceased Hamza did not execute the impugned documents, it is essential that DW1 should be recalled, in the context of production of fresh evidence, contended by the learned counsel for the respondents. He placed reliance on the decision in **Salem Advocate Bar Association T.N. v. Union of India** [2005 (6) SCC 344] to substantiate his contentions regarding necessity of examining a witness in court. Learned counsel for the petitioners submitted that the person who examined as DW1 is laid up and not able to move about. This argument is also challenged by the contesting respondents. As it is a question of fact, I do not wish to make any observation regarding that. It is for the court to decide whether DW1 can be summoned or not for effectually adjudicating the case. I do not find any legal reason to interfere with Ext.P8 order passed by the court below.

Therefore, the Original Petition (Civil) is dismissed.

A.HARIPRASAD, JUDGE.