

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 7TH DAY OF JULY 2015/16TH ASHADHA, 1937

OP(C).No. 1774 of 2014 (O)

OS 747/1995 of II ADDL. SUB COURT, ERNAKULAM

PETITIONER :

K.J.JOSEPH, AGED 60 YEARS,S/O.LATE JOSEPH,
KOTTEPARAMIL HOSUE, THOPPIL JUNCTION,
THRIKKAKKARA, ERNAKULAM DISTRICT.

BY ADV. SRI.VARGHESE C.KURIAKOSE

RESPONDENTS :

1. YACOB JOSEPH
S/O.JOSEPH, KOTTEPPARAMBIL HOSUE,
NEAR COCHIN UNIVERSITY, THRIKKAKKARA, BMC P.O.,
VAZHAKKALA VILLAGE, KANAYANNUR TALUK,
ERNAKULAM DISTRICT-682 030.
2. SARAMMA, W/O.A.V.XAVIER,
THOTTAMKARA HOUSE, NEAR BYE PASS HOTEL,
AROOR P.O., ALAPPUZHA DISTRICT - 689301
3. RAHALAMMA
W/O.SEBASTIAN, RESIDING AT VADAKKAL HOUSE,
THRIKKAKKARA, CHALIPARAMBU, NORTH OF DESEEYA MUKKU
VAZHAKKALA VILLAGE, ERNAKULAM DISTRICT-689 301.
4. VICTORY SETH, W/O.LATE SETH JOSEPH,
KOTTEPARAMBIL HOUSE, KUNNUMPURAM,
EDAPPALLY NORTH, COCHIN-682 024.

R1 BY ADV. SRI.K.C.CHARLES

R2,R3 & R4 BY ADV. SRI.A.BALAGOPALAN

BY ADV. SRI.A.RAJAGOPALAN

BY ADV. SRI.C.MURALI

BY ADV. SRI.M.S.IMTHIYAZ AHAMMED

R3 BY ADV. SRI.M.K.CHANDRA MOHANDAS

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

bp

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1: TRUE PHOTOSTAT COPY OF IA NO. 2151/2014 WHICH IS FILED UNDER ORDER IX RULE 13 OF THE CPC SEEKING THE SET ASIDE EX-PARTE DECREE.
- EXT.P2: TRUE PHOTOSTAT COPY OF IA NO. 2151/2014 WHICH IS THE APPLICATION FILED U/S.5 OF THE LIMITATION ACT SEEKING TO CONDONE OF DELAY.
- EXT.P3: TRUE PHOTOSTAT COPY OF IA NO. 4729/2013 SEEKING TO CONDUCT PUBLIC SALE.
- EXT.4: TRUE PHOTOSTAT COPY OF IA NO. 5775/2013 SEEKING TO REVIEW THE ORDER.
- EXT.P5: TRUE PHOTOSTAT COPY OF IA NO. 5776/2013 BY INVOKING SECTION 3 OF THE PARTITION ACT.
- EXT.P6: TRUE PHOTOSTAT COPY OF OBJECTION FILED BY THE PLAINTIFF IN EXT.P5.
- EXT.P7: TRUE PHOTOSTAT COPY OF OBJECTION FILED BY THE 3RD RESPONDENT IN EXT.P5.
- EXT.P8: TRUE PHOTOSTAT COPY OF IA NO. 2274/2014 SEEKING TO SET APART THE SHARES OF THE RESPONDENTS.
- EXT.P9: TRUE PHOTOSTAT COPY OF IA NO. 2290/2014.
- EXT.P10: TRUE PHOTOSTAT COPY OF COMMON ORDER PASSED IN IA NO. 5775/2013 AND 5776/2013 AND IA 5881/2013.
- EXT.P11: TRUE PHOTOSTAT COPY OF COMMON ORDER IN IA NO. 2290/2014 AND IA 2274/2014.

RESPONDENT(S)' EXHIBITS NIL.

//TRUE COPY//

P.S. TO JUDGE

bp

B. KEMAL PASHA, J.

.....
O.P.(C) No.1774 of 2014
.....

Dated this the 7th day of July 2015

J U D G M E N T

After much chequered career, a suit for partition was filed. Finally, the matter has been finalised and it was found that the plaintiff is entitled to 1/5th share and each one of defendants 1 to 4 is entitled to 1/5th share over the plaint schedule property. A registered Will was propounded by the 2nd defendant, who is the present petitioner herein. Twice the Will was found to be forged. Two rounds of litigations up to this Court were over. Even after that, it so resulted in passing an *exparte* preliminary decree.

2. At the time of passing the final decree, a Commission was taken out. The Commissioner has reported that the only course open for the passing of the final decree is to apply Sections 2 or 3 of the Partition Act. Initially, the

plaintiff filed an application to have a public auction. The said application was not duly opposed either by the petitioner or by the other defendants. The court below had allowed the application filed by the plaintiff by ordering public auction. Thereafter, the petitioner herein had stepped in with IA No.5775/2013 seeking a review of the order passed by the court below for public auction thereby expressing his willingness to purchase the shares of others and for getting the power of the court under Section 3 of the Partition Act invoked. Together with it, the other defendants also filed IAs expressing their willingness to purchase the shares of others.

3. Ultimately, through Ext.P10 common order, the court below has disposed of all those IAs thereby reviewing the earlier order passed by the court below for public auction, with a view to invoking the power of the court under Section 3 of the Partition Act. The court below through Ext.P10 order has ordered auction of the property among all the

defendants. Of course, it seems that the plaintiff is excluded from participating in the auction.

4. It seems that, thereafter, defendants 3 to 5 had filed IA 2290 of 2014 and the plaintiff filed IA 2274 of 2014 for getting their shares separated and divided by metes and bounds, based on the Commissioner's report. The court below has dismissed those IAs through Ext.P11 order and thereby once again confirming Ext.P10 order.

5. What is under challenge herein is Ext.P10. Over and above it there is also a request from the part of the petitioner to get Exts.P1 and P2 IAs disposed of. Those IAs were, one for condoning the delay and the other one under Order IX Rule 13 of the Code of Civil Procedure, 1908 for getting the *exparte* decree set aside.

6. Heard the learned counsel for the petitioner Sri. Varghese C. Kuriakose, the learned counsel for the first respondent Sri.K.C. Charles and the learned counsel for respondents 2 to 4 Sri.C.Murali.

7. The learned counsel for the petitioner has argued that the court below ought not to have given an opportunity to defendants 3 to 5 to participate in the private auction as they had earlier foreclosed their right to bid in such a private auction, and as they had never approached the court below for getting the order of public auction reviewed. It has been pointed out that mainly it was the petitioner herein who had applied for the review of the order and it was on his application the order of public auction was reviewed through Ext.P10 order.

8. The gist of the argument is that it is the petitioner, who is the 2nd defendant, is the only person, who is entitled to bid the property in such a private auction by paying the shares of others based on the Commissioner's valuation, under Section 3 of the Partition Act, and that anyone of the defendants 3 to 5 are not in any way entitled to bid the property in auction and they are not expected to bid the shares of others.

9. *Per contra*, the learned counsel for the plaintiff as well as the learned counsel for the defendants 3 to 5 has argued that the plaintiff as well as defendants 3 to 5 were fed up with the continued litigations and the deliberate dilatory tactics being repeatedly employed by the petitioner, and therefore, they wanted somehow to get the matters settled even if it may result in some loss to them, and that was why they were ultimately forced to prefer IAs in respect of Ext.P11 order for getting at least their shares separated. They have further expressed their willingness to accept the shares as per the valuation made by the Commissioner before the court below from the petitioner herein and they are not standing in the way of the petitioner for purchasing their shares also under Section 3 of the Partition Act, based on the valuation made by the Commissioner. It seems that the Commissioner has valued the property with the building at ₹88,47,691/-. There is no subsisting valid challenge as against the said valuation.

10. It seems that practically the plaintiff and defendants 3 to 5 have conceded to the argument forwarded by the learned counsel for the petitioner that the petitioner alone is entitled to bid in the private auction and purchase the shares of others by paying off their shares. When such a concession is there, much discussion is not required to conclude that the matter has to end here and the petitioner shall purchase the shares of others, and the petitioner is entitled to pay off all the shares of others for getting the whole property.

11. The learned counsel for the petitioner has forwarded a request to have a direction to the court below to dispose of Exts.P1 and P2 IAs. The question of Exts.P1 and P2 do not arise at present, because the petitioner has hotly contested the mode of the passing of the final decree. When he has participated in the proceedings for passing a final decree by mooting all possible claims, he has foreclosed his right to proceed with Exts.P1 and P2 IAs. Two rounds of

litigations were over. The petitioner, who is still enjoying the property has caused all sorts of impediments in the passing of the final decree. Having canvassed for his right to purchase the shares of others by paying of the amounts equal to their shares based on the Commissioner's report, the present request for a direction for the disposal of Exts.P1 and P2 IAs is nothing but an attempt to open up yet another round of unnecessary litigations with a view to protracting the matter further to another decade or more thereby denying the fruits of the suit to these respondents. Permitting the petitioner again to moot those questions is just like giving permission to open the *Pandora's box*, which I do not want to entertain. The court below shall act as aforesaid.

The Original Petition is disposed of accordingly.

B.KEMAL PASHA, JUDGE

ul/-

[True copy]

P.S. to Judge