

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

OP(C).No. 2224 of 2014 (O)

I.A.NO.1913 OF 2014 IN O.S.NO.268 OF 2009 OF THE MUNSIF COURT AT
MUVATTUPUZHA

PETITIONER(S)/PLAINTIFF :

SMT.CHINNAMMA VARGHESE, AGED 75 YEARS,
D/O.LATE VARGHESE, W/O.LATE MATHEW, KUNNUMMEL HOUSE,
NECHHOOR KARA, MANEED VILLAGE, MUVATTUPUZHA TALUK.

BY ADVS.SRI.P.M.JOSHI
SMT.SIJI K.PAUL

RESPONDENT(S)/PLAINTIFFS :

1. ANIL PETER, AGED ABOUT 44 YEARS,
S/O.PATHROSE, PALLATHADATHIL HOUSE, VELIYANADU,
NOW RESIDING AT KUNNUMMEL HOUSE, MANEED VILLAGE,
MUVATTUPUZHA TALUK, PIN - 686 664.
- * 2. ANI PETER, AGED ABOUT 41 YEARS,
S/O.PATHROSE, PALLATHADATHIL HOUSE, VELIYANADU,
NOW RESIDING AT KUNNUMMEL HOUSE, MANEED VILLAGE,
MUVATTUPUZHA TALUK, PIN - 686 664.(CORRECTED)
- * 3. SANTHA PETER, AGED ABOUT 64 YEARS,
W/O.PATHROSE, PALLATHADATHIL HOUSE, VELIYANADU,
NOW RESIDING AT KUNNUMMEL HOUSE, MANEED VILLAGE,
MUVATTUPUZHA TALUK, PIN - 686 664.(CORRECTED)

THE ADDRESS OF 2ND AND 3RD RESPONDENT ARE CORRECTED AS

2. ANIL PETER, AGED ABOUT 41 YEARS,
S/O.PATHROSE, PALLATHADATHIL HOUSE, VELIYANADU,
EDAKKATTUVAYAL VILLAGE, KANAYANNOR TALUK,
PIN CODE- 682 313.

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**3. SANTHA PETER, AGED ABOUT 64 YEARS,
W/O.PATHROSE, PALLATHADATHIL HOUSE, VELIYANADU,
EDAKKATTUVAYAL VILLAGE, KANAYANNOR TALUK,
PIN CODE- 682 313.**

*** AS PER ORDER DATED 03.02.2015 IN I.A.NO.1486 OF 2015.**

**R1 & R3 BY ADV. SRI.LAL GEORGE
R2 BY ADVS. SRI.LEGY ABRAHAM
SRI.ABE RAJAN**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 04-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

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APPENDIX

PETITIONER(S)' EXHIBITS :

EXHIBIT P1: THE TRUE COPY OF I.A.NO.1913/14 DATED 01.08.14 SUBMITTED BY THE PLAINTIFF IN O.S.NO.268/09 BEFORE THE MUNSIFF COURT, MUVATTUPUZHA.

EXHIBIT P2: THE TRUE COPY OF THE OBJECTION TO I.A.NO.1913/14 DATED 04.08.14 FILED BY RESPONDENTS BEFORE THE MUNSIFF COURT MUVATTUPUZHA.

EXHIBIT P3: THE TRUE COPY OF THE ORDER IN I.A.NO.1913/2014 IN O.S.NO.268/2009 DATED 26.08.2014 OF THE LEARNED MUNSIFF COURT, MUVATTUPUZHA.

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

B.KEMAL PASHA, J.

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O.P.(C).No.2224 of 2014

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Dated this the 4th day of August, 2015

J U D G M E N T

Exhibit P1 I.A. was filed by the plaintiff before the court below under Order XXIII Rule 1(3) CPC, seeking leave to withdraw from the suit with permission to file a fresh suit on the same subject matter. According to the plaintiff, the plaintiff has an apprehension that he must fail because of some formal defects crept in the plaint and the said defects cannot be cured through a mere amendment.

2. Exhibit P2 objection was filed by the respondents herein. According to the respondents, they are not standing in the way of permitting the plaintiff to withdraw from the suit; at the same time, they are objecting the granting of leave to file a fresh suit on the same subject matter. The court below has dismissed the I.A. through Exhibit P3 order, mainly

because of the reason that the I.A. was belated.

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

4. The apprehension forwarded by the learned counsel for the respondents is that this is an attempt by the plaintiff to escape from the clutches of the law of limitation and in case, leave is granted, they may be able to escape the limitation. The said apprehension is out of place in view of Order XXIII Rule 2 CPC. According to the learned counsel for the petitioner, the suit ought to have been filed by seeking a relief of partition also and otherwise the plaintiff may not get the fruits of the litigation, even if the suit is decreed. It seems that the court below is carried away by dismissing the said I.A. through Exhibit P3 by finding that the I.A. was filed belatedly. Even in the appellate stage, an application under Order XXIII Rule 1(3) CPC can be made. On hearing either side, this Court is of the view that the court below ought to have granted leave to the petitioner to withdraw from the suit with liberty to file a fresh suit on the

same subject matter.

In the result, this Original Petition (Civil) is allowed and Exhibit P3 order stands set aside. I.A.No.1913 of 2014 in O.S.No.268 of 2009 stands allowed.

Sd/-

B.KEMAL PASHA
JUDGE

DSV/4/8/15