

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 12TH DAY OF JANUARY 2015/22ND POUSHA, 1936

OP(C).No. 2929 of 2014 (O)

(OS 429/2006 of ADDITIONAL SUB COURT, NORTH PARAVUR)

PETITIONERS:

SHYNO GEORGE AGED 43 YEARS
W/O.GEORGE, KANNATTUMADATHIL
EDAPPALLY VADAKKUMBHAGOM KARA
EDAPPALLY NORTH VILLAGE REPRESENTED BY HER POWER OF
ATTORNEY HOLDER HARIKUMAR M.R. S/O.REGHUNATHA PILLAI,
AGED 55 YEARS, KESAVAVILASOM, GLASS FACTORY ROAD,
KALAMASSERY P.O., PIN - 683 104.

BY ADVS.SRI.K.C.CHARLES
SRI.M.POLY MATHAI
SRI.VIMAL K.CHARLES
SMT.A.T.RENJU

RESPONDENTS:

1. JOSEPH ANTONY,
S/O.THOMAS, PARATHARA VEETIL, PARUDEESA NAGAR
PARAVOOTHARA, PARAVUR VILLAGE, PARAVUR TALUK.
2. K.K.RAMAKRISHNAN
S/O.KANNAN, KOTHARA VEETIL, MURAVANTHURUTH MURI
VADAKKEKKARA VILLAGE, PARAVUR TALUK.
3. SASIDHARAN
S/O.VELAYUDHAN, NISH BHAVAN, KIZHAKKEPRAM MURI
KOTTUVALLY VILLAGE, PARAVUR TALUK (DIED)
4. BABURAJ
S/O.VELAYUDHAN, SASTHAMPARAMBIL CHETTIBHAGOM KARA
VARAPPUZHA VILLAGE, PARAVUR TALUK.
5. MOHANAN
S/O.VELAYUDHAN, SASTHAMPARAMBIL CHENNUR KARA,
KADAMAKKUDY VILLAGE.

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6. BABY

W/O.SASIDHARAN, NISHA BHAVAN, KIZHAKKEPRAM MURI
KOTTIVALLY VILLAGE, PARAVUR TALUK.

7. NISHA,

D/O.SASIDHARAN, NISHA BHAVAN, KIZHAKKEPRAM MURI
KOTTIVALLY VILLAGE, PARAVUR TALUK.

8. NIDHA

D/O.SASIDHARAN, NISHA BHAVAN, KIZHAKKEPRAM MURI
KOTTIVALLY VILLAGE, PARAVUR TALUK.

9. LATHA MOHANAN, AGED 50 YEARS

W/O.LATE MOHANAN, VELAYUDHA MANDIRAM, SASTHAMPARAMBIL
CHENNUR KARA, KADAMAKKUDY VILLAGE - 682 027 (L/R OF D4).

10. MANU VELAYUDHAN, AGED 19 YEARS

S/O.LATE MOHANAN, VELAYUDHA MANDIRAM, SASTHAMPARAMBIL
CHENNUR KARA, KADAMAKKUDY VILLAGE - 682 027 (L/R OF D4).

11. ARYA NARAYANI (MINOR), AGED 15 YEARS

D/O.LATE MOHANAN, REPRESENTED BY HER GUARDIAN MOTHER
8TH RESPONDENT RESIDING AT VELAYUDHA MANDIRAM
SASTHAMPARAMBIL, CHENNUR KARA
KADAMAKKUDY VILLAGE - 682 027 (L/R OF D4).(MINOR
RESPONDENT No.11 REPRESENTED BY THEIR MOTHER
LATHA MOHANAN, THE 9TH RESPONDENT).

BY ADV. SRI. P. CHANDRASEKHAR.

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
12-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :

- EXT.P-1: A TRUE COPY OF THE JUDGEMENT DATED 5.7.2011 IN O.S.NO.429/2006 OF THE SUB COURT, NORTH PARAVUR.
- EXT.P-2: A TRUE COPY OF THE JUDGEMENT IN R.F.A. 69/2012.
- EXT.P-3: A TRUE COPY OF I.A.1779/2014 IN OS.NO.429/2006 OF THE SUB COURT, NORTH PARAVUR.
- EXT.P-4: A TRUE COPY OF THE COUNTER AFFIDAVIT FILED IN EXHIBIT P3.
- EXT.P-5: A TRUE COPY OF I.A. 2025/2014 IN O.S.NO.429/2006 OF THE SUB COURT, NORTH PARAVUR.
- EXT.P-6: A TRUE COPY OF I.A.NO.1780/2014 IN O.S.429/2006 OF THE SUB COURT, NORTH PARAVUR.
- EXT.P-7: TRUE COPY OF THE COUNTER AFFIDAVIT FILED IN IA NO.1780/2014 IN O.S.429/2006 OF THE SUB COURT, NORTH PARUR.
- EXT.P-8: A TRUE COPY OF I.A.NO.2024/2014 IN O.S.NO.429/2006 OF THE SUB COURT, NORTH PARUR.
- EXT.P-9: A TRUE COPY OF THE COMMON ORDER IN I.A.1779/2014, 1780/2014, 2024/2014 AND 2025/2014 IN O.S.NO.429/2006 OF THE SUB COURT, NORTH PARUR, DATED 13.11.2014.
- EXT.P-10: A TRUE COPY OF THE POWER OF ATTORNEY EXECUTED BY THE PETITIONER IN FAVOUR OF M.R.HARIKUMR DATED 13.11.2013.

RESPONDENT(S)' EXHIBITS: NIL.

// True Copy //

P.A. to Judge.

smp

P.BHAVADASAN, J.

Original Petition (Civil) No.2929 OF 2014

Dated this the 12th day of January, 2015.

J U D G M E N T

Under challenge is Ext.P9 order dated 13.11.2014 in I.A.Nos.1779, 1780, 2024 & 2025 of 2014 in O.S.No.429/2006 before the Additional Sub Court, North Paravur. The court below by the impugned order dismissed all the applications.

2. The facts absolutely necessary for the disposal of this petition are as follows:

Defendants 1 to 4 entered into an agreement for sale with the plaintiff and the total extent that was to be assigned was 33 cents of land. Ext.A1 produced before the court below is the agreement. On failure of the defendants to execute the document, suit was laid. 8th defendant in the suit purchased the property after the agreement was entered into between defendants 1 to 4 and the plaintiff. During the pendency of the suit, the 2nd defendant died and his legal heirs were brought on the party array.

3. The court below, after adverting to the contention of both the parties, found that the plaintiff was successful in establishing his claim and granted a decree as follows:

"A) Decree is passed directing defendants 1 and 3 to 7 to execute sale deed in favour of the plaintiff on the basis of Ext.A1 agreement after accepting the balance sale consideration within a period of 60 days from the date of this decree. 8th defendant is also directed by this decree to join as a party to the said transfer so as to pass clear title of the plaint schedule property to the plaintiff. All the defendants are also directed to deliver possession of the property to the plaintiff. If the defendants fall in executing the document and to deliver possession as directed above plaintiff is at liberty to get the sale deed executed in his favour through court after depositing the balance sale consideration. In such an event plaintiff is allowed to realise the expenses thereof from the defendants and their assets.

B) Prayer for realisation of advance money made in the form of alternative remedy is rejected as the main relief is granted".

4. A reading of the above decree shows that the 8th defendant who was a transferee subsequent to the agreement was directed to join as a party to the transfer. The 8th defendant

carried the matter in appeal as R.F.A.No.69/2012. In R.F.A.No.69/2012, it appears that three applications have been filed as I.A.Nos.362 and 363 of 2012 and C.M. Application No.149/2012. The applications are filed for impleading the legal heirs of the 4th defendant, setting aside the abatement and also for condonation of delay in filing the petitions. This Court, in the said applications, passed an order which reads as follows:

“3. There is no dispute that the 4th respondent, who was the 4th defendant in the suit, died on 9.5.2011, that is, while the suit itself was pending before the court below. The suit was finally heard only on 27.06.2011 but the 4th defendant died before that. Hence the suit as against him had abated. In such a case the only course to be followed is to permit the plaintiff to cure the defect in the judgment and decree which have been passed against a dead person. The procedure to be followed is contained in ***Assy Amma v. Aisabi*** (1976 KLT 101). Accordingly, the judgment and decree are set aside, so far as they relate to the 4th defendant-Mohanan, in order to enable the plaintiff to file appropriate applications before the court below for substituting the legal representatives of the deceased 4th defendant after getting the abatement set aside and delay, if any, condoned”.

5. The appeal filed by the 8th defendant namely, R.F.A.No.69/2012 was disposed of by this Court by Ext.P2 judgment which reads as follows:

“In the light of the common order passed in C.M.Application No.149/2012 and I.A.Nos.362 and 363 of 2012, this appeal is dismissed as defective, since the impugned decree passed is against a dead person namely, the 4th defendant. The plaintiff is permitted to rectify the proceedings by filing appropriate petitions before the court below in terms of **Assy Amma** v. **Aisabi** (1976 KLT 101)”.

6. After the matter went back to trial court, it is not in dispute that the legal heirs of the 4th defendant who died during the pendency of the suit which was omitted to be noticed by the said court, were impleaded. Thereafter, the 8th defendant moved four applications which are marked as Exts.P3, P5, P6 and P8. They are filed for amending the written statement filed by the 8th defendant, impleading the legal heirs of 4th defendant in the amendment petition, accepting power of attorney and for permission to examine the husband of the 8th defendant to prove her case respectively. The court below dismissed the said

applications by the impugned order.

7. Learned counsel appearing for the petitioner-8th defendant contended that the court below was not justified in holding that the petitioner was not a party to the suit. Once the matter has been sent back to trial court, the court below should have considered the matter afresh and it could not be said that the petitioner was not a party to the suit. It is also significant to notice, according to the learned counsel, that it was the 8th defendant who had preferred an appeal before this Court which was dismissed as defective in the light of the fact that the decree has been passed without noticing the death of the 4th defendant.

8. It is also contended that four persons had jointly agreed to assign the property and if a decree is passed against one of them, it will bind all of them and therefore in the light of the order in the applications filed in R.F.A.No.69/2012 directing the petitioner to approach the court below for appropriate relief, the earlier decree passed in the suit does not survive. It is further contended that at any rate the decree passed against the 4th defendant who was no more at the relevant time was null and

void and that can be set aside at any point of time. Accordingly it is contended that the court below was not justified in dismissing the petitions.

9. Sri.P.Chandrasekhar, learned counsel appearing for the respondents, contended that a reading of the order dismissing the applications in R.F.A.No.69/2012 by a Division Bench of this Court would clearly indicate that the decree was set aside only as against the 4th defendant in the suit and the appeal as such was dismissed on the ground that it was defective. It is significant to notice, according to the learned counsel, that the decree as against other defendants was not set aside and was not interfered with. If the 8th defendant has a grievance that the appeal filed before this Court was not decided on merits, the remedy available to him was to take appropriate steps as against the judgment and decree passed by the court below after impleading the legal heirs of the 4th defendant.

10. The question as to whether the decree is indivisible will depend upon the facts of each case. In the case on hand, four persons had entered into an agreement to assign their property

jointly to the 1st respondent herein. On failure of those persons to honour the agreement, suit was filed and decreed and the petitioner who is the 8th defendant in the suit had obtained the property after the agreement for sale was entered into between the four persons with the plaintiff. By the decree, the 8th defendant was directed to join as a party to the execution of the deed.

11. It is significant to notice that it is the 8th defendant who had filed an appeal before this Court as R.F.A.No.69/2012. It is seen that the executants of the document did not prefer an appeal. Along with the appeal, the 8th defendant had moved C.M.Appln.No.149/2012 and I.A.Nos.362 and 363 of 2012 which were petitions seeking to have the legal heirs of the 4th defendant impleaded before the appellate court on the ground that even before the judgment was passed by the trial court, the 4th respondent had expired. This Court held that it is not possible for this Court to implead those persons in the light of the decision in **Assy Amma** vs. **Aisabi** (1976 KLT 101) and while holding so, this Court also held that the decree as against the 4th defendant

is set aside and appropriate applications be filed before the court below to bring on record the legal heirs of the 4th defendant. After having dismissed the applications made mention of above, this Court dealt with the appeal filed as R.F.A.No.69/2012 and that also was disposed of by Ext.P2.

12. On a reading of Ext.P2 it is extremely difficult to come to the conclusion as claimed by the petitioner that the decree as a whole is set aside. A reading of Ext.P2 as well as the order dated 07.02.2012 in the applications filed in R.F.A.No.69/2012, it would appear that the decree as against the 4th defendant alone was set aside. Probably, the petitioner may be justified in submitting that there is no hearing on merits of appeal. Whatever that be, R.F.A No.69/2012 was disposed of noticing that it was defective and observing that the defect be cured. But that is far from saying that the decree against all others are set aside. Apart from the fact that the 4th defendant was no more and the proper remedy available to the petitioner is to prefer an appeal after curing of defects and assail the findings in appeal on merits, the three applications filed by the petitioner were beyond

the scope of observations made by this Court while directing to cure the defects before the court below by taking steps to have the legal heirs of the 4th defendant impleaded in the party array.

For the above reasons, this original petition is without merits and it is accordingly dismissed.

Sd/-

P.BHAVADASAN
JUDGE

smp