

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR**

**TUESDAY, THE 22ND DAY OF DECEMBER 2015/1ST POUSHA, 1937**

**RSA.No. 810 of 2011 ( )**  
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**(AGAINST THE JUDGMENT IN AS.NO. 5/2010 OF PRINCIPAL SUB COURT,  
IRINJALAKUDA DATED 31-03-2011)**

**(AGAINST THE ORDER IN IA. NO.892/2005 IN OS.NO. 2017/2003 OF PRINCIPAL  
MUNSIFF COURT, IRINJALAKUDA DATED 10-09-2009)**  
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**APPELLANT/APPELLANT/3RD PLAINTIFF/3RD PETITIONER:**  
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**\*GEORGE, AGED 56 YEARS,  
S/O.KIDANGETH CHAKALAKAL YACOB, IRINJALAKUDA  
MARKET ROAD, MANAVALASSERY VILLAGE,  
MUKUNDAPURAM TALUK. (DIED, LRS IMPEADED)**

**\*ADDITIONAL APPELLANTS IMPEADED**

**\*ADDL.A2: JACKSON, S/O. LATE GEORGE, AGED 27,  
KIDANGETH CHAKALAKAL, IRINJALAKUDA MARKET ROAD,  
MANAVALASSERY VILLAGE, MUKUNDAPURAM TALUK.**

**\*ADDL.A3: SOSANNAM, W/O. LATE GEORGE,  
S/O. KIDANGETH CHAKALAKAL,  
IRINJALAKUDA MARKET ROAD,  
MANAVALASSERY VILLAGE, MUKUNDAPURAM TALUK.**

**\*THE LRS OF THE DECEASED SOLE APPELLANT IMPEADED AS ADDL.  
APPELLANTS 2 AND 3 AS PER ORDER DATED 18/10/2011 IN IA.NO.2373/2011**

**BY ADVS.SRI.G.SREEKUMAR (CHELUR)  
SRI.K.RAVI (PARIYARATH)**

**RESPONDENT(S)/RESPONDENTS/PLAINTIFFS 1,2,4 TO 8 AND DEFENDANTS 1 & 2 :**  
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**1. RAJU, S/O. KIDANGETH CHAKALAKAL YACOB,  
IRINJALAKUDA MARKET ROAD, MANAVALASSERY VILLAGE,  
MUKUNDAPURAM TALUK,  
RESIDING AT 102 ANKUR GREEN FIELD, C H S PLOT NO.8,  
SECTOR-16A, VASI, NEW MUMBAI-400 703.**

**2. RUBY, D/O.KIDANGETH CHAKALAKAL YACOB,  
W/O.PAREKADAN MATHEW, NADAVARAMBA DESOM,  
VELOOKARA VILLAGE, MUKUNDAPURAM TALUK-680 661.**

R.S.A.NO.810/2011

3. KUNJUROSE, D/O.KIDANGETH CHAKALAKAL YAACOB,  
W/O.CHERADAI THOMAS, KOTTANELLUR VILLAGE DESOM,  
MUKUNDAPURAM TALUK-680 001.
4. ANNIE, D/O.LATE KIDANGETH CHAKALAKAL DAVIS,  
IRINJALAKUDA MARKET ROAD, MANAVALASSERY VILLAGE,  
MUKUNDAPURAM TALUK-680 121.
5. NEENA, D/O.LATE KIDANGETH CHAKALAKAL DAVIS,  
IRINJALAKUDA MARKET ROAD,  
MANAVALASSERY VILLAGE, MUKUNDAPURAM TALUK-680 121.
6. TEENA, D/O. LATE KIDANGETH CHAKALAKAL DAVIS,  
IRINJALAKUDA MARKET ROAD,  
MANAVALASSERY VILLAGE, MUKUNDAPURAM TALUK-680 121.
7. NONU, D/O.LATE KIDANGETH CHAKALAKAL DAVIS,  
IRINJALAKUDA MARKET ROAD,  
MANAVALASSERY VILLAGE, MUKUNDAPURAM TALUK-680 121.
8. TESSY, D/O.KIDANGETH CHAKALAKAL YACOB,  
RESIDING AT 106/3, KEERTHY APARTMENTS,  
MAYUR VIHAR PHASE-I, EXTENSION, NEW DELHI,  
NEAR SAMACHAR BUILDING,PIN- 110 011.
9. JACOB, S/O.LATE JOHNY,  
RESIDING AT 106/3, KEERTHY APARTMENTS,  
MAYUR VIHAR PHASE-I, EXTENSION, NEW DELHI,  
NEAR SAMACHAR BUILDING,PIN- 110 011.

R1 BY ADVS. SRI.MURALI PURUSHOTHAMAN  
SRI.DEEPU LAL MOHAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD  
ON 02-12-2015, THE COURT ON 22-12-2015 DELIVERED THE FOLLOWING:

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**P.B.SURESH KUMAR, J.**

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**R.S.A. No.810 of 2011**  
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**Dated 22<sup>nd</sup> December, 2015.**

**J U D G M E N T**

The final decree in a suit for partition is under challenge in this second appeal. The third plaintiff in the suit is the appellant.

2. The property sought to be partitioned in the suit was a property measuring 13 cents. There were six sharers. Five among the sharers filed the suit for partition of their 5/6 share in the suit property. A preliminary decree was passed in the suit on 20.10.2004 declaring the 5/6 share of the plaintiffs over the suit property. Thereafter, the plaintiffs filed I.A.No.892 of 2005 for passing of a final decree in respect of their shares. An Advocate Commissioner was appointed in the final decree proceedings to effect partition of the shares of the plaintiffs. The Advocate Commissioner, however, reported that metes and bound partition of the suit property is not possible. In the

light of the report of the Advocate Commissioner, the plaintiffs filed I.A.No.3460 of 2006 seeking orders to value the suit property by an approved valuer to enable them to move the court for sale of the suit property. An approved valuer was thereupon, appointed by the court to value the suit property and the valuer appointed by the court assessed the market value and forced sale value of the suit property at Rs.32.72 lakhs and 26.20 lakhs respectively. The plaintiffs filed objections to the valuation contending that the suit property will not fetch more than Rs.60,000/- per cent. In the meanwhile, the plaintiffs also filed I.A.No.4092 of 2008 seeking orders to auction the suit property among the sharers. When I.A.No.4092 of 2008 was taken up for hearing, there was a consensus among the sharers as to the valuation of the suit property and consequently, the court ordered auction of the suit property among the sharers on 30.7.2009 fixing the upset price at Rs.13,00,000/-. Accordingly, the suit property was auctioned among the sharers on 30.7.2009 and the first plaintiff

purchased the suit property for a sum of Rs.24,90,000/-. On 31.7.2009, the court confirmed the auction in favour of the first plaintiff. Thereupon, the first plaintiff deposited the the bid amount. On deposit of the bid amount, a final decree was passed by the trial court specifying the amounts due to the parties out of the sale proceeds of the suit property.

3. A few months after the final decree, the third plaintiff preferred an appeal against the same, contending among others, that the bid by first plaintiff in the auction was for and on behalf of the other plaintiffs also and therefore, the trial court ought not have confirmed the sale in favour of the first plaintiff. Alternatively, it was also contended that the suit property would fetch more than Rs.50,00,000/- and therefore, the auction of the property for Rs.24,90,000/- has resulted in gross injustice to the parties. The appellate court rejected the contentions raised by the third plaintiff and confirmed the final decree passed by the trial court. The third plaintiff, who is aggrieved by the concurrent decisions against him has thus

come up in this second appeal.

4. At the time of admission, the following question of law was formulated for decision in the second appeal :

“When under the preliminary decree 5/6 shares were jointly allotted to eight plaintiffs and one share jointly to the two defendants and based on the report of the Commissioner that it is not possible to divide the property into two shares as provided under the preliminary decree application filed jointly by all the plaintiffs for sale of the property among the sharers as provided under sections 2 and 3 of Partition Act was allowed and permission was granted to the plaintiffs to participate in the auction and the first plaintiff on behalf of the plaintiffs participated in the auction and purchased the property, whether the courts below were justified in holding that the property was purchased by only the first plaintiff and the remaining plaintiffs are only entitled to get 4/6 shares of the sale price, especially when no court fee was paid for separation of the share of the first plaintiff.”

5. Heard the learned counsel for the appellant as also the learned counsel for the first respondent/first plaintiff.

6. The learned counsel for the appellant vehemently contended that I.A.No.4092 of 2008 seeking orders to auction the suit property was filed by all the plaintiffs except the

second plaintiff together and that therefore, the court below ought to have reckoned the bid of the first plaintiff as the bid of the plaintiffs. According to the learned counsel, the court below, in the circumstances, ought not have confirmed the auction in favour of the first plaintiff. The learned counsel also contended that I.A.No.4092 of 2008 was one filed under Section 2 of the Partition Act and therefore, the court below ought not have ordered sale of the property among the sharers. According to the learned counsel, had the court ordered sale of the suit property in public auction, the property would have fetched a much higher value. The learned counsel further contended that the property now fetches more than Rs.2 crores and that the confirmation of the sale of the property in favour of the first plaintiff has thus resulted in grave injustice to the parties.

7. A perusal of I.A.No.4092 of 2008 indicates that the same was an application filed by all the plaintiffs, except the second plaintiff, together. The first plaintiff has filed the

affidavit in support of the application. In the affidavit, the first plaintiff has stated that the affidavit is being filed on behalf of the other plaintiffs as well. Though the cause title of the application shows that the application is one filed under Section 2 of the Partition Act, the prayer was for auction of the suit property among the sharers. The records of the final decree proceedings indicate that on 16.7.2009, when I.A.No.4092 of 2008 was taken up for hearing, there was a consensus among the sharers as to the upset price to be fixed for the auction. The order passed by the court on 16.7.2009 on I.A.No.4092 of 2008 specifies that the auction shall be among the sharers. The proceedings of the auction is part of the records. The auction proceedings indicate that plaintiffs 1 to 5 and the wife of the first defendant who died pending suit participated in the auction. It is seen that the first plaintiff commenced the auction by offering a sum of Rs.13,00,000/- for the property. It is also seen that in the course of the proceedings, the second plaintiff offered upto a sum of Rs.16,50,000/- for the property. Likewise,

it is seen that plaintiffs 3, 4 and 5 have offered upto Rs.16,70,000/-, Rs.16,80,000/- and Rs.17,40,000/- respectively for the property. It is also seen that the wife of the first defendant has offered Rs.24,00,000/- and the first plaintiff has offered Rs.24,90,000/- for the property. A perusal of the auction proceedings would also show that the participants in the auction have offered different amounts at different intervals and the auction was confirmed in favour of the first plaintiff as he was the highest bidder. In so far as all the sharers including the third plaintiff participated in the auction in their individual capacity, there is absolutely no scope for the contention that the purchase of the property by the first plaintiff was on behalf of all the petitioners in I.A.No.4092 of 2008. The question formulated for decision by this Court at the time of admission of the second appeal is thus answered against the appellant.

8. The contention raised by the third plaintiff that the auction of the property by the first plaintiff was on behalf of other plaintiffs also and the contention that I.A.No.4092 of 2008

being an application filed under Section 2 of the Partition Act, the court should have ordered a public auction will not go together. Nevertheless, I would like to deal with the said contention also. In **Badri Narain Prasad Choudhary v. Nil Ratan Sarkar** (AIR 1978 SC 845), the Apex Court has categorically held that the request for sale envisaged by Section 2 of the Partition Act must be one for public sale. As noticed above, though it is shown in the cause title of I.A.No.4092 of 2008 that the same is an application filed under Section 2 of the Partition Act, the prayer in the said application was for sale of the suit property among the sharers. I.A.No.4092 of 2008, in the circumstances, cannot be treated as an application under Section 2 of the Partition Act. It is now settled that a court executing a decree for partition has the power to order sale of the suit property otherwise than in accordance with the provisions of the Partition Act also. As such, there is no substance to the contention that the prayer of the plaintiffs in I.A.No.4092 of 2008 was for a public sale of suit

property and that the court below acted illegally in ordering sale among the sharers.

9. As noted above, the valuer appointed in the final decree proceedings assessed the forced sale value of the suit property at Rs.26.20 lakhs. The aforesaid valuation was made during December, 2006. The plaintiffs including the third plaintiff filed objections to the assessment of the value made by the valuer contending that the suit property will not fetch more than Rs.60,000/- per cent. The said objection is seen filed on 5.1.2007. Later, on 16.7.2009, when the final decree court considered I.A.No.4092 of 2008, it was conceded by the third plaintiff and others that an auction can be conducted among the sharers for the sale of the property fixing the upset price at Rs.13,00,000/-. Despite the aforesaid stand taken by the third plaintiff and others as to the valuation, the first plaintiff purchased the suit property for a sum of Rs.24,90,000/-. The appellant, who also participated in the auction has offered only a sum of Rs.16,70,000/-. The

subsequent escalation in the price of the suit property, according to me, cannot have any bearing on the rights of parties.

In the light of the aforesaid facts and circumstances, there is no merit in the second appeal and the same is, accordingly, dismissed. All the interlocutory applications in the appeal are closed.

**Sd/-**

**P.B.SURESH KUMAR, JUDGE.**

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