

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

SA.NO. 297 OF 2002 (B)

AGAINST THE JUDGMENT IN AS 101/1992 OF II ADDITIONAL DISTRICT COURT,
THRISSUR DATED 16-10-2000

AGAINST THE ORDER/JUDGMENT IN OS 177/1989 OF MUNSIFF'S COURT,
WADAKKANCHERRY DATED 26-02-1992

APPELLANT/RESPONDENTS 1 AND 2/DEFENDANTS 1 AND 2:

1. KARAPPAI CHETTICHYAR, AGED 76,
D/O.KUNDANPANANGATT VELLAKUTTY CHETTIYAR
W/O.KONGATT RAMAN CHETTIYAR, MAYANNUR VILLAGE,
TALAPPILLY TALUK.
2. DEVAYANI, AGED 46,
D/O.KARAPPAI CHETTIYAR, MAYANNUR VILLAGE,
TALAPPILLY TALUK.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENTS/APPELLANT AND 3RD RESPONDENT/PLAINTIFF AND 3RD
DEFENDANT:

1. RUGMINI CHETTIYAR, AGED 58,
D/O.KARINCHIVEETIL VELLAKUTTY CHETTIYAR,
THIRUVAYIYOOR DESOM, VELLINEZHI AMSOM
OTTAPPALAM TALUK.
2. RAJAMMA, AGED 44,
D/O.KARAPPAI CHETTIYAR AND W/O.ALAKKALPARAMBIL
KRISHNADRI, KILLIMANGALAM VILLAGE, TALAPPILLY TALUK.

* ADDL.R3 IMPEADED

3. SREEDHARAN, AGED 59 YEARS,
S/O.RAMAN EZHUTHACHAN, KARIMPANAKKAL HOUSE,
MAYYANNAUR P.O., THRISSUR DISTRICT. IS IMPEADED AS
ADDL.R3 AS PER ORDER DATED 24.7.2013 IN I.A.NO.525/2009.

R1 BY ADVS. SRI.N.P.SAMUEL
SRI.B.V.BALAKRISHNAN
ADDL.R3 BY ADVS. SRI.SANTHEEP ANKARATH
SRI.V.C.MADHAVANKUTTY

THIS SECOND APPEAL HAVING COME UP FOR ADMISSION ON 15-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AS

A.HARIPRASAD, J.

S.A.No.297 of 2002

Dated this the 15th day of July, 2015

J U D G M E N T

Defendants 1 and 2 in a suit for declaration that Ext.B4 document is null and void and for a consequential relief of partition are the appellants.

2. Heard the counsel appearing for the appellants, the 1st respondent and the additional respondents.

3. The document under challenge, namely Ext.B4, is an assignment deed said to have been executed by one Ammalu alias Mariyayi Chettichiar in favour of three persons. The suit was dismissed by the trial court against which the plaintiff filed the appeal as A.S.No.101 of 1992 before the learned Additional District Court, Thrissur.

4. Learned Additional District Judge allowed the appeal declaring that Ext.B4 document is null and void and also a preliminary decree for partition was passed. That decree is challenged in this appeal by the defendants 1 and 2.

5. During the course of hearing, learned counsel

appearing for the appellants submitted that the 3rd defendant in the suit died on 14.07.1994, during the pendency of the first appeal. It is seen from the impugned judgment and decree of the first appeal that the factum of her death was not recorded and the lower appellate court proceeded with the matter as if the 3rd defendant was alive and contesting before the court. Therefore, it is a clear case that the lower appellate court's decree is a nullity for the reason that it was passed against a dead person.

6. Learned counsel for the contesting respondent contended that an application for impleading the legal representatives of the deceased 3rd defendant was filed before the court below. But the court below failed to pass any order thereon. Whatever that be, it is an admitted fact that the legal representatives of deceased 3rd respondent were not brought on record, when the lower appellate court passed a decree granting reliefs to the plaintiffs.

7. Then the question arising for consideration is

whether other defendants substantially represented the estate and interest of the deceased 3rd respondent. In answer to this query, the learned counsel for the appellants submitted that the defendants 1 and 2 on the one hand and the 3rd defendant on the other hand were having conflicting interests. It is the submission that the 3rd defendant had filed a suit against defendants 1 and 2 claiming partition of the properties. It is also submitted that they had filed separate written statements in the suit, taking divergent contentions. Therefore, the question of substantial representation of the estate of the 3rd defendant at the hands of defendants 1 and 2 does not arise in this case. To support this contention, two decisions of the Supreme Court in **State of Punjab v. Nathu Ram** (AIR 1962 SC 89) and **Ram Sarup v. Munshi** (AIR 1963 SC 553) have been pressed into service.

8. In the facts and circumstances of this case, it cannot be said that all the defendants were resisting the suit by raising common contentions. Therefore, the

question of substantial representation may not arise in this case. In the meantime, it is submitted by the learned counsel for the contesting respondent, a review petition was filed by the legal heirs of 3rd defendant before the lower appellate court. The learned District Judge passed an order in the review petition on 26.08.2003, allowing the petition in the following terms:

“In the result, the review petition is allowed and the decree passed in the appeal is reviewed and modified to the extent that Ext.B.4 assignment namely deed No.1970/84 in favour of Rajamma is valid and the decree in O.S.421/88 will not stand superseded by the decree in the appeal. It is made clear that right assigned to Rajamma by Ext.B.4 deed will remain intact and the property allotted to the heirs of Rajamma in execution of the decree in O.S.421/88 will not be available for partition between plaintiff and defendants 1 and 2 in O.S.177/89. Parties shall bear their respective costs.”

9. This order is legally unsustainable for the following reasons. This application for review was filed

after filing the second appeal before this court. Secondly, the order passed by the lower appellate court is illegal for the reason that Ext.A4 document, from the tenor of the document itself, it is clear, cannot stand in part or fall in part. If the document is to be declared void, it can be done in its entirety only. From the very nature of the document, allowing a portion of relief in respect of the document is legally not maintainable. Therefore, the order in the review passed by the court below cannot be countenanced.

It is settled law that when a party to a proceeding, dies during the pendency of the matter before the lower appellate court, the petition to implead the legal heirs and to set aside abatement, if any, can only be filed before the court, which was considering the matter at the time of death of the party. Therefore, the only course open to this court is to remand the matter to the court below for fresh consideration, if there is satisfactory explanation for the delay in setting aside the abatement. The impugned judgment and decree passed by the court below are set

aside. The matter is remitted back to the lower appellate court for fresh disposal on merits.

Parties shall appear before the court below on 10.08.2015.

Sd/-
A.HARIPRASAD, JUDGE.

AS

/True Copy/

P.A. to Judge