

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 31ST DAY OF MARCH 2015/10TH CHAITHRA, 1937

WP(C).No. 36006 of 2009 (O)

F.A.O.NO.62/2003 OF THE SUBORDINATE COURT, KOTTARAKKARA

PETITIONER(S) :

- 1. ANNAMMA VARGHESE, AGED 55 YEARS,
PLAMOOTTIL VEEDU, CHEMMANTHOOR, PUNALUR VILLAGE.**
- 2. SONIYA GHEEVARGHESE, AGED 31 YEARS,
RESIDING AT -DO-**
- 3. SUMAGI VARGHESE, AGED 29 YEARS, RESIDING
AT -DO-DO-**
- 4. JOHN VARGHESE, AGE 27 YEARS,
RESIDING AT -DO-**

**BY ADVS.SRI.M.RAJENDRAN NAIR (THONNALLOOR)
SRI.S.SHARAN**

RESPONDENT(S) :

- 1. GEORGE MATHAI, AGED ABOUT 63 YEARS,
RESIDING AT PLAMOOTTIL VEEDU, CHEMMANTHOOR VILLAGE,
PATHANAPURAM TALUK.**
- 2. THANKACHAN MATHAI, AGED 55 YEARS,
RESIDING AT -DO-**
- 3. PODIYAN MATHAI, AGED 53 YEARS,
RESIDING AT -DO-**
- 4. KOCHUKUNJU GHEEVARGHESE, (DECEASED)
RESIDING AT -DO-**
- 5. KOCHUKUNJU SAMUEL,
RESIDING AT -DO-**
- 6. KOCHUKUNJU PAPPACHAN,
RESIDING AT -DO-**
- 7. KOCHUKUNJU RAJAN,
RESIDING AT -DO-**
- 8. KOCHUKUNJU JOY,
RESIDING AT -DO-**

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9. JOSE OONNUNNI,
SINDHU BHAVAN OF -DO-
10. ABRAHAM VARGHESE,
KUNNILETHU VEEDU, KUTTICHIRA MURI OF -DO-
11. SUDHA VASUDEVAN ACHARI,
KUTTIVILAYIL, CHEMMANTHOOR MURI OF -DO-
12. VASUDEVAN NARAYANANACHARI,
RESIDING AT -DO-
13. PHILIPOSE JOY,
MULLIKKATTIL PUTHEN VEEDU OF -DO-
14. SONIA GEORGE,
KALARICKAL VEEDU, KOONAMKUZHI WARD OF -DO-
15. CHANDRA BABU,
NEDIYAVILA VEEDU, VENCHEMPU, KARAVALOOR VILLAGE.
16. CHINNAMMA MTHAI,
MYDIYIL PUTHEN VEEDU, THALACHIRA MURI,
CHAKKUVARACKAL VILLAGE, KOTTARAKKARA TALUK.
- * 17. KUNJAMMA OOMMAN,
KUZHIVILA KIZHAKKETHI, OF -DO-(DIED)
18. AMMINI OONNUNNI,
VAYALIRAKKATHU PUTHEN VEEDU, ELEMPAL MURI,
VILAKKUDY VILLAGE.
19. SARAMMA PAPPACHAN,
KALLARANGIL KUZHAYATHU VEEDU, KARAVALOOR MURI.
20. LEELAMMA SIMON,
ARAPPURACKAL VEEDU, AREEPLACHI MURI, ANCHAL VILLAGE.
21. SAM VARGHESE,
PLAMOOTTIL VEEDU, CHEMMANTHOOR, PUNALUR VILLAGE.
(NOW RESIDING AT AUTOMEC MARINE ENGINEERING,
POST BOX NO.60200, ABEER POST, DUBAI, U.A.E.)

*** ADDITIONAL RESPONDENTS 22 TO 24 IMPEADED**

22. PONNAMMA, AGED 40 YEARS,
D/O.OOMMEN, PALLIVADAKKETHIL, POOYAPPALLY,
KOTTARAKKARA, PIN- 691 537.
23. LASSAR, AGED 38 YEARS,
KUZHIVILA KIZAKKETHIL, THALACHIRA P.O,
CHAKKUVARAKKAL VILLAGE, KOTTARAKKARA TALUK, PIN- 691 546.

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**24. MARIYAKUTTY, AGED 32 YEARS,
GIJI BHAVAN, PANACHIVILA, EDAMULAKKAL VILLAGE,
PATHANAPURAM TALUK, PIN- 691 321.**

*** ADDITIONAL RESPONDENTS 22 TO 24 ARE IMPEADED AS LEGAL HERITS OF
DECEASED R17, AS PER THE ORDER DATED 10.10.2014 IN I.A.NO.10685/2011.**

**R1 TO R3 BY ADV. SRI.B.KRISHNA MANI
R16,R18 TO 20 BY ADVS. SRI.ABRAHAM P.GEORGE
SMT.K.V.LEKSHMY
SMT.C.L.MANJU**

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 31-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1: TRUE COPY OF THE PLAINT IN O.S.NO.127/96.

EXHIBIT P2: TRUE COPY OF THE WRITTEN STATEMENT IN O.S.NO.127/96.

**EXHIBIT P3: TRUE COPY OF THE COUNTER CLAIM FILED BY
ADDL.DEFENDANTS 14 TO 17 IN O.S.NO.127/96.**

EXHIBIT P4: TRUE COPY OF THE EXPARTE DECREE IN THE COUNTER CLAIM.

EXHIBIT P5: TRUE COPY OF THE COMMON ORDER IN I.A.NO.2137 & 2138/02.

**EXHIBIT P6: TRUE COPY OF THE F.A.O NO.62/2003 FILED BY THE PETITIONERS
ALONG WITH THE 21ST RESPONDENT.**

EXHIBIT P7: TRUE COPY OF THE ORDER IN F.A.O.NO.62/2003.

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

P. BHAVADASAN, J.

W.P.(C). No. 36006 of 2009

Dated this the 31st day of March, 2015.

JUDGMENT

Indeed an interesting issue is involved in this writ petition under Article 227 of the Constitution of India.

2. Most of the facts are not in dispute. The plaint schedule property originally belonged to Mathan Geevarghese who had three children, Mathai, Geevarghese Kochukunju and Aliamma. It is claimed by the petitioners before this Court that Mathan Geevarghese executed what is known as 'Danadharam' as per document No. 6117/1118 M.E. whereby the plaint schedule property and 20 cents of paddy land was assigned to Geevarghese Kochukunju, the younger son of Mathan Geevarghese. Mathan Geevarghese, however, retained life estate over the property. There is also a stipulation that consequent on the death of Mathan

Geevarghese, Geevarghese Kochukunju had to pay Rs.50/- to Mathai. Mathan Geevarghese died and according to the plaintiffs, in the suit, the amount was not paid and according to them, the allegation in the plaint was that Rs.50/- was half the share of the property which was totally valued at Rs.100/- and since the amount was not paid, they are entitled to half share of the property left behind by Mathan Geevarghese. The plaintiffs in the suit who are the sons of Mathai pointed out that even though they had five sisters, they cannot claim any share in the property in the suit since they have been given their share at the time of their marriage. The suit was therefore laid against the sons of Geevarghese Kochukunju being defendants 1 to 5. The plaintiffs claimed half share over the suit property.

3. The daughters of Mathai, who, the plaintiffs contended, had no share in the property, got themselves impleaded as defendants 13 to 17. They in turn set up a right over the property and claimed that they are entitled to

5/8 shares of the half share which the plaintiffs claimed.

4. The first defendant in the suit, who is the predecessor-in-interest of the petitioners before this Court in fact disputed the partibility of the estate itself. According to him, a sum of Rs.50/- alone was granted to the sons of Mathai and in fact there is no charge created over the property. All that they can do is to realise Rs.50/- from the legal heirs of Geevarghese Kochukunju.

5. It may be mentioned here that defendants 13 to 17 apart from resisting the claim of the first defendant also filed a counter claim claiming 5/8 shares of the half share claimed by the plaintiffs.

6. The first defendant had a case that subsequent to the execution of the document by Mathan Geevarghese, there was an exchange deed executed by him and his sister Aliamma as per document No. 6644/1960. Aliamma died issueless. She had executed two documents, namely sale deed No. 994/1970 and Will dated 20.3.1970. According to

the first defendant, as per these documents, the property reverted back to him.

7. The suit was listed for trial on 19.3.1999. On that day, the plaintiffs were absent and the suit was dismissed for default. However, the counter claimants gave evidence and a preliminary decree was passed in their favour granting 5/8 shares of the entire plaint schedule property.

8. It is not in dispute that the predecessor-in-interest of the petitioners i.e., the first defendant had filed a petition under Order IX Rule 9 of the Code of Civil Procedure. Though the relief sought for in the petition was to set aside the ex parte decree, that petition happened to be dismissed. A review petition was also filed which met with the same fate. Thereafter the legal heirs of the first defendant sought to get themselves impleaded which was also rejected. Later, the present petitioners filed two interlocutory applications, namely, I.A. 2137 of 2002

and I.A. 2138 of 2002, one to set side the ex parte decree passed and the other to condone the delay in filing the petition to set aside the ex parte decree.

9. Both the petitions were opposed by the respondents and other contesting defendants, who pointed out that these petitions are not maintainable in view of the fact that the predecessor-in-interest of the petitioners before the court below had failed in his attempt to get the decree set aside and the petitioners who have stepped into his shoes cannot have a better right. Therefore, since the predecessor-in-interest of the petitioners having failed in his attempt to get the decree set aside, the same relief cannot be claimed by the petitioners herein.

10. For the purpose of the interlocutory applications, P.W.1 was examined.

11. The trial court on an evaluation of the materials concurred with the resistance put forward by the respondents in the petition and took the view that the

predecessor-in-interest of the petitioners having failed to get the necessary reliefs, the petitioners cannot get a better right. It was also found by the trial court that the two petitions filed by the petitioners, namely I.A. 2137 of 2002 and I.A. 2138 of 2002, were also not acceptable for the reason that there was considerable delay in filing the petition to set aside the ex parte decree which was not satisfactorily explained and no sufficient cause has been shown. Accordingly, both the petitions were dismissed by the trial court.

12. The aggrieved petitioners carried the matter in appeal as F.A.O. 62 of 2003 before Sub Court, Kottarakkara. The lower appellate court, after an independent evaluation of the materials before it, concurred with the trial court and dismissed the appeal.

13. That brings the petitioners before the trial court before this Court under Article 227 of the Constitution of India.

14. Shri.M. Rajendran Nair, learned counsel appearing for the petitioners very vehemently contended that the decree passed is totally unsupportable in law and contrary even to the pleadings in the counter claim. It is true, according to the learned counsel that there is some laches on the part of the predecessor-in-interest of the petitioners, but that cannot visit them with such drastic consequences even assuming that the property is divisible. It is also contended on behalf of the petitioners that going by the sequence of events and also the documents now available, the plaintiffs in the suit may not be entitled to any share at all.

15. According to the learned counsel, there is clear and glaring illegality in the preliminary decree passed by the court below. Learned counsel went on to point out that even assuming that the petitioners had not contested the counter claim at all, still the decree now passed could not have been granted in view of the pleadings and the

rights claimed in the counter claim. Under these circumstances, learned counsel went on to point out that it is only just and proper that the petitioners be given an opportunity to contest the counter claim and the suit.

16. Learned counsel appearing for the respondents on the other hand contended that the predecessor-in-interest of the petitioners having failed in his attempt to get the ex parte decree set aside, the petitioners cannot stand on a better footing as they had to suffer the consequences of the acts committed by the predecessor-in-interest. It was pointed out that the predecessor-in-interest of the petitioners having filed a petition to set aside the ex parte decree though under Order IX Rule 9, and having got it dismissed and also got the review petition dismissed, the petitioners cannot seek the very same relief. It was therefore contended that the petitions were not maintainable. It was also contended that if at all the petitioners were aggrieved by the trial court

decree, their proper remedy was to file appeal against the preliminary decree and not to file a petition under Order IX Rule 9 of the Code seeking to get the decree set aside. Learned counsel went on to point out that both the courts below have considered the matter in considerable detail and came to the conclusion that there is no merit in the contentions raised by the courts below and rejected the petition. It is contended that unless it is shown that the findings are perverse or contrary to the evidence and the materials on record, interference under Article 227 of the Constitution may not be proper.

17. True, there are certain technical defects in the matter. It is not in dispute that the suit was dismissed for default on the failure of the plaintiffs to appear on the date it was posted for trial. The first defendant who is the predecessor-in-interest of the petitioners herein has a case that his counsel told him that the suit had been dismissed and he had won, he left the place. He had no knowledge of

the counter claim at all. He has a further case that the counter claim was decreed without his knowledge.

18. As regard sthe preliminary objection raised by the learned counsel for the respondents, one has to refer to the petition under Order IX of the Code.

19. One cannot dispute the fact that the petition filed under Order IX Rule 9 of the Code to set aside the ex parte decree was ill-advised and misconceived. It may be relevant to note at this juncture that the petition under Order IX Rule 9 of the Code was not by the plaintiffs, but by the first defendant and it was not for restoration of the suit at all. It was infact directed against the ex parte decree passed in the counter claim. To that extent learned counsel appearing for the respondents may be correct in their submission. However, it needs to be considered whether merely because a wrong provision is shown, the petition should have been thrown out.

20. The records indicate that the petition filed by the first defendant who is the predecessor-in-interest of the petitioners herein was dismissed for default. He thereafter filed a petition for review which was also dismissed.

21. It is also clear from the records that the attempt of the legal heirs to get themselves impleaded was also rejected. It was thereafter that the petitioners filed the two interlocutory applications made mention of earlier, one to set aside the ex parte decree and the other to condone the delay in filing the petition to set aside the ex parte decree.

22. There is nothing to indicate as of now that the petition filed by the first defendant for setting aside the ex parte decree and also the review petition were dismissed on merits. It would appear from the records that they were dismissed for not taking steps for serving notice on the respondents. If that be so, it could not be said that a second petition by the legal heirs is not maintainable. All

that one needs to notice is Order IX Rule 9 of the Code. True, Order IX Rule 9 deals with suits and the filing of independent suits after the earlier suit has been dismissed for want of taking steps. But there is no justification or reason as to why the same should not be adopted in the case of petitions also though they do not stand in the same footing. In the light of the said provision, the contention raised by the learned counsel for the respondents that since the petition filed by the first defendant had been dismissed for default, the petition filed by the petitioners for the very same relief is incompetent cannot be countenanced.

23. Next comes the delay in filing the petition. P.W.1 has given evidence as to the reason for the delay. Both the courts below found it difficult to accept the same. It is true that the delay has to be properly explained. But while considering the petition to set aside the ex parte decree as well as the petition to condone the delay, it will not be inappropriate for the court to verify whether the

decree passed by the court below is reasonable, justifiable or proper. If it is found that the decree is indeed justifiable, then one can proceed to dismiss the petition.

24. A person who suffered the ex parte decree has two parallel remedies available to him. He can file a petition to set aside the ex parte decree and he can also file a regular appeal. But the consideration in the two matters are entirely different. In the petition under Order IX Rule 13 of the Code, the primary concern of the court is whether there is sufficient cause shown by the defendants concerned for not appearing on the date on which the suit was posted for trial. But in a regular appeal from the ex parte decree, the question is whether there is any defect in the decree or decree suffers from any illegality.

25. It is here that one has to refer to the counter claim decree.

26. It cannot be disputed that the plaint itself proceeded on the basis that Mathai, the

predecessor-in-interest of the plaintiffs and defendants 13 to 17 had only half share over the plaint schedule property. One may recall here that the plaintiffs have conceded that they had five sisters but according to the plaintiffs they had no claim in the property for the reason that at the time of marriage they have given their due shares. These five sisters later got themselves impleaded as defendants 13 to 17 in the suit. They in their counter claim stressed and emphasised that the claim put forward by the plaintiffs that they had no share in the property cannot be countenanced and they had $\frac{5}{8}$ shares over the half share claimed by the plaintiffs. This is what is claimed by defendants 13 to 17 in the counter claim set up by them.

27. An ex parte decree was passed in the counter claim. But, unfortunately it is to be noticed that instead of granting $\frac{5}{8}$ shares in the half share sought for by the plaintiffs, the court below granted $\frac{5}{8}$ shares of the entire plaint schedule property which was not sought for either in

the suit or in the counter claim by the respective parties.

28. One may here remember that even assuming that the first defendants or the present petitioners did not even choose to contest, the decree as is now passed by the court below in the counter claim made by defendants 13 to 17 could not have been done by the court below in the light of the pleadings in the counter claim. This glaring aspect cannot be ignored as it vitally affects the rights of the parties and the decree goes far beyond what is claimed in the counter claim. This aspect of the case has been lost sight of by both the courts below. It is not a factor which can be easily ignored and the petition now filed by the petitioners be simply dismissed holding that no sufficient cause has been shown. For the reason that the decree passed in the counter claim cannot be sustained and is illegal and unjust, it is only proper that the parties be given an opportunity to reagitate all the issues again before the court below.

For the above reasons, this petition is allowed, the impugned order is set aside and the matter is remanded to the trial court for fresh disposal in accordance with law. Both the suit and the counter claim shall be tried afresh and the parties will be free to adduce evidence and to raise all their contentions. The court below shall not be guided by anything stated in this judgment and dispose of the suit in accordance with law and in the light of the evidence. The court below may make every endeavour to dispose of the suit within six months from the date of appearance of the parties. The parties shall appear before the trial court on 28.5.2015.

sb.

P. BHAVADASAN,
JUDGE