

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 29TH DAY OF FEBRUARY 2016/10TH PHALGUNA, 1937

RSA.No. 748 of 2009 ()

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AGAINST THE JUDGMENT & DECREE IN AS 42/2002 OF SUB COURT, CHERTHALA
AGAINST THE JUDGMENT & DECREE IN OS.NO. 489/2000
OF PRL.MUNSIFF COURT, CHERTHALA
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APPELLANTS/RESPONDENTS/DEFENDANTS :

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- 1. BHARATHI
W/O.THANKAPPAN,
POOTHANATTUVELI,
UZHUVA MURI,
VAYALAR KIZHAKKU VILLAGE
CHERTHALA.**
 - 2. SANTHAN,
S/O.THANKAPPAN OF -DO- -DO-**
 - 3. ASOKAN,
S/O.THANKAPPAN OF -DO- -DO-**

BY ADV. SRI.T.B.SARASAN

RESPONDENTS/APPELLANTS/PLAINTIFFS :

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- 1. LATHIKA,
D/O.CHELLAMMA,
NAMANATTUNIKARTHU,
PADINJATTUMKARA, VADAKKUM MURI
THURAVOOR VADAKKU VILLAGE,
CHERTHALA.**
 - 2. VISHNU,
S/O.VIJAYAN OF -DO- -DO-**

R1 & R2 BY ADV. SRI.J.OM PRAKASH

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 29-02-2016, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

R.S.A.No.748 of 2009

Dated this the 29th day of February, 2016

JUDGMENT

The defendants in a suit for partition are the appellants in this second appeal.

2. The suit property belonged to one Thankappan and on his death the same devolved on his wife and children. The plaintiffs are the wife and son of one of the sons of Thankappan namely Vijayan. The plaintiffs earlier filed O.P.(Pauper) No.27 of 1991 against Vijayan for maintenance. In the said suit, on 16.10.1991, the plaintiffs attached the undivided share of Vijayan over the suit property. The said suit was later decreed. The plaintiffs thereupon filed an application to execute the decree

obtained by them and the attached property was purchased in execution of the said decree. Thereupon, the present suit was filed by the plaintiffs for partition of the 1/4th share of Vijayan over the suit property. The defendants who were the wife and the remaining children Thankappan contested the suit contending inter alia that they have executed a partition deed in respect of the suit property on 22.10.1991 and that since the property sought to be partitioned has already been partitioned, the suit is not maintainable. In other words, according to the defendants, by virtue of the partition, the rights of Vijayan got crystallized and the plaintiffs are entitled to only the share of the property allotted to Vijayan as per Ext.B4. The trial court dismissed the suit. The appellate court, however, reversed the decision of the trial court and decreed the suit. The defendants who are aggrieved by the decision of the appellate court have thus come up in this second appeal.

3. Heard the learned counsel for the appellants as also the learned counsel for the respondents, the plaintiffs.

4. The learned counsel for the appellants contended vehemently that in so far as the suit property was partitioned among the parties including Vijayan as per Ext.B4 on 22.10.1991, the suit for partition is not maintainable at the instance of the plaintiffs who have obtained the share of Vijayan subsequently. According to the learned counsel, the appellate court reversed the decision of the trial court solely on the ground that Ext.B4 is hit by *lis pendens*. It is contended by the learned counsel for the appellants that the doctrine of *lis pendens* has no application to the facts of the present case as in the earlier proceedings for maintenance, the rights of parties over the suit property was not directly or substantially in issue.

5. The learned counsel for the respondents pointed out that the Commissioner appointed in the final decree

proceedings to effect partition did not make any serious changes as regards allotment of shares and the final decree passed in the suit is virtually in accordance with Ext.B4 partition, except to the extent of providing a way to the share of property allotted to plaintiffs.

6. It is conceded by the learned counsel for the appellants that the undivided share of Vijayan over the suit property was attached on 16.10.1991 prior to the execution of Ext.B4 partition on 22.10.1991. It is settled that attachment would take effect only when it is effected by serving notice of the attachment on the owner of the property. There is nothing on record to indicate as to when the attachment in the present case was effected. In the absence of any evidence as to the date on which the notice of attachment was served on the defendants, it cannot be presumed that the attachment was not effected before the execution of Ext B4 partition deed. If the attachment was

effected on 16.10.1991 itself, according to me, Section 64 of the Code of Civil Procedure would apply. The partition deed executed by Vijayan and others after the attachment by which Vijayan had released his share of rights in the property to the remaining sharers can only be treated as void as far as the plaintiffs are concerned. In the said view of the matter, the impugned decision of the appellate court is liable to be confirmed, though on a different ground. The second appeal, in the circumstances, is devoid of merits and the same is, accordingly, dismissed. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

smm