

**K.T.Thomas Vs. Alhonse Thomas**

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**SooperKanoon Citation :** [sooperkanoon.com/1096403](http://sooperkanoon.com/1096403)

**Court :** Kerala

**Decided On :** Oct-28-2013

**Judge :** Honourable Mr.Justice S.S.Satheesachandran

**Appellant :** K.T.Thomas

**Respondent :** Alhonse Thomas

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE S.S.SATHEESACHANDRAN MONDAY, THE 28TH DAY OF OCTOBER 2013 6TH KARTHIKA, 1935 FAO.No. 228 of 2012 ()  
----- AGAINST THE

JUDGMENT

IN AS492011 of SUB COURT, PALA AGAINST THE

ORDER

IN OS6011996 of MUNSIFF COURT, ERATTUPETTA  
===== APPELLANT/RESPONDENT NO.2/2ND

DECREE HOLDER: -----

K.T.THOMAS, S/O.THOMAS KOOTTUMKAL HOUSE ARUNOOTIMANGALAM  
KARA THALAPPALLAM VILLAGE BY ADV. SRI.P.R.VENKATESH  
RESPONDENT/APPELLANT/ADDL.7TH J.D.:

----- ALPHONSE THOMAS

S/O.THOMAS, KOOTTUMKAL HOUSE, ULLANADU KARA BHARANANGANAM  
VILLAGE R1 BY ADV. SRI.B.KRISHNA MANI BY ADV. SRI.JOSEPH T.JOHN  
THIS FIRST APPEAL FROM

## ORDER

S HAVING BEEN FINALLY HEARD ON 28-10-2013, THE COURT ON THE SAME  
DAY DELIVERED THE FOLLOWING: SD S.S. SATHEESACHANDRAN, J.,  
----- F.A.O.No.228 OF 2012-----

Dated this the 28th day of October, 2013.

## JUDGMENT

Appeal is directed against the order of remand passed by learned Sub Judge, Pala in A.S.No.49/2011 reversing the dismissal of a claim petition in an execution proceedings arising from a suit for partition and remitting the claim for fresh disposal.

2. Suit for partition was over a subject matter involving 26 cents filed by mother of the appellant against his father claiming one half right over that property. A preliminary decree was passed in that suit declaring one half right in the property in favour of plaintiff, mother of the appellant. While the final decree proceedings were pending, decree holder assigned the property allotted to her under the decree in favour of the appellant executing a sale deed and he thereupon got impleaded as additional second plaintiff in the proceedings. In due course, a final decree was also passed in terms of the preliminary decree. By the time execution proceedings were initiated, the defendant judgment debtor/ father of the appellant had passed away. His F.A.O. No. 228/2012 2 legal representatives were substituted as additional judgment debtors in the execution petition. Decree holder had moved a separate application also for substitution, which was allowed. In execution proceedings delivery of the decree scheduled property was ordered, and at that stage one among the legal representatives substituted, 7th judgment debtor, one among the brothers of appellant, put forth a claim based on a gift purported to have been made in his favour by the father in 1954, before the institution of the suit for partition. The execution court on the materials placed, after hearing both sides, held that the claimant brought in by substitution as one of the legal

representatives of the judgment debtor was incompetent to set forth an independent claim to resist the execution, and the claim was turned down. Against the dismissal of his claim, 7th judgment debtor preferred an appeal before Sub Judge and that appeal, after hearing both sides, was allowed remitting the claim petition for fresh consideration, with some directions.

3. Petition moved by the appellant/decreed holder for substitution of the legal representatives of judgment debtor in F.A.O. No. 228/2012 3 the execution proceedings, was allowed without notice to them, and that was improper and illegal, was the sole ground on which reconsideration of the claim petition setting aside the order passed by execution court was ordered by the appellate court. The lower appellate court has directed the execution court to re- open the petition moved by decreed holder for substitution of legal representatives and dispose the same after giving notice to the persons who were sought to be substituted to represent the deceased judgment debtor. Aggrieved by the order of remand so passed in appeal, the decreed holder has preferred this appeal.

4. Perusing the records of the case, it is seen, even in the execution petition, which was filed after the death of judgment debtor, his legal representatives have been shown as additional judgment debtors and notice ordered was also served on some of them. A separate petition was filed by the decreed holder to record the substitution of the additional judgment debtors as legal representatives of deceased judgment debtor. In such application, no separate notice for recording the above additional judgment debtors (deceased) as legal representatives of the F.A.O. No. 228/2012 4 judgment debtor was not required. At the most, in the execution petition a statement that such additional judgment debtors are brought in as legal representatives of deceased judgment debtor would have been sufficient. At any rate, when in the execution petition notice had been ordered and served on the parties proceeded for substituting the judgment debtor (deceased) no notice on the separate application moved by the decreed holder to record such substitution was warranted. The appellate court had gone wrong in holding that the substitution ordered without notice to the proposed additional judgment on the separate application of decreed holder as unsustainable. That being the sole ground on which the appeal was allowed reversing dismissal of the claim petition

with direction to re-open the execution proceedings, I find the order of remand cannot be sustained, and it has to be reversed. Whatever grounds available to claim petitioner to substantiate his claim can be canvassed by him before the lower appellate court on hearing of the appeal. Setting aside the order of remand, the lower appellate court is directed to hear the parties and dispose the appeal, at the F.A.O. No. 228/2012 5 earliest, on its merits, in accordance with law. Parties are directed to appear before lower appellate court on 25.11.2013. Sd/- S.S. SATHEESACHANDRAN JUDGE // True Copy // P.A. to Judge sd

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