

**Muraleekrishnan Vs. David George**

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**SooperKanoon Citation :** [sooperkanoon.com/3525](http://sooperkanoon.com/3525)

**Court :** Kerala

**Decided On :** Nov-21-2014

**Judge :** Honourable Mr.Justice P.Bhavadasan

**Appellant :** Muraleekrishnan

**Respondent :** David George

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.BHAVADASAN FRIDAY,THE21T DAY OF NOVEMBER201430TH KARTHIKA, 1936 OP(C).No. 2183 of 2014 (O) ----- (I.A.NO.1355/2014 IN O.S.NO.313/2012 OF SUB COURT, KOTTARAKARA) ----- PETITIONER: ----- MURALEEKRISHNAN, AGED57YEARS, S/O. LATE RAGHAVAN NAIR, PARVATHY MANDIRAM, CHEMMANTHOOR THEKKEKARA, PUNALUR. BY ADVS.SRI.K.S.HARIHARAPUTHRAN SRI.GEORGE MATHEW RESPONDENTS: ----- 1. DAVID GEORGE,S/O. GEORGEKUTTY, HILL PALACE, KUTHIRACHIRA, PUNALUR, PIN-691 305.

2. LATHA NAIR, D/O. PONNAMMA, PARVATHY MANDIRAM, CHEMMANTHOOR THEKKEKARA, PUNALUR, PIN-691 305.

3. ANITHA,W/O. MURALEEKRISHNAN, PARAVATHY MANDIRAM, CHEMMANTHOOR THEKKEKARA, PUNALUR, PIN-691 305. R1 BY

SRI.T.KRISHNAN UNNI,SENIOR ADVOCATE ADV. SRI.AJAYA KUMAR. G R2  
BY ADV. SRI.SYAM J SAM THIS OP (CIVIL) HAVING BEEN FINALLY HEARD  
ON2111-2014, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING: sts OP(C).No. 2183 of 2014 (O) -----

APPENDIX PETITIONER(S)' EXHIBITS ----- EXHIBIT P1-  
TRUE COPY OF PLAINT IN O.S.NO. 313/2012 OF SUB COURT,  
KOTTARAKARA DATED412-2012. EXHIBIT P2- TRUE COPY OF AGREEMENT  
DATED178-2011. EXHIBIT P3- TRUE COPY OF PLAINT IN O.S. 342/2012  
DATED79-2012 BEFORE THE MUNSIFF'S COURT, PUNALUR. EXHIBIT P4-  
TRUE COPY OF

#### JUDGMENT

DATED1512-2012 IN O.S.NO. 342/2012 OF MUNSIFF'S COURT, PUNALUR.  
EXHIBIT P5- TRUE COPY OF WRITTEN STATEMENT OF1T DEFENDANT  
DATED104-2013. EXHIBIT P6- TRUE COPY OF PETITION IN I.A.NO. 1355/2014  
IN O.S.NO. 313/12 BEFORE THE SUB COURT, KOTTARAKKARA. EXHIBIT P7-  
TRUE COPY OF

#### ORDER

IN I.A.NO. 1355/2014 IN O.S.NO. 313/2012 DATED208-2014 OF SUB COURT,  
KOTTARAKARA. RESPONDENT(S)' EXHIBITS: NIL /TRUE COPY/  
P.S.TO.JUDGE sts P. BHAVADASAN, J.

----- O.P.(C). No. 2183 of 2014 -----  
- - - - Dated this the 21st day of November, 2014.

#### JUDGMENT

Under challenge is Ext.P7 order whereby the court below postponed the decision  
on issue regarding the maintainability of the suit challenged on the basis of Order  
2 Rule 2 of the Code of Civil Procedure.

2. The facts absolutely necessary for the disposal of this petition are as follows:  
The first respondent herein instituted a suit for specific performance of a contract.  
It is the admitted fact that there was an agreement between the parties dated  
17.8.2011. Consideration covered by the agreement was Rs.2,75,000/- per cent. It

is submitted that subsequent to the date of agreement, certain amounts were paid. On 18.2.2012 the period for execution of the sale deed was extended by six months, i.e. till 18.8.2012. O.P.(C)2183/2014. 2 3. The first respondent had laid an earlier suit as O.S. 342 of 2012 on 7.9.2012 and later he filed a memo stating that the suit is not pressed and therefore the suit was dismissed as not pressed. That was a suit for injunction restraining the defendants from alienating the property to none else than the plaintiff.

4. Thereafter he instituted the present suit for specific performance. In the written statement filed by the first defendant, who is the petitioner before this Court, it was contended that the claim is barred by Order 2 Rule 2 of C.P.C. and then moved the court below for trying that as a preliminary issue. The court below framed an issue and then on hearing both sides found that it is a mixed question of fact and law and therefore deferred the decision on the issue regarding maintainability of Order 2 Rule 2 of the Code till the final stage, i.e. after trial. O.P.(C)2183/2014. 3 5. It is the said order that is assailed before this Court.

6. Learned counsel appearing for the petitioner pointed out that the court below was not justified in deferring the question as the documents produced would sufficiently show that the claim is bared by Order 2 Rule 2 of the Code. The plaint itself mentioned about the earlier suit and that would have been sufficient for the court below to dispose of the suit on the preliminary issue. Learned counsel went on to point out that assuming that there is a discretion on the part of the court below to defer the issue till the trial is over, that discretion has to be exercised in a judicial manner and on the facts and circumstances of the case which is not reflected in the present order. Therefore, the present order is liable to be set aside.

7. Sri. T. Krishnanunni, learned Senior Counsel appearing for the respondents on the other hand pointed out O.P.(C)2183/2014. 4 that after the 1976 amendment, the court has a discretion to decide whether an issue should be taken as a preliminary issue or should be deferred after trial. Learned Senior Counsel relied on the decision reported in *Mary v. Mathew Joseph* (1992(1) K.L.T. 227) for the above proposition. It is also pointed out that no prejudice is caused to the petitioner herein by deferring the issue especially when several documents will

have to be marked and also that the petitioner will have to get an opportunity to explain the situation under which the not press memo had been moved. It is also contended that the issue is a mixed question of fact and law and it could not be tried as a preliminary issue.

8. Going by the decision referred to by the learned Senior Counsel, this Court had occasion to consider the question of Order XIV Rule 2 of the Code after amendment and in that decision it was held as follows: "Even where issues of the said nature arise, what is stated in sub-rule (2) is, the court may try that issue O.P.(C)2183/2014. 5 first. What is significant to be noted is, the Court has got discretion to decide whether even the said type of issue should be tried as preliminary issues. The conditions, therefore, to be satisfied are, the court must be of the opinion that such preliminary issue can be disposed of on law and the issue relate to jurisdiction of the court or a bar to the suit created by law. Once it is seen that evidence is to be recorded, the issue will not fall under sub-rule (2). Only an issue raising a pure question of law, falling either under clause (a) or (b) of sub-rule 2 of Order XIV where evidence is not necessarily to be recorded can be tried as a preliminary issue. A judgment can operate as res judicata if the conditions enjoined under S. 11 CPC are satisfied, it should be proved that the issue in the suit was directly or substantially in issue in an earlier suit between the same parties, or between parties under whom they claim, and that they were litigating under the same title. A compromise decree creates an estoppel by judgment. Estoppel is a rule of evidence. In either case, the matter involves proof. Further res judicata prevents only trial; it does not prevent institution or entertaining of the suit. Therefore res judicata or estoppel cannot be said to be a bar to the suit created by law within the meaning of clause (b) of sub-rule (2) or Order XTV Rule 2 C.P.C. Even if the court O.P.(C)2183/2014. 6 is of the opinion that the case or any part thereof can be disposed of on an issue of law only, it is not obligatory for the court to try the same, as a preliminary issue. The court is not bound to try an issue as preliminary issue even as per sub-rule (2) of Rule 2 since it not obligatory. Sub-rule (2) of Order XIV Rule 2 C.P.C. is indicative of the fact that, the court has got discretion in the matter. The discretion exercised by the trial court in this regard cannot normally be interfered with by the High Court unless it is shown that the same is likely to result in injustice." 9. In the case on hand, the claim of the first

defendant is that by virtue of the dismissal of the earlier suit, O.S. 342 of 2012, as not pressed, the claim in the present suit is barred under Order 2 Rule 2 of the Code. This is essentially a question of fact. Plaint in the earlier suit, not press memo, the judgment etc., will have to be produced so as to reach some conclusion. The lower court therefore felt that the issue could not be decided independently. The court below could not be found fault with. As rightly pointed out, no prejudice is O.P.(C)2183/2014. 7 caused to the petitioner by having the issue deferred for decision after trial.

10. At any rate, it is felt that this is not a case where the supervisory jurisdiction of this Court needs to be exercised in favour of the petitioner especially when it is not shown that the finding of the court below is either perverse or contrary to law. This Original Petition is without merits and it is dismissed. P. BHAVADASAN, JUDGE sb.

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