

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2015/20TH KARTHIKA, 1937

FAO (RO).No. 170 of 2015 ()

**AS 25/2014 of SUB COURT, KANNUR
EA 58/2013 IN EA 131/2011 IN EP 341/2010 IN OS 335/95 PRL. MUNSIF COURT,
KANNUR**

APPELLANT/1ST RESPONDENT/DECREE HOLDER :

**KELATH PUTHIYA PURAYIL SHADULI, AGED 50 YEARS,
S/O. MUHAMMED, RAHMANYA COMPOUND, KOLACHERY P.O.,
KANNUR DISTRICT.**

**BY ADVS.SRI.R.PARTHASARATHY
SMT.SEEMA**

RESPONDENTS/APPELLANTS AND RESPONDENTS 3, 5, 7 TO 15

IN AS 25/2014.OBSTRUCTION PETITIONERS & RESPONDENTS 3.5.7 TO 15 :

- 1. PALLANTAVIDA UMMER, AGED 45 YEARS
S/O. ALEEMA, TEACHER, PONKUTHITHATTU,
NANIYOOR, LAKSHAM VEEDU, P.O.KOLACHERY
KANNUR DISTRICT.**
- 2. KUZHICHAL PUTHIYA PURAYIL ABOOBACKER, AGED 45 YEARS,
S/O. ABDULLA, BUSINESS, KOLACHERY AMSOM DESOM,
P.O. KOLACHERY, KANNUR DISTRICT.**
- 3. C.K. MOIDEEN HAJI, S/O. MUHAMMED HAJI,
NALAMPEEDIA, KOLACHERY AMSOM DESOM**
- 4. C.K.MAMMED
S/O. IBRAHIM, KOLACHERY AMSOM, KAMBIL DESOM.**
- 5. C.K.HAMZA, AGED 43 YEARS,
S/O. IBRAHIM, KOLACHERY AMSOM, KAMBIL DESOM.**
- 6. AHAMMED, AGED 40 YEARS
S/O. IBRAHIM, KOLACHERY AMSOM, KALBIL DESOM.**
- 7. C.K. ABOOBACKER
S/O. IBRAHIM, KOLACHERY AMSOM, KAMBIL DESOM.**

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8. C.K. NAFEESA, AGED 36 YEARS,
KOLACHERY AMSOM, KAMBIL DESOM.
9. C.K. SHAREEFA, D/O. IBRAHIM,
KOLACHERY AMSOM, KAMBIL DESOM.
10. C.K.KADEESA
D/O. IBRAHIM, KOLACHERY AMSOM, KAMBIL DESOM.
11. C.K.FATHIMA, D/O. ALEEMA, C.K.HOUSE,
NALAMPEEDIA, P.O.KOLACHERY.
12. C.K.GAFOOR, AGED 28 YEARS,
S/O. ALEEMA, C.K.HOUSE, NALAMPEEDIA
P.O.KOLACHERY.
13. C.K.ABDUL KHADER, AGED 28 YEARS
S/O. ALEEMA, C.K.HOUSE, NALAMPEEDIA
P.O.KOLACHERY.

R1 BY ADV. SRI.V..RAMKUMAR NAMBIAR (CAVEATOR)

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN
FINALLY HEARD ON 11-11-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

bp

P.B.SURESH KUMAR, J.

F.A.O.(R.O).No.170 of 2015

Dated this the 11th day of November, 2015

JUDGMENT

The decision in A.S.No.25 of 2014 on the file of the Sub Court, Kannur is under challenge in this appeal.

2. The appellant was the plaintiff in O.S.No.335 of 1995 on the file of the Munsiff Court, Kannur. O.S.No.335 of 1995 was a suit for fixation of the boundaries of the plaint schedule properties. Defendants 3 to 11 in the suit were persons arrayed as the owners of the property on the north and west of the plaint schedule item No.1 property in the suit. They contended, among others, that the plaint schedule item No.1 property is part of 44 cents of property owned by them and the plaintiff has no right in the said

property. The trial court rejected the case of defendants 3 to 11 and decreed the suit fixing the western and northern boundaries of plaint schedule item No.1 property. Though the said defendants took up the matter in appeal, the appellate court confirmed the decision of the trial court.

3. Thereupon, the plaintiff filed E.P.No.341 of 2010 to execute the decree and the boundaries of plaint schedule item No.1 property were accordingly fixed through the process of the court. Thereafter, when the plaintiff attempted to put up a compound wall on the boundaries fixed by the court, respondents 1 and 2 filed E.A.No.131 of 2011 in the execution petition objecting the construction of the compound wall on the boundaries fixed by the court. According to them, plaint schedule item No.1 property is part of the 44 cents of property belongs to them and others. E.A.No.131 of 2011 was filed invoking Rule 99 of Order XXI of the Code of Civil Procedure. The application was opposed

by the plaintiff contending that respondents 1 and 2 are transferees of the property from defendants 3 to 11 and that therefore they are bound by the decree. He also filed E.A.No.58 of 2013 seeking orders to hold that E.A.No.131 of 2011 is barred by Rule 102 of Order XXI of the Code of Civil Procedure. The trial court allowed E.A.No.58 of 2013 and dismissed E.A.No.131 of 2011 as not maintainable. However in appeal, the appellate court reversed the decision of the trial court and remitted E.A.No.58 of 2013 for fresh disposal. The plaintiff who is aggrieved by the said decision of the appellate court has thus come up in this appeal.

4. Heard the learned counsel for the appellant as also the learned counsel for the first respondent, the first petitioner in E.A.No.131 of 2011.

5. The learned counsel for the appellant contended that respondents 1 and 2 are transferees *pendente lite* of the property on the north and west of plaintiff

schedule item No.1 property and therefore, in the light of the provision contained in Rule 102 of Order XXI of the Code of Civil Procedure, the application filed by them under Rule 99 of Order XXI of the Code is not maintainable.

6. Rule 102 of Order XXI of the Code of Civil Procedure reads thus:

"102. Rules not applicable to transferee pendente lite:-
Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."

It is evident from the said rule that transferees pendente lite of the properties involved in suits are not entitled to file application under Order XXI Rule 99 of the Code of Civil Procedure. The short question arises for consideration is therefore, whether respondents 1 and 2 are transferees *pendente lite* of the suit property as contended by the plaintiff. E.A.No.131 of 2011 indicates that respondents 1

and 2 are asserting independent right over plaint schedule item No.1 property on the strength of partition deed No.2056 of 1996 executed between them and defendants 3 to 11 in the suit in respect of 44 cents of property. It is beyond dispute that defendants 3 to 11 claimed title to plaint schedule item No.1 property on the basis that the same is part of 44 cents of property referred to in the said partition deed. In other words, respondents 1 and 2 are also claiming right over the suit property on the strength of their title to the very same property based on the document executed by them with defendants 3 to 11. It is also beyond dispute that the partition deed relied on by respondents 1 and 2 is a document executed during the pendency of the suit. But it is now settled that partition does not involve transfer of property and it involves only adjustments of pre-existing rights. (See **Cheeru v. Kelu Nair** (1987 (2) KLT S.N.50 Case No.19). Respondents 1 and 2, in the

circumstances, cannot be regarded as transferees *pendente lite* of the property.

7. The learned counsel for the appellant also contended that the suit property originally belonged to one Ammed and defendants 3 to 11 as also respondents 1 and 2 are claiming title under Ammed. According to the learned counsel, since all of them are claiming title under Ammed, the estate of Ammed is substantially represented in the suit and as such, even if it is found that respondents 1 and 2 cannot be regarded as transferees of the property, they are certainly bound by the decree and as such, they cannot claim independent title over the suit property. At the outset, I must point out that this is not a contention raised by the plaintiff before the lower appellate court. Further, a copy of the plaint which was made available to me at the time of hearing indicates that defendants 3 to 11 were impleaded in the suit only in their capacity as the owners of the property

on the north and west of plaint schedule item No.1 property. They were never sued in their capacity as the legal representatives of Ammed. Since defendants 3 to 11 were not sued in their capacity as the legal representatives of Ammed, the principle of substantial representation does not apply.

8. The learned counsel for the plaintiff further contended that E.A.No.131 of 2011 is a collusive one intended to defeat the rights of the plaintiff. According to the learned counsel, respondents 1 and 2 had no rights whatsoever in the property referred to in the partition deed and the said document was prepared to make it appear that they also had rights in the said property. Admittedly, respondents 1 and 2 are not parties to the suit. The question whether E.A.No.131 of 2011 was filed collusively to defeat the rights of the plaintiff is a matter to be considered by the court at the time of adjudicating the said

interlocutory application on merits.

9. In the said circumstances, I do not find any merit in the appeal and the same is accordingly dismissed. However, having regard to the fact that the appellant is unable to enjoy the fruits of the decree obtained by him as early as in the year 2004, I deem it appropriate to direct the execution court to finally dispose of E.A.No.131 of 2011 as also E.A.No.58 of 2013, as expeditiously as possible, at any rate, within six weeks from today. All the interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

smm