

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

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

FAO (RO).No. 73 of 2013 ()

AS 57/2012 of DISTRICT COURT, THODUPUZHA
I.A.NO.596/10 IN OS 18/2009 of MUNSIFF, THODUPUZHA.

APPELLANT(S)/RESPONDENT/IST RESPONDENT/IST DEFENDANT:

MUHAMMED, AGED 66 YEARS
S/O.IBRAHIM, MECHERIL HOUSE, PATHINARAMKANDAM KARA
KONNATHADY VILLAGE, UDUMBANCHOLA TALUK
IDUKKI DISTRICT.

BY ADVS.SRI.G.SREEKUMAR (CHELUR)
SMT.PREETHY KARUNAKARAN

RESPONDENTS(S)/APPELLANTS/PETITIONERS/PLAINTIFFS:

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1. KHADEEJA, AGED 66 YEARS
W/O.SAIDUMUHAMMED, KOTTARATHIL HOUSE, POOVARANTHODE.PO
KODARANJI VILLAGE, KOZHIKODE DISTRICT-673001.
 2. AMINA., AGED 59 YEARS
W/O.PAREETH, MALEPARAMBIL HOUSE, KUNNAM BHAGAM
MUTHALAKODAM KARA, THODUPUZHA VILLAGE-685584.
 3. RUKHIYA., AGED 53 YEARS
W/O.ABDUL KHADAR, THATTUPARAMBIL HOUSE
MUTHALAKODAM BHAGAM, MUTHALAKODAM KARA
THODUPUZHA VILLAGE-685584.
 4. FATHIMA., AGED 62 YEARS
D/O.IBRAHIM, MECHERIL HOUSE, PERUMBILICHIRA BHAGOM
KUMARAMANGALAM VILLAGE, THODUPUZHA TALUK
BY NEXT FRIEND JABBAR, S/O.MYTHEEN, KOTTRATHIL HOUSE
POOVANTHODE.P.O, KODARANJI VILLAGE, KOZHIKODE DISTRICT 685 584.

BY ADV. SRI.K.K.CHANDRAN PILLAI (SR.)
BY ADV. SRI.THOMAS JAMES MUNDACKAL
BY ADV. SRI.BOBBY THOMAS
BY ADV. SRI.ARUN ANTONY

THIS FIRST APPEAL FROM ORDER – REMAND ORDER HAVING BEEN FINALLY HEARD
ON 31-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

F.A.O.(R.O.) No.73 of 2013

Dated 31st March, 2015.

J U D G M E N T

The decision in A.S.No.57 of 2012 on the file of the District Court, Thodupuzha, by which the final decree application in O.S.No.18 of 2009 on the file of the Munsiff Court, Thodupuzha was remitted for fresh disposal is under challenge in this appeal. The first defendant in the suit is the appellant.

2. O.S.No.18 of 2009 is a suit for partition. A preliminary decree was passed in the suit declaring the 1/6 share each of the four plaintiffs and the 2/6 share of the first defendant over plaint A and B schedule properties. The plaintiffs have applied for passing of the final decree. In the final decree application, the trial court appointed an Advocate Commissioner to effect partition. The Advocate Commissioner appointed in the suit filed Ext.C1 report and C1(a) and C1(b) plans. The trial court accepted the report and plans submitted by the Advocate Commissioner and passed a final decree.

3. The plaintiffs challenged the decision of the trial

court in appeal. The appellate court, on an appraisal of the materials on record, found that it was unnecessary to extend the pathway provided in Ext.C1(b) plan upto the western boundary of the plaint A schedule property. According to the appellate court, the land utilised for the unnecessary portion of the pathway should have been partitioned among the parties. As per the final decree passed by the trial court, the building in plaint B schedule property was allotted to the first defendant. The appellate court found that the fourth plaintiff being a person residing in the building in plaint B schedule property and being a person who is unable to live independently, the said building should have been allotted to her. The appellate court also found that the partition has not been effected in such a manner so as to reduce the owelty payable by the sharers to the minimum possible amount. The appellate court further found that since the fourth plaintiff is not in a position to pay owelty to anyone, the allotment of the building to the fourth plaintiff shall be made in such a manner that there is no obligation for the fourth plaintiff to pay owelty to other sharers.

The appellate court further found that the valuation of the shares in plaint B schedule property was not properly done. In the light of the said findings, the appellate court set aside the final decree and judgment in the suit and remitted the final decree application for fresh disposal with a direction to afford the parties to take out a fresh Commission to effect the partition. The first defendant is aggrieved by the decision of the appellate court. Hence this appeal.

4. The following are the questions raised for decision in the appeal :

“1. Was it justified on the part of the lower appellate court in remanding the case when the parameters which should be followed for ordering remand are not available in the facts and circumstances of the case?

2. Was it justified on the part of the lower appellate court to interfere with the just decision taken judiciously by the trial court in the final decree matter?

3. Was it justified on the part of the lower appellate court to order of remand when the lower appellate court could itself determine the legality or otherwise of the final decree?

4. Was it justified on the part of the lower court to hold that the way was not required and that the fourth plaintiff should be provided with the house when such findings are not justifiable and at any rate having such findings and thereafter remanding

the case, is totally illegal a procedure?"

5. Heard the learned counsel for the appellant and the learned counsel for the respondents.

6. The learned counsel for the appellant contended that there was no reason for the appellate court to remand the final decree application for fresh disposal and the appellate court could have decided the matter finally. He has also contended that the finding of the appellate court that it was unnecessary to extend the pathway provided in Ext.C1(b) plan upto the western boundary of the plaint A schedule property is incorrect and unsustainable.

7. I have perused Ext.C1 report and Exts.C1(a) and C1(b) plans filed by the Advocate Commissioner which were made available to me at the time of hearing. It is seen that the plot allotted to the first defendant in Ext.C1(b) plan is the plot which lies on the western extremity of the plaint A schedule property. It is seen that there is a footpath on the further west of the plaint A schedule property and it is on account of the said reason, the Commissioner has extended the pathway provided

in the plan upto the western boundary of plaint A schedule property. The lie of the property in Ext.C1(a) plan indicates that the plaintiffs may not be benefitted on account of the extension of the pathway upto the western boundary of the plaint A schedule property. The appellate court is, therefore, justified in holding that the pathway was not required beyond the beginning of the plot allotted to the first defendant.

8. Order 41 Rule 23A of the Code of Civil Procedure confers power on the appellate court to remand a case for fresh disposal if the decree impugned is reversed and the appellate court considers it necessary to order a retrial. In the instant case, in the light of the factual findings rendered by the appellate court, the decision of the trial court cannot be sustained and the appellate court cannot, therefore, be found fault with for having set aside the decision of the trial court. Since the appellate court found that the final decree application cannot be disposed of on the basis of Ext.C1 report and C1(a) and C1(b) plans, the appellate court had no option, but to remit the final decree application for fresh disposal.

The view taken by the appellate court that a retrial is necessary in the matter cannot also be faulted. There is no merit in the appeal and the appeal is accordingly, dismissed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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