

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 10TH DAY OF JULY 2015/19TH ASHADHA, 1937

OP(C).No. 1721 of 2012 (O)

IN OS 34/1977 of ADDITIONAL SUB COURT, PALAKKAD DATED 26-07-1993

PETITIONER(S):

1. RAJAN
S/O.LATE PONNUKUTTY.
2. AMMUKUTTY
D/O.KOTTU.
3. JANAKI
D/O.KOTTU.
4. KOUSALLYA
D/O.KOTTU.
5. MURUKAN
S/O.KOTTU. ALL ARE RESIDING AT MOZHIKUNNAM
MUNDUR AMSOM, PALAKKAD TALUK.

BY ADVS.SRI.T.C.SURESH MENON
SRI.P.S.APPU
SRI.A.R.NIMOD

RESPONDENT(S):

1. MADHAVI
W/O.KRISHNAN, W/O.CHETHY, RESIDING AT MOZHIKUNNAM
MUNDUR AMSOM, PALAKKAD 678 592.
2. LAKSHMI
W/O.NAMBULLIPURAKKAL GOPALAN
RESIDING AT MUNDUR AMSOM, PALAKKAD 678 592.
3. AMBUJAKSHI
W/O.NARAYANAN, S/O.AYYAPPAN, RESIDING AT MOZHIKUNNAM
MUNDUR AMSOM, PALAKKAD 678 592.
4. KRISHNAN
S/O.KUNJU, RESIDING AT MOZHIKUNNAM, MUNDUR AMSOM
PALAKKAD 678 592.

ADDL. R5. DEVAKI, WIDOW OF APPUKUTTAN.

ADDL. R6. VIVIDHA, WIDOW OF JAYAPRAKASH.

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ADDL. R7. SURESH, S/O. LATE APPUKUTTAN.

ADDL. R8. CHANDRIKA, D/O. LATE APPUKUTTAN.

ADDL. R9. SHEELA, D/O. LATE APPUKUTTAN.

ADDL. R10. SHYLA, D/O. LATE APPUKUTTAN. ALL ARE RESIDING AT MOZHIKUNNATH HOUSE, MUNDUR P.O., NOCHIPULLY, PALAKKAD - 678 592.

(ADDL. R5 TO R10 ARE IMPEADED AS ADDL. RESPONDENTS 5 TO 10 AS PER ORDER DT. 8.12.2014 IN I.A. 13439/2014 IN OPC)

R2& R3 BY ADV. SRI.RAJESH SIVARAMANKUTTY

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 10-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ds

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APPENDIX

PETITIONER(S) EXHIBITS :

- EXHIBIT P1. TRUE COPY OF THE ORDER IN IA NO.827/1988 IN OS NO.34/1977 ON THE FILE OF THE COURT OF THE SUBORDINATE JUDGE OF PALAKKAD DATED 26.7.1993.**
- EXHIBIT P2. TRUE COPY OF IA NO.4513/2010 IN IA NO.827/1988 IN OS NO.34/1977 ON THE FILE OF THE COURT OF THE ADDITIONAL SUBORDINATE JUDGE OF PALAKKAD DATED 1.11.2010.**
- EXHIBIT P3. TRUE COPY OF THE ORDER IN IA NO.4513/2010 IN IA NO.827/1988 IN OS NO.34/1977 OF THE FILE OF THE COURT OF THE ADDITIONAL SUBORDINATE JUDGE OF PALAKKAD DATED 10.2.2012.**

RESPONDENTS' EXHIBITS :

NIL

//TRUE COPY//

P.A. TO JUDGE

P.BHAVADASAN, J.

O.P.(C) No. 1721 of 2012

Dated this the 10th day of July, 2015

J U D G M E N T

This original petition is directed against Ext.P3 order dated 10.02.2012, whereby, the court below rejected Ext.P2, an application for amendment filed by the petitioners herein.

2. In a suit for partition consisting of A and B schedule properties, the trial court found the properties to be partible and it was also found that the plaintiffs are entitled to 6/7th shares and the first defendant is entitled to 1/7th share. It may be noticed here that the first defendant in fact had alienated the entire properties to defendants 2 to 7. The preliminary decree was challenged before this Court which confirmed the preliminary decree passed by the trial court. Thereafter, I.A.No.827/1988 was filed by the petitioners for passing of a final decree. A Commissioner was deputed and he filed Exts. C1 and C2 report and Ext.C3 plan. On the basis of the Commissioner's report, Ext.P1

order was passed.

3. As per Ext.P1, the final decree was passed in the following terms:

“1. A schedule item Nos. 3, 4 and 5 properties respectively are allotted to defendants 5, 6 and 7.

2. Defendants 5, 6 and 7 are liable to pay Rs.6300/-, 7650/- and Rs. 4200/- respectively to the plaintiff.

3. The amount due to the plaintiff from the defendants 5, 6 and 7 are made a charge over the properties set apart to the share of defendants 5, 6 and 7.

4. The schedule of properties and Ext.C3 plan will be part of the decree and appended to it.

5. The costs of the proceedings will come out of estate.

6. The parties are directed to deposit the amount sufficient for purchasing the non-judicial stamp paper and drafting the final decree.”

4. Finding that an error had crept into Ext.P1 order, the petitioners filed Ext.P2 petition to carry out the

necessary correction. Their grievance was that they had given up their claims in respect of defendants 2 to 4 and not as against defendants 5 to 7. Therefore, that part of Ext.P1 whereby, the final decree was drawn up allotting items 3, 4 and 5 to 5, 6 and 7 is incorrect because by the statement filed by the petitioners before the court on the basis of which the final decree was to be drawn up, what was intended and what was mentioned in the final statement was that the petitioners in the final decree proceedings did not want to pursue their remedies against defendants 2 to 4 and they would confine their reliefs to defendants 5 to 7 who are alienees from the first defendant.

5. The court below rejected the application holding that there was no error in the passing of the final decree as per Ext.P1. That order is under challenge.

6. The learned counsel appearing for the petitioners contended that in the statement filed on 30.03.1993, what is stated is that “among the items included in A schedule, the

claim for partition and mesne profits is settled with the defendants D2, D3 and D4 who are alienees of item No. 6, item No.1 and item No. 2 in the final decree sketch drawn up by the Commissioner". The statement further stated that the remaining items in A schedule to be divided and allotted are Item 3 outstanding with D5, item 4 outstanding with D6 and item 5 outstanding with D7. They also mentioned about the mesne profits due from each one of them. Finally in the statement, it was prayed that the allotment of properties in A and B schedule as stated above, will be upheld and confirmed.

7. It is quite evident from the statement that the petitioners had given up their claims only against defendants 2 to 4 and did not want to disturb their possession and right over the properties obtained by them. But they did not give up their claims as against defendants 5 to 7.

8. It must be noticed that defendants 2 to 7 are alienees from the first defendants and they could only legitimately get what the first defendant would get in partition i.e. $1/7^{\text{th}}$ share allotted to him as per the preliminary decree. In the commissioner's report prepared on the basis of the final decree now passed, 'rose' shaded portions are set apart to the first defendant. Fortunately for defendants 5 to 7, the petitioners have settled their differences with defendants 2 to 4 and do not want to pursue their claims as against them. That means defendants 5 to 7 will have to seek their remedies against the properties set apart to the first defendant. There seems to have been some misreading of the statement filed by the petitioners by the court below. May be because, the court below confused the A and B schedule properties mentioned in the plaint with A and B schedule mentioned by the Commissioner which was set apart to the respective parties.

9. A reading of the statement filed by the petitioners leave one in no doubt that they had settled their claims only with defendants 2 to 4, who therefore can have no subsisting claims against the properties set apart to the first defendant and that would be confined to the claim of defendants 5 to 7.

10. For the above reasons, this petition is allowed. The impugned order is set aside and the court below is directed to pass a final decree in accordance with what is stated above.

Parties shall appear before the court below on **10.08.2015**. The trial court may make every endeavour to dispose of the matter as expeditiously as possible, at any rate, within a period of three months from the date of appearance of the parties.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge