

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 22ND DAY OF JANUARY 2015/2ND MAGHA, 1936

OP(C).No. 215 of 2014 (O)

OS 187/1989 of PRINCIPAL SUB COURT, PALAKKAD

PETITIONERS :

1. HEMALATHA, D/O. CHELLAPPAN,
RESIDING AT ULLATTIL HOUSE, KOPPAM
PALAKKAD.
2. PUSHPALATHA,D/O. CHELLAPPAN,
RESIDING AT ULLATTIL HOUSE, KOPPAM
PALAKKAD.
3. PRAMEELAKUMARI, D/O. CHELLAPPAN,
RESIDING AT ULLATTIL HOUSE, KOPPAM
PALAKKAD.
4. PRASANNAKUMARI,D/O. CHELLAPPAN,
RESIDING AT ULLATTIL HOUSE, KOPPAM
PALAKKAD.
5. MRIDULADEVI,D/O. CHELLAPPAN,
RESIDING AT ULLATTIL HOUSE, KOPPAM
PALAKKAD.
6. SHEEBA, D/O. CHELLAPPAN,
RESIDING AT ULLATTIL HOUSE, KOPPAM
PALAKKAD.

**BY ADVS.SRI.SANTHEEP ANKARATH
SRI.ARUN MATHEW VADAKKAN**

RESPONDENTS :

1. THANKAMANI
S/O. MALLI, ULLATTIL HOUSE, KOPPAM
PALAKKAD DISTRICT-678001.
2. MURALEEDHARAN,
S/O. MADHAVAN, ANGANA VADI, PALLIPPARAMBU
ALATHUR, PALAKKAD, PIN-678541.

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3. SYAMALA D/O. MADHAVI,
ANGANAVADI, PALLIPPARAMBU
ALATHUR, PALAKKAD, PIN-678541.
4. RUGMANI
D/O. MALLI, APPAKKADU VEEDU, VENGASSERY
MANNUR, PALAKKAD DISTRICT-679516.
5. THATHA
D/O. MALLI, ANGANAVADI, PALLIPPARAMBU
ALATHUR, PALAKKAD, PIN-678541.

R1 BY ADVS. SRI.T.C.SURESH MENON
SRI.P.S.APPU

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 22-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

bp

APPENDIX

PETITIONER(S)' EXHIBITS

- P1: TRUE COPY OF THE JUDGMENT DATED 19-7-1991 IN O.S. NO. 187/1989 PASSED BY SUBORDINATE JUDGES COURT, PALAKKAD.
- P2: TRUE COPY OF THE JUDGMENTG DATED 18-11-2002 IN A.S. N. 768/1992 PASSED BY THIS HON'BLE COURT.
- P3: TRUE COPY OF THE COMMISSIONERS SKETCH REPORT AND ACCOUNT DATED 23-3-2012 IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 BEFORE THE SUB COURT, PALAKKAD.
- P4: TRUE COPY OF ORDER DATED 31-7-2012 IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 PASSED BY SUBORDINATE JUDGES COURT, PALAKKAD.
- P5: TRUE COPY FO THE EXECUTION PETITION DATED 17-12-2012 AND NUMBERED AS EP. NO. 3/2013 IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 BEFORE THE PRINCIPAL SUB COURT, PALAKKAD.
- P6: TRUE COPY OF THE PETITION FOR REVIEW DATED 13-3-2013 AND NUMBERED AS I.A. NO. 1030/2013 FILED BY THE PETITIONERS IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 BEFORE THE PRINCIPAL SUB COURT, PALAKKAD.
- P7: TRUE COPY OF THE CONDONE THE DELAY IN FILING THE PETITION FOR REVCIEW DATED 13-3-2013 AND NUMBERED AS I.A. N. 1029/2013 FILED BY THE PETITIONERS IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 BEFORE THE PRINCIPAL SUBCOURT PALAKKAD, PALAKKAD.
- P8: TRUE COPY OF THE PETITION TO SET ASIED COMMISSIONER REPORT AND PLAN AND NUMBERED AS IA NO 1031/2013 DATED 13-3-2013 FILED BY THE PETITIONERS IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 BEFORE THE PRINCIPAL SUBCOURT PALAKKAD, PALAKKAD.
- P9. TRUE COPY OF COUNTER DATED 28-5-2013 FILED BY THE 1ST RESPONDENT IN EXT. P6.
- P10: TRUE COPY OF ORDER DATED 19-12-13 IN I.A. N. 1029/2013 IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 PASSED BY PRINCIPAL SUBRODINATE JUDG'S COURT, PALAKKAD.
- P11: TRUE COPY OF THE ORDER DATED 19-12-13 IN I.A. NO. 1030/2013 IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 PASSED BY PRINCIPAL SUBRODINATE JUDG'S COURT, PALAKKAD.
- P12: TRUE COPY OF THE ORDER DATED 19-12-13 IN I.A. NO. 1031/13 IN FDIA NO. 861/2004 IN O.S. NO. 187/1989 PASSED BY PRINCIPAL SUBRODINATE JUDG'S COURT, PALAKKAD.
- P13: TRUE COPY OF THE ORDER DATED 21-8-2013 IN E.P. NO. 3/2013 IN O.S. NO. 187/1989 PASSED BY PRINCIPAL SUBORDINATE JUDGE'S COURT, PALAKKAD.

RESPONDENT(S)' EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

P.BHAVADASAN, J.

O.P.(C) No. 215 of 2014

Dated this the 22nd day of January, 2015

J U D G M E N T

Aggrieved by the preliminary decree, the plaintiff came up in appeal before this Court as A.S.No.68/1992. This Court disposed of the first appeal and passed a decree which reads as follows:

“1. That the decree of the court below be and is hereby modified and a preliminary decree is passed as follows:-

2. That A Schedule Items 1 and 2 (reserving the house situated in item 1 or in clause 3) be partitioned into 15 shares and the appellant be allotted 6/15 shares from Item No.2 alone of 'A' schedule properties;

3. That the house situated in item No.1 be reserved in favour of respondents 2 to 7;

4. That save as aforesaid the decree of the court below be and is hereby confirmed;”

2. After passing of the preliminary decree by this Court, it appears that final decree proceedings were initiated and a Commission was deputed. The Commissioner prepared Ext.P3 report and a sketch appended thereto.

Even though several opportunities were given to both sides to object to the Commissioner's report, nothing was done by any of them and ultimately, both agreed to passing of final decree on the basis of the Commissioner's report and a final decree came to be passed.

3. When execution was taken out, the petitioners before this Court realized that the final decree is not in terms of the preliminary decree and is at variance thereof and they therefore filed a review application as I.A.No.1030/2013 to review the order in I.A. 861/2004 in O.S.No. 187/1989. Since there was delay in filing the review petition, they also filed I.A.No. 1029/2013 to condone the delay and hear the review petition on merits. As already noticed, both those petitions were dismissed.

4. The learned counsel appearing for the petitioner pointed out that a mere perusal of the preliminary decree and the final decree would clearly indicate that final decree is not passed in terms of the preliminary decree and that

vitiates the final decree proceedings. It was pointed out by the learned counsel that as far the respondents herein are concerned, their share is to be carved out from Item No.2, the plaint schedule alone as would be clear from the preliminary decree passed by this Court. On going through the sketch and report, it can be seen that the allocation now made is not so and also that the extent of property that was to be allotted to each of the parties was 4.5 cents each which is also not seen allotted as per the present sketch.

5. It is also significant to notice that the Commissioner when inspected the property found the area to be lesser in extent. It is not discernible from the plan now before this Court as to the exact location of the house and other features of the property which was sought to be partitioned. It is also to be noticed that way will also have to be provided for the person who is allotted property on the southern side which has also to be taken note of at the time of passing of the final decree.

6. The learned counsel appearing for the respondent pointed out that he has purchased two shares from person who have shares in Item No.1 and that may also be considered.

7. After having bestowed attention to various aspects, it is felt that final decree now passed cannot be sustained and it has to be necessarily set aside. It is so done and the matter is remanded to the trial court for fresh disposal in accordance with the law and in the light of what has been stated above.

Parties shall appear before the lower court on **04.02.2015** and the court below shall depute a Commission immediately and ensure that a report is obtained within a month thereof. The final decree proceedings shall be disposed of before the summer vacation begins.

**P.BHAVADASAN
JUDGE**

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