

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

RFA.No. 580 of 2009 ()

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AGAINST THE ORDER IN OS. NO.201/1994 OF SUB COURT, OTTAPPALAM
DATED 31-03-2009.**

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APPELLANT/4TH DEFENDANT:

**SAID, S/O. SAIDALI,
RESIDING AT VAZHAKKAPARAMBIL,
P.O. NELLAYA, CHERPLASSERY,
PALAKKAD-679 335.**

**BY ADVS. SRI.T.C.SURESH MENON,
SRI.JIBU P THOMAS,
SRI.P.SAPPU,
SRI.A.R.NIMOD,
SRI.C.A.ANOOP.**

RESPONDENTS/PLAINTIFFS/DEFENDANTS 1, 2, 3, 5 & 6:

- 1. AMINA, D/O LATE SAIDALI.**
- 2. KADEEJA, D/O.LATE SAIDALI.**
- 3. MUHAMMED, S/O. LATE SAIDALI.**
- 4. VEERAN, S/O.LATE SAIDALI.**
- 5. HASSAN, S/O.LATE SAIDALI.**
- 6. NABEESA, D/O.LATE SAIDALI.**
- 7. PATHUMMA, D/O.LATE SAIDALI.**

**ALL ARE RESIDING AT VAZHAKKAPARAMBIL,
NELLAYA AMSOM, EZHUVANTHALA DESOM,
OTTAPALAM TALUK, PALAKKAD DISTRICT.**

**R1 & R2 BY ADVS. SRI.SANTHEEP ANKARATH,
SRI.V.C.MADHAVANKUTTY.**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 03-09-2015, THE COURT ON 14/09/2015 DELIVERED THE
FOLLOWING:**

rs.

P.B.SURESH KUMAR, J.

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R.F.A.No.580 of 2009.

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Dated this the 14th day of September, 2015.

J U D G M E N T

The fourth defendant in a suit for partition is challenging in this appeal the final decree passed in the suit.

2. The plaintiffs claimed in the suit, partition of their 14/96 share in the suit properties. The suit was resisted by the defendants contending mainly that a partition deed in respect of the suit properties has already been executed among the sharers except the plaintiffs; that the plaintiffs have been allotted due shares in the plaint schedule properties as per the said partition deed and that therefore the suit is not maintainable. Alternatively, the defendants have pleaded that if the suit is decreed, the allocation of the properties made in the partition deed executed by them may not be disturbed. A preliminary decree was passed in the suit on 16.12.1997 declaring the

share of the plaintiffs. The court, however, did not consider the alternative plea raised by the defendants. Instead, the court left the said issue to be decided at the final decree stage. After the preliminary decree, the plaintiffs filed I.A.No.315 of 1998 seeking orders to pass a final decree. An Advocate Commissioner was appointed in the final decree proceedings and the Advocate Commissioner filed Ext.C1 report, Ext.C2 share of accounts and Ext.C3 rough plan on 24.11.1998. The report, share of accounts and rough plan submitted by the Advocate Commissioner have been accepted by the trial court and the impugned final decree was passed on 31.3.2009. The fourth defendant is aggrieved by the said final decree and hence this appeal.

3. Heard the learned counsel for the appellant as also the learned counsel for respondents 1 and 2, the plaintiffs.

4. The learned counsel for the appellant contended that detailed objections have been filed to the

report of the Advocate Commissioner by the first defendant and that the same was not considered by the final decree court while passing the impugned final decree. The learned counsel took me to the report submitted by the Advocate Commissioner and argued that the allotment of the properties made by the Advocate Commissioner is inequitable and gross injustice has been done to the fourth defendant in the matter of allotment. He also contended that I.A.No.1768 of 1999 was filed by the first defendant on behalf of defendants 1 to 7 seeking orders to set aside the report of the Advocate Commissioner and the impugned final decree has been passed without considering the said interlocutory application. He further contended that the appellant himself has filed I.A.No.1023 of 2009 seeking orders to review the order closing the evidence in the final decree proceedings and permit him to adduce evidence in the matter and that the said application was also not considered by the trial court. According to the learned

counsel, since the impugned final decree was passed without considering I.A.No.1768 of 1999 and I.A.No.1023 of 2009, the same is liable to be set aside. The learned counsel for the appellant further contended that at any rate, in the light of the observations in the preliminary decree, the final decree court should have considered the plea of equity raised by the defendants.

5. The contentions raised by the learned counsel for the appellant cannot be accepted. It is seen that the appellant has not filed any objection to the report submitted by the Advocate Commissioner in the final decree proceedings. The Advocate Commissioner filed the report in the proceedings as early as on 24.11.1998. The impugned final decree has been passed after about ten years on 31.3.2009. The appellant who has not filed any objection to the report of the Advocate Commissioner is not entitled to contend in this proceedings that the allotment of the properties made by the Advocate Commissioner is

inequitable. Coming to the two interlocutory applications referred to by the learned counsel, it is seen that I.A.No.1768 of 1999 is seen dismissed by the court below as the counsel for the appellant had reported no instruction. I.A.No.1023 of 2009 referred to by the learned counsel was filed only on 31.3.2009. It is seen that the final decree was passed on 31.3.2009 and I.A.No.1023 of 2009 was dismissed on the ground that the final decree has already been passed. It is also seen that the counsel for the appellant had reported no instruction on I.A.No.1023 of 2009 also. The dismissal of the said interlocutory applications, in the circumstances, cannot be said to be illegal or incorrect in any manner.

6. Coming to the plea of equity raised by the fourth defendant and others at the preliminary decree stage, it is worth referring to the relevant portion of the preliminary judgment in the suit. Paragraph 10 of the preliminary judgment reads thus:

"Suit is to be decreed for separation on plaintiffs' 14/96 shares. Learned counsel on defendants' side requests not to disturb the entire allotment suggested in Ext.B-1 partition deed. Two questions arise; (1) Whether the said request can be considered as a claim for equity? (2) Should such a claim of equity be allowed? These two questions are left open for consideration and decision at the final decree stage."

It is evident from the aforesaid extracted portion of the preliminary judgment that the trial court only permitted the parties to raise the plea of equity at the final decree stage. Admittedly, there is nothing on record to indicate that any of the parties have raised the plea of equity at the final decree stage. There is, therefore, no merit in the said contention also.

In the result, the appeal is devoid of any merits and the same is, accordingly, dismissed.

Sd/-
P.B.SURESH KUMAR,
(JUDGE)

Kvs/-

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PA TO JUDGE.