

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYAISHTA, 1937

OP(C).No. 1438 of 2014 (O)

AGAINST THE ORDER IN IA NO.522/2013 IN FINAL DECREE IA.NO.1415/2011 IN OS 177/2008
of MUNSIFF COURT,ALATHUR DATED 5.3.2014

PETITIONER(S):

DEVADAS, S/O.CHAMIYAR, AGED 44 YEARS
RESIDING AT VELICHAPADU HOUSE
KUNISSERY AMSOM AND DESOM, ALATHUR TALUK
PALAKKAD DISTRICT.

BY ADV. SRI.P.K.MOHANAN(PALAKKAD)

RESPONDENT(S):

RAJAN
S/O.CHAMIYAR, RESIDING AT VELICHAPADU HOUSE
KUNISSERY AMSOM AND DESOM, ALATHUR TALUK
PALAKKAD DISTRICT-678 681.

BY ADV. SRI.M.R.VENUGOPAL
BY ADV. SMT.DHANYA PASHOKAN

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 01-06-2015, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 1438 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1.A TRUE COPY OF THE PRELIMINARY DECREE DATED 30/10/2009 IN OS NO.177/2008 ON THE FILE OF THE MUNSIFF COURT,ALATHUR.

EXT.P2.A TRUE COPY OF THE REGISTERED RELEASE DEED NO.2253/2011 OF SRO, ALATHUR.

EXT.P3.A TRUE COPY OF THE REGISTERED RELEASE DEED NO.2330/2011 OF SRO, ALATHUR.

EXT.P4.A TRUE COPY OF THE IA NO.522/2013 FILED IN FDIA 1415/201 IN OS NO.177/2008 ON THE FILE OF THE MC, ALATHUR.

EXT.P5.A TRUE COPY OF THE COUNTER STATEMENT FILED BY THE RESPONDENT

EXT.P6.A TRUE COPY OF THE ORDER IN IA NO.522/2013 IN FINAL DECREE IA NO.1415/2011 IN OS NO.177/2008 ON THE FILE OF THE MUNSIFF COURT,ALATHUR.

RESPONDENT(S)' EXHIBITS NIL

//TRUE COPY//

A.HARIPRASAD, J.

O.P.(C) No.1438 of 2014

Dated this the 1st day of June, 2015

JUDGMENT

Ext.P6 order passed by the learned Munsiff, Alathur in an interlocutory application filed in a final decree application in a suit for partition is under challenge in this proceedings.

2. Heard the learned counsel for the petitioner and the respondent.

3. Petitioner is the fifth defendant in the partition suit. Respondent is the plaintiff in the suit. A preliminary decree for partition was passed, declaring that the plaintiff has $\frac{1}{7}$ th share and defendants in the suit have $\frac{1}{7}$ th share each over five items of property sought to be partitioned. In item No.3, there is a family house which is also included in the partition. The extent of item No.3 is only 13 cents. Learned counsel for the petitioner submitted that in addition to petitioner's $\frac{1}{7}$ th share, he purchased the share of defendants 1 and 6. Thereby his share was increased to $\frac{3}{7}$. Later, third defendant died. Her rights devolved on son and daughter. From one of the heirs of the deceased third defendant, the petitioner purchased half share in $\frac{1}{7}$ th share. Therefore, the petitioner has now $\frac{7}{14}$ shares over all the five items, thereby entitling him to half share in

each of the items.

4. Ext.P4 is the petition filed by the petitioner, wherein Ext.P6, the impugned order, happened to be passed. In Ext.P4, the petitioner claimed that item No.3 should be partitioned providing him with 7/14 (half) shares and the house also to be set apart to him. Another request made by the petitioner is that the shares to be given to defendants 1 and 6 and one of the legal heirs of deceased third defendant should be allotted to him together so that he can enjoy 7/14 shares in each item as a single plot.

5. Learned counsel for the respondent/plaintiff contended that the petitioner is not entitled to get any reservation in respect of the tarwad house. It is also submitted that the petitioner's case of making repairs and improvements in the tarwad house is completely unbelievable. At one point of time, the petitioner has contended that he had spent ₹1,25,000/- to renovate the house and at another point of time, he contended that ₹2,50,000/- had been spent. However, the question of reservation was not urged by the petitioner in the suit nor the court reserved the house in favour of the petitioner in the preliminary decree proceedings. Since the question of reservation is a matter to be adjudicated before passing a preliminary decree, the petitioner certainly cannot now make any claim for reservation of the house in which he is said to be residing. Learned counsel for the

petitioner submitted that he is entitled to get the house allotted for two reasons. Firstly, he is residing in the house and all other sharers have their own residences. Secondly, he is having half share over the entire property acquired through purchases after the preliminary decree. This submission is forceful. It is settled that a court handling a suit for partition has equitable jurisdiction also vested in it in order to grant a relief which is just and proper for the parties. The court below has not considered any of these aspects. Section 3 of the Partition Act, 1893 deals with the procedure when a sharer undertakes to buy. The court below should have directed the commissioner to set apart the share of the petitioner in such a way taking into consideration the shares acquired by him subsequent to the preliminary decree. Petitioner is entitled to claim that equity. If the house in item No.3 could not be set apart to the share of the petitioner, certainly it has to be auctioned among the sharers as per the provisions in the above mentioned Act. Petitioner is entitled to claim allotment of shares set apart to defendants 1 and 6 and one of the legal heirs of the third defendant along with his shares in other items as well. That equity is also to be worked out in favour of the petitioner.

In the result, the impugned order is set aside. It is made clear that the petitioner is not entitled to get reservation of the tarwad house. If it is

possible to allot the house after valuing to the share of the petitioner, taking into consideration that he is entitled to 7/14 shares, it shall be set apart to him after determining its value. If that is not possible, the court below shall direct that the family house to be auctioned among the sharers and the highest bidder shall be entitled to the house and appurtenant site. If for some reason the sale among sharers could not be materialised, the house and appurtenant site shall be sold in public auction. Petitioner is entitled to get his 7/14 shares in all the items as a single plot.

Original petition is disposed of accordingly.

A. HARIPRASAD, JUDGE.

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