

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 14TH DAY OF JANUARY 2015/24TH POUSHA, 1936

RFA.No. 218 of 2012 ()

(AGAINST THE FINAL JUDGMENT AND DECREE IN I.A.3066/2008 IN O.S.131 OF 1999 OF
SUB COURT, OTTAPALAM DTD. 13.8.2010)

APPELLANT/RESPONDENT NO.1/PLAINTIFF

P.SATHIRATNAM
D/O.VALADIYIL LATE KUNJUKUTTAN NAIR
KAVUKKODE P.O, PATTISSERY
OTTAPALAM, PALGHAT DISTRICT,
NOW RESIDING AT C/O SQNLDR S. VASUDEVAN
B4/160 SAFDARJUNG ENCLAVE, NEW DELHI 110029

BY ADVS.SRI.K.V SOHAN
SMT.SREEJA SOHAN.K.

RESPONDENTS/PETITIONERS AND RESPONDENT NO.2/DEFENDANTS:

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1. VENUGOPALAN
S/O.VALADIYIL LATE KUNJUKUTTAN NAIR
KAVUKKODU P.O., PATTISSERY,
OTTAPALAM, PALGHAT DISTRICT
PIN 679 536
 2. UNNIKRISHNAN
S/O. -DO- - DO-
 3. VIJAYAKUMARI
D/O. -DO- - DO-
 4. RAMABHAI
W/O. -DO- - DO-
 5. RAJAN NAIR
S/O. -DO- -DO-

R1,R 3 AND 4 BY ADV.SRI.PJAYARAM

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 24.10.2014,
THE COURT ON 14-01-2015 DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & P.B.SURESH KUMAR, JJ.

R.F.A. No.218 of 2012

Dated this the 14th day of January, 2015

J U D G M E N T

P.N.Ravindran, J.

The appellant is the plaintiff in O.S.No.131 of 1999 on the file of the Court of the Subordinate Judge of Ottappalam. The respondents are the defendants therein. In this appeal, the appellant challenges the final decree for partition passed by the court below on 13.8.2010 on Final Decree Application No.3066 of 2008 in O.S.No.131 of 1999. The brief facts of the case are as follows:

2. The appellant/plaintiff instituted O.S.No.131 of 1999 in the Court of the Subordinate Judge of Ottappalam for partition of the plaint B schedule property into six equal shares and allotment of one such share to her. The appellant had averred that the plaint B schedule property belonged to late Kunjukuttan Nair, father of the plaintiff and defendants 1 to 4 and husband of the fifth defendant, that he passed away in the year 1976 and on his death, the plaint B schedule property devolved on the plaintiff and the defendants in equal shares. Defendants 1, 2, 4 and 5 filed a joint written statement wherein after conceding the claim of the plaintiff for partition, they contended that the first defendant had, with the consent of all the

sharers, constructed a house in the plaint B schedule property spending his own funds for the residence of the fifth defendant, that defendants 4 and 5 are residing therein, that they have no other house to reside and therefore, defendants 4 and 5 are entitled in equity to have the house situate in the plaint B schedule property allotted to them without valuing it. The trial court considered the rival contentions and passed a preliminary decree for partition by judgment delivered on 13.9.2004. The trial court overruled the contention of the first defendant that he had constructed the house in the plaint B schedule property by spending his own funds. The trial court however held that as the plaintiff who is residing at New Delhi has not controverted the averment that defendants 4 and 5 have no separate house and the fifth defendant is aged more than 70 years, the house in the plaint B schedule property can be set apart to the share of defendants 4 and 5 after valuation. Paragraphs 10 and 11 of the judgment delivered by the trial court on 13.9.2004 in O.S.No.131 of 1999 are extracted below in full:

"10. Issue No.1 *The case of the plaintiff is that she is entitled to get 1/6 share in the plaint schedule property. The case of the defendants is that the 1st defendant constructed a house in the plaint schedule property for the purpose of residence of the 5th defendant by spending his own money. According to the defendants, the 4th and 5th defendants have got no separate house for their residence. The plaintiff is residing in New Delhi at the place of work of her husband. The plaintiff has not controverted the contention that defendant Nos.4 and 5 have no separate house for their residence. But defendant No.1 has not adduced any evidence to prove that he constructed the house by spending his own money. The 5th defendant is aged more than 70 years.*

Therefore it is found that the house in the plaint B schedule property can be set apart to the share of defendant Nos.4 and 5 upon valuation. Issue No.1 is answered accordingly. (emphasis supplied)

11. Issue No.3. *It is the admitted case of both sides that the plaintiff and the defendants are entitled to get 1/6 share each in the plaint B schedule property. Therefore the plaint B schedule properties shall be divided into six equal shares. 1/6th share of the plaintiff shall be separately allotted to her. The house standing in the plaint B schedule property shall be set apart to the share of defendant Nos.4 and 5 upon valuation. The defendants have not prayed for separate allotment of their individual share.*

In the result the plaint B schedule property shall be divided into 6 equal shares and the 1/6 share of the plaintiff shall be separately allotted to her. Each one of the defendants is entitled to get 1/6th share each in the plaint B schedule property. The house standing in the plaint B schedule property shall be set apart to the share of defendant Nos.4 and 5 after valuation. The plaintiff is entitled to get share of profits from the date of filing of the suit till the date of passing of the final decree. The cost of the plaintiff shall come out of the estate. The plaintiff can apply for passing of the final decree."

3. The records disclose that on application filed by the plaintiff as I.A.No.1421 of 1999, an Advocate Commissioner had been appointed by the trial court and he had submitted a report dated 4.11.1999 accompanied by a sketch wherein he had reported that there is a two storied building situate in the plaint B schedule property and that it is worth approximately Rs.3,00,000/-. The relevant portion of the report reads as follows:

"അന്യായം B പട്ടികയിലെ വീടിന് സുമാർ 3,00,000/- (മൂന്ന് ലക്ഷം) രൂപ വില മതിക്കും."

The said report also discloses that at the time of inspection by the Advocate Commissioner, the plaintiff and defendants 1, 4 and 5 were present in the plaint B schedule property.

4. The records also disclose that the plaintiff had on 26.6.2007

filed I.A.No.1265 of 2007 for the passing of a final decree for partition. On that application notice was ordered on 2.8.2007 to the respondents/defendants. Notice on I.A.No.1265 of 2007 was served on the first respondent who received the notice on his own behalf and on behalf of respondents 3 and 4/defendants 3 and 4. Notice was served on respondents 2 and 5/defendants 2 and 5, personally. In the cause title of I.A.No.1265 of 2007, the address of the applicant therein (the plaintiff) was set out as shown below:

"Sathirathnam, Aged 46 years, D/o.Valadiyil Late Kunjukuttan Nair, Kavukkode Amsom, Pattissery Desom in Ottapalam Taluk, now residing at No.47-R Model Town, Karnal, Haryana, PIN. 132 001."

5. When I.A.No.1265 of 2007 came up for hearing before the trial court on 22.1.2008, learned counsel appearing for the appellant made an endorsement on it to the effect that "the final decree application is not pressed as the petitioner is not well and is at Delhi". Consequently I.A.No.1265 of 2007 was dismissed as not pressed by order passed on 22.1.2008.

6. Later, to be exact on 31.10.2008, defendants 1, 3, 4 and 5 filed I.A.No.3066 of 2008 wherein they prayed for the passing of a final decree for partition, joining the plaintiff and the second defendant as respondents in the application. In that application, the address of the appellant is given as in the cause title of the plaint and not as in the cause title of I.A.No.1265 of 2007. The notice issued by the trial

court to the appellant/plaintiff on I.A.No.3066 of 2008 in that address with the hearing date fixed as 5.12.2008 was however redirected to the address given by the appellant/plaintiff in I.A.No.1265 of 2007, but the postal article was returned with an endorsement in Hindi, which roughly translated reads as follows:

"Left this house and went away. Not known where she has gone."

7. The applicants in I.A.No.3066 of 2008 thereupon took fresh steps to serve notice of I.A.No.3066 of 2008 on the appellant/plaintiff by sending the notice to the address given by her in I.A.No.1265 of 2007, with the hearing date fixed as 26.8.2009. The said postal article was also returned with an endorsement in Hindi, which roughly translated reads as follows:

"Came to know that this addressee is not residing in house No.47R. Hence returned."

8. The applicants in I.A.No.3066 of 2008 thereupon filed I.A.No.2383 of 2009 under Order V rule 20 of the Code of Civil Procedure wherein they prayed that the notice may be served by affixture at the plaintiff's last known residence in Ottappalam Taluk where she had earlier resided and in the court house. That application filed on 14.9.2009 was allowed and notice of I.A.No.3066 of 2008 was served on the appellant by affixture at her last known residence in Ottappalam Taluk. The notice was also published in Pradeepam Daily, Calicut edition dated 29.10.2009. In the aforesaid notices, the hearing

date was fixed as 17.12.2009. An Advocate Commissioner was appointed by order passed on 17.12.2009 and the Advocate Commissioner inspected the plaint B schedule property on 30.3.2010. He thereafter submitted a report dated 2.7.2010 accompanied by a plan and account. The Advocate Commissioner had in his report estimated the value of plaint B schedule property at Rs.4,000/- per cent. Though he had not valued the house situate in the plaint B schedule property in his report, he had in his account estimated the value of the building at Rs.1,00,000/- and the value of the other improvements in the plaint B schedule property at Rs.16,850/-. Though the Advocate Commissioner had not set out the area of the building, he had estimated the age of the building as above 30 years. The court below accepted the report and plan submitted by the Advocate Commissioner and by the impugned order passed a final decree for partition. The appellant/plaintiff has aggrieved thereby, filed this appeal.

9. The main ground raised in the instant appeal is that the allotment made in the final decree is inequitable, that the valuation of the house by the Advocate Commissioner is meager and inequitable, that the Advocate Commissioner has valued the house which will fetch a minimum value of Rs.10,00,000/- at Rs.1,00,000/- and that by furnishing the local residential address, a decree has been obtained ex-

parte without serving notice on the appellant. The appellant has also contended that though the plaint B schedule property has an area of 1.45 acres, as stated by the Advocate Commissioner in his report, only 23.7 cents of land was set apart to her share though under the preliminary decree, she is entitled to have $1/6^{\text{th}}$ of 1.45 acres corresponding to 24.166 cents of land allotted to her share.

10. We heard Sri.K.V.Sohan, learned counsel appearing for the appellant and Sri.P.Jayaram, learned counsel appearing for respondents 1, 3 and 4. The learned counsel appearing for the appellant contended that substituted service of notice on the final decree application was effected by affixing a copy of the notice in the former residential address of the appellant in Ottappalam Taluk, notwithstanding the fact that the applicants in I.A.No.3066 of 2008 were aware of the fact that the appellant is residing at New Delhi, that paper publication was effected by publishing the notice in a local daily published from Calicut, that the said newspaper daily does not have wide circulation in New Delhi, where the appellant is residing and therefore, it cannot be said that there was proper service of notice on the appellant before she was set ex-parte and the final decree was passed accepting the report and plan submitted by the Advocate Commissioner. Inviting our attention to paragraph 10 of the judgment delivered in the suit on 13.9.2004, learned counsel for the

appellant/plaintiff contended that even when the preliminary decree was passed, the plaintiff was residing at New Delhi, where her husband was employed. Learned counsel appearing for the appellant submitted that the trial court has not taken note of the fact that even at the time the preliminary decree was passed, the plaintiff was residing at New Delhi along with her husband and therefore, the applicants in I.A.No.3066 of 2008 should have taken steps to serve notice on the plaintiff at New Delhi, that no such steps were taken; instead, notice was sent to the plaintiff in the address mentioned in the plaint, that it was redirected to the address given by the plaintiff herself in I.A.No. 1265 of 2007, but the said notice was not served on her. The learned counsel for the appellant submitted that even going by the materials on record, the last known residence of the appellant was in Haryana and therefore substituted service of notice by affixture should have been effected at Haryana and not at Ottappalam. Learned counsel appearing for the appellant contended that as paper publication was also not properly effected, it cannot be said that there was proper service of notice on the appellant.

11. Per contra, Sri.P.Jayaram, learned counsel appearing for respondents 1, 3 and 4 submitted that it was without disclosing the fact that I.A.No.1265 of 2007 filed by the appellant for the passing of a final decree for partition was dismissed as not pressed that the instant

appeal was filed with a long delay of more than 407 days, that from the conduct of the appellant and the attendant circumstances, it is evident that she was aware of I.A.No.3066 of 2008 and the final decree passed therein and therefore, the appellant cannot contend for the position that there was no proper service of notice on her. The learned counsel appearing for the respondents contended that the last known residence of the appellant was in Ottappalam Taluk and therefore, substituted service by way of affixture and by way of publication in Pradeepam Daily is liable to be treated as proper service of notice on the appellant. Referring to the plaint, learned counsel appearing for the respondents contended that the appellant/plaintiff had in the plaint valued the house at Rs.1,00,000/- and therefore, she cannot take exception to the valuation made by the Advocate Commissioner. Relying on the decision of a learned single Judge of this Court in **Maimu & Others v. Beebi & Others** (1971 KLT 741), learned counsel for the respondents contended that valuation for the purpose of determining the jurisdiction of the court is the market value, that the value of the share claimed by the plaintiff is the proportionate market value of her share and therefore, the plaintiff who had valued the house situate in the plaint B schedule property at Rs.1,00,000/- cannot be heard to contend that the valuation made by the Advocate Commissioner is not correct or that it is meager. The

learned counsel appearing for the respondents contended that in execution of the final decree, the house and the appurtenant land, which was set apart to the share of respondents 4 and 5 by the Advocate Commissioner, was delivered over to them, that they have renovated it and therefore, if at this distance of time the final decree is interfered with, serious prejudice will be caused to them. The learned counsel contended that as the house has been substantially renovated, the valuation now taken will not be the valuation of the house which existed at the time when it was delivered over to defendants 4 and 5 in execution of the final decree for partition.

12. We have considered the submissions made at the Bar by the learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. It is evident from the judgment of the trial court whereby a preliminary decree for partition was passed that even at that time the plaintiff was residing at New Delhi along with her husband where he was employed. Paragraph 10 of the judgment of the trial court extracted earlier discloses the said fact. That apart, the plaintiff had in I.A.No.1265 of 2007, the application filed by her for the passing of a final decree for partition, set out her then address in the cause title. Notice on the said application was served on the defendants and it was only thereafter that I.A.No.1265 of 2007 was dismissed as not pressed. Going by the

cause title of I.A.No.1265 of 2007, the appellant/plaintiff was then residing in 47-R, Model Town, Karnal, Haryana, PIN-132 001. Notwithstanding that fact, defendants 1, 3, 4 and 5 had in I.A.No.3066 of 2008, the application for passing of a final decree for partition filed by them, shown the address of the appellant/plaintiff as in the plaint. Notice was taken out in that address. But it was redirected to 47-R, Model Town, Karnal, Haryana, PIN-132 001. The said postal article was returned with the endorsement "Left this house and went away. Not known where she has gone." Later, the applicants again took steps to serve notice on the appellant in that address. The said postal article was also returned with the endorsement "Came to know that this addressee is not residing in house No.47R. Hence returned." Thereupon, they filed I.A.No.2383 of 2009 to serve notice on the plaintiff by affixture in her last known residence in Ottappalam Taluk. In the affidavit filed in support of the application, the first defendant had averred that the applicants may be allowed to serve notice on the first respondent in I.A.No.3066 of 2008 by affixing the notice in her last known residence at Valadi in Pattisserry Desom, Kavukkode Amsom, Ottappalam Taluk and in the notice board of the court house. The said application was allowed, without noticing the fact that the last known residence of the appellant was at Karnal in Haryana and not at Ottappalam. The defendants had

also not averred that they are not aware of the whereabouts of their own sister. All that was stated was that if fresh steps are again taken, it will lead to delay in disposal of the application. The trial court fell into error of not noticing the fact that the plaintiff was residing at New Delhi and later in Haryana and if notice was to be served by affixture and paper publication, such affixture and paper publication should have been in the last known address of the plaintiff ie., 47-R Model Town, Karnal, Haryana. Though Order V rule 20 of the Code of Civil Procedure stipulates that the court while ordering service of notice by affixture may direct publication of the notice in a newspaper daily, it is stipulated that such newspaper daily should have wide circulation in the area where the defendant is last known to have resided. Going by the materials on record, it cannot be said that the last known residence of the plaintiff was in Ottappalam Taluk. From the materials on record, the only conclusion possible is that the last known residence of the plaintiff was in the State of Haryana. It was that address which was given by the plaintiff herself in I.A.No.1265 of 2007. Without taking steps to effect substituted service of notice in that address, substituted service was effected in the local address of the plaintiff and the notice was published in a local daily which by no stretch of imagination can be said to be a daily having wide circulation at Karnal in State of Haryana or in New Delhi. We are therefore of the

considered opinion that there was no proper service of notice of I.A.No.3066 of 2008 on the appellant/plaintiff who was joined as first respondent therein.

13. That takes us to the question whether the appellant/plaintiff is estopped from challenging the valuation made by the Advocate Commissioner for the reason that she had adopted the very same valuation in the plaint. As stated earlier, the Advocate Commissioner has not referred to the valuation of the house in his report, though he has valued the plaint B schedule property at Rs.4,000/- per cent. The plaintiff had in the plaint valued the plaint B schedule property at Rs.10,40,000/-. The valuation given by the Advocate Commissioner is Rs.5,80,000/-. The Advocate Commissioner has in the account accompanying his report valued the house at Rs.1,00,000/-. Apart from giving a brief description of the house, he has not given the area of the house and the materials used therein. The learned counsel appearing for the respondents however supports the valuation made by the Advocate Commissioner by contending that the same valuation had been adopted by the plaintiff in the plaint. He also relies on sections 7 and 53 of the Kerala Court Fees and Suits Valuation Act, 1959 and the decision of this Court in **Maimu & Others v. Beebi & Others** (1971 KLT 741).

14. In **Maimu & Others v. Beebi & Others** (1971 KLT 741)

the question that arose for consideration before this Court was whether the plaintiff has the right to value the suit for the purpose of court-fee and jurisdiction at her discretion. It was also a suit for partition of an item of immovable property. The plaintiff had also claimed her share of the income. She had valued her share of the property as Rs.4,000/- and her share of the income as Rs.875/-. The defendants objected to the valuation stating that the market value of the plaintiff's share in the property and the share of the income would exceed Rs.5,000/- and therefore the suit was not maintainable in the Munsiff's Court. The Munsiff Court held that section 53(1) of the Act would apply and that the plaintiff had the right to value the suit for the purpose of court-fee and jurisdiction at her discretion. Setting aside the said order and directing the trial court to consider the matter afresh, this Court held that in a suit covered by section 37(2) of the Kerala Court Fees and Suits Valuation Act, 1959 the provision which applies is section 53(2) and not section 53(1) of the Kerala Court Fees and Suits Valuation Act, 1959. In that context it was held that though section 37(2) is not a provision mentioned in section 7(2) of the Kerala Court Fees and Suits Valuation Act, 1959 it is clear from sub section (4) of section 7 that a suit for partition governed by section 37(2) also falls within the scope of section 7(4) of the Kerala Court Fees and Suits Valuation Act, 1959 and that going by the terms thereof, the value of

the share claimed by the plaintiff in such a suit shall be the proportionate market value of that share. The learned single Judge held that the market value of the plaintiff's share determines the jurisdiction of the court even in a suit for partition falling under section 37(2) of the Kerala Court Fees and Suits Valuation Act, 1959.

15. The said decision does not in our opinion answer the question as to whether the house situate in the plaint B schedule property has been properly valued. As stated earlier, the plaintiff had in the plaint estimated the value of the plaint B schedule property as Rs.10,40,000/-, which is nearly twice the valuation of the plaint B schedule property by the Advocate Commissioner. The plaintiff had also estimated the market value of the house at Rs.1,00,000/-. Going by the provisions contained in section 37(2) and 53 of the Kerala Court Fees and Suits Valuation Act, 1959 even assuming that it was the market value of the plaint schedule property and the house therein, it was a valuation for the purpose of jurisdiction and court-fee as on the date of presentation of the plaint. The instant suit was filed on 20.9.1999. The Advocate Commissioner appointed in the final decree proceedings inspected the plaint B schedule property and the house on 30.3.2010, more than a decade later. By no stretch of imagination can it be said that the market value as on the date of presentation of the plaint which alone is contemplated in section 7 of the Kerala Court

Fees and Suits Valuation Act, 1959 and also in section 53 thereof, will be the market value of the property a decade later. On the terms of section 7 of the Kerala Court Fees and Suits Valuation Act, 1959 we are not persuaded to accept the submission made by the learned counsel appearing for the respondents that as the plaintiff had on 20.9.1999 when she presented the plaint, valued the house at Rs.1,00,000/-, she cannot object to the very same valuation being adopted by the Advocate Commissioner in the year 2010.

16. There is also yet another reason why we are not persuaded to accept the valuation made by the Advocate Commissioner. Apart from the fact that the Advocate Commissioner has not given the area of the building or the materials used therein, he had also not availed the services of an expert to have the building valued. The Advocate Commissioner has not ascertained the present cost of constructing the building or deducted the depreciation value on account of the age of the building or the amount required for keeping the building in a fit condition. It is evident from the account submitted by him that he has merely adopted the valuation shown in the plaint. As a matter of fact he has valued the land at a value lower than the value mentioned in the plaint. Therefore for that reason also, we are of the opinion that the report and account submitted by the Advocate Commissioner cannot be accepted. We accordingly overrule the said contention. In

the view that we have taken, the appeal will necessarily have to be allowed. We deem it appropriate to mention in this context that though on several occasions this Court had given the parties an opportunity to amicably sort out the issue and the appellant was willing to settle the dispute if a reasonable amount is paid towards the value of her share in the building now allotted to defendants 4 and 5, defendants 4 and 5 were not prepared to accede to that request. In such circumstances, in the light of the finding that we have entered, we have no other alternative but to interfere with the impugned order.

For the reasons stated above, we allow the appeal, set aside the order dated 13.8.2010 passed by the Court of the Subordinate Judge of Ottappalam on I.A.No.3066 of 2008 in O.S.No.131 of 1999, restore the said application to file and direct the trial court to dispose of the application afresh after appointing an Advocate Commissioner to have the plaint B schedule property and the building therein valued with the assistance of a qualified Engineer. The parties shall appear in the court below through counsel on 2.2.2015. No costs.

**P.N.RAVINDRAN,
(JUDGE)**

vps

**P.B.SURESH KUMAR,
(JUDGE)**

