

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

RFA.No. 249 of 2012 ()

AGAINST THE JUDGMENT IN OS 430/2009 of III ADDL.SUB COURT,
KOZHIKODE DATED 23-09-2011

APPELLANT(S)/DEFENDANT NO.1 IN THE SUIT:

C.JASMINE,
W/O.SHAHUL HAMEED, SCHOOL TEACHER, THADATHIL HOUSE
AIRPORT ROAD, KOLAPURAM NORTH
ABDURAHIMAN NAGAR AMSOM DESOM
MALAPPURAM DISTRICT-676305.

BY ADVS.SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.P.B.KRISHNAN
SMT.GEETHA P.MENON
SRI.N.AJITH
SRI.P.B.SUBRAMANYAN

RESPONDENT(S)/PLAINTIFFS:

1. C.SEETHI,
S.O.ABDUL KHADER, 5/976A, CHERAYAKATT HOUSE
KACHERI AMSOM AND DESOM, KOZHIKODE TALUK, PIN-673502.
2. SUHARA,
D/O.C.SEETHI, 5/976 A, CHERAYAKATT HOUSE
KACHERI AMSOM AND DESOM, KOZHIKODE TALUK, PIN-673502.
3. MARIYAM,
D/O.C.SEETHI, PLOT NO.11, HOUSING COLONY
CHEROOTTY NAGAR, PUTHIYARA.P.O
KALATHINKUNNU AMSOM DESOM, KOZHIKODE TALUK
PIN-673004.
4. C.SALIKAT,
D/O.C.SEETHI, 5/976A, CHERAYAKATT HOUSE
KACHERI AMSOM AND DESOM, KOZHIKODE TALUK, PIN-673502.
5. C.KAMARUNNEESA,
D/O.C.SEETHI, 5/976A, CHERAYAKATT HOUSE
KACHERI AMSOM AND DESOM, KOZHIKODE TALUK, PIN-673502.

Contd....

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6. C.HASHIM, S/O.C.SEETHI,
5/976A, CHERAYAKATT HOUSE

7. P.V.SHAHUL HAMEED,
S/O.SAYED HUSSAN THANGAL, PUTHAN VEETIL HOUSE,
KIZHAKOTH AMSOM AND DESOM, KODUVALLY,
KOZHIKODE, PIN-673513.

R7 BY ADV. SRI.R.SURAJ KUMAR
R1 -R6 BY ADV. SRI.R.SREEHARI

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
08-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ami/

**ANTONY DOMINIC &
P.V.ASHA, JJ.**

R.F.A.No.249 of 2012

Dated this the 8th day of December, 2015.

J U D G M E N T

ANTONY DOMINIC, J.

The 1st defendant in O.S.No.430/09 on the file of the Sub court, Kozhikode, is the appellant. The suit was filed by respondents 1 to 6 praying for partition of plaint A to D scheduled properties. By the preliminary decree challenged in this appeal, the court below rejected the claim for partition in respect of plaint C and D scheduled properties and allowed the partition of plaint A and B scheduled properties. It is aggrieved by this preliminary decree, the 1st defendant in the suit has filed this appeal.

2. We heard the senior counsel for the appellant and the learned counsel appearing for respondents 1 to 6 and the 7th respondent.

3. The 1st plaintiff is the husband and plaintiffs 2 to 6 in the suit are the children of late P.V.Khadeeja who expired

on 28.9.2005. By A3 notice issued on 4.4.2009, the 1st defendant sought partition of plaint scheduled properties and thereafter, on 26.6.2009 filed the suit for partition. Before the court below, the 6th plaintiff was examined as PW1 and Exts.A1 to A9 were marked. No oral evidence was adduced by the defendants and on their behalf Exts.B1 and B2 were marked. Considering the evidence adduced, the court below passed the impugned preliminary decree in the following terms :

"In view of the findings on issue No.1 to 6 preliminary decree is passed allowing the plaintiff together 82/91 right in the plaint A schedule property. Plaintiff No.2 to 6 together 82/91 right in the plaint B schedule property and 9/91 right of D2 over plaint A schedule property. Defendant No.2 is allowed to realise future mesne profit from plaintiff 1 to 6 till he get separate possession in respect of plaint A schedule adjourned sine die. The prayer of parties over C and D schedule properties are dismissed."

It is this decree which is appealed before us.

4. During the hearing of the appeal, there was an agreement between the appellant and the respondents that, the preliminary decree, in so far as the allotment of

the shares is concerned, could be modified. Accordingly, on agreement of the parties and as suggested by them, the preliminary decree is modified as follows :

- 1) The plaintiffs in the suit will be entitled to 75/84 share in the plaint A and B scheduled properties.
- 2) The 1st defendant will be entitled to 9/84 share in the plaint A and B schedule properties.
- 3) In view of document no.618/09, whereby the 1st defendant has assigned her rights in plaint A schedule property to the 2nd defendant, the 2nd defendant will be entitled to 9/84 shares of the 1st defendant in A scheduled property.
- 4) Since the 1st plaintiff has assigned his rights in plaint B scheduled property vide A2 document No.896/09 to the other plaintiffs, his share in the plaint B scheduled property will be allotted to the other plaintiffs.

5. Though the aforesaid modifications have been made on agreement of the parties and as suggested by them, disputes survived with respect to the claim of the appellant for mesne profits from the 7 shop rooms included in the plaint B schedule. The only evidence, in so far as this aspect of the matter is concerned, is that of PW1. From the evidence of PW1, it would appear that among the two rooms in the ground floor and the five remaining rooms in the first floor, building bearing No.299 in the ground floor, till it was vacated by the tenant pursuant to the order in R.C.(O.P.)No.9/09, was occupied for commercial purposes. From the evidence it also appears that prior to the institution of the eviction proceedings, the rent for this building was being collected by the 1st plaintiff. In so far as building No.300, which is also in the ground floor, is concerned, that is leased out for commercial purposes. The appellant's claim for past mesne profits from Building Nos.299 and 300 is confined to 3 years preceding the suit.

The appellant also concedes that she is not claiming anything in respect of the rooms in the first floor, except in case those rooms are let out in future.

6. In such circumstances, the appellant will be entitled to proportionate mesne profits in respect of building Nos.299 and 300 for the 3 years preceding the suit and in so far as the five rooms in the first floor are concerned, it is decreed that in case those rooms are let out in future, she will be entitled to proportionate share in the mesne profits also. It is also ordered that the appellant will be entitled to mesne profits in respect of building No.299 for the period from the date of the suit, till it was surrendered by the tenant pursuant to the order in R.C.(O.P.)No.9/09. She will also be entitled to proportionate share of rent in case building No.299 is let out in future. The 1st defendant is also entitled to proportionate share of rent in respect of building No.300 from the date of suit until she obtains possession of her share or her claim in respect of that

building is otherwise satisfied.

The preliminary decree passed by the lower court will stand modified to the above extent.

This appeal is disposed of accordingly.

Sd/-
ANTONY DOMINIC,
JUDGE.

Sd/-
P.V.ASHA,
JUDGE.

ami/9/12/15

//True copy//

P.A. to Judge