

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 17TH DAY OF JUNE 2015/27TH JYAISHTA, 1937

RFA.No. 749 of 2012 ()

**(AGAINST THE JUDGMENT AND DECREE IN OS.NO.122/1986 OF SUB COURT,
KASARAGOD)**

APPELLANT/PLAINTIFF :

**K.RAMANANDA MALLAYA,
S/O.K.PANDURANGA MALLAYA, HINDU,
TILAK MAHAL COMPOUND,
MANAGUDDE, MANGALORE-570 003,
NOW RESIDING AT FLAT NO.304, AMARIS HEIGHTS, KHANGMET,
AYYAPPA SOCIETY, MADHAPUR, HYDERABAD 500 081.**

**BY ADVS.SRI.K.P.BALASUBRAMANYAN
SRI.NIRMAL. S**

RESPONDENT(S):

- *1. K.ANASUYA BAI,
THILAK MAHAL COMPOUND, MANNAGUDDE,
MANGALORE- 575 003. (DIED)**
- 2. K.SHESHAGIRI MALLYA,
FLAT NO.2, 47/41/WEST AVENUE, PUNJABI BHAG,
NEW DELHI -110 001.**
- 3. K.RADHAKRISHNA MALLYA,
474, EAST END ROAD, 9TH BLOCK,
JAYA NAGAR, BANGALORE -560 069.**
- 4. K.MANOHARA MALLYA,
473, EAST END ROAD, 9TH BLOCK,
JAYANAGAR, BANGALORE- 560 069.**
- 5. K.RAMESHA MALLYA,
474, EAST END ROAD, 9TH BLOCK,
JAYA NAGAR, BANGALORE- 69.**
- 6. K.SANDEEPA MALLYA,
FLAT NO.2, 47/41/WEST AVENUE, PUNJABI BHAG,
NEW DELHI -110 001.**

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- *7. K.P.RAMARISHNA,
JUNCTION OF M.G. ROAD AND NAYAK'S ROAD,
KASARAGOD KASHA VILLAGE, KASARAGOD TALUK,
P.O.KASARAGOD-671 121 (DELETED)
8. ABDUL RAHIMAN @ HAIDER HAJI,
CHERUMBA OF PANAYALA VILLAGE,
HOSDURG TALUK,
P.O PANAYAL- 671 318.
9. FISAL,
CHERUMBA OF PANAYALA VILLAGE,
HOSDURG TALUK,P.O PANAYAL- 671 318.
10. ABDUL RAHMAN,
MUSRATH ROAD, TALANGARA VILLAGE,
KASARAGOD TALUK, P.O KASARAGOD -671 121.
11. S.H.NOORUNISSA,
MUSRATH ROAD, TALANGARA VILLAGE,
KASARAGOD TALUK,
P.O KASARAGOD -671 121.
- * 12. NOORISHA SHANAWAZ,
MUSRATH ROAD, TALANGARA VILLAGE,
KASARAGOD TALUK,
P.O KASARAGOD- 671 121. (CORRECT NAME RECORDED)
- *13. AYISHATH MUNEER,
MUSRATH ROAD, TALANGARA VILLAGE,
KASARAGOD TALUK,
P.O KASARAGOD -671 121. (CORRECT NAME RECORDED)
14. T.H.MOHAMMAD,
KOLLAMBADI OF KASARAGOD KASHA VILLAGE,
KASARAGOD TALUK, P.O KASARAGOD -671 121.
15. K.M.ZAINUDDIN,
KOLLAMBADI KASARAGOD KASHA VILLAGE,
KASARAGOD TALUK, P.O.KASARAGOD -671 001.
16. M.ABBAS,
KUNNIL HOUSE, PALLIKKARA VILLAGE,
HOSDURG TALUK,
P.O PALLIKARA- 671 121.
- *17. AYISHA, KUNNIL HOUSE, PALLIKKARA VILLAGE,
HOSDURG TALUK, P.O. PALLIKARA-671 121 (DELETED)

**It is recorded that the correct name of R12 is "Noorisha Nawas" and the correct name of R13 is "Aaysha Muneera" vide order dt 17-6-2015 in memo bearing c.f. No.6102/14 dt 01-10-2014.

SD/-ASSISTANT REGISTRAR

RFA.NO.749/2012

18. KOVVAL AHAMED HAJI,
KOVVAL HOUSE, CHATTACHAL, P.O THEKKIL,
KASARAGOD, BUSINESSMAN. PIN-671 121.

***THE NAME OF R7 AND R17 ARE REMOVED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT VIDE ORDER DATED 13/3/2013 IN IA.NO.NOS.533/2013 AND 532/2013 RESPECTIVELY.**

***IT IS RECORDED THAT THE FIRST RESPONDENT IN THE APPEAL IS DIED AND THE LR'S OF DECEASED FIRST RESPONDENT ARE APPELLANT AND THE RESPONDENTS NO.2,3,4,5 & 6 IN THE APPEAL VIDE ORDER DATED 16/1/2015 IN MEMO DATED 11/12/2014 BEARING CF NO.7485/2014**

**R2 TO R6 BY ADV. SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH MENON
SRI.BENNY P. THOMAS
R8 BY ADV. SRI.SURESH KUMAR KODOTH
R11 TO R13 BY ADV. SRI.D.KRISHNA PRASAD
R18 BY ADV.SRI.K.RAMACHANDRAN
SRI.P.RAMACHANDRAN**

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 03-06-2015, THE COURT ON 17-06-2015 DELIVERED THE FOLLOWING:

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P.B.SURESH KUMAR, J.

R.F.A.No.749 of 2012

Dated 17th June, 2015.

J U D G M E N T

The plaintiff in a suit for partition is the appellant in this appeal.

2. Though a large extent of property was sought to be partitioned in the suit, in the course of the trial, the plaintiff gave up his claim over a portion of the property and pursued the suit only in respect of 49 cents. As such, I am referring in the judgment only to the facts relevant for adjudication of the right claimed by the plaintiff over the said 49 cents.

3. The case of the plaintiff is that the plaint schedule property including the 49 cents referred to above is a joint family property of the plaintiff and defendants 1 to 6 and that the plaintiff is entitled to 1/7th share over the same. It is alleged by the plaintiff that one Muthappa had filed an application before the Land Tribunal, Kasaragod, invoking Section 72 of the Kerala Land Reforms Act, and obtained a purchase certificate in respect of the said 49 cents on the basis that he is a cultivating

tenant in respect of the said portion of the property. According to the plaintiff, the order obtained by Muthappa from the Land Tribunal is vitiated by fraud as the plaintiff and defendants 1 to 6 who are the owners of the property were not impleaded as parties in the said application. It is also alleged by the plaintiff that defendants 10 to 13 who are claiming under the said Muthappa are asserting title over the said 49 cents. According to the plaintiff, Muthappa was only a tenant in the building in the property referred to above and therefore, the purchase certificate and the subsequent documents executed by Muthappa on the strength of the purchase certificate are invalid and not binding on the plaintiff.

4. Defendants 1 to 6, who are the sharers of the property, filed a joint written statement admitting the plaintiff's allegations. Among the remaining defendants, defendants 10 to 13 filed a written statement contending that the plaintiff's schedule property is not the joint family property of the plaintiff and that in the light of the purchase certificate obtained by Muthappa in O.A.No.1186 of 1971 from the Land Tribunal,

Kasaragod, the plaintiff is not entitled to the decree for partition claimed by him in the suit. They also contended that they are in absolute possession of the property covered by the purchase certificate referred to above. The property covered by the purchase certificate has been shown in the written statement filed by the said defendants as 'X' schedule.

5. The plaintiff gave evidence as PW1 and produced Exts.A1 to A7 documents on his side. One Moideenkunhi gave evidence as DW1 on behalf of the defendants. Exts.B1 to B23 were the documents produced on the side of the defendants. Ext.X1 is the file received from the Land Tribunal. Among the documents produced by the defendants, Ext.B1 is a purchase certificate obtained by Muthappa. Exts.B3 to B6 are the documents executed on the strength of Ext.B1 purchase certificate in favour of defendants 10 to 13.

6. Initially, the trial court dismissed the suit and the decision of the trial court was set aside by this Court holding among others, that the plaint schedule property belonged to the joint family of the plaintiff and that Ext.B1 purchase

certificate is not valid or binding the plaintiff and other members of the joint family. Consequently, the suit was remitted to the trial court with a direction to refer the claim for fixity of tenure raised by defendants 10 to 13 to the Land Tribunal as provided under Section 125(3) of the Kerala Land Reforms Act and decide the suit thereafter in accordance with law. Pursuant to the said decision of this Court, the trial court referred the matter to the Land Tribunal and the Land Tribunal, after taking evidence in the matter, found that Muthappa was only a building tenant and therefore, defendants 10 to 13 who are claiming under him have no right in the property.

7. When the trial court restored the proceedings before it on receipt of the findings of the Land Tribunal, one Kovval Ahamed Haji got himself impleaded in the suit as additional 18th defendant alleging that he is in possession of the property covered by Ext.B1 purchase certificate as assigned to him by defendants 10 to 13. Thereupon, the trial court found that defendants 10 to 13 and their assignee, the additional 18th defendant are in possession of the 49 cents of property covered

by Ext.B1 purchase certificate and they have perfected title to the said property by adverse possession and limitation. Consequently, despite the decision of the Land Tribunal in favour of plaintiff, the suit was dismissed. The plaintiff is aggrieved by the decision of the court below and hence this appeal.

8. Heard Adv.K.P.Balasubramanyan for the appellant, Adv.M.Gopikrishnan Nambiar for respondents 1 to 6, Adv.D.Krishnaprasad for respondents 11 to 13 and Adv.K.Ramachandran for 18th respondent.

9. Muthappa, who obtained Ext.B1 purchase certificate is not a party to the suit. Defendants 10 to 13 are the successors-in-interest of Muthappa. They claimed title to the property on the strength of Ext.B1 purchase certificate. This Court, in the judgment in A.S.No.172 of 1995, found that Ext.B1 purchase certificate is neither valid nor binding the plaintiff and other members of the joint family of the plaintiff. It is beyond dispute that pursuant to the said decision of this court, though the claim of defendants 10 to 13 for fixity of

tenure was referred to the Land Tribunal, on an elaborate consideration of the entire materials on record, the Land Tribunal found that Muthappa was only a building tenant and that therefore defendants 10 to 13 who are claiming under him cannot be regarded as cultivating tenants entitled to fixity of tenure. In the light of the provision contained in Section 125(4) of the Land Reforms Act, it is beyond dispute that the trial court is bound to accept the decision of the Land Tribunal in the reference made under Section 123(3) of the said Act. Of course, the correctness or otherwise of the decision of the Land Tribunal can be canvassed by the persons claiming tenancy in the appellate court if the suit is decided against them based on the decision of the Land Tribunal. In the instant case, though the question of tenancy was decided against the contesting defendants, the suit was dismissed holding that they have perfected title to the plaint schedule property by adverse possession and limitation. In the said situation, the contesting defendants could have attacked the finding of the Land Tribunal on the question of tenancy invoking the provision contained in

Order 41 Rule 22 of the Code of Civil Procedure. There was no attempt either by defendants 10 to 13 or by the additional 18th defendant to attack the finding of the Land Tribunal on the question of tenancy. A close reading of the decision of the Land Tribunal indicates that it is based on its finding that Muthappa was only a building tenant, it came to the conclusion that he was not a cultivating tenant of the land in respect of which he was issued Ext.B1 purchase certificate. As indicated above, the civil court is bound by the decision of the Land Tribunal on the question of tenancy. If the trial court is bound by the said decision of the Land Tribunal, I wonder how the trial court can hold that the said defendants are in physical possession of the property. Even otherwise, defendants 10 to 13 have no case in the written statement filed by them that they have obtained possession of the property otherwise than through Exts.B3 to B6 documents. It is on the basis of Exts.B3 to B6 documents, defendants 10 to 13 claim possession over the property. In so far as it is found that the predecessors of defendants 10 to 13 have not obtained possession of the property, it cannot be

contended that defendants 10 to 13 are in possession of the property. In the said circumstances, the finding of the trial court that the said defendants are in possession of the plaint schedule property is incorrect and unsustainable. If the said defendants cannot be found to be in possession of the plaint schedule property, they cannot raise a plea of adverse possession. Further, the specific contention of defendants 10 to 13 in their written statement is that they have title to the plaint schedule property by virtue of Ext.B1 purchase certificate and that they are holding possession of the property on that basis. As such, at any rate, they cannot raise a plea of adverse possession, for, to raise a plea of adverse possession, they should accept the title of the real owner. The impugned decision of the court below, in the circumstances, is illegal and unsustainable.

10. The learned counsel for defendants 10 to 13 as also the learned counsel for the additional 18th defendant contended that in the light of the decision of the trial court that defendants 10 to 13 are in possession of the property, they can

be evicted only in a proper suit for recovery of possession. According to them, in the light of the decision of the Land Tribunal, they are liable to be treated as trespassers of the property. I have already held that in so far as the defendants 10 to 13 claim under Muthappa who is found to be a building tenant, they cannot be held to be in possession of the property. As such, the said contention is only to be rejected.

11. The learned counsel for the additional 18th respondent contended that in so far as the plaintiff has abandoned the claim over a portion of the plaint schedule property, the suit is bad for partial partition. First of all, a claim for partial partition is not an absolute bar [See the decisions in **Hari Narayan Brahme v. Ganpatrav Daji and another** (ILR VII Bombay 272) and **Parameswara Menon v. Sachidananda Menon** (1970 KLT 1031)]. Further, a suit for partial partition is normally not entertained by the courts to ensure a fair and equitable distribution of the assets among the sharers. As such, the contention that a suit is hit by partial partition can be raised only by a sharer. The additional 18th

defendant who claims that he is liable to be treated as a trespasser of the property is not entitled to raise a contention of partial partition.

12. The learned counsel for defendants 10 to 13 as also the learned counsel for the additional 18th defendant contended that the finding rendered by the Land Tribunal that Muthappa was only a building tenant is unsustainable. There is no substance in this contention also. It is seen that Muthappa had obtained purchase certificate in respect of the property based on a few rent receipts produced before the Land Tribunal. When the matter was taken up again by the Land Tribunal pursuant to the decision of this Court, the Land Tribunal had called for and examined the said rent receipts. On a close scrutiny of the said rent receipts, the Land Tribunal came to the conclusion that Muthappa was only a building tenant. I have perused meticulously the decision rendered by the Land Tribunal in this connection. The relevant portion of the order of the Land Tribunal reads thus:

"Excepting these rent receipts there is neither any oral evidence nor any other documentary evidence seen produced by A.Muthappa in Ext.A(1) order of Land Tribunal, Kasaragod. On perusal of Ext.B(2) to B(9) and their original copy from Ext.C(2) it is seen that three rent receipts and three money order acknowledgement issued by Panduranga Mallya are the clinching evidence to show that A.Muthappa was only a building lessee as the rent thereunder is described as monthly building rent at the rate of Rs.18/- per month. Generally in Malabar area especially in Hosdurg and Kasaragod Taluks lease rent of agricultural land except double crop wet lands are paid once in a year and no in monthly wise as stated by petitioners. There is no such instance noticed or heard so far. The argument of petitioners in this regard is unbelievable. Two rent receipts are the receipt issued by the court receiver and fixity of tenure can be claimed under these receipts on the same is exempted under chapter II section 3(1) (IV) of Kerala Land Reforms Act. The Authorised Officer in his report marked as Ext.C(1) reported that local enquiry shows that landed property claimed by petitioners is jointly in their possession and enjoyment at present. But he has not given the details of such local enquiry and the person with whom he has made enquiry in his report. Another point to be noted in this case is that the Authorised Officer appointed in OA 1186/71 in his report dt.15.12.72 available in Ext.C(2) marked in this proceedings reported that Sri.Muthappa predecessor of petitioners is in possession and enjoyment of the land involved in this reference as cultivating tenant and he is entitled for the assignment of land lords right. At the same time against question 12 in his form report he has stated that the applicant Sri.Muthappa has not produced any document to prove tenancy

right. According to his report the land contains only 36 coconut trees aged about 50 years and considering his date of visit in 1972 the coconut trees might have been planted in 1922. The land lord Seshu Mallya predecessor of Panduranga Mallya purchased the property in two separate sale deed dt.10.12.1993 and 9.12.1928. Therefore it is clear that the only improvements existing in the property was effected either by Sheshu Mallya or his predecessors and the alleged cultivating tenant Muthappa has not effected any improvements as claimed by him. Considering the conflicting views the two reports submitted by the Authorised Officer as per Ext.C(1) and C(2) cannot be considered as trustworthy report in respect of possessary right of A.Muthappa predecessor of the petitioners. Ext.B(1) is the true extract of settlement register in respect of R.S.No.94/4 of Kasaragod Village. According to Ext.B(1) Panduranga Mallya the predecessors of respondent 1 to 7 is the registered holder of the land involved in this reference. From the materials available before this Tribunal it is crystal clear that, the rent receipts issued by Panduranga Mallya as per Ext.B(2) to B(9) are the clinching evidence to show that A.Muthappa predecessor of petitioners was only a building lessee as the rent thereunder is described as monthly building rent."

I fully concur with the finding of the Land Tribunal that Muthappa was only a building tenant.

13. The specific case of the plaintiff is that he is entitled to 1/7th share in the plaint schedule property. The

claim of the plaintiff as regards his share in the plaint schedule property is not disputed by the contesting defendants. In the circumstance, I hold that the plaintiff is entitled to a decree for partition of 1/7th right in the plaint schedule property.

14. In the result, the impugned judgment is set aside and a preliminary decree for partition of 1/7th right of the plaintiff over the portion of the plaint schedule property described as schedule 'X' in the written statement filed by defendants 10 to 13 is passed. The plaintiff is also given a decree for recovery of mesne profits as claimed in the suit to be determined at the final decree stage.

The appeal is allowed as above. All the interlocutory applications in the appeal are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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(true copy)