

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

RSA.No. 503 of 2008

AS 283/2006 OF DISTRICT COURT, ERNAKULAM, DATED 26-11-2007
IA.173/1998 IN OS 100/1996 OF PRINCIPAL SUB COURT, KOCHI, DATED 22-07-2006

APPELLANT/1ST RESPONDENT/1ST RESPONDENT:

MARY @ MARIAMMA, W/O.RAPHEL, AGED 50,
KANIAMPURATH HOUSE, MULAVUCAD VILLAGE,
KANAYANNUR TALUK.

BY ADV. SRI.ALAN PAPALI

RESPONDENT(S)/RESPONDENTS/CLAIM PETITIONER, RESPONDENTS 2 TO 5:

1. STANLEY REBERA, KANIATH HOUSE,
MANJANAKAD, NARAKKAL VILAGE, NARAKKAL PO.
KOCHI TALUK-PIN 682505.
2. JOSEPH, S/O.OUSEPH, 60 YEARS,
KURUPPASSERY HOUSE, PERUMPADAPPU, PALLURUTHY PO.
EDAKOCHI VILLAGE, KOCHI TALUK.
- * 3. K.A.ANTONY, S/O.OUSEPH, AGED 58, KURUPPASSERRY HOUSE,
NEAR KALLUMADAM, MANJANAKAD JATTY, NARAKKAL PO.
NARAKKAL VILLAGE, KOCHI TALUK. (DELETED)

R3 IS DELETED FROM PARTY ARRAY AS PER ORDER DT.1/12/08 IN IA.1978/08.

4. K.A.GEORGE, S/O.OUSEPH, AGED 55,
KURUPPASSERRY HOUSE, NEAR MANJANAKAD JATTY
NARAKKAL PO., NARAKKAL VILLAGE, KOCHI TALUK.
5. K.A.PETER @ PERU, S/O.OUSEPH, AGED 50,
KURUPPASSERY HOUSE, HOSPITAL JN., (WEST)
NARAKKAL PO., NARAKKAL VILLAGE, KOCHI TALUK.

R1 BY ADV. SRI.ANTONY MUKKATH

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 3/3/2015 THE COURT ON 25-05-2015 DELIVERED THE FOLLOWING:

PJ

A.V.RAMAKRISHNA PILLAI, J.

R.S.A.No.503 of 2008

Dated this the 25th day of May , 2015

JUDGMENT

The 1st respondent in E.A. No.256/2004 in E.P.No.46/2004 in O.S. 100/96 on the files of the Principal Sub Court, Kochi is the appellant. The aforesaid E.A. was a claim petition filed by the 1st respondent herein. Respondents 2 to 5 are judgment debtors in the aforesaid suit. The suit was filed by the appellant for partition.

2. The allegation in the claim petition was that the father of the Claim Petitioner, namely, Augustine Ribera obtained 10 cents of property as Kudikidappu in Survey No.514/2 in O.A.No.7304/1970 of Land Tribunal, Vypin. He further alleged that out of the aforesaid 10 cents of property, an extent of 2.5 cents comprised in Survey No.514/2 was given to the claim petitioner in the year 1987 as per Document No.738/1987 of SRO, Narakkal by the father of the claim petitioner and the said property is in the ownership and possession of the petitioner. It is also

alleged that the remaining 7.5 cents of property was being enjoyed by the children of Augustine Ribera and they are in ownership and possession of the same. The claim petitioner alleged that he and his brothers were not parties to the above partition suit and on 26/7/2004, the Amin of the Sub Court, Kochi along with the Village Officials came to the above mentioned 2.5 cents of property and tried to measure the same stating that the said property was subject matter in the partition suit. It was alleged that the parties in the partition suit have no right, title or interest in the above mentioned 2.5 cents of property. Therefore, he pointed out that property shown as Plot 'H' in the plan prepared by the Commissioner which was appended to the final decree in the suit is the property belonging to the claim petitioner only and he was in possession of the same from 1975 onwards. Therefore, he prayed that the aforesaid property be removed from the partition consequent to the final decree proceedings.

3. The Execution Court which considered the claim

petition allowed the same. The matter was taken in appeal by the appellant before the District Court, Ernakulam as A.S.283/2006. The appellate court after reappreciating the evidence dismissed the appeal confirming the order of the Execution Court on the E.A. It is against this judgment this appeal has been filed.

4. I have heard Mr.Alan Papali, the learned counsel for the appellant and Mr.Antony Mukkath, the learned counsel for the 1st respondent who is the claim petitioner.

5. The learned counsel for the appellant would submit that the lower appellate court relied on Ext.A1 Purchase Certificate and Ext. A2 sketch issued by the Land Tribunal, Vypin, which was set aside by Ext.B3 judgment in LARS 402/1975 of the Appellate Court (Land Reforms), Ernakulam (Ext.B3). It is submitted by Mr.Alan Papali that the total extent of property in Survey No.514/2 is 12 cents and as per Ext.A1 the Land Tribunal has granted 10 cents of property from the northern side of Survey No.514/2 excluding the 2.5 cents in the said Survey No. on the northern side. It was

pointed out that Ext. A1 Purchase Certificate was later set aside by the Appellate Authority (Land Reforms) directing the Land Tribunal, Vypin to allot 10 cents of land to the Kudikidappukaran who is the predecessor in interest of the claim petitioner touching the western, southern and eastern boundaries of the property in Survey No.514/2 so that the Kudikidappukaran's house, latrine, peeling shed and the shed in the north east of the house would come within the 10 cents of land. It was pointed out that as evidenced by Ext.B3 judgment of the Appellate Authority dated 23/02/76, 2.5 cents on the northern portion of survey No.514/2 vested in the land owner Margareetha was assigned in favour of Plamena the predecessor in interest of the appellant on 25/01/1982 as evidenced by Ext.B1. Therefore, according to Mr.Alan Pappali, the appellant was granted this item of property shown as 'H' in sketch attached to the final decree proceedings in the partition suit. According to the learned counsel for the appellant the finding of the appellate court that the appellant cannot claim the portion

shown as 'H' in the partition suit is incorrect. It was further argued that by Ext.B2 judgment the predecessor in interest of the claim petitioner and the sons and others were restrained by a mandatory injunction against causing objection to the predecessor in interest of the appellant in using the latrine situated in the north east corner of Survey No.514/2 and from causing any obstruction to the plaintiff in using the said latrine which is situated in the northern side of the property of Survey No.514/2.

6. The appellant relied on Ext.B1 assignment deed No.174/1982 of Narakkal SRO executed by Margareetha Varghese in favour of Plamena. It pertains to the assignment of 1 are and 7 square metres (2.646 cents) of land in Survey No.514/2. As per the boundary description the said portion is bounded on the south by the property of one Augustine Ribera. Ext.B3 is the copy of the order passed by the Appellate Authority in the appeal preferred by the aforesaid Margareetha who is the assignor of Ext.B1. As rightly pointed out by the lower appellate

court the only complaint that was raised by the appellant-land owner was regarding the mode of allotment of 10 cents to the Kudikidappukaran who was the respondent. The Appellate Authority was of the view that the demarcation and allotment would cause considerable prejudice to the land owner and therefore, the complaint is legitimate. Accordingly the impugned order was set aside and 10 cents was ordered to be allotted to the Kudikidappukaran touching the western, southern and eastern boundaries of the property. The purpose of the reallocation was to provide an access to the backwaters from the applicant's house, latrine, peeling shed and the shed on the north eastern corner. Nobody has the case that the Land Tribunal did not pass any final order after the remand in accordance with Ext.B3 judgment.

7. The appellant claims title on the basis of Ext.B1 assignment deed executed by Margareetha. The boundary description in Ext.B1 would indicate that Plamena who is the assignee in Ext.B1 had other properties on the western side of the property covered by

Ext.B1. As already pointed out, the property on the southern side belonged to Augustine Ribera who is the father of the Claim petitioner. It is crucial to note that the Appellate Authority has never interfered with the assignment of Kudikidappu right to Augustine in respect of 10 cents as the only dispute was regarding demarcation. The Appellate Authority found that the allotment of 10 cents, by the Tribunal accepting the report of the Revenue Inspector excludes a narrow strip along the southern boundary with latrine and peeling shed and also a narrow strip along the eastern boundary which abuts the backwaters. As the said demarcation would cause prejudice to the land owner, reallocation touching the western, southern and eastern boundaries of the property was ordered. The applicant was a fisherman, and the reallocation provided access to the backwaters. The entire complication arose on account of the non issuance of a fresh certificate of kudikidappu by the Land Tribunal showing the exact location after the remand. It is impossible to hold that Margareetha got 2.464 cents

carved out of the northern side of 12 cents. Augustine Ribera who is the Kudikidappukaran has gifted 2.5 cents of his property from the north eastern portion as per Ext.A3 settlement deed to the claim petitioner wherein he had constructed a house. The appellant claims right over that portion by virtue of Ext.B1 assignment deed while the claim petitioner claims right over that portion as per Ext.B3 settlement deed. By description, both the properties are same. It cannot be said that the appellant's predecessor in interest has actually got possession of 2.5 cents which was now included in 'H' schedule in the final decree proceedings. Therefore the lower appellate court held that the claim petitioner was in actual possession of the property described as plot 'H' which is allotted in the partition deed on the basis of Ext.B1 assignment. As the said land had not been taken possession by Margareetha, she could not assign the land which is not in her actual possession; so found the appellate court.

8. It cannot be said that the lower appellate court

has taken a erroneous decision as no question of law has been wrongly decided by the appellate court and interference by this court in a second appeal is not called for.

In the result, the appeal fails and accordingly it is dismissed.

Sd/- **A.V.RAMAKRISHNA PILLAI**
JUDGE

MJL

Copy of the order dated 16/11/2015 in R.P 874/2015 in R.S.A 503/2008 is appended.

Sd/-
Registrar (Judicial)