

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 11TH DAY OF JUNE 2015/21ST JYASHTA, 1937

RFA.No.467 of 2014

F.D.I.A NO.1306/2011 IN O.S. NO.99/1989 OF THE SUB COURT,VADAKARA.

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APPELLANT/13TH RESPONDENT:

**MYLADI KRISHNAN,S/O.POKKI,
IRINGANNUR AMSOM DESOM,
IRINGANNUR P.O.,KOZHIKODE DISTRICT.**

**BY ADVS.SRI.C.P.PEETHAMBARAN
SMT.MINI.V.A.**

RESPONDENT'S/PETITIONER & RESPONDENTS 1 TO 12 AND 14 TO 36:

- 1. NADUKKANDI SURENDRAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,VATAKARA TALUK,
KOZHIKODE DISTRICT-673705.**
- 2. MYLADI POKKI (DIED),IRINGANNUR AMSOM DESOM,
VATAKARA TALUK,KOZHIKODE DISTRICT-653705.**
- 3. KOVUKKA VEETIL CHEERU (DIED),
IRINGANNUR AMSOM DESOM,VATAKARA TALUK,
KOZHIKODE DISTRICT-673705.**
- 4. *KOVUKA KUNHIRAMAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.(DIED)**
- 5. KELOTH NARAYANI @ NARUMBU (DIED),
IRINGANNUR AMSOM DESOM,VATAKARA TALUK,
KOZHIKODE DISTRICT.**
- 6. ARYAKKOOL THAZHEKUNIYIL JANU @ MATHU,
D/O.KANARAN,EDACHERI AMSOM DESOM,
EDACHERI P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT.**
- 7. KATTIL MATHA,D/O.KANARAN,EDACHERI AMSOM DESOM,
EDACHERI P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT.**
- 8. KUNNUMMAL PARU,D/O.KANARAN,IRINGANNUR AMSOM DESOM,
IRINGANNUR P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT-673705.**
- 9. NADUKANDY ANANDAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.**

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10. NADUKANDY KRISHNAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
11. NADUKANDY GOVINDAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
12. NADUKANDY NARAYANAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
13. NADUKANDY GOPALAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
14. CHAPPARIPOYIL KUMARAN (DIED),
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT.
15. NADUKANDIYIL CHANDRAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
16. NADUKANDIYIL KANNAN,S/O.KANARAN,
IRINGANNUR AMSOM DESOM, IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
17. NADUKANDIYIL RAMAKRISHNAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
18. NADUKANDIYIL PONNAKANDI KUNHIRAMAN,
IRINGANNUR AMSOM DESOM,IRINGANNUR P.O.
VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
19. VANNARATH VASANTHA,IRINGANNUR AMSOM DESOM,
IRINGANNUR P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
20. VANNARATH BABU,IRINGANNUR AMSOM DESOM,
IRINGANNUR P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
21. VANNARATH AJAYAN,IRINGANNUR AMSOM DESOM,
IRINGANNUR P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
22. VANNARATH BABY,IRINGANNUR AMSOM DESOM,
IRINGANNUR P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
23. VANNARATH MANI,IRINGANNUR AMSOM DESOM,
IRINGANNUR P.O.,VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
24. JANU KOTTEMBRATH,IRINGANNUR P.O.,
NADAPURAM (VIA),VATAKARA TALUK,KOZHIKODE DISTRICT-673705.

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25. DECHOOTTY,ERIKOOL HOUSE,IRINGANNUR P.O.,
NADAPURAM (VIA),VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
26. RADHA,KUNNUMMAL HOUSE,IRINGANNUR P.O.,
NADAPURAM (VIA),VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
27. VASANTHA,EERATINTAVIDA HOUSE,KACHERY P.O.,
NADAPURAM VIA.,VATAKARA TALUK,KOZHIKODE DISTRICT-673705.
28. NALINI,KUNDYENTAVIDA HOUSE,TUNERI P.O.,
NADAPURAM VIA.,KOZHIKODE DISTRICT-673705.
29. INDIRA,KOLLANDI HOUSE,PEROXE P.O.,TUNERI P.O.
NADAPURAM VIA.,KOZHIKODE DISTRICT.
30. VASU,KELOTH HOUSE,KAYAPANCICHI P.O.,KOZHIKODE DISTRICT.
31. KUMARAN,S/O.POKKI,HEMANTH NIVAS,VADIKKAL ROAD,
THIRUVANGAD AMSOM DESOM,KOZHIKODE DISTRICT.
32. RAMA REGHAVAN,S/O.POKKI,PULIKKAL KUTTOTH AMSOM DESOM,
KOZHIKODE DISTRICT.
33. SARADA,D/O.POKKI,MEETHALE PUTHIYARATH,
EDACHERY AMSOM DESOM,VADAKARA,KOZHIKODE.
34. KRISHNAN,S/O.POKKI,MYLADI HOUSE,AMK STORE,
IRINGANNUR AMDOM DESOM, VATAKARA TALUK
KOZHIKODE DISTRICT-673705.
35. SATHI,D/O.POKKI,MYLADI HOUSE,AMK STORE,
IRINGANNUR AMDOM DESOM,VATAKARA TALUK,
KOZHIKODE DISTRICT-673705.
36. RAVI,S/O.POKKI,MYLADI HOUSE,AMK STORE,
IRINGANNUR AMDOM DESOM,VATAKARA TALUK,
KOZHIKODE DISTRICT-673705.

***IT IS RECORDED THAT 4TH RESPONDENT DIED AND IA 796/2015 IN
IMPLEADED THE LEGAL HEIR OF DECEASED 4TH RESPONDENT
CLOSED VIDE JUDGMENT DATED 11.6.2015.**

***ADDITIONAL RESPONDENTS 37 TO 42 IMPLEADED**

**ADDL.R37:KOVUKKAVEETIL NARAYANI,AGED 67 YEARS,
W/O.LATE KOVUKKA KUNHIRAMAN,IRINGANNUR P.O.,
KOZHIKODE DISTRICT-673514.**

**ADDL.R38:VALIYATHALAPPATTIL CHANDRI,AGED 46 YEARS,
W/O.LATE KOVUKKA KUNHIRAMAN,RAJESH NIVAS,
IRINGANNUR P.O.,KOZHIKODE DISTRICT-673514.**

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**ADDL.R39:KAMMALI RAVEENDRAN,AGED 44 YEARS,
S/O.LATE KOVUKKA KUNHIRAMAN,IRINGANNUR P.O.,
KOZHIKODE DISTRICT-673514.**

**ADDL.R40:KOVUKKAVEETIL PAVITHRAN,AGED 43 YEARS,
S/O.LATE KOVUKKA KUNHIRAMAN,IRINGANNUR P.O.,
KOZHIKODE DISTRICT-673514.**

**ADDL.R41:KIZHAKKAYIL SATHI,AGED 40 YEARS,
D/O.LATE KOVUKKA KUNHIRAMAN,
IRINGANNUR P.O.,KOZHIKODE DISTRICT-673514.**

**ADDL.R42:KOVUKKAVEETIL VISWAN,AGED 39 YEARS,
S/O.LATE KOVUKKA KUNHIRAMAN,IRINGANNUR P.O.,
KOZHIKODE DISTRICT-673514.**

***ADDITIONAL RESPONDENTS 37 TO 42 ARE IMPEADED AS LEGAL HEIRS
OF DECEASED 4TH RESPONDENT AS PER ORDER DATED 11.6.2015.**

**R1 BY ADV.SRI.SUNIL V.MOHAMMED
R10-R13 BY ADV.SMT.M.HEMALATHA**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 11-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

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R.F.A.No.467 of 2014.

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Dated this the 11th day of June, 2015.

J U D G M E N T

This is an appeal preferred against the final decree and judgment in a suit for partition. An assignee of the property which is the subject matter of the suit, is the appellant. The plaint schedule property belonged to one Kanaran. Kanaran had three wives. The first defendant is the son of Kanaran in his first wife. The second defendant is the second wife and defendants 3 to 7 are the children born to Kanaran in his second wife. Kanaran contracted a third marriage during the subsistence of his second marriage and the plaintiff and defendants 8 to 12 are the children born to Kanaran in his third wife. According to the plaintiff, he is entitled to 1/13 share in the plaint schedule properties held by Kanaran on his death. The suit was, therefore, filed seeking partition of

the said right of the plaintiff.

2. There was an earlier suit namely, O.S.No.1 to 1968 between the parties and the same was compromised. As per the terms of the compromise, an item of property having an extent of 55 cents was gifted to the plaintiff and defendants 8 to 12 by the remaining sharers. Ext.B11 is the document executed pursuant to the compromise arrived at in the said suit. The plaintiff was a minor at the time of execution of Ext.B11 gift deed. The present suit was filed alleging that as the plaintiff was a minor at the time of execution of Ext.B11 gift deed, the compromise arrived at between the parties in O.S.No.1 of 1968 and Ext.B11 gift deed are not binding on him.

3. Initially, the trial court dismissed the suit. The plaintiff has taken up the matter in appeal before this Court in A.S.No.671 of 1991. This Court set aside the decision of the trial court and remanded the suit for fresh disposal. Even thereafter, the trial court dismissed the suit. The

matter was taken up again before this Court in appeal by the plaintiff in R.F.A.No.385 of 2004. In R.F.A.No.385 of 2004, this Court found that the plaintiff is entitled to 1/13 share in the plaint schedule properties. This Court also found that since the plaintiff has obtained a share in Ext.B11 property, the said benefit is liable to be deducted from the share to be allotted to the plaintiff. In the light of the said findings, this Court passed a preliminary decree in favour of the plaintiff on the following terms:

- "i. It is found that items 1 to 7 of the plaint schedule property are available for division.
- ii. It is further found that the plaintiff is entitled to one out of 13 shares over the property.
- iii. It is also found that defendants 8 to 12 are not entitled to any right or share over the property.
- iv. As far as possible least inconvenience to be caused to the possession of defendants in the case and if there are any buildings or other improvements, it shall be excluded from the valuation calculated for the purpose of valuing the property and house or other

buildings shall be allotted to their respective shares, if any.

v. So far as mesne profits are concerned, defendants 2 to 7 shall be liable to pay mesne profits from the date of suit and the quantum can be decided in the final decree proceedings. It is made clear that items 8 and 9 of the plaint schedule are excluded from the division.

vi. The plaintiff is at liberty to apply for final decree.

vii. The plaintiff is bound to return the benefit he had obtained under Ext.B11 as stated in para.12."

4. Pursuant to the preliminary decree passed by this Court, an application for passing of a final decree was filed by the plaintiff. In the final decree proceedings, the court below had deputed an Advocate Commissioner to effect partition of the properties in terms of the preliminary decree. The Advocate Commissioner, after valuing the property and the improvements therein, allotted 34 cents of property to the plaintiff from out of the property described in item No.I of the schedule of the properties in the plaint.

The court below accepted the division of property made by the Advocate Commissioner and passed a final decree accordingly. The appellant is the assignee of item No.1 property from defendants 1 to 7. He is aggrieved by the allotment made by the Advocate Commissioner as accepted by the court below. Hence this appeal.

5. Heard the learned counsel for the appellant and the learned counsel for the first respondent, the plaintiff.

6. The learned counsel for the appellant contended that there are altogether seven items of properties in the plaint and the allotment of the property made from item No.1 alone is unjustified. He also pointed out that the direction issued by this Court in the judgment in R.F.A.No.385 of 2004 that the benefits obtained by the plaintiff under Ext.B11 shall be deducted from the share to be allotted to the plaintiff has not been complied with by the Advocate Commissioner.

7. Per contra, the learned counsel for the first

respondent pointed out that all items of properties are presently in the possession of strangers like the appellant and having regard to the present situation, the plaintiff could be allotted his share conveniently only from the property held by the appellant.

8. As pointed out by the learned Counsel for the first respondent, the Advocate Commissioner has stated in the report that all the items of properties are presently in the possession of strangers. The Advocate Commissioner visited all the properties and found that item No.1 property is the property from which the plaintiff could be allotted his share conveniently. The appellant has not preferred any objection to the report of the Advocate Commissioner. As such, the court below cannot be found fault with for having made a partition as suggested by the Advocate Commissioner.

9. As noticed above, there is a categoric finding in the judgment of this Court in R.F.A.No.385 of 2004 to the

effect that the plaintiff has obtained some benefits under Ext.B11. Paragraph 12 of the judgment of this Court in R.F.A.No.385 of 2004 dealing with the said aspect reads thus:

“12. The plaintiff as a beneficiary has gained advantage by getting a share under Ext.B11 property. His share worked out may be calculated and he may be asked to reimburse that amount or let that be adjusted while effecting division of the property.”

In the light of the finding rendered in paragraph 12 of the judgment, this Court had also directed that the plaintiff is bound to return the benefits which he has gained under Ext.B11. In other words, the direction in the preliminary decree is to the effect that the benefit obtained by the plaintiff under Ext.B11 shall be deducted from the share to be allotted to the plaintiff. True, there is nothing on record as to the benefit obtained by the plaintiff under Ext.B11. But, still in the light of the finding of this Court in R.F.A.No.385 of 2004 and the direction issued therein as

referred to above, the court below was bound to determine the benefits obtained by the plaintiff under Ext.B11 and make appropriate deductions from the share to be allotted to the plaintiff. The plaintiff has no case that the said direction in the preliminary decree passed by this Court has been complied with. In the said circumstance, I am of the view that the impugned judgment has to be set aside and the matter has to be remitted to the court below for fresh disposal for the limited purpose of complying with the direction contained in the preliminary decree that the share of the plaintiff shall be determined after deducting the benefit obtained by him under Ext.B11.

In the result, the appeal is allowed in part, the impugned final decree and judgment are set aside and the matter is remitted to the court below for fresh disposal for the limited purpose of complying with the direction contained in the preliminary decree that the share of the plaintiff shall be determined after deducting the benefit

obtained by him under Ext.B11. The parties are permitted to adduce evidence on the said issue. Since the suit is of the year 1989, I deem it appropriate to direct the court below to dispose of the final decree application as directed above, as expeditiously as possible, at any rate within a period of three months. All the interlocutory applications in the appeal are closed.

**Sd/-P.B.SURESH KUMAR,
(JUDGE)**

Kvs/-

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PATO JUDGE.