

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 11TH DAY OF AUGUST 2015/20TH SRAVANA, 1937

RFA.No. 546 of 2014 ()

AGAINST THE JUDGMENT IN OS 142/2008 of SUB COURT, KOCHI DATED
12.01.2010 AND FINAL DECREE DATED 07.12.2012 IN FDA No.1143/2010

APPELLANT/ADDITIONAL 2ND PETITIONER/NOT A PARTY:

SHEELA AGED 43 YEARS
W/O. LATE MR. BAIJU, PAYEKKADU VEEDU, VACHAKKAL
EDAVANAKKAD KARA, EDAVANAKKAD VILLAGE, ERNAKULAM.

BY ADVS.SRI.K.CHANDRACHODAN (ERNAKULAM)
SRI.INNOCENT FRANCIS PAPALI
SRI.BOBBYMATHEW KOOTHATTUKULAM

RESPONDENT/RESPONDENT/PLAINTIFF:

SHIBU AGED 51 YEARS
S/O. LATE MR. DEVASSYKUTTY, PAYEKKADU VEEDU, VACHAKKAL
EDAVANAKKAD KARA, EDAVANAKKAD VILLAGE
ERNAKULAM-682502.

R1 BY ADV. SRI.PEYUS A.KOTTAM

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 11-08-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

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R.F.A.No.546 of 2014

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Dated this the 11th day of August, 2015

JUDGMENT

Thottathil B. Radhakrishnan, J.

This appeal is against the final decree in a suit for partition. Heard the learned counsel for the appellant and the learned counsel for the respondent.

2. Though this appeal initially came with an application seeking condonation of delay of 460 days in its institution, it was thought appropriate to consider the appeal on merits after condoning the said delay. After noticing that the plea attempted to be projected by the appealing defendant is that the final decree has been passed in violation of the terms of the preliminary decree, the delay was condoned. The records have been considered and the appeal has been heard today based on all such submissions.

3. The plaintiff and defendant are siblings. They sought partition of an item which came to them from their father on the basis of a testament. Pending suit, the defendant died. His

issueless widow is the appellant before us.

4. In opposition to the suit for partition of one item of property which included a building, two sheds and 35 cents of land, the defendant set up a case that the ancestral home which was given to him under the testament deteriorated and had to be pulled down and in its place, the defendant constructed a four-storied structure. He claimed that the said building was put up at his expense exclusively and he had leased out the rooms therein to different persons and was collecting rent. He claimed exclusive right to the said building and the right to collect rent from that building. The plea of the plaintiff for partition was accordingly resisted in relation to that parcel. He had also set up other contentions as regards the entire parcel as well.

5. The trial court found that the aforesaid building which is stated to have been put up by the defendant cannot be partitioned at the instance of the plaintiff and the plaintiff could claim a share over the building and shed derived therefrom. Therefore, the court below passed a preliminary decree directing partition of the plaint schedule landed property into two equal shares and decreed that the plaintiff is not entitled to get any share in the building situated in the plaint schedule property or any share from the rent of that

building.

6. Adverting to the schedule to the preliminary decree, we note the description of the suit property as follows:

Description

“ All the part and parcel of 35 cents and the building therein bearing Door No.171A to G and two sheds numbered as 171 and 171H of Edavanakad panchayath and all improvements therein.”

7. Thus, it can be seen that what was sought to be partitioned is the building bearing door No.171 A to G and two sheds numbered as 171 and 171H and the entire land of 35 cents. The preliminary decree and the contents of the preliminary judgment through which we have gone through, clearly show that the preliminary decree was passed excluding only the building from partition and not the so called sheds. The clear indication available in this regard from the terms and discussions and conclusions in the preliminary judgment show that what has been upheld as the plea of the defendant is his claim that it was he who built up the four-storied building and had let out rooms therein. Therefore, we have no doubt in our mind that the letter and spirit of the preliminary decree unequivocally discloses that everything other than that

particular building was available for partition, notwithstanding whether the two sheds were also standing in the land in question. Though the term "property alone" is used in the preliminary judgment and decree, we are not persuaded to take any other view in the matter. In the final decree proceedings, Commissioner was deputed. The Commissioner identified the land and placed two plans before the court below. The plan that has been accepted by the court below had been drawn in a manner which results in slicing of the entire parcel into two equal halves, with the building in one half, though the other two sheds may be in the other half also. That appears to be the foundation of the present appeal challenging the final decree which was granted accepting the Commissioner's report. The final decree was granted by the court below allotting plot B marked in Ext.C3 plan to the share of the defendant (now the defendant's widow) and plot A marked in that plan was allotted to the share of the plaintiff. Ext.C3 submitted during the final decree proceedings was thus accepted and made part of the final decree. Having considered the contents of Ext.C3 report vis-a-vis the written statement of the defendant and also the clear terms of the preliminary decree and the description of the property as reflected in the preliminary decree as quoted above, we

find no legal infirmity or jurisdictional error in the final decree proceedings. We also do not see any ground to hold that the final decree is contrary to the preliminary decree or that the final decree is drawn in any manner affecting the legal rights of the appealing defendant's heir. Under such circumstances, we are of the view that this appeal is bound to fail.

In the result, this appeal is dismissed. We forbear from imposing any order of costs in favour of the respondent having regard to the relationship between the parties.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

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