

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

RSA.No. 1238 of 2015

**ORDER DATED 10-08-2015 IN AS 25/2013 OF DISTRICT COURT, MANJERI
JUDGMENT DATED 08-04-2009 IN OS 105/2006 OF SUB COURT, MANJERI**
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APPELLANT(S)/APPELLANT/5TH DEFENDANT:

**PARAYATHODI KUNHALI @ KUNHALIKUTTY, AGED 59 YEARS,
S/O.KUNHAHAMMED, PARAYATHODI HOUSE, NILAMBUR AMSOM,
NILAMBUR TALUK.**

**BY ADVS.SRI.N.M.MADHU
SMT.C.S.RAJANI**

RESPONDENT(S)/RESPONDENTS/PLAINTIFF/DEFENDANTS 1 TO 4 AND 6 TO 15:

- 1. PARAYATHODI KUNHAYISHA, AGED 62 YEARS,
D/O.KUNHAHAMMED, KAPPIL HOUSE, VAZHIKADAVU AMSOM DESOM,
P.O.MARUTHA, NILAMBUR TALUK-679 333.**
- 2. KOLATHUMTHODI AYISHA BEEVI UMMA (DIED)**
- 3. PARAYATHODI NAFEESA, AGED 67 YEARS,
D/O.KUNHAHAMMED, W/O.KAPPIL KUNHIMOIDU, KAPPIL HOUSE,
VAZHIKADAVU AMSOM DESOM, P.O.MARUTHA,
NILAMBUR TALUK-679 333.**
- 4. PARAYATHODI AMINAKUTTY (DIED)**
- 5. PARAYATHODI AZEEZ, AGED 61 YEARS,
S/O.KUNHALI, PARAYATHODI HOUSE, NILAMBUR AMSOM DESOM,
NILAMBUR TALUK-679 333.**
- 6. PARAYATHODI PATHUKUTTY, AGED 74 YEARS,
D/O.KUNHAHAMMED, W/O.PALLIKANDY UMMER,
PARAYATHODI HOUSE, NILAMBUR DESOM,
NILAMBUR TALUK-679 329.**
- 7. PARAYATHODI MAIYAKUTTY, AGED 76 YEARS,
W/O.PARAYATHODI UNNIMOTHI, PARAYATHODI HOUSE,
KANHIRATHINGAL, VAZHIKKADAVU AMSOM, P.O.MARUTHA,
NILAMBUR TALUK-679 333.**

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8. PARAYATHODI SAINABA, AGED 63 YEARS,
D/O.PARAYATHODI UNNIMOTHI, VAZHAKADAVU AMSOM,
P.O.MARUTHA, NILAMBUR TALUK-679 333.
9. PARAYATHODI HAMSA (DIED)
10. PARAYATHODI KUNHAYAMMED, AGED 59 YEARS,
S/O.UNNIMOTHI, PARAYATHODI HOUSE, KANHIRATHINGAL,
VAZHAKADAVU AMSOM, P.O.MARUTHA, NILAMBUR TALUK-679 333.
11. PARAYATHODI HUSSAIN, AGED 57 YEARS,
S/O.UNNIMOTHI, PARAYATHODI HOUSE, KANHIRATHINGAL,
VAZHAKADAVU AMSOM, P.O.MARUTHA, NILAMBUR TALUK-679 333.
12. PATHUMMAKUTTY, AGED 64 YEARS,
W/O.PARAYATHODI ABOOBACKER, SHAHINA MANZIL,
NILAMBUR AMSOM, NILAMBUR TALUK-679 329.
13. AYISA, AGED 49,
D/O.PARAYATHODI ABOOBACKER, W/O.MUHAMMEDALI,
P.O.MODAPOIKA, EDAKKARA AMSOM, NILAMBUR TALUK-679 331.
14. AMINA, AGED 46,
D/O.PARAYATHODI ABOOBACKER, PILATHOTTATHIL HOUSE,
PONGALLUR, P.O.MAMBADU, NILAMBUR TALUK-676 542.
15. KATHEESA, AGED 71,
D/O.PARAYATHODI KUNHAHAMMED, PARAYATHODI HOUSE,
VAZHAKADAVU AMSOM, P.O.MARUTHA, NILAMBUR TALUK-679 333.
16. FATHIMA, AGED NO KNOWN,
W/O.PARAYATHODI HAMSA, PARAYATHODI HOUSE,
KANHIRATHINGAL, VAZHAKADAVU AMSOM DESOM-679 333.
17. PARAYATHODI SUNEER, AGED NO KNOWN,
S/O.PARAYATHODI HAMSA, PARAYATHODI HOUSE,
KANHIRATHINGAL, VAZHAKADAVU AMSOM DESOM-679 333.
18. PARAYATHODI ABID, AGED NO KNOWN,
S/O.PARAYATHODI HAMSA, PARAYATHODI HOUSE,
KANHIRATHINGAL, VAZHAKADAVU AMSOM DESOM-679 333.
19. PARAYATHODI JAFAR, AGED NO KNOWN,
S/O.PARAYATHODI HAMSA, PARAYATHODI HOUSE,
KANHIRATHINGAL, VAZHAKADAVU AMSOM DESOM-679 333.
20. PARAYATHODI SHAMEER, AGED NO KNOWN,
S/O.PARAYATHODI HAMSA, PARAYATHODI HOUSE,
KANHIRATHINGAL, VAZHAKADAVU AMSOM DESOM-679 333.

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21. PARAYATHODI NISHAD, AGED NO KNOWN,
S/O.PARAYATHODI HAMSA, PARAYATHODI HOUSE,
KANHIRATHINGAL, VAZHIKADAVU AMSOM DESOM-679 333.
22. K.V.THANOOJA, AGED NO KNOWN,
W/O.KAKKODAN MUSTHAFA, KAKKODAN HOUSE, BATHERY VILLAGE,
SULTHAN BATHERY, WAYANAD DISTRICT-673 592.
23. K.V.SHAHINI, AGED NO KNOWN,
W/O.ERANHIKKAL HANEEFA, ERANHIKKAL HOUSE, THORAKKAL,
KONDOTTI, MALAPPURAM DISTRICT-673 638.
24. K.V.SAJEER, AGED NO KNOWN,
S/O.KALLUVETTUKUZHIYIL MUHAMMEDALI (LATE),
SHAHINI MANZIL, KALATHINKADAVU, NILAMBUR POST,
MALAPPURAM DISTRICT-679 329.
25. K.V.ANVAR SADATH, AGED NO KNOWN,
S/O.KALLUVETTUKUZHIYIL MUHAMMEDALI (LATE),
SHAHINI MANZIL, KALATHINKAVU, NILAMBUR POST,
MALAPPURAM DISTRICT-679 329.

R1 BY ADV. SMT.M.A.ZOHRA

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
10-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

msv/

P.B.SURESH KUMAR, J.

R.S.A.No.1238 of 2015

Dated this the 10th day of December, 2015

JUDGMENT

The fifth defendant in a suit for partition is the appellant. The preliminary decree passed in the suit is under challenge. The trial court resolved the disputes between the parties and passed a preliminary decree in respect of plaintiff A schedule item Nos 1 to 4 properties, plaintiff B schedule item No 1 property and the plaintiff C schedule property as follows:

"In the result, the suit is decreed as follows:

(1) A preliminary decree for partition in respect of plaintiff A schedule Nos.1 to 4 excluding the property having an extent of 2.77 acres which is covered by Ext.B6, the property having an extent of 4.66 acres covered by Ext.B7 and also the C schedule item No.1, by metes and bounds into 30240 shares is ordered;

(2) The plaintiff B schedule property item No.1 is also ordered to be partitioned into 30240 shares;

(3) The share pertaining to the plaintiff is quantified as 2412/30240 shares, 1st defendant is entitled to get 4944/30240

shares, 2nd defendant is entitled to 4642/30240 shares, 3rd defendant is entitled to get 4642/30240 shares, defendants 4 and 5 are entitled to get 644/30240 each, 6th defendant is entitled to get 1659/30240 shares, defendants 7 and 8 are entitled to get 63/30240 shares each, defendants 9 to 11 are entitled to get 126/30240 shares each, 12th defendant is entitled to get 603/30240 shares, defendants 13 and 14 are entitled to get 1407/30240 shares each and 15th defendant is entitled to get 6732/30240 shares.

(4) Plaintiff C schedule item Nos. 1 and 2 are ordered to be partitioned among the plaintiff and 15th defendant by metes and bounds into two shares and they are entitled to get ½ share each;

(5) Plaintiff is entitled to get proportionate share of future profits the quantum of which will be ascertained at the stage of final decree from the defendants;

(6) The partition shall be affected by the deputation of an advocate-commissioner.

(7) The allotment of shares in respect of the defendants shall be subject to the remittance of requisite court fee;

(8) The plaintiff is entitled to get costs of the suit from the defendants which shall come out of the estate.

(9) The prayer for partition in respect of A schedule item No.5 and item No.2 of plaintiff B schedule are found not available for partition”

The fifth defendant challenged the decision of the trial court in appeal with a petition to condone the delay of 1442 days in filing the appeal. I.A.No.324 of 2013 was the application filed by the fifth defendant seeking orders to condone the delay. The appellate court took the view that sufficient cause has not been shown by the fifth defendant for the delay and consequently dismissed I.A.No.324 of 2013. In the light of the said decision, the appeal was also dismissed without going into the merits. The fifth defendant, who is aggrieved by the preliminary decree passed by the trial court as confirmed in appeal, has thus come up in this second appeal.

2. Though notice was ordered to the respondents, only the plaintiff entered appearance through counsel.

3. Heard the learned counsel for the fifth defendant as also the learned counsel for the plaintiff.

4. The grievance highlighted by the fifth defendant in this appeal concerns his share in respect of plaint A and B

schedule properties. According to the learned counsel for the fifth defendant, the determination of shares by the trial court is not in accordance with the principles of Mohammedan Law. The learned counsel for the plaintiff conceded that there are a few mistakes in the determination of the shares made by the trial court. According to the learned counsel for the plaintiff, the shares which the parties are entitled in accordance with the principles of Mohammedan Law in respect of the aforesaid properties are as follows:

**A SCHEDULE ITEM NO.1-4
TOTAL SHARES 30240**

Kunjhaysa (Plaintiff)		1764
Aysha Beebi Umma (wife)	D1	4368
Nafeesa (Daughter)	D2	2254
Amina (Daughter)	D3	2254
Azeez (Son)	D4	4508
Kunjhali (Son)	D5	4508
Pathukutty (Daughter)	D6	2744
Mariakutty W/o. Unnimothy	D7	441

Kunjhaysa (Plaintiff)		1764
Sainaba (D/o. Unnimothy)	D8	441
HaHamsa (S/o. Unnimothy)	D9	882
Kunjahammed (S/o. Unnimothy)	D10	882
Hussain S/o. Unnimothy)	D11	882
Pathumma Kutty (W/o. Abubacker)	D12	588
Ayisha (D/o. Abubacker)	D13	980
Amina (D/o. Abubacker)	D14	980
Kadeesa (Daughter)	D15	1764

B SCHEDULE PROPERTY ITEM NO.1

TOTAL SHARES 30240

1	Ayisha Beevi (D1) 1/7	4320
2	Nabeesa (D2) 1/7	4320
3	Amina (D3) 1/7	4320
4	Kadeesa (D15) 1/7	4320
5	Aboobacker (died) 1/7	4320
6	Kunhahammed (died) 1/7	4320
7	Unnipathu (died) 1/7	4320

The submission made by the learned counsel for the plaintiff as regards the shares has been endorsed by the learned counsel for the fifth defendant. However, the learned counsel for the fifth defendant pointed out that the original owner of the property namely Kunjahmed gifted the plaint B schedule properties as per Ext.A2 gift deed to his wife and six children. According to the learned counsel, among the donees under Ext.A2, Ayisha Beevi initially released her share over the said properties in favour of Nabeesa, another donee and later Nabeesa and two other donees under Ext.A2 together assigned their respective shares over the said property to a stranger namely Kunhimoidu as per Ext.B2. It was also pointed out by the learned counsel for the fifth defendant that later the assignee of the donees referred to above transferred the said shares to the fifth defendant as per Ext.B1. According to the fifth defendant, in the said circumstances, the shares due to the parties in respect of B

schedule item No.1 property as worked out by the learned counsel for the plaintiff are liable to be modified as follows:

1	Plaintiff Kunhayisa	2412
2	D1 Ayisha Beevi	$4944-4320 = 624$
3	D2 Nafeesa	$4642-4320 = 222$
4	D3 Amina	$4642-4320 = 222$
5	D4 Azeez	644
6	D5 Kunhali	$17280+644 = 17924$
7	D6 Pathukutty	1659
8	D7 Martiyakutty	63
9	D8 Sainaba	63
10	D9 Hamza	126
11	D10 Kunhayammed	126
12	D11 Hussain	126
13	D12 Pathummakutty	603
14	D13 Ayisha	1407
15	D14 Amina	1407
16	D15 Kadeesa	$6732-4320 = 1612$

The learned counsel for the plaintiff endorsed the said argument of the learned counsel for the fifth defendant. In the circumstances, the shares of the parties as determined in the

preliminary decree in respect of plaint A schedule item Nos.1 to 4 excluding the property having an extent of 2.77 acres which is covered by Ext.B6 and the property having an extent of 4.66 acres covered by Ext.B7 are liable to be modified as follows:

	Kunjhaysa (Plaintiff)		1764
	Aysha Beebi Umma (Wife)	D1	4368
	Nafeesa (Daughter)	D2	2254
	Amina (Daughter)	D3	2254
	Azeez (Son)	D4	4508
	Kunjhali (Son)	D5	4508
	Pathukutty (Daughter)	D6	2744
	Mariakutty W/o. Unnimothy	D7	441
	Sainaba (D/o. Unnimothy)	D8	441
H	Hamsa (S/o. Unnimothy)	D9	882
	Kunjahammed (S/o. Unnimothy)	D10	882
	Hussain (S/o. Unnimothy)	D11	882
	Pathumma Kutty (W/o. Abubacker)	D12	588
	Ayisha (D/o. Abubacker)	D13	980
	Amina (D/o. Abubacker)	D14	980
	Kadeesa (Daughter)	D15	1764

Likewise, the shares of parties as determined in the preliminary

decree in respect of B schedule item No.1 property are liable to be modified as follows :

1	Plaintiff Kunhayisa	2412
2	D1 Ayisha Beevi	$4944-4320 = 624$
3	D2 Nafeesa	$4642-4320 = 222$
4	D3 Amina	$4642-4320 = 222$
5	D4 Azeez	644
6	D5 Kunhali	$17280+644 = 17924$
7	D6 Pathukutty	1659
8	D7 Martiyakutty	63
9	D8 Sainaba	63
10	D9 Hamza	126
11	D10 Kunhayammed	126
12	D11 Hussain	126
13	D12 Pathummakutty	603
14	D13 Ayisha	1407
15	D14 Amina	1407
16	D15 Kadeesa	$6732-4320 = 1612$

5. The learned counsel for the plaintiff pointed out that since there was no appeal against the preliminary decree, a final decree in accordance with the impugned preliminary decree has

already been passed and the plaintiff has got the final decree engrossed in stamp papers by incurring substantial expenditure. Since the plaintiff had to incur substantial expenditure on account of the delay on the part of the fifth defendant in preferring the appeal on time, I am of the view that the plaintiff has to be compensated by the fifth defendant in that regard.

6. In the result, the preliminary decree is modified as indicated above on condition that the appellant shall pay to the first respondent/plaintiff a sum of Rs.20,000/- by way of costs. The costs ordered as above shall be paid by the appellant to the learned counsel for the first respondent before this Court within two weeks from the date of receipt of a copy of this judgment. Having regard to the facts and circumstances of the case, I deem it appropriate to direct the court below to pass the final decree within four months from the date of receipt of a copy of this judgment.

The second appeal is allowed in part. All the

interlocutory applications in the appeal are closed.

P.B.SURESH KUMAR, JUDGE.

smm