

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 13TH DAY OF JANUARY 2015/23RD POUSHA, 1936

RSA.No. 1271 of 2014 ()

**AGAINST THE JUDGMENT AND DECREE IN AS 77/2011 of DISTRICT COURT,
ALAPPUZHA DATED 11-12-2012.**

**AGAINST THE JUDGMENT IN OS 521/2009 of PRINCIPAL MUNSIF, ALAPPUZHA
DATED 12-07-2011.**

APPELLANT(S)/IST RESPONDENT/PLAINTIFF:

**N.SUKUMARAN NAIR, AGED 69 YEARS,
S/O.LATE KOCHUKUNJU PILLAI NEELAKANTA PILLAI,
RESIDING AT EZHARAYIL HOUSE, PULINCUNNU.P.O,
KANNADY, KUNNUMMA VILLAGE, KUTTANADU TALUK,
ALAPPUZHA DISTRICT PIN - 688504.**

**BY ADVS.SRI.MAURICE VINCENT
SRI.B.SUBASH.**

RESPONDENTS/APPELLANTS/DEFENDANTS:

- 1. BEENAKUMARI, AGED 35 YEARS,
W/O.SURESHKUMAR, PARASSERIL FROM
THUNDIYIL HOUSE, KANNADI KIZHAKKE MURI,
PULINCUNNU.P.O.,KUNNUMMA VILLAGE,
KUTTANADU TALUK, ALAPPUZHA DISTRICT-688 504.**
- 2. MADHAVANKUTTY NAIR,, AGED 50 YEARS,
S/O.LATE KRISHNA PANICKER, ERAYANNOOR HOUSE,
THODANAL.P.O, POOVARANI, PALA TALUK,
KOTTAYAM DISTRICT. REPRESENTED BY HIS
POWER OF ATTORNEY HOLDER USHADEVI
W/O.MADHAVANKUTTY NAIR, ERAYANNOOR HOUSE,
THODANAL.P.O.,POOVARANI, PALA TALUK,
KOTTAYAM DISTRICT-686 577.**
- 3. N.SADASIVAN NAIR,, AGED 63 YEARS,
S/O.LATE KOCHU KUNJU PILLAI NEELAKANTA PILLAI,
KOYIPURATHU HOUSE, MITHRAKKARY.P.O., PUTHUKKARY MURI,
MUTTAR VILLAGE, KUTTANADU TALUK, ALAPPUZHA DISTRICT-689 595.**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
13-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

amk

A.HARIPRASAD, J.

R.S.A No.1271 of 2014

Dated this the 14th day of January, 2015.

J U D G M E N T

Whether a co-owner is entitled to alienate his undivided share without acknowledging the rights of other co-owners in the sale deed ? This is the substantial question of law propounded in this Second Appeal. According to the appellant, such a document is void, at the least voidable, and is liable to be cancelled under Section 31 of the Specific Relief Act, 1963.

2. Heard the learned counsel for the appellant and perused the records.

3. Facts relevant for resolution of the dispute are as follows :

Plaint schedule property, having an extent of 10 cents, was obtained in kudikidappu right by Kochukunju Pillai Neelakanta Pillai (in short, 'Pillai') as per a purchase certificate issued by the Land Tribunal concerned in accordance with the provisions of

the Kerala Land Reforms Act, 1963. Pillai was a Hindu, governed by Hindu Succession Act, 1956. During his life time, his wife expired. In 1978, the acquirer of kudikidappu right died. He is survived by five children. Plaintiff/appellant is one of his sons. Second defendant is the brother of the plaintiff. Appellant contended that after the death of father, his right title and interest in the plaint schedule property devolved on his children. They are holding the property in co-ownership right. While so, without knowledge and consent of the appellant, the sale deed in question, Ext.A1, was executed by Chellamma, mother of the first defendant (sister of the appellant), Sadasivan Nair and Govindan Nair (brothers of the appellant). According to the appellant, the recitals in Ext.A1 sale deed would not reveal that the property was outstanding in co-ownership with the assignors and the appellant. In other words, his co-ownership right was suppressed in the document. It is his

contention that Ext.A1 was executed to defeat his interest over the property.

4. Defendants 1 and 2 filed a written statement admitting the fact that the property involved in the assignment is a co-ownership property. It is true that in Ext.A1 deed, the right of the appellant was not mentioned. But at the same time, it is to be mentioned that there is no recital in Ext.A1 negating the right of appellant over the property. According to the stand taken by the contesting defendants, the appellant could have claimed partition, instead of filing a suit for cancellation of the document and injunction. Maintainability of the suit is seriously challenged by the contesting defendants.

5. The trial court decreed the suit finding that there is no legal force for Ext.A1 and it does not bind the plaintiff/appellant. In the first appeal, the lower appellate court set aside the decree passed by the trial court. Interestingly, even

without a demand, the lower appellate court generously granted a decree of declaration of the appellant's 1/5th right over the property and a permanent prohibitory injunction. Tenor of the prohibitory injunction is rather strange. The court granted a relief of prohibitory injunction against the defendants from committing “damage or mischief” in the property till partition.

6. Dissatisfied with the decree of the lower appellate court, the appellant has come up in this second appeal.

7. Rudimentary knowledge of the law relating to co-ownership (tenancy-in-common) will show that the suit as framed cannot be legally maintained. Where the aggregate of rights, which form the ownership, is held and enjoyed by one person, then he is the sole owner of the property. In that event, he may enjoy all those rights exclusively or he may assign or part with some of the them. The sole owner can assign a limited right by way of lease, mortgage etc., thereby limiting his

ownership over the property. Still, he will have ownership, but subject to the derivative title created. If the assignment is of some interest or share of ownership itself, both the assignor and the assignee become holders of co-ordinate interest in the property and they become co-owners. Another instance wherein a co-ownership is created is the death of an owner and in that event his estate devolves on his heirs. Thence, they hold the property as co-owners. Yet another instance of creation of co-ownership is when several persons acquire property together. When several persons acquire any property, either in equal or unequal shares, they become co-owners in respect of such property. These are some of the methods in which a co-ownership come into existence. The law is well settled that all the co-owners have equal rights and co-ordinate interest in the property. But their shares may be either fixed or indeterminate. Even if the shares are known, they need not be

equal. But whether the shares are known or indeterminate and whether the shares are equal or unequal, every co-owner has a right of enjoyment and possession equal to that of other co-owners. Each co-owner, in theory, is interested in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others.

8. There is a marked difference between joint tenancy and tenancy-in-common. Joint tenancy form, as it were, one body owning the properties. It is said to be distinguished by four unities, viz; unity of possession, unity of interest, unity of title and unity of the time of commencement of such title. But a tenancy-in-common (co-ownership) does not require all the four requisites. Between a joint tenancy and tenancy-in-common, there is one similarity, viz; unity of possession. To constitute co-ownership, there must be an equal right to possession of

every part and parcel of the subject matter; joint possession is not essential, only unity of right of possession is required. The other three unities mentioned in the case of joint tenancy need not be there in the case of co-ownership, so that the interest of the co-owners may be unequal, their title may be different and such title may commence at different times. A tenant-in-common is, as to his own share, precisely in the position of the owner of an entire and separate estate. Heritability and alienability are the essential incidents of co-ownership. A co-owner can transfer his share during his life time or by way of a will, so as to take effect after his death. Other co-owners, generally as a rule, will have no right to prevent a co-owner from alienating his share in the co-ownership property. The probable exception to this rule is a case where a right of pre-emption or other rights under a covenant exist between them.

9. Understanding the law as stated above, it can only be

held that simply for the reason that Ext.A1 does not mention the right of the appellant, it will not become void or voidable at the option of the appellant. Section 31 of the Specific Relief Act, 1963 will be attracted only when a written document is void or voidable against a person having a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury. In this case, as there is an unbridled right for a co-owner to alienate his share, the suit can only be seen as a misconceived action.

10. The appellant obviously not satisfied with the grant of a declaratory decree and permanent prohibitory injunction by the lower appellate court has come up in appeal. The appellant has no case in the plaint that the defendants were attempting to cause damage or mischief to the property. Not only that, the expressions “committing any act of damage or mischief” used by the lower appellate court is highly obscure, hazy and evasive.

The lower appellate court lost sight of the well established principle that a relief which is not asked for cannot normally be granted in an action as it may cause injury or prejudice to the other side. The palpable reason is that the opposite party may be denied of an opportunity to put up effective resistance against granting a relief which is not claimed. Here, even without a decree of declaration that the appellant has 1/5th right over the property, his interests are well protected by statutory provisions applicable to the parties. The declaratory decree passed by the lower court is bad not only for the reason that there was no prayer made in the plaint, but also for the reason that no court fee was paid for such a relief either. Further, the grant of relief was without any plea of foundational facts in the plaint. Even if we consider the proposition that the court is entitled to mould reliefs in a case to do complete justice between the parties, I am of the view, in the facts and circumstances of this case, that such

a course was unnecessary, especially when no threat was posed by other co-owners against the rights of the appellant. I also find that the lower appellate court flouted the principle that no court shall pass a decree which is incapable of execution due to obscurity or vagueness. Using terms like “damage” or “mischief” in the decree may lead to controversies in future as they lack specificity. It is well settled that the relief granted to a party must be clear and capable of being understood clearly without any ambiguity. Viewing from that angle, the decree of permanent prohibitory injunction passed by the lower court is also unsustainable. Hence, to that extent the judgment and decree of the lower appellate court is to be interfered with. Therefore, I set aside the same. Denial of relief of cancellation of document and permanent prohibitory injunction as claimed in the plaint by the lower appellate court and resultant dismissal of the suit is upheld. As rightly observed by the court below, the

remedy of appellant lies in getting his share separated from the assignees of the co-owners. I find no question of law, leave alone a substantial question of law, in this appeal. Hence the appeal is only to be dismissed.

In the result, the appeal is disposed as indicated above.
There is no order as to costs.

All pending interlocutory applications will stand dismissed.

**Sd/-
A.HARIPRASAD,
JUDGE.**

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P.A to Judge