

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 20TH DAY OF JANUARY 2015/30TH POUSHA, 1936

SA.No. 506 of 2002 (B)

AGAINST THE JUDGMENT IN AS 18/1996 of SUB COURT, MANJERI DATED 20-06-2002.

AGAINST THE JUDGMENT IN OS 458/1993 of MUNSIFF'S COURT, MANJERI
DATED 09-04-1996.

APPELLANT(S)/APPELLANTS/DEFENDANTS:

1. PATHUMMA, 58 YEARS,
D/O. CHINGAMKULATHIL MOIDEEN KOYA.
2. SISTER AMINA, 58 YEARS.
3. SISTER MARIYUMMA.

(THE 1ST APPELLANT RESIDES AT POOLAKODE AMSOM,
PAZHOO DESOM, KOZHIKODE TALUK, 2ND APPELLAND
RESIDES AT KARUMARAKKAD AMSOM VAZHAKKAD DESOM AND
THE THIRD APPELLANT RESIDES KALARIKANDIPURAYIL,
CHERUVAYOOR.)

BY ADV. SRI.K.M.SATHYANATHA MENON.

RESPONDENT(S)/RESPONDENTS/PLAINTIFF:

MUHAMMED, 63 YEARS, S/O.CHINGAMKULATHIL
MOIDEENKOYA, RESIDING AT CHERUVAYOOR AMSOM DESOM,
CHERUVAYOOR, VAZHAKKAD (VIA), IN ERNAD TALUK.

BY ADVS. SRI.A.P.CHANDRASEKHARAN (SR.).
SMT.PRABHA R.MENON.
SRI.M.KRISHNAKUMAR.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20-01-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

S.A No.506 of 2002

Dated this the 20th day of January, 2015.

J U D G M E N T

What does the expression “ reservation” in a partition suit mean ? Is it synonymous with “equities” to be worked out at the time of allotment of shares ? These are the substantial questions of law raised in this appeal.

2. Heard the learned counsel for the appellants and the respondent.

3. Dispute between the parties lie in a narrow compass. The suit is one for partition of immovable property and a house situated thereon. Appellants are the defendants in the suit. Respondent (plaintiff) is the brother of the appellants. The suit property originally belonged to their father. In a partition effected between the sharers in 1992, the suit property was kept in common. Later, four sisters of the respondent released their

rights in favour of him as per a registered document. The appellants were not willing to part with their shares. They were also not prepared to partition the property. In that situation, the suit was filed by the respondent.

4. In the written statement, the appellants admitted that the plaint schedule property is partible. There is no dispute regarding the shares also. The respondent is entitled to get 6/9 shares. Factum of release of shares by other co-owners is also undisputed. The respondent claimed that he, being the major share holder, is entitled to get the house situated in the property, reserved in his name; whereas the appellants would contend that the plaint schedule property is liable to be sold in public auction as partition by metes and bounds is impracticable and the sale proceeds has to be divided among the sharers.

5. The trial court rightly decreed the suit, which was confirmed in appeal. The objectionable part of the judgments and decrees, according to the learned counsel for the appellants,

is the finding that the respondent is entitled for reservation of the house in his favour as far as possible. The legal obscurity lies in the use of expression “reservation” in the impugned judgment indicating that the house in the property has been excluded from the partible assets.

6. The concept of reservation of property involved in a suit for partition in favour of a sharer (or a co-owner, as the case may be) is to be understood clearly. It amounts to exclusion of certain property from the partible assets. In a partition suit, at the preliminary decree stage, the court is called up to adjudicate the partibility of assets involved in the suit, the share of each of the parties, whether any of the parties is entitled to claim exclusion of any property from division etc. Normally, in order to claim exclusion of an item from partition, the sharer/co-owner claiming such a right will have to establish his exclusive right over the property. The law presumes that each co-owner is the absolute owner in respect of each part and parcel of the land.

Unless a co-owner gets consent from other co-owners, he cannot effect improvements in the property so as to claim reservation of the asset to him at the time of division. If he effects improvements in a co-ownership property, the law presumes that it is for the benefit of all and therefore, he cannot claim reservation of the same to the exclusion of others. So much so, the burden is purely on the person making a claim for reservation that he effected improvements in the co-ownership property with the consent of others, either expressly or impliedly, agreeing to reserve the same to him at the time of division. The court adjudicating the rights of the parties will have to consider at the preliminary decree stage whether a particular property, over which one of the parties claim reservation, is available for partition or not. If a party claiming reservation of an item of property included in the suit proves that the property is not available for partition, the court at the stage of preliminary decree will have to consider the plea and if

it is found allowable, the item should be discounted from the list of partible property. The adjudication regarding reservation of an item in favour of a co-owner or in other words, the exclusion of a property from partition, is a matter based purely on legal principles. Merely on an equitable principle, such an adjudication cannot be done. If one sharer/co-owner raises a contention that a particular property or any structure thereon is to be allotted to him for his use and it is unlikely to cause difficulties to other sharers, that plea is based on equity and the court will have to consider whether the request of that party can be allowed without affecting the legal or equitable rights of other sharers/co-owners. Well settled is the principle that a court dealing with a partition suit can decide not only legal rights arising in the case, but also equitable principles for doing complete justice between the parties. In a claim for reservation, the burden is on the person making the claim to establish that for valid reasons the property is to be excluded from the partible

assets. The essential distinction between the claim for reservation and claim based on equity for allotting a particular portion of the property or a structure thereon to a sharer lies in the fact that if the claim for reservation is proved, it results in exclusion of the property from partition and the claim for working out equity will only result in allotment of the property in favour of that person, which will certainly be included in the partible assets. That apart, the claim for reservation shall be considered while passing a preliminary decree and the equities regarding allotment may be relegated to the final decree proceedings. Viewing from this angle, I am of the view that the observation by the trial court and the lower appellate court that the respondent is entitled to reservation of the house in dispute is legally not correct and proper. At the most, he can only claim an equitable relief of allotting that portion of the land along with the house to his share after valuing the entire assets.

7. Learned counsel for the respondent relied on ***Badri***

Narain Prasad Choudhary v. Nil Ratan Sarkar (AIR 1978 S.C 845). The Supreme Court inter alia held that for exercising power under Sections 2 and 3 of the Partition Act, 1893, a request by the shareholders interested individually or collectively to the extent of one moiety or upwards for the sale of property and its distribution is essential. Further, even if the conditions prescribed therein are satisfied, the court has a discretion to direct or not to direct sale of the property and distribution of the proceeds. In this case, the contention of the appellants is that the property as such cannot be divided into metes and bounds and therefore, the property should be sold in a public auction. The trial court is right in holding that the question can be considered at the time of passing a final decree, as that is a matter directly touching upon the actual allotment of shares. But for the mistake in the approach of the courts below regarding the grant of right of reservation to the respondent, I find no other legal reason to unsettle the concurrent findings. It

is made clear that the respondent is not entitled to get reservation of the house without valuation, but the court while passing the final decree shall consider his request for allotment of the house in the property to his share, if it is found practicable.

In the result, the appeal is dismissed. 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

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