

IN THE COURT OF THE MUNSIFF, KAYAMKULAM

Present: Sri.Shanavas.A, Munsiff

Thursday, the 20th day of October 2022/28th Aswina 1944.

COMMON JUDGMENT IN
ORIGINAL SUIT. 71/2020 & ORIGINAL SUIT. 5/2019
(Filed on 20.02.2020)(03.01.2019)

Original Suit.71/2020
(Filed on 20.02.2020)

- Plaintiffs:**
1. Kanakamma, aged 63 years,
W/o.Prabhakaran,
Thandasseril veedu,
Puthiyavila muri,
Kandalloor Village.
 2. Divya, aged 36 years,
D/o.Kanakamma,
Thandasseril veedu,
Puthiyavila muri,
Kandalloor Village.

(By Adv.Sri.P.Viswanathan)

Defendant: Deepa, aged 41 years,
Aaradhanayil,
Edathupuram,
Eranthode desom,
Valampur Village,

Perinthalmanna Taluk,
Malappuram District.
From Thandasseril veedu,
Puthiyavila muri,
Kandalloor Village.

(By Adv.Sri.M.R.Salim)

ORIGINAL SUIT. 5/2019

(Filed on 03.01.2019)

Plaintiff:

Deepa, aged 40 years,
D/o.Prabhakaran,
Aaradhana House,
Edathupuram,
Eranthode desom,
Valampur Village,
Perinthalmanna Taluk,
Malappuram District.
From Thandasseril veedu,
Puthiyavila muri,
Kandalloor Village.

(By Adv.Sri.M.R.Salim)

Defendants: 1. Divya, aged 36 years,

D/o.Late.Prabhakaran,
Thandasseril House,
Puthiyavila muri,
Kandalloor Village.

2. Kanakamma, aged 62 years,
W/o.Late. Prabhakaran,
Thandasseril House,
Puthiyavila muri,
Kandalloor Village.

(By Adv.Sri.P.Viswanathan)

These suits are filed under section XXVI, Order VII and Rule 1 and 2 of the Civil Procedure Code and coming on for final hearing before me on 19.10.2022 in the presence of the counsel for both sides and and having been stood over for consideration till 20.10.2022 court on the same day delivered the following.

COMMON JUDGMENT

Joint trial is allowed as per order in I.A.No.3/2021 in O.S.No. 71/2020 dated 10.06.2022 treating O.S.No. 71/2020 as the leading case.

O.S.No. 71/2020

Suit for partition and permanent injunction.

2. The essence in the plaint may be summarized as follows:-
The 1st plaintiff is the mother of the 2nd plaintiff and defendant. The plaintiffs and defendant are the heirs of Late Prabhakaran, who is the husband of the 1st plaintiff and father of 2nd plaintiff and defendant.

The deceased Prabhakaran was the owner-in-possession of plaint A schedule item Nos. 1 to 3 properties by virtue of second schedule of Partition Deed No. 186/1994 of Sub Registrar's Office, Keerikkad. Plaint A schedule item No. 1 property ad-measuring 12.50 ares comprised in re-survey No.329/29 of Kandallor Village. Plaint A schedule item No. 2 property ad-measuring 2.30 ares comprised in re-survey No.329/25 of Kandallor Village. Similarly, plaint A schedule item No. 3 property ad-measuring 1.15 ares comprised in re-survey No.304/2 of Kandallor Village. The husband of 1st plaintiff Sri. Prabhakaran mutated the property and paying basic tax for the same. Plaint B schedule property having an extent of 9.22 ares comprised in survey No. 47/2 of Valampoor Village by virtue of sale deed No. 305/2013 of Sub Registrar's Office, Perinthalmanna. The 1st plaintiff and her deceased husband Sri.Prabhakaran jointly purchased plaint B schedule property for value. After the purchase of plaint B schedule property, they had mutated the property and paying basic tax for the same. Matter being so, the husband of the 1st plaintiff and father of 2nd plaintiff and defendant had died on 18.07.2014 leaving the plaintiffs and defendant as the sole heirs. As per the provisions of Hindu

Succession Act, 1956, the plaintiffs have got 2/3 right over plaint A schedule item Nos. 1 to 3 properties and they have 2/3 right over the half share of plaint B schedule property. After the demise of the husband of the 1st plaintiff, the defendant being another daughter of the 1st plaintiff and sister of 2nd plaintiff are at loggerheads with the plaintiffs. Though the plaintiffs approached the defendant to make partition of the plaint schedule properties, she did not adhere to the demand of the plaintiff. Instead, the defendant had filed O.S.No. 5/2019 before this court for partition against the plaintiffs. The plaintiffs as the defendants in O.S.No. 5/2019 filed written statement. It is reliably learnt on 10.02.2020 that the defendant is preparing to create documents with regard to the plaint schedule property. So, the plaintiffs have approached this court for partitioning the plaint schedule properties by metes and bounds and for permanent injunction restraining the defendants from creating any documents with regard to the plaint schedule properties and from committing any acts of waste in the plaint schedule properties. Thus, the suit.

3. The defendant appeared and filed written statement contending *inter alia* as follows:- The suit is not maintainable either in

law or on facts. The plaintiffs filed the suit stating frivolous and vexatious contentions. The only intention of the plaintiffs is to cause financial loss to the defendant. The relationship between the parties and derivation of the title of the properties are admitted. The alleged animosity by the defendant against the plaintiff is false. In fact, it was the defendant, who initially approached the plaintiff to make partition of the plaint schedule properties. Since it was denied by the plaintiffs, the defendant was compelled to file O.S.No. 5/2019 before this court. It is the demand of the plaintiffs that the house situated in plaint A schedule item No. 1 property has to be given to the 2nd plaintiff. Since the defendant was not heeded for the above demand, the plaintiff delayed making the partition making puerile excuses. Therefore, the defendant as plaintiff filed O.S.No. 5/2019 as plaint A schedule item Nos. 1 to 3 properties situates within the territorial jurisdiction of this court. The plaintiff could have prefer a counter claim in O.S.No. 5/2019 instead of filing this suit. Therefore, the bar under Order II Rule 2 will attract. A pre litigation petition was filed as PLP No. 6040/19 before Taluk Legal Services Committee. Whereas, it did not yield any positive result. The averment that the defendant is trying to

create documents with regard to the plaint schedule property is also false. The defendant had no intention to cut and remove any trees from the plaint schedule properties. The plaintiffs have no cause of action. Therefore, the defendant sought to dismiss the suit with costs.

4. On the basis of the averments in the plaint and contentions in the written statement, the court framed the following issues for trial:-

1. Is the suit barred under Order II Rule 2 of the Code of Civil Procedure, 1908?
2. Whether the plaint schedule properties are partible?
3. If so, what is the share of each party entitled to ?
4. Is the cause of action alleged by the plaintiffs is true ?
5. Whether the plaintiffs are entitled for a decree of perpetual prohibitory injunction as sought for ?
6. Reliefs and costs ?

O.S.No. 5/ 2019.

Suit for partition and perpetual prohibitory injunction.

5. In a nutshell, the plaintiff's case is as follows:- The 1st defendant is the sister and 2nd defendant is the mother of the plaintiff. Plaintiff and 1st defendant are the children born out of the wedlock between the 2nd defendant and Sri. Prabhakaran. Plaintiff schedule item Nos. 1 to 3 properties belongs to Sri. Prabhakaran by virtue of partition deed No. 186/94 of Sub Registrar's Office, Keerikkad. He died intestate on 18.07.2014. As the plaintiff and defendants are the sole legal heirs, they have got the property as per the intestate succession. Since the plaintiff and defendants are co-owners, they got 1/3 right each over plaintiff A schedule item Nos. 1 to 3 properties and the building therein. As the defendants are in bad terms with the plaintiff, the plaintiff has been confronting with various difficulties from enjoying the plaintiff schedule properties without making partition. The demand of the plaintiff to make partition of the plaintiff schedule property was denied by the defendants on 28.12.2018. Instead, they have filed petition before various authorities to threaten the plaintiff. The plaintiff got reliable information that the defendants are making preparation to

create some deeds with regard to the plaint schedule properties. If the defendants are succeeded in their attempt, it will cause irreparable injuries to the plaintiff. Thus, the plaintiff has approached this court for making partition of the plaint schedule properties by metes and bounds and for permanent injunction restraining the defendants from creating any deeds with regard to the plaint schedule properties or from committing any acts of waste or mischief therein.

6. Defendants appeared and filed written statement contending *inter alia* as follows:- The suit is not maintainable either in law or on facts. In fact, the plaintiff did not schedule any property at Perinthalmanna, owned by Late Sri. Prabhakaran. So, it is not possible to pass a valid decree. The deceased Prabhakaran has 22.770 cents of property as per sale deed No. 305/2013 of Sub Registrar's Office, Perinthalmanna. After the demise of the father of the plaintiff and 1st defendant and husband of the 2nd defendant, the parties got 1/3 right each over the half of the above property. As the plaintiff is the second daughter of the 2nd defendant, she raised the plaintiff her, imparted very good education and finally, according to her own volition, she married to a person, who is a Christian by faith. Even after the birth of

the child of the plaintiff, the 2nd defendant was there to look after the affairs of the child. After the demise of the husband of the 2nd defendant, the plaintiff developed animosity towards the defendants. The fortune of the 2nd defendant and her deceased husband was used to purchase property for the plaintiff at Perinthalmanna as the plaintiff and her husband are the Assistant Professors at MES College, Perinthalmanna, ergo they are permanently residing there. The deceased father of the 1st defendant cherished an ambition that the house situated in plaint A schedule item No. 1 property has to be given to the 1st defendant. Now, the plaintiff has approached this court against the will and wishes of her deceased father. It is false to say that the defendants denied the request to make partition of the plaint schedule properties. The defendants never acted in such a way so as to diminish the value of the property. On all these reasons, the defendants sought to dismiss the suit with costs.

7. The following issues were settled:-

1. Whether the plaint schedule properties are partible?
2. If so, what is the quantum of share of each party entitled to ?

3. Is the cause of action alleged by the plaintiff is true ?

4. Whether the plaintiff is entitled for a decree of perpetual prohibitory injunction as sought for ?

5. Reliefs and costs ?

8. The evidence of plaintiffs consists of the oral testimony of PW1 and Exts. A1 to A4 were marked. The evidence of defendant consists of oral testimony of DW1 and Ext. B1 was marked. Heard both the sides.

9. **Issue Nos.1 to 5 in O.S.No. 71/2020 and issue Nos. 1 to 4 in O.S.No. 5/2019:-** For the sake of brevity and convenience, these issues are considered together. The parties will be referred as stated in the cause title of O.S.No. 71/2020. The plaintiffs approached this court for making partition of plaint A schedule item Nos. 1 to 3 properties and half right over plaint B schedule property of deceased Prabhakaran. It is to be noted that rather than the oral evidence, the right of the parties, which can be seen from documentary evidence matters. In order to prove the case put up by the plaintiffs in O.S.No. 71/2020, the 2nd plaintiff mounted the box and stated the averments in the plaint in O.S.No. 71/2020 in detail through the affidavit in lieu of

examination in chief. PW1 further swears that the averments in the plaint in O.S.No. 5/2019 are false and the defendant is the person, who is making obstruction to make partition of the plaint schedule properties. She was cross-examined by the learned counsel for the defendant. One of the contentions raised by the defendant is that PW1 could have preferred a counter claim in O.S.No. 5/2019 instead of filing O.S.No. 71/2020. It was stated by PW1 that in O.S.No. 5/2019, the defendant herein did not schedule B schedule property. So that, they could file a separate suit for partition. PW1 inter alia stated the usage of the pathway to access plaint A schedule item Nos. 1 to 3 properties. It is to be noted that throughout the evidence, it can be seen that the parties are not at issue regarding the right and share over plaint schedule properties as per the provisions of Hindu Succession Act, 1956.

10. As regards the evidence of DW1, the defendant/ plaintiff in O.S.No. 5/2019, mounted the box and stated the averments in the plaint in O.S.No. 5/2019 through the affidavit in lieu of examination in chief. When she was also cross-examined by the plaintiff, it has come out in evidence that she has no objection to make partition of the

plaint schedule properties. Only prayer is that she would get 1/3 of the above properties. It is the case of DW1 that she did not make any demand for partition of the plaint schedule property after the demise of her father and according to her, she had approached this court for making partition of the plaint schedule properties.

11. As regards the documents produced, Ext. A1 is the partition deed No. 186/1994 of Sub Registrar's Office, Keerikkad, which is also marked on the side of DW1 as Ext. B1. In the second schedule of Ext. A1/ B1, there are three schedule of properties which is scheduled as plaint A schedule item Nos. 1 to 3 properties. Ext. A3 makes it very clear that the deceased father of 2nd plaintiff had been paying tax for plaint A schedule item Nos. 1 to 3 properties. So, there is no dispute regarding the identity, extent etc. over plaint A schedule item Nos. 1 to 3 properties by either party. As per s. 8 of the Hindu Succession Act, 1956, the 1st plaintiff being the wife of deceased Prabhakaran, is entitled to 1/3rd share over plaint A schedule item Nos. 1 to 3 properties. The 2nd plaintiff and the defendant being the daughters of deceased Prabhakaran, are also entitled to 1/3 shares each over plaint A schedule item Nos. 1 to 3 properties.

12. As regards plaint B schedule property, it is not within the territorial jurisdiction of this court. Whereas, it is situated at Valampoor Village of Perinthalmanna, Malappuram District. Ongoing through the recitals in Ext. A2 document, deceased Prabhakaran and the 2nd defendant purchased plaint B schedule property in 2013 from one Kamarudeen. So, the 2nd defendant has half right over plaint B schedule property as she is one of the vendors of plaint B schedule property. As the plaintiff and defendants are the heirs of deceased Prabhakaran, they are entitled to 1/3 right of half share of plaint B schedule property. As the plaint B schedule property situates within the jurisdiction of another court, this court can exercise the jurisdiction as provided under s. 17 of the Code of Civil Procedure, 1908. As regards the bar of Order II Rule 2 in this case, it cannot be applicable as there is no judgment passed by this court regarding the same cause of action. Here in this case both suits are pending. In **Gopi.p.k. v. Gopinathan and others (2021(4)KHC 484)** the Hon'ble High Court **held that** *"It is settled law that where the plaintiff is aware of his relief and yet omits to claim in the previous suit, a subsequent suit for such relief is barred. The learned counsel for the appellant contended that the*

rule does not preclude second suit based on distinct cause of action. To make the Rule applicable, the defendants must satisfy three conditions, namely, (i) the previous and second suit must arise out of the same cause of action; (ii) both the suits must be between the same parties; and (iii) the earlier suit must have been decided on merit". Obviously, the parties are not at all issue regarding the case at hand. So, the entitlement of 1/3rd share over the plaint schedule property has to be allotted to the parties to the lis. Therefore, issue No. 1 in O.S.No. 71/2020 is found against the plaintiffs. Issue Nos. 2 to 5 are found in favour of the plaintiffs. So also, issue Nos. 1 to 4 in O.S.No. 5/2019 are found in favour of the plaintiff/ defendant in OS 71/2020.

13. Issue No. 6 in O.S.No. 71/2020 and issue No. 5 in O.S.No. 5/2019:- In view of my discussions and findings on the foregoing issues, O.S.Nos. 71/2020 and 5/2019 are liable to be decreed.

In the result, O.S.Nos. 71/2020 and 5/2019 are decreed and a preliminary decree is passed as follows:-

- (a) Plaintiff A schedule item Nos. 1 to 3 properties in O.S.No. 71/2020 and the building therein shall be divided into three equal shares by metes and bounds and out of that 1/3 share each shall be allotted to plaintiff Nos. 1 and 2 and defendant.
- (b) Half share of plaintiff B schedule property shall be divided into three equal shares by metes and bounds and out of that 1/3 share each shall be allotted to plaintiff Nos. 1 and 2 and defendant.
- (c) Equity and owelty, if any, shall be decided in the final decree proceedings.
- (d) The defendant in O.S.No. 71/2020 is hereby restrained by a decree of perpetual prohibitory injunction from creating any documents with regard to plaintiff A schedule item Nos. 1 to 3 properties or from encumbering the same or from cutting and removing any trees from the plaintiff A schedule item Nos. 1 to 3 properties or from committing any acts of waste therein.

- (e) The defendants in O.S.No. 5/2019 are hereby restrained by a decree of perpetual prohibitory injunction from creating any documents with regard to plaint A schedule item Nos. 1 to 3 properties or from committing any acts of waste or mischief therein and from causing any damage to plaint A schedule item Nos. 1 to 3 properties.
- (f) The costs shall come out of the estate.
- (g) As regards the costs of injunction, both parties shall bear their respective costs.

Both the suits adjourned for further steps to 11.11.2022.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in open court on 20th day of October, 2022.)

Sd/-
SHANAVAS.A
MUNSIF

APPENDIX

Exhibits for the Plaintiffs:

- | | | | |
|-----|------------|---|---|
| A1. | 10.01.1994 | : | Partition Deed No.186/94 of
Sub Registrar's Office, Keerikkad. |
| A2. | 16.01.2013 | : | Deed. |
| A3. | 07.05.2019 | : | Tax receipt of Kandallloor Village Office. |
| A4. | 11.06.2019 | : | Tax receipt of Valampur Village Office. |

Exhibits for the Defendants:

B1. 10.01.1994 : Partition Deed No.186/94 of
Sub Registrar's Office, Keerikkad.

Witness for the Plaintiffs:

PW1 19.08.2022 : Divya.

Witness for defendants:

DW1 26.08.2022 : Deepa.T.K.

Court Exhibits : Nil.

Sd/-
MUNSIF

// True Copy //

MUNSIF

Typed by: Shafeek

Compd by:

Common Judgment in
OS.71/20 & OS.5/19
Dated 20/10/2022.