

IN THE COURT OF MUNSIF, PERUMBAVOOR

Present:- Sri. M.I. Johnson, B.A., LL.B., Munsiff.

Friday, the 27th day of November, 2015/6th Agrahayana, 1937.

O.S.No. 365/2005

Plaintiff:-

Kamalakshi, aged 42 years, D/o Ammini, Muttathukudy Veettil, Kurichilakodu Kara, Kodanad Village. Now residing at Nellipparambu Veettil, Perumani Kara, Arackappady Village.

By Adv: M.K. Jayapalan

Defendants:-

1. Thankamma, aged 70 years, D/o Ayyappan, Muttathukudy Veettil, Kurichilakodu Kara, Kodanad Village. Present address: W/o Padmanabhan, Mundakathuparambil, Chirangara Kara, Koratty, Vadakkummuri Village, Mukunthapuram Taluk.
2. Sarada, aged 65 years, D/o Ayyappan, Muttathukudy Veettil, Kurichilakodu Kara, Kodanad Village. Present address: Kizhakkappurathukudy Veettil, Karikkodu, East Okkal Kara, Okkal Village.
3. Shobhana, aged 38 years, D/o Gangadharan, Muttathukudy Veettil, Kurichilakodu Kara, Kodanad Village. Present address: Mundakkathuparambil Veettil, Peranjarakara, Koratty Kara, Vadakkummuri Village. Mukunthapuram Taluk. (Velamavukudy Veedu, Thannipuzha Bhagom, Okkal Kara)
4. Radhamani, aged 33 years, D/o Gangadharan, Muttathukudy Veettil, Kurichilakodu Kara, Kodanad Village. (W/o Sajeevan, Kudiyil Veedu, Okkal P.O., Onampilly)
5. Ramesan, aged 30 years, S/o Gangadharan, Muttathukudy

- Veettil, Kurichilakodu Kara, Kodanad Village.
(Mundakathuparambil, Chirangara Kara, Koratty)
6. Ajitha, aged about 27 years, D/o Gangadharan, Muttathukudy Veettil, Kurichilakodu Kara, Kodanad Village. (Mundakathuparambil, Chirangara Kara, Koratty)
 7. Mallika, aged 60 years, D/o Narayanan, Muttathukudy Veettil, Kurichilakodu Kara, Kodanad Village.
 8. Ponnamma, aged 45 years, D/o Narayanan, Muttathukudy Veettil, Kurichilakkodu Kara, Kodanad Village, W/o Thirumeni, Thattandukudiyil, Aimury
 9. Jayanandan, aged 55 years, S/o Narayanan, Muttathukudy Veettil, Kurichilakkodu Kara, Kodanad Village
 10. Sivarajan, aged 50 years, S/o Narayanan, Muttathukudy Veettil, Kurichilakkodu Kara, Kodanad Village
 11. Sukumaran, aged 50 years, S/o Narayanan, Muttathukudy Veettil, Kurichilakkodu Kara, Kodanad Village
 12. Vijayan, aged 43 years, S/o Narayanan, Muttathukudy Veettil, Kurichilakkodu Kara, Kodanad Village

D1,2 By Adv. G. Santhosh Kumar

D3,4, 12 By Adv. M. G. Jayachandran

D5 to D8 Ex-parte

D9,10 &11 By Adv: P.T. Geevarghese

This suit having been finally heard before me on 16.11.2015 and the Court on 27.11.2015 delivered the following:-

JUDGMENT

Suit is for setting aside a judgment and decree, setting aside delivery in execution proceedings, for partition and for permanent prohibitory injunction.

2. Averments in plaint and amended plaint in brief are stated as follows:- Plaint schedule properties were originally belonged to one Ayyappan. Ayyappan died intestate. Ayyappan had two wives and they are also no more. Narayani, Karthiyayani, Thankamma, Narayanan and Saradha are the children of Ayyappan. Narayani, Karthiyayani and Narayanan are no more. Plaintiff is the daughter of deceased Narayani. Aforesaid Thankamma and Saradha who are daughters of Ayyappan are defendants 1 and 2 herein. Defendants 3 to 6 are children of Gangadharan who is son of deceased Karthiyayani who is daughter of Ayyappan. 7th defendant is daughter of Narayanan who is son of Ayyappan. Defendants 8 to 12 are also children of Narayanan in his second marriage. Ayyappan died intestate with respect to his properties and thereupon, plaint schedule properties were devolved upon plaintiff and defendants. Plaintiff is entitled to 1/5 share in plaint schedule property. Defendants 1 and 2 are entitled to 1/5 share each in plaint schedule property. Defendants 3 to 6 are jointly entitled to 1/5 share. Defendants 7 to 12 are jointly entitled to remaining 1/5 share. Plaintiff has joint ownership and possession over plaint schedule property. Plaintiff several times requested the defendants to partition the property, but in vain.

While so, defendants, in collusion with each other filed O.S.No.210/94 for partition of plaint schedule property and obtained a preliminary decree as well as a final decree after misleading and defrauding the court. Thereafter, defendants filed execution petition for delivery of the property as per the final decree. Amin from the court reached the property for delivery of the property and thereupon, plaintiff putforwarded a claim over the plaint schedule property before the Amin. Amin omitted to receive the petition from the plaintiff. Judgment and decree in O.S.No.210/94 are not binding over plaintiff and her right over plaint schedule property. Defendants obtained the decree in O.S.No.210/94 by playing fraud. Hence, plaintiff is entitled to get a decree for setting aside the judgment in O.S.No.210/94. Plaintiff is entitled to get a decree for partition of plaint schedule property and to get 1/5 share entitled to her. While the suit was pending, execution petition filed in O.S.No.210/94 as E.P.No.30/2005 was allowed and share of 7th defendant was delivered to her. Aforesaid delivery is also to be set aside. Defendants are to be restrained by a permanent prohibitory injunction from cutting and removing valuable trees from plaint schedule property, committing any waste therein and from alienating any portion of plaint schedule property

until the partition is effected by metes and bounds. For the said reliefs, plaintiff filed the suit.

3. Defendants 1 to 4 and 9 to 12 filed written statement admitting the plaint claim.

4. Defendant No.7 filed written statement and additional written statement with contentions briefly stated as follows:- It is not correct to say that, entire plaint schedule property was originally belonged to Ayyappan. It is not correct to say that, plaintiff is great grand daughter of Ayyappan. It is not correct to say that, plaintiff is the only daughter of Ammini who is daughter of Narayani, daughter of Ayyappan. Plaintiff has no ownership or possession over plaint schedule property. It is not correct to say that plaintiff and defendants have joint ownership and possession over plaint schedule property. The documents relied on by plaintiff will not show that, entire plaint schedule property was belonged to Ayyappan. Plaintiff has shown plaint schedule property after including the properties which were not belonged to Ayyappan. After death of Ayyappan, defendants 7 to 12 and Narayanan were in possession of plaint schedule property, openly, continuously without any obstruction and thereby, they perfected their title over aforesaid property by adverse possession. O.S.No.210/1994 was

decreed and a final decree was passed on 14.10.2004. For delivery of the share belonged to this defendant, she filed E.P.No.30/05 and on 30.11.2005 share of this defendant was delivered to her. Thereafter, this defendant became absolute owner of that property. She has actual physical possession over that property. Since plaint schedule property was disposed of, plaintiff is not entitled to file this suit. Plaintiff ought to have been approached the court by filing a petition as per Order 21 Rule 99 and 100 of CPC for re-delivery and the suit is not maintainable. It is not correct to say that, plaintiff requested the defendant to partition the property and to give her separate share. It is not correct to say that decree in O.S.No.210/94 was obtained by fraud and collusion. Plaintiff is not entitled to get a decree for setting aside the judgment and decree in O.S.No.210/94. Plaintiff has no right at all over any portion of plaint schedule property. Plaintiff was ousted by defendants 7 to 12. Plaintiff is not entitled to get a decree for setting aside the order of delivery in E.P.No.30/05. Plaintiff is not entitled to get any of the relief sought for in the suit. The suit is liable to be dismissed with costs of this defendant.

5. Other defendants remained exparte.

6. Upon the pleadings, following issues and additional issues

were raised for consideration:

- 1) Whether the preliminary decree and final decree in O.S.No.210/94 are liable to be set aside ?
- 2) Whether the plaintiff is entitled to get a decree for partition of plaint schedule property and if so what shall be the share if any to which each of the parties is entitled ?
- 3) Whether the delivery of property in E.P.No.30/2005 dated, 30.11.2005 is liable to be set aside ?
- 4) Whether the plaintiff is entitled to get a decree for permanent prohibitory injunction as prayed for ?
- 5) Relief and costs ?

Additional Issue:

Whether the suit is barred by provisions of O.21, R.97 to R.101 CPC as contended by defendant No.7.

7. Plaintiff's evidence in this case is comprised of oral testimonies of PW1 and 2 and documents marked as Exts.A1 to A14. Defendants' evidence is comprised of documents marked as Exts.B1 to B7. Commission Report and Rough Sketch were marked as Ext.C1 and C1(a). Ext.X1 was also marked.

8. I heard the counsel for both sides.

9. **Additional Issue No.1**:- The suit is for setting aside the judgment and decree in O.S.No.210/94, for setting aside the delivery of property as per order in E.P.30/2005, for partition of plaint schedule property and for permanent prohibitory injunction. Case of the plaintiff in the plaint is that, plaint schedule property was originally belonged to one Ayyappan and he died intestate. Further case of plaintiff is that, aforesaid Ayyappan has two wives and there are altogether five children in aforesaid wedlock. It is alleged by plaintiff that, she is daughter of Ammini who is daughter of Narayani where Narayani is daughter of Ayyappan in his first wedlock. Further allegation of the plaintiff is that, defendants in the suit are other legal heirs of Ayyappan. It is alleged by plaintiff that, earlier, 7th defendant herein filed O.S.No.210/94 before this Court for partition of plaint schedule property without including plaintiff herein as a party in that suit and obtained a decree for partition of plaint schedule property. It is further alleged by plaintiff that, later on, plaintiff in that suit, obtained a final decree in that suit and finally filed an execution petition for delivery of share of plaintiff therein as per the final decree and Amin from the Court reached the property for delivery of property to the plaintiff therein. Further allegation of the

plaintiff herein is that, when Amin reached the property, she filed a petition before the Amin opposing delivery, but, Amin evaded from receiving the petition. According to the plaintiff herein, plaintiff and defendants in O.S.No.210/94, colluded together and obtained a preliminary decree as well as a final decree in that suit by fraud, avoiding plaintiff herein. With these allegations, plaintiff filed this suit for setting aside judgment and decree in O.S.No.210/94, for partition of plaintiff schedule property and for permanent prohibitory injunction. Later on, plaintiff filed I.A.No.1733/2008 for amendment of the plaint stating that, plaintiff in O.S.No.210/94 filed E.P.No.30/2005 for delivery of property as per the final decree in O.S.No.210/94 and properties were delivered as per final decree in that suit. It is further alleged that, since, the property was delivered, where plaintiff herein has right over the property, aforesaid delivery in E.P.30/2005 is to be set aside. Aforesaid petition was allowed and the plaint was amended. Now, the suit is for setting aside judgment and decree in O.S.No.210/94, setting aside delivery in E.P.No.30/2005, for partition of plaintiff schedule property and for permanent prohibitory injunction.

10. As already stated, 7th defendant herein is the plaintiff in O.S.No.210/94. In the written statement, 7th defendant herein has

contended that, the proper forum before which, plaintiff ought to have been filed the petition, was the executing court and separate suit is not maintainable. It is further contended that, plaintiff herein ought to have been filed a petition under Order 21 Rule 99 and 100 of CPC and as per aforesaid provisions, a separate suit is not maintainable. Apart from this contention, defendant No.7 has contended that plaintiff herein is not a legal heir of deceased Ayyappan and plaintiff herein has no right at all over plaint schedule property. It was further contended that there was no fraud or collusion in filing O.S.No.210/94 as alleged by the plaintiff herein.

11. In considering the contention of 7th defendant, this Court has to decide, which is the proper forum before which, plaintiff ought to have been filed a petition for getting the relieves sought for in the suit. As already stated, according to 7th defendant, plaintiff herein ought to have been filed a petition under O.21 R.99 and 100 of CPC for getting the relief sought for in this suit and a separate suit is barred under aforesaid provisions. On the other hand, plaintiff has alleged that, since, she was not a party in the suit, the decree in aforesaid suit is not binding on her and her rights over plaint schedule property and hence, she is entitled to

file a separate suit on the basis of her independent rights over plaint schedule property.

12. Admittedly, O.S.No.210/94 was decreed and a preliminary decree was passed on 31.1.2000. Thereafter, a final decree was passed in that suit, on 14.8.2004. Thereafter, plaintiff in that suit filed E.P.No.30/2005 for delivery of her separate share. Plaintiff herein has categorically stated in the plaint that, Amin from the Court reached the property for delivery as per the final decree in O.S.No.210/94 and she resisted the same by filing a petition before the said Amin. According to the plaintiff, Amin was reluctant to receive her petition and hence, she filed the suit.

13. In *Unnikrishnan V. Kunhibeevi* (2011(1)KLT 508, it was held by a division bench of Hon. High Court of Kerala that,

“8. The short question posed for consideration in the given facts of the case, is whether the plaintiff has to approach the execution court which passed the decree in O.S.No.67/81 in favour of the first defendant bank to impeach the court sale in execution of that decree and re-delivery of the property ordered thereon in favour of the auction purchasers, who had purchased B schedule in the auction, or, is the plaintiff empowered to file a separate suit to impeach such court sale and delivery on any ground whatsoever for a declaration that the court sale is void and for re-delivery of the property.

9. The learned counsel for the plaintiff Sri.Subrarnaniam relied on a number of authorities to contend that the suit is perfectly maintainable as he being a third party to the proceeding in O.S.No.67/81 he cannot be compelled to approach the execution court in which the decree passed in the above suit had been executed, moving an application under O.XXI R.99 of the Code. The decree passed in the above suit was not binding on the plaintiff as he was not a party to that suit and so, his right to impeach the court sale and the delivery in execution of the decree passed in that suit by way of a separate suit is a civil right, which is, in no way, interdicted by the procedure covered by O.XXI R.99 of the Code, is the submission of the learned counsel.”

14. It was further held that,

“Highlighting that the right to adjudication of a dispute whether it be in respect of right title and interest of a party in an immovable property which, no doubt, is a substantive right, the Apex Court has held that it is only a procedural right to which no one has a vested right. Whatever be the substantive right of a party, the right to an adjudication of a dispute thereto is regulated by the procedure laid down by the legislature. The object of the law is primarily to meet out justice. The rules of procedure have been devised to decide the disputes to render substantive or at best substantial justice. By virtue of the amendment in 1976 to the Code the right to adjudication of the dispute in respect of a claim to right, title or interest of any person, after the passing of a decree with respect to that property, has to be decided by the court called upon to execute that

decree in accordance with the procedure laid down under O.XXI Rr.97 to 103 of the Code, as may be applicable. If a third party to the decree on the plea that he being not a party to such decree can file a fresh suit to vindicate his right, title or interest claimed over the property overlooking and negating the procedure covered by the above rules under O.XXI, then, naturally, it would undermine the faith of the public in the efficacy of the law and administration of justice by the court and further the litigation can be continued with no end in sight. The Apex Court in the above decision, emphasizing that the right to adjudication of a dispute over the claim of any person as to his right, title or interest in an immovable property is only a procedural right to which no one can claim a vested right, has stated thus.

“The faith of the plea in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Any weakening like in the judicial process would rip apart the edifice of justice and create a feeling of disillusionment in the minds of the people of the very law and courts. The rules of procedure have been devised as a channel or man and alamameter (sic) for the mankind. It is a foundation for orderly human relations. Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of the court to subvert justice. The court has, therefore, to wisely evolve its process to aid expeditious adjudication and would preserve the possession of the property in the interregnum based on factual situation. Adjudication under O.21, Rr.98, 100 and 101 and its successive rules is *sine qua non* to a finality of the adjudication of the right, title or interest in the

immovable property under execution.”

12. We find that even before Nooruddin's case (cited supra) the Apex Court has pointed out that the words 'any person' covered by O.XXI R.97 of the Code includes persons other than the judgment debtor or those who claim derivative title from the judgment debtor. Even where a person sets up his own right, title or interest *de hors* the judgment debtor and he resists the execution of the decree, it has been held in *Bhanwar Lal v. Satyanarayain* (1995) 1 SCC 6), the execution court, by virtue of the amendment in O.XXI R.97 of the Code, has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession over the immovable property was legal or not. True, in that decision, the impact and scope of the amendment in 1976 to the Rules covered by O.XXI Rr.97 to 103 of O.XXI has not been dealt with, which, we find, was considered in the latter decision in *Nooruddin's* case, discussed above. The Apex Court in *Babulal v. Rajkumar* (AIR 1996 SC 2050), relying on *Bhanwar Lal's* case (1995) 1 SCC 6) has held that an obstruction, even before dispossession, put forth by a party moving an application claiming a right, title or interest in a property covered by the decree the decree in execution has to be adjudicated, conducting an enquiry as enjoined under O.XXI R.98 and a finding is required to whether an anterior obstruction by any person whether he be a party and not bound by the decree in execution, before dispossession could be entertained by the execution court and whether an enquiry over such claim is warranted has been settled by the Apex Court clarifying that such claim required to be enquired into and a

finding recorded and that the order thereof would squarely fall as a decree as covered under R.103 of O.XXI and it shall be subject to an appeal. Adverting to the entertainability of a claim by any person in execution, before his dispossession by an application under O.XXI R.97 of the Code, the Apex Court has held thus, in the above decision.

“The determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under O.21 R.98, which is an order and is a decree under O.21 R.103 for the purpose of appeal or otherwise as if it were a decree. Thus, the procedure prescribed is a complete Code in itself.” (emphasis supplied)

13. the Apex Court again in *Brahmadeo Chaudhary v. Rishikesh Prasad Jaiswal* (AIR 1997 SC 856) reiterating the principles laid down in *Bhanwar Lal's* case (cited supra) set at rest all controversies as to whether an obstructer resisting a decree for possession as being a stranger to such decree has the right to approach the court executing that decree before his dispossession. It has been held that such stranger can agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even prior to his dispossession. Pointing out that O.XXI R.97 deals with stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree holder, and O.XXI R.99 contemplates with a subsequent stage where a stranger after dispossession in execution of the decree seek adjudication of his independent right, title

and interest over the property delivered over, the Apex Court held that both types of enquiries are clearly contemplated by the scheme of O.XXI and "it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before.

" In the above decision, what has been stated earlier in *Babulal's* case (cited supra), but without referring to that decision, has been emphasized expressing thus:

"Provisions of O.XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree holder and whose attempts at executing the said decree meet with rough weather."

15. It was further held that,

"Where the provisions covered by Rr.97 to 103 of O.XXI is a complete Code by themselves, as has been held by the Apex Court, time and again, in the decisions referred to above, in the matter of adjudication over the disputes as between any person and the decree holder over a property covered by a decree for possession put in execution, where under the jurisdiction to decide such disputes vests with the execution court and none else, when the execution of a decree has led to a court sale and dispossession of the claimant, only an application under R.99 of O.XXI, would lie, if the applicant is so entitled to. A suit by a third party before any court impeaching the correctness of the court sale, setting up any claim over the property covered cannot at all be entertained."

16. From aforesaid decision, it is crystal clear that, the forum

before which the plaintiff herein ought to have been appeared is the executing court in E.P 30/2005. In other words, it is only to be held that, this separate suit filed by the plaintiff is not maintainable under the provisions of Order 21 Rules 99 to 103 of CPC. This issue is accordingly found against the plaintiff.

17. **Issues 1 to 4**:- In Unnikrishnan V. Kunhibeevi 2011(1) KLT 508 it was held by Hon'ble High Court of Kerala that,

“As the very jurisdiction of the court to entertain a suit, under the circumstances indicated, is interdicted by provisions covered by Rule 97 to 103 of Code, the inescapable conclusion which follows is that the suit filed by the plaintiff in the present case was not maintainable and it ought to have been dismissed at the threshold. The exercise done by the court below on the materials placed to find that the sale of B schedule properties under Ext.A1 decree was vitiated by fraud and material irregularity and illegality was quite unwarranted, and, in view of the conclusion reached that the suit is not maintainable, such finding has to be treated as of no consequence and devoid of any value.”

18. In the light of aforesaid decision, it is only to be held that there is no necessity to discuss issues 1 to 4 and to record a finding. All these issues are found accordingly.

19. **Issue No.5**:- Considering the facts and circumstances of

the case, there is no costs. This issue is found accordingly.

In the result, the suit is dismissed as not maintainable under the provisions of Order 21 Rule 97 to 103 CPC. It is made clear that, plaintiff herein is entitled to get exclusion of time in computing the period of limitation as provided under S.14 of Limitation Act, if the plaintiff wants to file a petition under Order 21 Rule 97 to 103, before the executing court. Considering the facts and circumstances of the case, there is no costs.

Dictated to Confl. Asst., transcribed and typed by him, corrected and pronounced by me in the open Court on this the 27th day of November, 2015.

M.I.JOHNSON,
MUNSIFF.

APPENDIX

Plaintiffs Exhibits:-

A1	5.8.2006	Copy of certificate No. L Dis 7377/06/A2 of Taluk Office, Kunnathunadu
A2	31.1.2000	Certified copy of Judgment in O.S. 210/94 of Munsiff's Court, Perumbavoor
A3	14.8.2004	Certified copy of Decree in IA No. 1106/2000 in O.S. NO. 210/94
A4	28.6.1994	Certified copy of plaint in O.S. 210/94 of Munsiff's Court, Perumbavoor
A5	31.1.2000	Certified copy of Decree in O.S. 210/94 of Munsiff's Court, Perumbavoor
A6	9.11.1995	Certified copy of written statement in O.S. 210/94 of Munsiff's Court, Perumbavoor
A7	24.10.1996	Certified copy of written statement in O.S. 210/94 of

Munsiff's Court, Perumbavoor

- A8 7.3.1099 Partition deed No. 680/99 of SRO Perumbavoor
A9 14.1.1952 Sale deed No. 160/1952 of SRO, Perumbavoor
A10 29.11.1965 Sale deed No. 3954/65 of SRO, Perumbavoor
A11 21.12.2005 Thandapper kanakku No. 3624 issued by Village Officer, Kodanad
A12 3.1.2006 Certified copy of judgment in WP(C) 36382/2005 of the Hon'ble High Court of Kerala.
A13 16.1.2009 Copy of Death certificate of Smt. Ammini issued by Registrar of Birth and death Perumbavoor Municipality
A14 24.11.2005 Petition

Defendant Exhibit :

- B1 1.11.2005 Certified copy of Delivery Report in O.S. No. 210/94 in EP 30/2005 of Munsiff's Court, Perumbavoor
B2 Thandapper kanakku No. 1828 issued by Village Officer, Kodanadu
B3 28.6.1994 Certified copy of plaint in O.S. No. 210/94 of Munsiff's Court, Perumbavoor
B4 9.11.1995 Copy of written statement in O.S. No. 210/94 of Munsiff's Court, Perumbavoor
B5 20.11.2006 Certified copy of Judgment in AS 213/2005 of the Court of the Addl. District Court, North Paravoor.
B6 20.11.2006 Certified copy of Decree in A.S. 213/2005 of the Court of the Addl. District Court, North Paravoor.
B7 5.1.2009 Petition

Witness Exhibits:

- X1 File No. A2-7377/2006 Taluk Officer, Kunnathunadu.

Court Exhibit :

- C1& 17.12.2005 Commission report and rough sketch submitted
C1(a) by Adv. C.V. Babu

Plaintiff's Witness:-

PW1 7.7.2009 Kamalakshi

PW2 10.7.2009 C.K. Prakash

Defendant's Witness : Nil

Id/-
MUNSIFF.

//true copy//

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Copy of Judgment in O.S.No. 365/2005	
Dated	27.11.2015