

Between

And

This suit is coming on for final hearing before me on 06-08-2025 and stood over for consideration to 12-08-2025 and on the same day the Court delivered the following.

JUDGMENT

Suit for partition and consequential injunction.

2. **The plaint averments, in brief, are as follows:** - The 1st plaintiff is the wife of Allesh, and the 2nd and 3rd plaintiffs are the children of Allesh

and the 1st plaintiff. Sri. Allesh has not been heard of since 05/11/1998, and his whereabouts are not known. He has not been seen or heard of by any persons who would have seen or heard of him. Thus, Allesh is presumed to have died. The plaintiffs are the legal heirs of Allesh. The plaintiffs are Christians and are governed by the Indian Succession Act. Sri. Allesh's parents had passed away. The plaint schedule property originally belonged to the father of Allesh, namely, Augustine. After his death, the legal heirs executed a partition deed No. 2192/1985 of Pathanapuram SRO, in which A schedule property was allotted to the share of Allesh. After that, Allesh and his brother Varghese executed an exchange deed No. 4785/1986 of Pathanapuram SRO, in which the B schedule was allotted to Allesh. Thus, the plaint schedule property was in the possession of Allesh, and he was residing in the building situated therein. Thereafter, one Retnamma filed a money suit against Allesh, before this court as OS 280/1998, and she obtained a money decree. On the basis of the decree, she attached one-half of the right of Sri. Allesh over the plaint schedule property and on the basis of EP 24/2001, she obtained a sale certificate with regard to one-half right of Sri. Allesh over the plaint schedule property. So far, Smt. Retnamma has not filed any delivery application. She sold the one-half rights over the plaint schedule property in favour of the defendant by virtue of the sale deed No. 177/2011 of the Pathanapuram SRO. The defendant has not filed any delivery application either. By virtue of the said sale deed, now the

plaintiffs and the defendant are in joint possession of the plaint schedule property. The plaintiffs have a prima facie case, and the balance of convenience is in their favour. The plaintiffs demanded the defendant to effect partition of one-half rights over the plaint schedule property of the plaintiffs. The defendant is somehow evading. The plaintiff directly demanded partition on 20/06/2019. But partition was not effected. Hence, this suit.

3. The defendant filed written statement contending the following:-

The suit is not maintainable either in law or on facts. The plaint averments lack bonafides. Alles, husband of the 1st plaintiff, is very much alive. He is heavily indebted to several people, and hence, he moved to some faraway place with the knowledge and concurrence of the plaintiffs. At the time of his mother's funeral, he came and paid the last homage. The allegation that the said Alles is unheard of is wrong and unsustainable, he is very much alive, and the plaintiffs know that also. The averments that the plaintiffs and defendant are in joint possession are wrong and hence denied. Plaintiffs never demanded partition, and they have no right in the plaint schedule property and are not entitled to any share. The Alles was having 40 cents of property which was pledged to the Kollam District Co-operative Bank, Pathanapuram Branch in loan transaction No. 17/95-96 dated 19/12/1995 of which 20 cents were attached sold by Munsiff court,

Punalur in EP 24/2001 and the remaining 20 cents of property is proceeded with sale proceedings for recovery of loan debt. Now there is no property available as alleged in the plaint as partible. The plaintiffs have no cause of action, and the alleged cause of action is wrong and unsustainable. The suit property is not partible. The prayers sought in the plaint are not allowable. Hence this suit is liable to be dismissed with compensatory costs of the defendant.

4. Based on the above-mentioned pleadings, the following issues are raised for consideration: -

- 1) Whether the plaintiffs have any cause of action to institute the suit?
- 2) Whether the plaint schedule property is partible?
- 3) Whether the plaintiffs are entitled to get a preliminary decree as prayed for?
- 4) Whether the plaintiffs are entitled to get a final decree partitioning the plaint schedule property by metes and bounds as prayed for?
- 5) Whether the plaintiffs are entitled to get a decree of permanent prohibitory injunction as prayed for?
- 6) Relief and costs?

5. From the plaintiffs' side, PW1 and PW2 were examined, and Exts. A1 to A5 documents were marked. Ext. X1 was also marked. From

the side of the defendant, DW1 and DW2 were examined, and no document was marked.

6. Heard both sides.

7. **Issue Nos. 1 to 6:** - These issues are considered together for brevity, convenience, and to avoid repetition of facts. Here the plaintiffs have filed this suit seeking the relief of partition of plaint schedule property and consequential injunction. According to the plaintiffs, the husband of the first plaintiff and the father of the second and the 3rd plaintiffs, Mr. Allesh, has not been heard of since 05.11.1998, and his whereabouts are not known, and he has not been seen or heard by any persons who would have naturally seen or heard him if Allesh was alive. Hence, according to the plaintiffs, Allesh is presumed to be dead, and the plaintiffs are the legal heirs of Allesh. It was also contended that the plaintiffs are Christians and are governed by the provisions of the Indian Succession Act. According to the plaintiffs, the plaint schedule property belongs to Allesh by virtue of an exchange deed No.4785/1986 of Pathanapuram SRO, and that the property is in the possession and enjoyment of the plaintiffs. It is the specific case of the plaintiffs that one Ratnamma filed a money suit against the Allesh as OS 280/1998, and an exparte decree was obtained. On the basis of that decree, Ratnamma attached one-half right of Sri Allesh over the plaint schedule property, and she obtained a sale certificate regarding half right over the plaint schedule property as part of EP No. 24/2001. Thereafter,

Ratnamma sold her one-half right over the plaint schedule property in favour of the defendant by virtue of a sale deed No.177/2011 of Pathanapuram SRO. Now, The specific case of the plaintiffs is that even though the plaintiffs demanded partition of the plaint schedule property, the defendant is not amenable.

8. To prove the case of the plaintiffs, first plaintiff mounted the box and gave evidence as PW1. PW1 filed affidavit in lieu of examination in chief reiterating the plaint averments. During her cross-examination, PW1 deposed before the court that she is not aware of the loan transaction of Allesh with the District Cooperative Bank. PW1 also denied the fact that Allesh borrowed money from Ratnamma. According to PW1, the plaint schedule property is cultivated with rubber and the defendant is taking yield from the plaint schedule property. PW1 further added that she is remitting land tax for the property. When Exhibit A4 was shown to witness, PW1 testified that she remitted land tax online and produced the tax receipt. When a specific question was put to PW1 regarding the auction conducted by the bank, she denied the same and added that all those things are false. According to PW1 Allesh left from his native land on 05.11.1998 and the present suit was filed on 2019. PW1 further added that during this period she preferred a complaint before the police station and the police assured that they will enquire the matter and no receipt was given for the complaint. According to PW1 since she was busy with raising her children

she did not made any further enquiry. PW1 further added that since 1998 she is residing in another house. PW1 further added that she went to the funeral of her mother-in-law. When a specific question was put to PW1 that as she did not attend the funeral of Allesh's mother, she did not saw Allesh, PW1 replied in negative. According to PW1, she does not have any problems with her husband and Allesh promised to return home after going to his brother's home. According to PW1, she does not have enough financial stability to enquire about Allesh. PW1 further added that when her children became major they also tried to enquire about their father. But no information was received. When a specific question was put to PW1 that she does not have any joint possession of the property she admitted the same but added that she is remitting land tax. PW1 further added that the defendant did not hand over the title deed and they would not allow the plaintiffs enter the plaint schedule property. PW1 further added that she also took care of a sister of Allesh, who was not well. PW1 further added that she left the house only after the Allesh went missing. PW1 further admitted the fact that she filed another case OS 136/2021 claiming partition of that sister's property. When a suggestion was made to PW1 that Allesh is still alive, she denied the same. During her re-examination she deposed before the court that if Allesh was alive he would definitely come to meet her. To prove the contentions of plaintiffs, Exhibit A1 to A4 documents were marked. Exhibit A1 is the Exchange Deed No. 4785/1986.

Exhibit A2 is the Sale Deed No. 177/2011, Exhibit A3 is the original tax receipt dated 06.04.2019 and Exhibit A4 is the land tax receipt dated 27.08.2024.

9. From the side of the plaintiff, Village Officer, Piravanthoor was examined as PW2. He identified document No. 5 produced from the side of the plaintiffs, and deposed before the court that it contains the signature and seal of the Village Officer. He further added that the signature is that of the Village Officer, Punnala, and that he was holding the additional charge.

10. During his cross-examination, he deposed before the court that Ext. A5 is dated 31/08/2024. He further added that the document was issued after conducting a due enquiry with the neighbours, local people and the ward member. He further added that those persons were not summoned or their statements were not recorded. He further added that there is no entry in Ext. A5 to the effect that the officer who signed it was holding the additional charge. He further added that the Village Officer has the power to issue such certificate regarding the missing of a person and by a government order Village Officer was authorised to do so. He further added that the power to conduct an enquiry regarding the civil death of a person is vested in the RDO. He further added that on requisition, Village Officer would submit a report to the RDO, and that Ext. A5 is not issued in

such a manner. PW2 denied the suggestions put to him, challenging the veracity of Ext.A5 document.

11. To prove the case of the defendant, the defendant was examined as DW1. DW1 filed affidavit in lieu of examination-in-chief, reiterating the averments in the written statement. DW1 admitted the fact that the plaint schedule property is the share of the 1st plaintiff's husband as his family share. When a specific question was put to DW1, whether she had any right over the plaint schedule property, her answer was that she was given an oral direction to look after the property. DW1 further admitted the fact that the 1st plaintiff is the wife of Allesh and the 2nd and 3rd defendants are their children. DW1 further added that she purchased 20 cents, which was part of the plaint schedule property, from the children of one Ratnamma. She further added that she has not filed any case before the Munsiff Court. DW1 further added that she effected mutation in her name regarding the 20 cents of property and is paying land tax for the property. When a specific question was put to DW1 that she did not have any right over the plaint schedule property, as Ratnamma did not take any steps to get possession of the plaint schedule property, she answered that she was given oral direction to manage the property. She further added that Allesh entrusted the property to her in 1998. Further, she added that the property was entrusted to her husband. According to DW1, Allesh came to attend the funeral of his mother on March 24th, and the date of his mother's death is

specified in the written statement. According to DW1, Allesh came to attend the funeral of his mother and now he is at Palakkad. DW1 deposed before the court that the marriage of the 2nd plaintiff was conducted in 2014, and that Allesh did not attend any of the ceremonies in connection with the marriage. When a specific question was put to DW1 that if Allesh was alive, he would have come to attend the marriage of his son, DW1 answered that the son went to Palakkad to meet Allesh. DW1 further admitted that she is not aware of the case number wherein the Munsiff Court attached the 20 cents of property. She further added that the attachment petition was filed by her husband. DW1 further added that the bank attached the property due to the default in repayment. DW1 further added that she purchased the property sold through court auction, and the sale consideration was paid by her husband. When a suggestion was made to DW1 that Allesh is not alive, she denied it. When a specific question was put to DW1 that she did not reveal in the written statement that her husband's 40 cents of property was sold to clear off the debts of Allesh, DW1 answered that she would produce a document to prove the same. According to DW1, Allesh orally directed to look after the property and to look after his mother and sister. When a specific question was put to DW1 that she had not disclosed in her written statement that the plaint schedule property is under the possession and management of Varghese for the last 30 years, DW1 answered that an oral direction was given to look after the

property. DW1 further added that she had not obstructed the plaintiffs from entering the plaint schedule property

12. From the side of the defendant the Bank Manager, Kerala Bank, Pathanapuram branch was examined as DW2. She deposed before the court that the records regarding loan details in 2010 are not available and that documents from 2013 onwards are only available.

13. Here, the present suit is filed seeking the relief of partition and consequential injunction. It can be seen that there is no dispute about the fact that the plaintiffs are the legal representatives of Allesh. The main objection raised by the defendant is that there is no prayer for a declaration of civil death of Allesh, and there is no FIR or the order of the RDO stating that Allesh has not been heard for so many years. It is the specific case of the plaintiffs that Allesh was not heard of since 1998, and even though she filed a complaint before the police, no receipt was given. Here, it can be seen that from the plaint schedule property, the defendant is entitled to get a half share as the purchaser, and the plaintiffs are entitled to get the other half. There is no evidence on record to evidence the fact that Allesh is alive. On the other hand, the oral evidence and Ext. A5 makes it clear that the Village Officer has given a certificate to the effect that, as per the local enquiry conducted, it is certified that Allesh has not been heard for the last 15 years. It is a settled point of law that if a person is not heard for more than 7 years, then the presumption is that he is not alive. Here, the

plaintiffs are the persons who would have heard of Allesh had he been alive. Even though the defendant contended that Allesh is alive, no steps were taken to prove the same. Section 108 of the Indian Evidence Act, 1872 states that “Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he has been alive, the burden of proving that he is alive is shifted to the person who affirms it.” In light of S.108 of the Indian Evidence Act, it can be seen that here, the plaintiff proved the fact that Allesh is not heard of for more than 7 years; hence, as per the provision of law, the burden shifts to the defendant to prove that Allesh is alive, as the defendant alleges so. The only contention of the defendant is that Allesh is at Palakkad and that he came to attend the funeral of his mother. But not even a single witness was examined to prove that Allesh had come to attend the funeral of his mother. Even otherwise, the date of death of Allesh’s mother is not known. The defendant herself admitted the fact that Allesh did not come to attend his son’s marriage. Considering the evidence on record, it can be seen that the defendant failed to prove that Allesh is alive. On the other hand, the evidence adduced by the plaintiffs proves the fact that Allesh is not heard of for more than seven years. Hence, this court is of the view that the relief claimed by the plaintiffs can be granted as a presumption of civil death of Allesh arises. There is no dispute to the fact that the plaintiff schedule property is partible.

Even though the defendant contended that her husband sold 40 cents of property to clear off the liabilities of Allesh and to clear the encumbrance over the remaining 20 cents of the plaint schedule property, no evidence was adduced to prove it other than the oral testimony of the defendant. Considering the evidence on record, this court is of the view that the plaintiffs are jointly entitled to get $\frac{1}{2}$ right over the plaint schedule property. Thus, issues No.1 to 4 are answered accordingly, in favour of the plaintiffs.

14. It is to be noted that in the plaint, the plaintiffs have also sought for a decree of perpetual injunction against the defendants. But it is to be noted that the plaintiffs and the defendant are the co-owners of the plaint schedule properties. It is the settled law that one co-owner cannot claim an injunction against the other co-owner with regard to the property owned jointly. The Hon'ble Apex Court in **Mohammed Baqar and Others v. Naim un Nisa Bibi and Others** reported in **AIR 1956 SC 548**, held that "The parties to the action are co-owners, and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them unless there is a denial of their right to their knowledge by the person in possession, exclusion and ouster following thereon for the statutory period." Thus, the only case in which a co-owner can claim an injunction against the other co-owner is in the case of ouster. Here, no such ouster is made out from the evidence. The plaintiffs do not have a case that the

defendant is trying to oust them from the plaint schedule properties. Hence, this court is of the view that if an order restraining the defendant is passed, it will cause injury to the defendant's right of enjoyment of the plaint schedule property as a co-owner. Hence, issue No.5 is answered accordingly. The general rule is that costs shall follow the event. Considering the relationship between the parties, they are directed to bear their respective costs. Thus, all the issues are answered accordingly.

In the result: The suit is decreed as follows:

- 1) The plaint schedule property is found partible.
- 2) A preliminary decree of partition of plaint schedule property by metes and bounds is granted.
- 3) The plaintiffs are jointly entitled to get $\frac{1}{2}$ share of the plaint schedule property.
- 4) The defendant is entitled to get $\frac{1}{2}$ share over the plaint schedule property.
- 5) The defendant's share shall be allotted on payment of requisite court fees.
- 6) The plaintiffs are entitled to be put in possession of their share demarcated in the final decree.
- 7) Equities, if any, will be considered at the final decree proceedings.
- 8) The parties shall bear their respective costs.

- 9) The suit is hereby converted into FDA 15/2025. The parties shall appear on 22/09/2025.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in open court on this the 12th day of August 2025)

Sd/-
Civil Judge (Junior Division)

Appendix

Witness for the Plaintiff

PW1	19-11-2024	Ponnamma K
PW2	27-11-2024	Sudheeran B, Village Officer.

Exhibits for the Plaintiffs

A1	18-11-1986	The Exchange Deed No.4785/1986.
A2	21-01-2011	The Sale Deed No.177/2011.
A3	06-04-2019	The Tax Receipt issued from Village Office, Piravanthoor.
A4	27-08-2024	The Land Tax Receipt issued from Village Office, Piravanthoor.
A5	31-08-2024	Certificate issued from Village Office, Piravanthoor.

Witness for the Defendant

DW1	11-12-2024	Jaya Varghese
DW2	01-07-2025	Pushpalatha C

Third Party Exhibits

X1	27-11-2024	Certificate issued from Village Office, Piravanthoor.
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Id/-
Civil Judge (Junior Division)

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Typed by : Reeja Jasmine M.V
Compared by :

CIVIL JUDGE (Junior Division)