

IN THE COURT OF THE CIVIL JUDGE OF MANJERI.
Present:- Sri.Arun Bechu.N.N, Civil Judge (Senior Division) Judge.

Tuesday, the 9th day of April, 2024

EXECUTION APPLICATION No.9/2024

in

EXECUTION PETITION No.39/2023

in

INTERLOCUTORY APPLICATION No.941/2016

in OS No.105/2006

Between:-

P.T.Kunhalikutty, 70 years, S/o Kunhahammed,
Parayan Thodika House, Nilambur amsom desom and
PO, Nilambur Taluk, Malappuram District.

Claim Petitioner/
2nd respondent

And:-

1. Parayan Thodika Kunhayisha, 75 years,
D/o Kunhahamed, Kappil House,
Vazhikkadav amsom desom, PO Marutha,
Nilambur Taluk, Malappuram District.
2. Parayan Thodika Nafeesa, W/o Kunhi Moidu,
Kappil House, Nilambur amsom desom,
Malappuram District.
3. Parayathodika Sainaba, D/o Unnimothe,
Parayan thodika House, Vazhikkadavu amsom
desom, Marutha Post, Malappuram District.
4. Parayan Thodika Kunhimammed,
S/o Unnimothe, Parayanthodi House,
Vazhikkadavu amsom desom, Marutha Post,
Malappuram District.

Respondents/
EP Petitioners/
R1,3 to 27

5. Parayan thodika Hussain, S/o Unnimothi, Parayathodika House, Vazhikkadavu amsom desom, Marutha Post, Malappuram District.
6. Pathummakutty, W/o Aboobacker, Pilathodan House, Mampad amsom desom, Malappuram District.
7. Parayan thodika Ayisha, W/o Mohammedali Moothedath Parakkal House, Manimooli Post, Malappuram District.
8. Parayan thodika Amina, W/o Rouf, Pilathodan House, Mambad amsom desom, Malappuram District.
9. Parayanthodika Kadeesa, D/o Kunhahamed, Parayanthodika House, Marutha, PO, Vazhikkadavu amsom desom, Malappuram District.
10. Fathima, W/o Parayanthodika Hamza, Kanhirathingal, Marutha amsom desom, Malappuram District.
11. Suneer, S/o Parayanthodika Hamza, Kanhirathingal, Marutha amsom desom, Malappuram District.
12. Abid, S/o Parayanthodika Hamza, Kanhirathingal, Marutha amsom desom, Malappuram District.
13. Jafer, S/o Parayanthodika Hamza, Kanhirathingal Marutha amsom desom, Malappuram District.
14. Shameer, S/o Parayanthodika Hamza, Kanhirathingal Marutha amsom desom, Malappuram District.
15. Nishad, S/o Parayanthodika Hamza, Kanhirathingal, Marutha amsom desom, Malappuram District.
16. K.V.Thanooja, W/o Kakkodan Musthafa, Kakkodan House, Sulthan Batheri, Wayanad District.

Respondents/
EP Petitioners/
R1,3 to 27

17. K.P Shahina, W/o Eranjikkal Haneefa,
Shahini Manzil, Nilambur amsom desom,
Malappuram District.
18. K.V.Muhammed Sajeer, S/o K.V.Mohamedali,
Shahina Manzil, Nilambur amsom desom,
Malappuram District.
19. Anwar Sadath, S/o K.V.Mohamedali, Shahina
Manzil, Nilambur amsom desom, Malappuram
District.
20. Sainaba, D/o Pilakkalkandi Ummer,
Parayanthodi House, Padikkunnu, Janathappadi,
Nilambur Post, Nilambur Taluk, Malappuram
District.
21. Muhammadali, S/o Pilakkalkandi Ummer,
Pilakkalkandi House, Kalarikkunnu, Manalody,
Nilambur Taluk, Malappuram District.
22. Ilsmunneesa, D/o Abdurahiman,
Musliyarakath House, Charamkulam,
Chandakkunnu Post, Nilambur Taluk,
Malappuram District.
23. Sakkeer Hussain, S/o Abdurahiman,
Thahir House, Poochakkuth, Jilla Krishi Thottam,
Chungathara Post, Nilambur Taluk, Malappuram
District.
24. Rahmath, W/o Late Parayanthodika
Abdul Azeez @ Azeez, Parayanthodi House,
Kalathinkadavu, Nilambur amsom desom,
Nilambur Post, Malappuram District.
25. Ahammedkutty, S/o Late Parayanthodika
Abdul Azeez @ Azeez, Parayanthodi House,
Kalathinkadavu, Nilambur amsom desom,
Nilambur Post, Malappuram District.
26. Asitha, D/o Late Parayanthodika
Abdul Azeez @ Azeez, Parayanthodi House,
Kalathinkadavu, Nilambur amsom desom,
Nilambur Post, Malappuram District.

Respondents/
EP Petitioners/
R1,3 to 27

- | | | |
|--|---|--|
| <p>27. Anula, W/o Late Parayanthodika
Abdul Azeez @ Azeez, Parayanthodi House,
Kalathinkadavu, Nilambur amsom desom,
Nilambur Post, Malappuram District.</p> | } | <p><u>Respondent</u>
<u>EP Petitioners/</u>
R1,3 to 27</p> |
|--|---|--|

This petition coming on this day for hearing before me in the presence of Sri.P.P.Muhammed Noufal, Advocate for the petitioner, and of Sri.Abdussalam Kolakkanni Advocate for R1, R2 to R27 are being not entered in appearance and the court passed the following:-

ORDER

This order is passed in a petition filed under Section 47 of the Code of Civil Procedure.

2. The averments in the petition can be summarised as follows:- The petition schedule properties belonged to the petitioner. It originally belonged in jenmam to Nilambur Kovilakam and was obtained by the father of the petitioner, Kunhahammed, by lease. The father transferred the property in favour of the petitioner, brother Ahammedkutty and Assain by document No.800/1955. Later, by death and by release deed 2336/2010, the petitioner became the absolute owner of the petition schedule property. The first respondent filed O.S. 105/2006 for partition of properties left behind by the father and it was decreed on 8.4.2009. The appeals preferred by the petitioner were dismissed. But, in the execution petition, Amin had attempted to deliver the petition schedule property which was not partitioned in O.S. 105/2006. It was not included in the plaint schedule. Document 800/1955 was produced and marked as Ext.B4 in the suit. It was observed that Ext.B4 does not form part of A schedule property in the suit. In the present execution petition attempt is being made to deliver property not covered

by the plaint schedule. The decree, insofar as it relates to the petition schedule property, is a nullity and this aspect is to be considered by the executing court. Another point is that as per the preliminary decree B schedule item No.1 is also ordered to be partitioned. The total property in B schedule item 1 is 50.66 cents. The petitioner is the owner of adjacent property having an extent of 31.5 cents covered by purchase certificate 817/2004. This does not form part of the plaint schedule property. However, the commissioner partitioned 81.5 cents instead of 50 cents. So, the decree is a nullity on this count as well. Hence, an order is to be passed that the petition schedule property does not form part of the plaint schedule property and cannot be delivered in execution of final decree.

3. The first respondent filed objection opposing the application. It is stated that the contentions regarding title are incorrect. These were raised in the suit as well as final decree application and were decided against the petitioner. The decision was challenged before the District Court, Honourable High Court and the Honourable Supreme Court and all the appeals were dismissed. No resort can be had to Section 47 to raise the issue again. The contentions raised now were already raised in E.A. 2/2023 and that was dismissed. The only intention is to protract the delivery in E.P. 39/2023. In the final decree proceedings itself the purchase certificate 817/2004 was considered and the appeals preferred against the judgment were dismissed. In the circumstances, the application is only to be dismissed.

4. The following points arise for consideration:-

- 1) Is the final decree passed in I.A. 941/2016 a nullity?
- 2) Reliefs and costs?

5. From the petitioner's side, Exts.A1 to A7 were marked. The first respondent did not adduce any evidence.

6. Heard both sides

7. **The Points**:- OS 105 of 2006 was initiated by the first respondent

before this court to divide the assets left by her father. The present petitioner was among the defendants (the fifth defendant) in this case. The court decreed the suit on 8th April 2009, specifying the respective shares of the petitioner and the first respondent. Plaintiff A schedule items 1 to 4, excluding some portion, Plaintiff B schedule and Plaintiff C schedule were decreed to be divided. It was determined that certain items listed in Plaintiff C were to be divided only between the first respondent and another party, with each entitled to half. Subsequently, the fifth defendant challenged the decree through AS 25 of 2013 in the District Court, Manjeri, but it was rejected due to it being filed beyond the stipulated time. The fifth defendant then appealed through RSA 1238 of 2015 to the Hon'ble High Court of Kerala. Meanwhile, the first respondent filed IA 1477/2009 in the original side this court to finalize the decree, and a decree was passed on 2nd March 2015. This led the fifth and fourth defendants to appeal against the decree through AS 40/2015 and AS 41/2015 in the District Court, Manjeri. RSA 1238/2015 saw partial acceptance by the Hon'ble High Court of Kerala, modifying the preliminary decree from this court on 10th December 2015. Consequently, AS 40/15 and AS 41/15 were dismissed by the District Court on 30th November 2016. The first respondent then moved IA 941 of 2016 to finalize the decree according to the modified terms. The petitioner participated in this petition. An advocate commissioner, along with a surveyor, was tasked with measuring the properties. Based on their report (marked as Ext C1 series in the final decree proceedings), the court passed a final decree. The fifth defendant lodged an appeal as AS 32 of 2019 before the District Court, Manjeri, which was rejected on 10th August 2021. A second appeal filed against the decree before the High Court of Kerala as RSA 679 of 2021 was dismissed. The challenges against the Judgment as SLP 1580-1581 of 2024 before the Hon'ble Supreme Court of India were also dismissed.

8. Two properties are scheduled in this petition. Item 1 is stated to be

covered by Ext A1 deed 800/1955, executed by the father of the petitioner. It is stated that the rights of the other parties in Ext A1 were later obtained by the petitioner. It has an extent of 3 acres and 82 ½ cents. Item 2 has an extent of 31.5 cents. It is stated to be covered by purchase certificate 817/2004, copy of which is marked as Ext A2. It is argued that the properties covered by these documents were not the subject matter of OS 105/2006, but, the final decree was passed based on a plan that included these properties. On this premise, it is argued that the decree is a nullity.

9. It is pointed out that in Ext A3 Preliminary Judgment, it is recorded that Ext B4 therein, which corresponds to Ext A1 herein, was not included in the Plaintiff A schedule. Reference is then made to Ext A6 title document of the first respondent corresponding to Plaintiff C schedule item 1. The said property is in survey 980. It is then pointed out that as plot 22 in plan No1 in Ext C1, instead of surveyed land, unsurveyed land belonging to the petitioner, covered by Ext A1 was allotted to the first respondent. It is then argued that Plaintiff B schedule item 1 has an extent of 50.66 cents. But, the commissioner partitioned 81.55 cents. It is argued that the remaining 31.5 cents is covered by Ext A2. Reliance is placed on Ext A7 commissioner report and plan filed in OS 105/2006 prior to the report on the basis of which the final decree was passed, to argue that this particular report painted a more accurate picture of the state of affairs.

10. Ultimately, the arguments are all centred on the identity of plaintiff schedule property. Ext A7 report was remitted and thereafter, based on the subsequent report, a final decree was passed. If the properties covered by Ext A1 and A2 were included in the plan and report filed by the Advocate commissioner, the petitioner had to establish the same before passing of the final decree. Though an application was filed to set aside this report, it was dismissed. The said dismissal was not interfered with in appeals. It is now futile to contend that the identification in Ext C1 report made part of the decree is incorrect.

11. If, in the present execution petition, a property not covered by Ext C1 was about to be delivered, then, certainly, this court has to inquire into the same. But, here, the case of the petitioner is not that the properties covered by Exts A1 and A2 are not included in Ext C1; the case is that though this is included in Ext C1, the same was not part of the plaint schedule. Such a question cannot be considered by the executing court, as it would be barred by res judicata, if the argument was raised at the final decree stage and decided; constructive res judicata, if the argument was not raised at that time.

12. The assertion that the first respondent was apportioned unsurveyed land instead of surveyed land was not previously raised and is now precluded by constructive res judicata. The contention concerning the disparity in extent was advanced and decided against the petitioner, thus barred by res judicata.

13. Reliance was placed on **India Cements Capital Limited v. William, ors 2015(4) KHC 728, Chandrika Misir v. Bhaiyalal 1973KHC 595 and Saraswat Trading Agency v. Union of India and others 2004 KHC 3469** to argue that executing court has to consider the objection that the decree is a nullity. No doubt, if the decree is a nullity, it cannot be executed. But, here, for reasons stated earlier, the contentions raised do not render the decree a nullity.

14. For the reasons stated above, this application is hereby dismissed.

(Typed, corrected and pronounced by me in open Court, this, the 9th day of April, 2024).

Civil Judge
(senior Division)

APPENDIX

Witnesses examined for the Petitioners :- Nil

Witness examined for the Respondents:- Nil

Exhibits marked for the Petitioners:-

A1	20-04-1995	:	Janmam Assignment Deed
A2	28-09-2004	:	Purchase Certificate
A3	08-04-2009	:	Copy of Judgment
A4	08-04-2009	:	Copy of decree
A5	31-07-2018	:	Commissioner report in FDIA 941/2016
A6	17-09-1955	:	Document No.1769/1955
A7	28-06-2014	:	Commissioner report

Sd/-

Civil Judge
(senior Division)

Typed by –Shaini.T.T

Compared by:

1. Johnson
2. Shaini TT

.....
Copy of Order in EA.9/2024
in EP. No.39/2023, in IA.941/2016 in
OS No.105/2006
Dated: 09-04-2024
.....