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**(2012) 08 KL CK 0029**

**In the High Court Of Kerala**

**Case No :** Regular Second Appeal . No. 568 of 2012

B. Sreelatha

APPELLANT

Vs

Gopakumari Amma Pillai and Others

RESPONDENT

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**Date of Decision :** 06-08-2012

**Acts Referred:**

**Citation :** (2012) 08 KL CK 0029

**Hon'ble Judges :** Thomas P. Joseph, J

**Bench :** Single Bench

**Advocate :** T. Krishnanunni Sr and Sri. K.N. Chandrababu, for the Appellant;  
Alex N. Mathew (Kollam), Sri. H. Ramanan and Sri. P.A. Rabeez, for the  
Respondent

**Final Decision :** Dismissed

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## **Judgement**

Thomas P. Joseph, J.—The 9th defendant in O.S. No. 707 of 2003 of the court of learned Principal Munsiff, Kollam is the appellant before me. The 1st respondent filed the suit for partition of plaintiff A and B schedules and for allotment of the 1/5th share she claimed in the plaintiff A and B schedules. Appellant and defendants 2 to 9 remained absent in the suit. The 1st respondent filed proof affidavit and proved Exts.A1 to A3, C1 and C2. Based on that, the trial court passed an ex parte preliminary decree for partition. The 1st respondent filed I.A. No. 3587 for passing a final decree. The trial court passed a final decree as well. Appellant-9th defendant challenged that final decree in A.S. No. 286 of 2009 before the First Additional District Court, Kollam. That appeal was dismissed. Hence this Second Appeal.

2. I have heard learned counsel on both sides.

3. It is pointed out by the learned counsel for the appellant that to set aside the ex parte preliminary decree, appellant had filed application in the trial court. That application was dismissed against which the appellant filed C.M.A. No. 21 of 1979 before the learned District Judge, Kollam. The C.M. Appeal was dismissed against

which appellant filed O.P. (C) No. 1458 of 2011. This Court by judgment dated 05.06.2012 allowed the said Original Petition, set aside the judgment in C.M. Appeal No. 71 of 2009 and allowed the application to set aside the ex parte preliminary decree.

4. Learned counsel for the respondents has given me a copy of the said judgment.

5. It is seen from the copy of the said judgment that Ext.P7, order on I.A. Nos. 1299 and 1300 of 2009 to set aside the ex parte decree and condone delay are set aside, judgment in C.M. Appeal No. 71 of 2009 is also set aside and consequently I.A. Nos. 1299 and 1300 of 2009 are allowed. It follows that the ex parte preliminary decree is now no more. Therefore the final decree passed based on it should fall to the ground.

6. It is pointed out by the learned counsel for the 1st respondent that pursuant to the final decree, non-judicial stamp paper for Rs. 74,800/- was purchased and on that stamp paper the final decree was engrossed. Consequence of setting aside the final decree is that the 1st respondent is put to loss of Rs. 74,800/-. The 1st respondent is entitled to be compensated for the said loss, it is argued.

7. The learned counsel for the appellant has pointed out that in the judgment in O.P. (C) No. 1458 of 2011 it is observed that the said aspect could be considered while deciding this Second Appeal.

8. Having heard the learned counsel on both sides I am inclined to think that the question whether the 1st respondent is entitled to be compensated for the loss he has (allegedly) suffered on account of purchase of non-judicial stamp papers on which the final decree is engrossed (which is being set aside) could be relegated to the trial court for decision in the final decree proceedings in case the suit results in a preliminary decree. It will be open to the 1st respondent to make a claim for the said amount in the final decree proceedings (in case a preliminary decree is passed) and if any such request is made the trial court shall decide upon the said request and pass appropriate orders/adjustment as the case may be. In the light of the setting aside of the preliminary decree, as aforesaid the final decree is only to be set aside.

Resultantly, the Second appeal is allowed as under:

(i) The Judgment and decree of the learned Additional District Judge, Kollam in A.S. No. 286 of 2009 are set aside.

(ii) The final decree passed by the learned Principal Munsiff, Kollam on I.A. No. 3785 of 2008 in O.S. No. 707 of 2003 is set aside.

(iii) I.A. No. 3785 of 2008 will stand dismissed since preliminary decree stands set aside.

(iv) The trial court is directed to expedite the proceedings in the suit having regard to the fact that it is of the year 2003.

(v) If the parties have not already appeared in the trial court, they shall do so on 05.09.2012.

All pending Interlocutory Applications will stand dismissed.