

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

CRP.No. 444 of 2012 (C)

AGAINST THE ORDER IN I.A.NO.3931/2010 IN O.S.NO.678/2004 ON THE FILE OF THE JUDGE, ADDL.MUNSIFF'S COURT, THIRUVANANTHAPURAM DATED 03-07-2012.

REVISION PETITIONERS/PETITIONERS/DEFENDANTS:

1. A.SABEENA, AGED ABOUT 48 YEARS
D/O. LATE SAFIA BEEVI, THOPPIL HOUSE
KATTAKKATHU CHERI, KOLLAM.
2. A.M. NOUSHAD, THOPPIL HOUSE,
KATTAKKATHU CHERI, KOLLAM.
3. A.M. NAZAR, THOPPIL HOUSE,
KATTAKKATHU CHERI, KOLLAM.
4. A.M. NAJEEL, THOPPIL HOUSE,
KATTAKKATHU CHERI, KOLLAM.
5. A.M. NAJEEM, THOPPIL HOUSE,
KATTAKKATHU CHERI, KOLLAM.

BY ADVS. SRI.G.S.REGHUNATH
SRI.K.RAJESH KANNAN
SRI.A.S.SHAMMY RAJ
SRI.P.SHANES

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

1. JAMAL, AGED 58 YEARS
S/O. LATE MOHAMMED MUSTHAFA, MUSLIM,
PROPRIETOR OF JAMAL HOTEL,
RESIDING AT VAYALARIKATHU PUTHEN VEEDU
POWER HOUSE ROAD, THIRUVANANTHAPURAM-695 002.
2. M. MYTHEEN BEEVI,
RESIDING AT VAYALARIKATHU PUTHEN VEEDU
POWER HOUSE ROAD, THIRUVANANTHAPURAM-695 002.
3. BADARUDEEN,
RESIDING AT VAYALARIKATHU PUTHEN VEEDU
POWER HOUSE ROAD, THIRUVANANTHAPURAM-695 002.
4. SALAHUDEEN
RESIDING AT VAYALARIKATHU PUTHEN VEEDU
POWER HOUSE ROAD, THIRUVANANTHAPURAM-695 002.

R1 TO 4 BY ADV. SMT.KEERTHI SOLOMON

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 09.06.2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

I.A.NO.603/2014 IN R.C.R.NO.56/2014

DISMISSED

09/06/2015

SD/- **K.T.SANKARAN, JUDGE**

//TRUE COPY//

AHZ/

K.T.SANKARAN, J.

C.R.P. NO.444 OF 2012 (C)

Dated this the 9th day of June, 2015

ORDER

This revision is filed by the defendants in O.S.No.678 of 2004 on the file of the Court of the First Additional Munsiff, Thiruvananthapuram in I.A.No.3931 of 2010, by which, the court below refused the prayer made by the defendants to strike out the pleadings of the plaintiffs under Rule 16 of Order VI of the Code of Civil Procedure.

2. The case of the plaintiffs in a nutshell is the following: The plaint 'A' and 'B' schedule properties, situated in Sy.No.2754/1 of Thycaud village belonged to the Government, the land being a puramboke land. The Government assigned the plaint 'A' schedule property in favour of the first plaintiff as per the proceedings dated 23.6.1989. The plaint 'B' schedule property was assigned by the Government in favour of the second plaintiff. The second plaintiff executed a settlement deed in favour of the third plaintiff in respect of

C.R.P. NO.444 OF 2012 (C)

:: 2 ::

the plaint 'B' schedule property. Later, the third plaintiff executed a gift deed in the year 1996 in favour of the fourth plaintiff in respect of 375 square links of property out of the plaint 'B' schedule property. There is no boundary wall in between plaint 'A' and 'B' schedule properties which are lying contiguously. Safia Beevi, the mother of the defendants, claimed right over 8.800 cents in Sy.No.2754/2 of Thycaud village on the basis of a sale deed dated 25.5.1979. That is a sham document. There were some buildings in that property. The father of the plaintiffs was in possession of some of the buildings. The mother of defendants 1 to 5 filed R.C.P.No.98 of 1984 before the Rent Control Court, Thiruvananthapuram for eviction of the plaintiffs. That Rent Control Petition was allowed by the Rent Control Court and the appeal filed by the plaintiffs was dismissed by the Rent Control Appellate Authority. The plaintiffs challenged the judgment of the Rent Control Appellate Authority in Revision before the High Court and the case was referred to a Full Bench for hearing.

3. The reliefs prayed for in the suit were the following:

“A) To measure and survey the plaint A and B
schedule properties and demarcate the

C.R.P. NO.444 OF 2012 (C)

:: 3 ::

boundaries of the same to separate it from the properties situated around the same and permit the plaintiffs to construct a permanent boundary wall of 5 feet height with rubble foundation and burnt brick super structure with cement mortar on the boundary lines;

- B) to restrain and prohibit the defendants 1 to 5 permanently from disturbing or dispossessing the plaintiffs from the buildings in A and B schedule properties and from any other buildings in execution of the order of eviction passed in RCP.No.98/1984 confirmed in RCA No.6/1993;
- C) to allow the cost of the plaintiffs from the contesting defendants;
- D) to allow such other reliefs which this court deems fit, proper and equitable.”

4. Later, the plaint was amended and instead of relief (B), the following relief was substituted:

- “B) To restrain the defendants 1 to 5 and their agents from trespassing into the plaint A and B schedule properties or disturbing the peaceful possession and

C.R.P. NO.444 OF 2012 (C)

:: 4 ::

enjoyment of the plaintiffs over the same or from doing any act detrimental to the interest of the plaintiffs over the same.”

5. The defendants contested the suit. According to them, 8.800 cents of land in Sy.No.2754/2 and the buildings thereon belonged to Safia Beevi. Building Nos.TC.38/679 to 38/682 (new T.C.Nos.38/1373 to 1379) were in the possession of tenants including the plaintiffs. For evicting the tenants, Safia Beevi filed R.C.P.No.98 of 1984 before the Rent Control Court. The Rent Control Court ordered eviction and that order was confirmed in appeals. The revision filed by the plaintiffs as C.R.P.No.1748 of 2001 was dismissed by this Court, against which they filed S.L.P.No.3728 of 2007 before the Supreme Court. The Supreme Court dismissed the Special Leave Petition. After the plaintiffs filed counter in R.C.P.No.98 of 1984 stating that they are tenants, they got patta from the Revenue Authorities in respect of another property and produced those documents as if those documents relate to the property involved in the Rent Control Petition. The plaintiffs also denied the title of the landlady. The case of denial of title was found against the present plaintiffs.

C.R.P. NO.444 OF 2012 (C)

:: 5 ::

6. The defendants also contended that Safia Beevi filed O.S.No.519 of 1984 before the Munsiff's Court, Thiruvananthapuram when the plaintiffs attempted to construct buildings in the open space of the property involved in the Rent Control Petition. That suit was decreed and it was confirmed in appeal. E.P.No.108 of 2007 was filed by the defendants to execute the order in the Rent Control Petition and the executing court ordered eviction rejecting all the objections raised by the plaintiffs. The amin had to visit the property on several occasions due to the obstruction caused by the plaintiffs.

7. The defendants also contended that after the present suit (O.S.No.678 of 2004) was filed, one Sukumaran filed a claim petition in the execution proceedings in the Rent Control Petition claiming that he got right from the fourth plaintiff. That claim petition was dismissed and appeal therefrom was also dismissed. Likewise, one Radhakrishnan and others filed a claim petition in the execution proceedings in the Rent Control Petition contending that they got title from the third plaintiff. That claim petition was also dismissed by the executing court and it was confirmed in appeal. When the amin

C.R.P. NO.444 OF 2012 (C)

:: 6 ::

attempted to effect delivery, he was obstructed by the plaintiffs. On the application made by the defendants, the executing court directed delivery to be effected with police aid and a Commissioner was also appointed to identify the property. Accordingly, delivery was effected in part including the plaint 'A' and 'B' schedule properties involved in the present suit. On the application filed by the defendants before the executing court to deliver the portion of the property in which some constructions were made violating the decree in O.S.No.519 of 1984, the executing court appointed a Commissioner to submit a report identifying the property. Since that application was not being disposed of, the defendants filed W.P.(C) No.5267 of 2009 before the High Court. The High Court allowed the Writ Petition and directed the executing court to effect delivery of the rest of the portion of the property. Challenging that order, the plaintiffs filed S.L.P.No.7783 of 2009 before the Supreme Court. The Supreme Court dismissed the SLP granting the plaintiffs time till 31.1.2010 to vacate the property involved in R.C.P.No.98 of 1984. The plaintiffs were directed to file an undertaking to that effect. The plaintiffs failed to comply with the terms of the undertaking and the Supreme Court directed them to pay ₹25,000/- as costs to the defendants. The defendants further

C.R.P. NO.444 OF 2012 (C)

:: 7 ::

contended that the wife of the first plaintiff filed an application in the execution proceedings in the Rent Control Petition raising objections and that application was also dismissed on 5.2.2010. The application filed by the plaintiffs under Section 47 of the Code of Civil Procedure as E.A.No.176 of 2009 was also dismissed by the executing court. Since the plaintiffs failed to comply with the directions issued by the Supreme Court, the defendants applied for effecting delivery of the rest of the portion of the property and on 8.4.2010, delivery was effected in respect of the entire balance extent including the unauthorised constructions made by the plaintiffs.

8. The defendants raised a contention that the present suit is barred by res judicata in view of the proceedings and orders in the Rent Control Petition and Execution Petition as well as in the previous suit. The defendants also contended that the question of res judicata may be decided as a preliminary issue. The trial court, as per the order dated 20.3.2009 in I.A.No.5564 of 2006, declined the prayer for trying the question of res judicata as a preliminary issue. That order was challenged by the defendants in W.P.(C)

C.R.P. NO.444 OF 2012 (C)

:: 8 ::

No.18705 of 2009. A learned single Judge of this Court disposed of the Writ Petition by the judgment dated 23.9.2009 and held thus:

“4. Whatever that be, in the light of the undertaking given before the apex court, atleast by two of the plaintiffs, the tenants are bound to unconditionally surrender and vacate from the leasehold buildings even assuming that they have got some land obtaining pattas from the Government or otherwise. So much so, in the given facts of the case, the question to be considered is whether the continuation of the suit while the execution proceedings is continuing in respect of the buildings under the occupation of the plaintiffs as tenants are yet to be surrendered, crops up for consideration. That question has to be considered by the trial court taking note of all the facts and circumstances involved in the case especially the order of the apex court under Ext.P11 order, and, the undertaking given on the basis of that order by atleast two of the plaintiffs.

5. Suit for surveying and measuring of plaint 'A' and 'B' schedule properties and demarcation of its boundaries seeking an additional relief to restrain the defendants/the landlords from disturbing or dispossessing the plaintiffs/tenants, from 'A' and 'B' schedule properties and the buildings therein was instituted, admittedly, long after orders of eviction were

C.R.P. NO.444 OF 2012 (C)

:: 9 ::

passed against the tenants in the rent control proceedings. Plaintiffs had obtained assignment of the land 'A' and 'B' schedule, which are claimed to be puramboke lands, under pattas issued by the Government, is the case canvassed for the reliefs as aforementioned. Ext.P1 is the copy of the plaint in the suit. The rent control court allowed the petition for eviction moved by the landlords against the tenants/the plaintiffs in the above suit on the grounds under Section 11(2) (b) and 11(4)(i) and 11(4)(iv) of the Kerala Buildings (Lease and Rent Control) Act by Ext.P4 dated 28.3.1992. Ext.P1 suit was instituted by the tenants nearly after a decade on 3.4.2004. Ext.P4 order would disclose that plaintiffs were the 6th, 7th, 8th and 11th counter petitioners in the rent control petition giving rise to Ext.P4 order. On the basis of the objections raised by the aforesaid tenants and others proceeded in the eviction proceedings, one among the points raised for consideration by the rent control court was whether the denial of title advanced by the counter petitioners 6, 7, 8, 10 and 11 bona fide. The very same pattas and other connected documents, on which the suit had been instituted for the reliefs claimed, had been produced to prove the denial of title of the landlords before the rent control court. The denial of title canvassed by the tenants on the basis of such documents was found to be

not bona fide. Perusing Ext.P4 order passed by the rent control court, which has become final and conclusive, it is seen, so far as the building covered by the rent control proceedings the landlord tenancy relationship continued between the parties and the tenants are liable to surrender vacant possession. In view of the orders passed by the apex court in the S.L.P., and the undertaking given by two of the tenants, who are admittedly two among the four plaintiffs in the suit, and such undertaking binding on all the plaintiffs, the tenants are bound to surrender vacant possession of the leasehold premises on or before the date fixed by the apex court and so unconditionally undertaken by them for enjoying that extended grace period in avoiding eviction. So, in the given facts of the case, any further step in trial of the present suit would result in negating and setting at naught the order passed by the apex court and the undertaking given by the tenants/plaintiffs.

6. Is the court helpless when confronted with a situation where the facts and circumstances ex facie demonstrate that the cause sought to be agitated, though not specifically interdicted by any law for the time being in force, would tantamount to the majesty of the court, its supremacy and, further, tend to flagrant flouting of the undertaking given in compliance with the orders of

the apex court? Even if the ordinary rules of procedure there is no remedy, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. So much so, the question whether any further step in trial of the suit can be continued till honouring of the undertaking given in surrendering vacant possession of the leasehold premises by the plaintiffs/tenants in compliance of the orders of the apex court has to be considered by the trial court.

7. In the given facts of the case the petitioners in the writ petition can move an application before the trial court seeking for stay of all further proceedings in the suit under Section 151 of the CPC, till the period fixed by the apex court under Ext.P11 order for surrender of the leasehold premises by the tenants. If any such application is filed by the petitioners, within a period of three weeks from the date of this judgment, the court below shall consider and dispose that application, after hearing both sides, taking note of the observations made above and in accordance with law, within a further period of two weeks. The further proceedings of the

C.R.P. NO.444 OF 2012 (C)

:: 12 ::

case including local inspection by the Commissioner, who has been appointed by the court on the application of the plaintiffs, shall proceed and continue only after a decision is taken on the orders passed by the court on the application, if any, moved within the time by the petitioner before the court below. In the light of the above directions, the challenges against Ext.P8 order canvassed by the petitioner are not examined in detail by this Court; but, in case, the court below pass any order to proceed with the trial of the suit, it is open to the petitioner to approach this Court again to canvass the correctness of Ext.P8 order. Reserving the right of the petitioner to do so, the writ petition is disposed.”

9. Thereafter the defendants filed I.A.No.3931 of 2010 to strike out the pleadings of the plaintiffs. The court below, by a detailed order dated 3.7.2012, dismissed that application, against which the defendants have filed this Revision.

10. Learned counsel for the revision petitioners submitted that excluding an extent of 1.45 cents, the balance portion out of the 8.800 cents of land claimed by the revision petitioners was acquired by the Government.

C.R.P. NO.444 OF 2012 (C)

:: 13 ::

11. Heard the learned counsel for the revision petitioners and the learned counsel for the respondents.

12. On going through the order passed by the court below in I.A.No.3931 of 2010, in the light of the facts and circumstances of the case, I do not think that this is a fit case where the pleadings of the plaintiffs are liable to be struck out. At the same time, the contention raised by the defendants that the question of res judicata needs to be tried as a preliminary issue, requires reconsideration as observed in the order dated 23.9.2009 in W.P.(C) No.18705 of 2009. It is relevant to note that the rejection of the prayer made by the defendants to try the question of res judicata as a preliminary issue (in I.A.No.5564 of 2006) was under challenge in W.P.(C) No.18705 of 2009. When that Writ Petition was being considered, time for surrendering the property as per the direction of the Supreme Court was not over. Therefore, the learned single Judge observed that the defendants could move an application before the trial court seeking stay of all further proceedings in the suit till the period fixed by the Supreme Court for surrender of the leasehold premises by the

C.R.P. NO.444 OF 2012 (C)

:: 14 ::

tenants was over. Accordingly, the learned single Judge observed that the challenge against the order in I.A.No.5564 of 2006 was not examined in detail. It was observed that in case the court below passes an order to proceed with the trial of the suit, it would be open to the defendants to approach the High Court again to canvass the correctness of the order in I.A.No.5564 of 2006.

13. In the peculiar facts and circumstances of the case, I am of the view that the proper course to be adopted is to direct the court below to consider the question of res judicata raised by the defendants as a preliminary issue. If such a course is adopted, the plaintiffs will have no grievance that their contentions were not considered on the merits. On the other hand, if accepting the contention of the defendants the pleadings of the plaintiffs are struck out, the plaintiffs would be barred from raising any of the contentions in the suit. If the trial court finds that the present suit is hit by res judicata, the suit itself can be disposed of on that preliminary issue. If the court finds that the suit is not hit by res judicata, the suit is to be tried and disposed of. It is made clear that if the court below finds that for disposing of the preliminary issue, an inspection of the

C.R.P. NO.444 OF 2012 (C)

:: 15 ::

property or oral evidence or both is required, the court below would be justified in permitting the parties to do so. On the other hand, if the court finds that a perusal of the documents and pleadings would be enough to arrive at a conclusion on the question of res judicata, the court below would be free to adopt such a course.

14. By directing the court below to consider the question of res judicata as a preliminary issue, I am of the view that justice to both parties would be done and no question would be decided without affording an opportunity to the parties to put forward their contentions. The court below shall dispose of the preliminary issue of res judicata as expeditiously as possible and, at any rate, within a period of six months from the date of receipt of a copy of this order.

The Civil Revision Petition is disposed of as above.

(K.T.SANKARAN)
Judge

ahz/