

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

FAO.No. 28 of 2015 ()

AGAINST THE ORDER DATED 09.01.2015 IN I.A.NO.1177/2014 IN A.S.NO.15/2014 OF SUB COURT , NEYYATTINKARA FROM JUDGMENT DATED 07.12.2013 IN O.S.NO. 658/2011 of PRINCIPAL MUNSIF COURT, NEYYATTINKARA

APPELLANT(S)/COUNTER PETITIONER /1ST RESPONDENT:

VINCENT
S/O KOCHUKUNJAN NADAR, PARAYANVILA VEEDU
ARAYOOR DESOM, CHANKAL VILLAGE.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENT(S)/PETITIONERS/APPELLANTS:

1. SYLUS RAJEEVAN
S/O. KUTTI NADAR, KAMALA VILASAM BUNGLOW
MEENOTTUKAVU, ARAYOOR DESOM, CHENKAL VILLAGE
TRIVANDRUM-695 132.
2. MERCY PUSHPALEELA, KAMALA VILASAM BUNGLOW,
MEENOTTUKAVU, ARAYOOR DESOM
CHENKAL VILLAGE, TRIVANDRUM-695 132.

BY ADVS. SRI.G.P..SHINOD	()	
SRI.RAM MOHAN G	()	
SRI MANU V.	()	CAVEATORS (R1 & R2)
GOVIND PADMANABHAN	()	
AJIT G.ANJARLEKAR	()	

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 25-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

F.A.O. No.28 of 2015

Dated this the 25th day of February, 2015

JUDGMENT

The appeal is against an order on I.A.No.1177 of 2014 in A.S.No.15 of 2014 pending before the Sub Judge, Neyyattinkara, whereby the appellant/1st defendant is enjoined from making construction in the plaint schedule property. The suit is one for partition of the properties. Trial court passed a preliminary decree in the suit, which is taken in appeal by the plaintiffs. On a perusal of the judgment of the trial court, it can be seen that there is some dispute regarding the entitlement of share of the appellant/1st defendant. The ultimate question raised is whether the appellant is entitled to 1/4th share or 4.75 cents in the plaint schedule property. However, that is a matter to be decided by the court below in the appeal.

2. Heard the learned counsel for the appellant and the learned counsel for the respondents.

3. The impugned order was passed by the lower court whereby the appellant is restraining from making any construction in the portion of the property claimed to be in his possession by entering into arrangements between the co-owners. According to the learned counsel for the appellant, the extent of property for which the appellant is entitled is 15.6

cents, whereas the learned counsel for the respondents would contend that an assignment claimed to be in favour of the appellant is under challenge in the first appeal and the appellant can claim only 4.75 cents. The plea of the appellant is to allow him to construct a residential building in the property in his possession. The case of the appellant is that when he started construction of a house in the property in his possession, the suit was filed to wreak vengeance. In answer to this argument, learned counsel for the respondents submitted that the appellant claims possession in respect of a portion of the property which is abutting a pathway and the prime part of the partible property. If the appellant is allowed to proceed with construction, other sharers would suffer prejudice at the time of allotment of property in the final decree. Grievance of the appellant is that he filed an application before the trial court, where the final decree application is pending, seeking permission to proceed with the construction of a residential house, which is a dire necessity for him. Court below permitted him to make the construction on an undertaking that he will not claim any reservation or other rights in respect of the newly constructed building. In the meantime, the respondents/plaintiffs filed the application before the appellate court for injunction against the appellant/1st defendant for preventing him from proceeding with the construction. In that matter also, the appellant/1st defendant offered an unconditional undertaking to

demolish the building, if the land on which the building is to be situated happens to be allotted to some other sharer. But, the court below noticing the principle that each co-owner is entitled to every part and parcel of the land and no co-owner can make improvements/constructions in the co-ownership property without the consent of other co-owners, disallowed the prayer of the appellant and enjoined him from proceeding with the construction. Learned counsel for the appellant submitted that the court below did not consider the factual situations and legal principles correctly. According to him, the appellant is entitled to get 15.6 cents of property and the proposed construction is of a small house which can be accommodated well within the property to be set apart to him. The grievance of the respondents is that if the appellant is allowed to construct a residential building, it may cause problems in the future if it ultimately found to be demolished. That apart, appellant is attempting to construct a residential building at a prime location of the property which is abutting a pathway running through the northern side. The principle to be applied is very simple. A co-owner has no right to effect improvements or make alterations in a co-ownership property if it is likely to cause prejudice to other co-owners. This proposition is unchallengeable. The learned counsel for the appellant contended that here the parties are in separate possession of the property by an earlier arrangement. However, this point is disputed by the

learned counsel for the respondent. The fact that the appellant is in possession of some portion of the property is beyond any pale of dispute. Location of the property and the extent of the property are the matters in dispute. The principle relied on by the court below for rejecting the prayer of the appellant cannot be applied blindfolded. If a party unconditionally undertakes to a court to perform a duty as and when directed, it is settled law that understanding is equivalent to an order of injunction. Therefore, there is no legal reason for the court below to flatly deny the request, provided the other co-sharers are not prejudiced by the proposed construction. Only thing to be ascertained is where exactly the construction is to be effected by the appellant. If that does not create any injury or prejudice to other co-sharers in the future allotment of property in the final decree, the appellant can be permitted to effect construction in the joint property possessed by him if he undertakes to demolish it without any demur in case the final allotment is not in tune with his present possession of land. Therefore, the approach of the court below cannot be said to be legal in this matter. Hence it requires interference.

In the result, the appeal is allowed. The impugned order is set aside. The matter is remitted back to the court below. Appellant/1st defendant shall take out a commission from the court below to get a sketch of the property and also to identify the portion of the property where he

intends to make the construction. Court below shall consider the request of the appellant in the light of the inputs and also in the light of the unconditional undertaking, which will be furnished by the appellant/1st defendant, that he will demolish the proposed construction without any demur in the event the land, wherein the house is to be located, is allotted to some other sharers. If the location of the proposed construction does not cause injury or prejudice to the other sharers, the court below shall allow the appellant to proceed with the construction on undertaking. The court below shall take a decision in the matter within a period of one month from the date of production of a copy of the judgment.

All pending interlocutory applications will stand closed.

A. HARIPRASAD, JUDGE.

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