

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

WEDNESDAY, THE 24TH DAY OF JUNE 2015/3RD ASHADHA, 1937

OP(C).No. 1130 of 2015 (O)

OS 27/2007 OF PRINCIPAL SUB COURT, NORTH PARAVUR

PETITIONER:

ASOK KUMAR, AGED 53 YEARS,
S/O.PRABHAKARAN NAIR, MANGUZHAY HOUSE, VAYALKARA,
KUNNUKARA VILLAGE 683578.

BY ADV. SRI.DINESH R.SHENOY

RESPONDENTS:

1. KOOTTALA KSHETHRA SAMITHY,
REP. BY ITS PRESIDENT KUMARAN, S/O.AYYAPPAN.
PATHUPARAMBIL HOUSE, VAYALKARA, KUNNUKARA VILLAGE,
PIN 683578.
2. KOOTTALA KSHETHRA SAMITHY,
REP. BY ITS SECRETARY, P N VISWANATHAN,
S/O.NARAYANAN NAIR, THARAMEL HOUSE, KUNNUKARA P O
PIN-683578.
3. KOOTTALA KSHETHRA SAMITHY,
REP. BY ITS VICE PRESIDENT P B SASIDHARAN NAIR,
S/O.BALAKRISHNAN NAIR, KALLANGATTU HOUSE,
KUNNUKARA VILLAGE, PIN 683578.
4. KOOTTALA SKHETHRA SAMITHY,
REP. BY ITS TREASURER, SUKUMARAN, S/O.PAPPU
KOOTTALA HOUSE, VAYALKARA, KUNNUKARA VILLAGE,
PIN 683578.
5. COCHIN DEVASWOM BOARD,
REP. BY ITS SECRETARY, THRISSUR 680001.

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6. KERALA KSHETHRA SAMRAKSHANA SAMITHY,
REP. BY ITS SECRETARY, HARIDAS V N, S/O.NARAYANAN,
VADAKKEVEEDU, MANJALI, THELATHURTHU,
NORTH KUTHIYATHODU P O- 683594

7. HINDU AIKYA VEDHI,
ALUVA TALUK, ANGAMALLY, REP. BY ITS SECRETARY
K P SURESH, S/O.PARAMESWARAN, KAUSTHUBHAM,
CHENGAMANAD, PIN-683572.

8. UNNIKRISHNAN, SEEVOLLIMANAKKAL,
VAYALKARA, KUNNUKARA VILLAGE, PIN 683578.

9. ASOKAN, S/O.CHANDRAN,
VYALKARA, KUNNUKARA VILLAGE, PIN-683578.

R1-R3 BY ADV. SRI.M.PASHOK KUMAR
R5 BY ADV. SRI.KRISHNA MENON, SC,
R8 BY ADV. SMT.K.M.RASHMI (PARAVOOR)

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 24-06-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER(S)' EXHIBITS

- P1:- TRUE PHOTOCOPY OF THE ORDER DTD 29/11/2004 IN DBA NO 109/2004, HIGH COURT OF KERALA
- P2:- TRUE PHOTOCOPY OF THE STATEMENT DTD 25/10/2004 FILED BY THE ADDITIONAL TAHSILDAR, PARAVUR IN DBA NO 109/2004 HIGH COURT OF KERALA
- P3:- TRUE PHOTOCOPY OF THE ORDER DTD 7/3/2006 IN DBA NO 25/2006, HIGH COURT OF KERALA
- P4:- TRUE PHOTOCOPY OF THE ORDER DTD 30/3/2006 IN DBA NO 25/2006, HIGH COURT OF KERALA
- P5:- TRUE PHOTOCOPY OF REPORT OF ADV. RAJEEV NAMBEESAN DTD 7/4/2006 IN OS NO 179/06, SUB COURT, PARAVUR
- P6:- TRUE PHOTOCOPY OF THE ROUGH SKETCH PRODUCED BY THE RESPONDENTS IN RFA NO 398/2006, HIGH COURT OF KERALA
- P7:- TRUE TYPED COPY OF ORDER DTD 12/1/2007 IN IA NO 228/2007 IN OS NO 27/2007 SUB COURT, PARAVUR
- P8:- TRUE PHOTOCOPY OF REPORT AND ROUGH SKETCH DTD 27/1/2007 FILED IN IA NO 230/2007 IN OS NO 27/2007, SUB COURT, PARAVUR
- P9:- TRUE PHOTOCOPY OF THE REPORT SUBMITTED BY ADVOCATE RAJEEV NAMBEESAN DTD 12/4/2007 ADVOCATE COMMISSIONER IN OS NO 27/2007
- P10:- TRUE PHOTOCOPY OF THE ORDER DTD 30/4/2007 IN IA NO 1577/2007 IN CMA (UNNUMBERED) DISTRICT COURT, VACATION COURT, ERNAKULAM
- P11:- TRUE PHOTOCOPY OF THE JUDGMENT DTD 25/2/2008 IN WPC NO 35021/2007
- P12:- TRUE PHOTOCOPY OF THE JUDGMENT DTD 2/4/2009 IN WPC NO 8725/2009 , HIGH COURT OF KERALA
- P13:- TRUE PHOTOCOPY OF THE REPORT FILED BY ADVOCATE V S SURESH KUMAR DTD 14/4/2010 IN IA NO 1194/2010 IN OS NO 27/2007, SUB COURT, NORTH PARAVUR
- P14:- TRUE PHOTOCOPY OF JUDGMENT DTD 23/5/2014 IN OP NO 523/2011 , HIGH COURT OF KERALA
- P15:- TRUE PHOTOCOPY OF IA NO 2925/2012 IN OS NO 27/2007, SUB COURT, PARAVUR

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- P16:- TRUE PHOTOCOPY OF THE REPORT DTD 27/10/2012 AND THE ROUGH SKETCH IN IA NO 2925/2012 IN OS 27/2012 , SUB COURT, PARAVUR,
- P17:- TRUE PHOTOCOPY OF THE ORDER DTD 1/11/2012 IN IA NO 2998/2012 IN OS NO 27/2007 SUB COURT NORTH PARAVUR
- P18:- TRUE PHOTOCOPY OF REPORT DTD 7/11/2012 IN IA NO 2998/2012 IN OS NO 27/2007 , SUB COURT, PARAVUR
- P19:- TRUE PHOTOCOPY OF IA 2783/2013 IN OS NO 27/2007 , SUB COURT, PARAVUR
- P20:- TRUE PHOTOCOPY OF IA 1784/2013 IN OS NO 27/2007 , SUB COURT, PARAVUR
- P21:- TRUE TYPED COPY OF THE ORDER IN OS NO 27/2007 , SUB COURT, PARAVUR
- P22:- TRUE PHOTOCOPY OF IA 264/2015 IN OS NO 27/2007 , SUB COURT, PARAVUR
- P23:- TRUE PHOTOCOPY OF COUNTER AFFIDAVIT 31/3/2015 FILED BY THE PETITIONER IN IA 624/2015 IN OS NO 27/2007 SUB COURT, NORTH PARAVUR
- P24:- TRUE PHOTOCOPY OF THE ORDER DTD 8/4/2015 IN IA NO 624/2015 IN OS NO 27/2007 , SUB COURT, PARAVUR
- P25:- TRUE PHOTOCOPY OF THE ROUGH SKETCH
- P26:- PHOTOGRAPHS OF THE EASTERN WALL AND THE BRAHMARAKSHAS THARA IN 2014 AND THE PRESENT POSITION , DUE TO THE UNILATERAL CONSTRUCTIONS MADE BY RESPONDENTS 1 TO 4 THEIR HENCHMEN, ON 6/5/2015, IN VIOLATION OF THE COURT ORDERS
- P27. TRUE PHOTOCOPY OF THE REPORT DATED 16/5/15 WHICH HAD ORIGINALLY FILED BY THE ADVOCATE COMMISSIONER V.S.SURESH KUMAR BEFORE THIS COURT, RETURNED AS DEFECTIVE
- P28: TRUE PHOTOCOPY OF ROUGH SKETCH SHOWING THE DIMENSIONS AND SHAPE OF THE ORIGINAL TEMPLE WALLS AND THE PRESENT TEMPLE WALLS.

RESPONDENT(S)' EXHIBITS

NIL.

/ TRUE COPY /

P.S. TO JUDGE

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[CR]

B. KEMAL PASHA, J.

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O.P.(C) No.1130 of 2015
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Dated this the 24th day of June, 2015

J U D G M E N T

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Ext.P24 order passed by the court below is under challenge. The petitioner is the plaintiff in a suit for fixation of boundary and for recovery of possession. The plaintiff claims title over the property having an extent of 1.20 Acres in survey Nos.438/11-A and 438/11-B of the Kunnukara village. According to the petitioner, the said property was assigned through an order of the Land Tribunal in favour of the father of the petitioner namely, Achuthan Prabhakaran Nair, through assignment order dated 06.09.1988. Immediately after that, the father of the petitioner, as plaintiff, had preferred O.S.No.579/1989 before the Munsiff's Court, Paravur seeking a decree of perpetual injunction

against some persons, thereby restraining them from obstructing the removal of earth from the property and also the cultivation by the plaintiff in the property. It seems that through judgment dated 31.08.1995, the Munsiff's Court, Paravur dismissed the suit by taking the view that the circumstances available in the said case would go to show that the possession of the plaintiff over the plaint schedule property was in his capacity as office bearer of the Koottala Devi Temple Committee and that the plaintiff was attempting to assert personal right over the plaint schedule property, after obtaining Ext.A1(the aforesaid patta) by claiming that he was having absolute right over the plaint schedule property. A finding was also endorsed to the effect that the property in question is Devaswom property.

2. The aforesaid judgment was challenged by the father of the petitioner before the Additional District Court, North Paravur through Appeal Suit No.127/1995. In the appeal, an IA was filed by the appellant as I.A.No.894/1997

seeking leave of the court to 'withdraw the suit and the appeal' on the averment that some formal defects had been crept in the suit. It seems that the learned Additional District Judge, vide judgment dated 04.12.1997, allowed the appeal as well as the aforesaid IA by setting aside the decree passed by the Munsiff's Court and by permitting the appellant to 'withdraw the original suit with liberty to file a fresh suit'.

3. Thereafter, the petitioner filed DBA No.25/2006 before this Court in respect of the property. Subsequently, almost within a month, the present petitioner had preferred O.S.No.179/2006 before the Subordinate Judge's Court, North Paravur for declaration of title, fixation of boundary and for consequential injunction. This Court, vide order dated 22.06.2006, dismissed the DBA as withdrawn. It has been mentioned in the order that the pendency of O.S.No.179/2006 with regard to the very same subject matter was brought to the notice of this Court and the

appellant wanted permission to 'withdraw the said DBA' without prejudice to his right to prosecute the said suit.

4. Thereafter, the Subordinate Judge's Court, North Paravur considered I.A.No.1289/2006 seeking an order of temporary injunction in O.S.No.179/2006. In the said suit, the Kochi Devaswom Board, Koottala Kshethra Kshema Samithy, etc. were made parties. While dealing with I.A.No.1289/2006, the court below held that the suit itself was not maintainable. On that ground, the suit as well as the IA was dismissed through order dated 08.08.2006.

5. The said order was challenged by the petitioner as plaintiff through RFA No.398/2006 before this Court. It seems that the appellant had conceded before this Court that the suit was hit by Section 124 of the Travancore Cochin Hindu Religious Institutions Act, 1950 and, therefore, the appellant wanted to 'withdraw the appeal and the suit with liberty to file a fresh one'. It seems that for reasons best known to them, at that stage, the respondents had

submitted before this Court that they did not propose to make any construction on the East, North and South of the existing temple, where *brahmaraksha thara*, *manputtu*, *kalkettu*, are situated. The said submission was recorded and interim injunction granted by this Court in the matter was ordered to be remained in force for one more week from 05.01.2007, the date of judgment. It was also made clear that the same should not be relied on by the parties in any of the proceedings either pending or future. Ext.X1 sketch was also appended with the judgment. It seems that this Court has permitted the plaintiff to 'withdraw the appeal and suit with liberty to file a fresh suit'.

6. After all the procedures noted above, the petitioner herein, as plaintiff, has filed O.S.No.27/1977 before the Subordinate Judge's Court, North Paravur for a decree for getting the plaint schedule property located and its boundaries fixed, recovery of possession of portions of the plaint schedule property, if any, on which constructions

were made by the respondents and also a decree of perpetual injunction. On 12.01.2007, Ext.P7 order was passed by the court below in I.A.No.228/2007 in the present suit. It seems that the Koottala Kshethra Kshema Samithy had submitted before the court below that they had no objection in passing an order of temporary injunction on the basis of the aforesaid order passed by this Court on 05.01.2007. Consequently, an order in the said lines was passed. It was further clarified that the order of injunction is limited to construction activities only on the East, North and South of the temple structure.

7. It is the case of the petitioner that thereafter the aforesaid order of temporary injunction passed by the court below has been consistently and frequently violated. According to the petitioner, constructions were made outside the temple structure at the southern side, the eastern side and the northern side. Other constructions were also allegedly made by encroaching into the portions of the

property at the northern side, by making a tarred road at the eastern side by widening the then existing pathway, and also by making constructions at the southern side. The petitioner has preferred altogether four applications by way of IAs under Order XXXIX Rule 2A. On all such four occasions, Commissions were also taken out. The Commissioners filed reports in the matter. According to the petitioner, his cries that the order passed by the court below is being flouted and violated, remained as wild cries and all such cries fell in deaf ears.

8. In the meantime, I.A.No.2998/2012 was filed by the temple committee seeking permission for reconstruction of compound wall to the temple and also the construction of *oottupura* inside the compound wall. Ext.P17 order was passed by the court below on 01.11.2012, thereby granting permission to the proposed reconstruction of the compound wall at its original position and also the construction of *oottupura*, in the presence of the Advocate Commissioner

namely, Sri.V.S.Suresh Kumar. The said V.S.Suresh Kumar was appointed to scrutinise the proposed construction and reconstruction. According to the petitioner, by violating the said directions, the temple committee started construction of a compound wall according to their will and pleasure by encroaching into the properties of the petitioner. The same has resulted in subsequent applications. It seems that the court below has not disposed of those IAs. Thereafter, the Koottala Kshethra Kshema Samithy and some of the other respondents herein as petitioners had filed I.A.No.624/2015 seeking permission for the construction of the boundary wall based on Ext.P17 order. It seems that the court below has affirmed Ext.P17 order once again, and passed Ext.P24 order on the same lines. The said order is under challenge.

9. It seems that the petitioner is not challenging Ext.P17 or Ext.P24 on the merits of its contents. The only complaint is that the court below has passed these orders favouring the Koottala Kshethra Kshema Samithy without

disposing of the other four applications filed by the petitioner clamouring about the continued violation of the injunction order passed on 12.01.2007.

10. Heard learned counsel for the petitioner Sri.Dinesh R. Shenoy, learned counsel for respondents 1 to 3 Sri.M.P.Ashok Kumar, learned counsel for the 5th respondent Sri.V.Krishna Menon and learned counsel for the 8th respondent Smt.K.M.Rashmi.

11. Sri.Ashok Kumar has argued that the suit itself is not maintainable. Sri.Krishna Menon has also supported the argument forwarded by Sri.Ashok Kumar. According to them, the property in question is a land which is unassignable and, therefore, the *patta* being claimed by the plaintiffs itself is a *nullity* in the eye of law. They have resorted to Section 3(1)(x) of the Kerala Land Reforms Act, 1963, which states that tenancies in respect of sites, tanks and premises of any temple or sites of office buildings and other buildings attached to such temple, etc. are clearly

exempted from assignment and the provisions of the KLR Act. It has also been pointed out that even though the Koottala Kshethra Samithy was running from pillar to post to get the copy of the proceedings by which the aforesaid *patta* was granted in respect of the temple property, no such documents were made available to them by stating that those records could not be traced out. Further, in order to fortify the argument that the said properties belonged to Thiruvanchikulam Devaswom, Sri.Ashok Kumar has produced the copy of the *thandaper* account, which shows that 15 Ares of property in survey No.438/11-A and 98 Ares of property in survey No.438/11-B of the Kunnukara village belonged to Thiruvanchikulam Devaswom. It is mainly on this ground, it is argued that the *patta* itself is a *nullity* in the eye of law and, therefore, the petitioner cannot claim any valid title over the said properties in view of Section 3(1)(x) of the KLR Act, 1963.

12. Learned counsel for the respondents have invited

the attention of this Court to the decision in ***A.A.Gopalakrishnan Vs. Cochin Devaswom Board and Others*** [(2007) 7 SCC 482], wherein it was held in paragraph 10 as follows:-

“The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/archakas/shebaites/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of “fences eating the crops” should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions

from wrongful claims or misappropriation.”

13. Further, the attention of this Court has been invited to the decision rendered by a Division Bench of this Court in ***Travancore Devaswom Board Vs. Mohanan Nair*** [2013 (3) KLT 132], wherein it was held in paragraph 64 as follows:-

“64. The judgment of the Apex Court in Balvant N. Viswamitra & Ors. v. Yadav Sadasiv Mule (dead) through Lrs. & Ors. ((2004) 8 SCC 706) relied upon by the learned Standing Counsel for the Board brings out the difference between a void decree as well as illegal, incorrect or irregular decree. It has been held that “where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, non est and void ab initio.” We extract paragraphs 9 and 15 of the said judgment hereunder:

“9. The main question which arises for our consideration is whether the decree passed by the trial court can be said to be 'null and 'void'. In our opinion, the law on the point

is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.

15. From the above decisions, it is amply clear that all irregular or wrong decrees or orders are not necessarily null and void. An erroneous or illegal decision, which is not void, cannot be objected in execution or collateral proceedings.”

Since exemption under S.3(1)(x) of the Act applies to Temple premises, the order passed by the Land Tribunal was totally without jurisdiction.”

14. By relying on the decision of the Apex court in

Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and

Others [(2007) 2 SCC 355], it was also held in ***Travancore Devaswom Board*** (Supra) that there cannot be any acquiescence in the matter as the principles of estoppel, waiver and acquiescence will not have any application in a case where the order passed by the authority is a *nullity*. In ***Harshad Chiman Lal Modi Vs. D.L.F. Universal Ltd. and another*** [(2005) 7 SCC 791], in paragraph 30, it was held that “*an order passed by a court which is not having any jurisdiction, is a nullity.*”

15. The tenor of the decisions shows that such orders passed by the authority are *nullity* in the eye of law and the same cannot be acted upon. Sri.Krishna Menon has pointed out that even though the decision in ***Travancore Devaswom Board*** (*supra*) was challenged before the Apex Court, the decision rendered by this Court has been affirmed.

16. Whatever it is, there is merit in the argument forwarded by the learned counsel for the petitioner that the

respondents are not so vigilant before the court below to take up the matter there; whereas, they used to vehemently oppose matters before this Court. This Court is at a loss to understand as to why the respondents have not taken up the plea of maintainability of the suit before the court below instead of pointing out the said facts before this Court. It is open to the respondents to take up the question of maintainability before the court below and in such case, the court below shall give paramount importance to the issue of maintainability of the suit as such before dealing with other issues in the suit.

17. There is merit in the argument forwarded by the learned counsel for the petitioner that his repeated cries that the order of injunction based on a consent order passed by the court below is being repeatedly flouted and violated are not being attended to. The court below ought to have disposed of those IAs filed under Order XXXIX Rule 2A CPC. At the same time, if any issue of maintainability is

there, the court below shall raise it as a preliminary issue and shall hear that issue and also consider the earlier IAs filed by the petitioner herein and dispose it of.

18. This Court has come to a strange situation wherein repeatedly the suits and appeals were permitted to be withdrawn by the petitioner on the ground of formal defect. What is permitted under the court under Order XXIII Rule 1(3) is to permit the plaintiff/plaintiffs to 'withdraw from the suit' and not the suit as such. When a suit is filed, it is the property of the court and not that of the party. A party cannot be permitted to withdraw a suit; at the most he can only be permitted to withdraw from the suit.

19. This Court is not expressing any opinion on the merits of the matter. This Court is of the view that this O.P. (Civil) can be disposed of by directing the court below to dispose of the IAs filed by the petitioner under Order XXXIX Rule 2A, as expeditiously as possible, at any rate, within a period of one month from the date of receipt of a copy of this

judgment. Along with that question, the court below shall consider the question of maintainability of the suit as such and shall hear the parties on that issue also and dispose of that issue in accordance with law.

O.P.(Civil) is disposed of accordingly.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/24/06

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PA to Judge