

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 3RD DAY OF FEBRUARY 2015/14TH MAGHA, 1936

OP(C).No. 2104 of 2014 (O)

CMA 27/2012 of SUB COURT, NEYYATTINKARA
OS 12/2012 of PRL. MUNSIFF COURT, NEYYATTINKARA

PETITIONERS :

1. KRISHNAN NADAR, AGED 74 YEARS,
S/O. KOCHAPPI NADAR, RESIDING AT KRISHNA BHAVAN
CHOWARA, KOTTUKAL DESOM, KOTTUKAL VILLAGE
NEYYATTINKARA TALUK, CHOWARA P.O.
(VIA) BALARAMAPURAM - 695501.
2. BINUKRISHNAN AGED 41 YEARS
S/O. KRISHNAN NADAR, RESIDING AT KRISHNA BHAVAN
CHOWARA, KOTTUKAL DESOM, KOTTUKAL VILLAGE
NEYYATTINKARA TALUK, CHOWARA P.O.
(VIA) BALARAMAPURAM - 695 501.

BY ADVS.SRI.T.KRISHNAN UNNI (SR.)
SRI.VINOD RAVINDRANATH
SRI.SAJU.S.A
SRI.K.C.KIRAN

RESPONDENT :

MANU VAIDYAR, AGED 46 YEARS
WRITTEN AS SADASIVAN NAIR, S/O.SIVAN PILLAI
TC 111/1717, KESAVADASAPURAM, PATTOM P.O.,
PIN - 695 004, THIRUVANANTHAPURAM FROM M.S.BUNGLOW,
PUNNAKULAM KOTTUKAL VILLAGE, NEYYATTINKARA.

R1 BY SRI.S.SREEKUMAR SENIOR ADVOCATE
BY ADVS. SRI.RENJITH B.MARAR
BY ADV. SRI.V.R.REKESH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 03-02-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 2104 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

- P1: TRUE COPY OF THE COMMON JUDGMENT DT. 10.12.10 IN CRP NO. 468/10 AND
CONNECTED MATTERS.
- P2: THE TRUE COPY OF THE PLAINT IN OS NO. 12/2012 ON THE FILE OF MUNSIFF
COURT, NEYYATTINKARA DT. 02.1.12.
- P3: THE TRUE COPY OF ORDER OF THE MUNSIFF COURT, NEYYATTINKARA IN IA
NO. 513/12 IN OS NO. 12/2012 DT. 13.4.12
- P4: THE TRUE COPY OF THE JUDGMENT OF SUB COURT, NEYYATTINKARA IN
CMA 27/12 DT. 11.7.14.

RESPONDENT(S)' EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

bp

P.BHAVADASAN, J.

O.P.(C) No. 2104 of 2014

Dated this the 03rd day of February, 2015

J U D G M E N T

This original petition filed under Article 227 of the Constitution of India is directed against the order dated 11.07.2014 in C.M.A.No. 27/2012 by which the lower appellate court vacated the injunction order regarding commission of waste by the first defendant in the suit. The first defendant was restrained from committing waste by the order of the trial court in I.A.No. 513/2012 in O.S.No. 12/2012.

2. Shorn off unnecessary details, the short case now put forward before this Court by the petitioner is that out of 3.15 acres of land mortgaged by the tarwad of which the first defendant was a member, after the decree for redemption was passed and before actual redemption took place, some of the co-mortgagors assigned their shares to mortgagee and thus the plaintiff occupied the status of a co-

mortgagor also. Though he tried to resist delivery of the property, this Court in Ext.P1 judgment observed that delivery cannot be deferred and delivery has to be given and if at all anybody had a claim, he had to independently sue for partition. Contending that as a result of the observation made by this Court in Ext.P1, the plaintiff was constrained to institute a suit for partition on the basis that he obtained a portion of the mortgaged property which was redeemed. Along with the suit, he laid I.A. No. 513/2012 for interim injunction seeking to restrain the first defendant who was in possession of the property from alienating the property and committing waste in the property and also making construction in the property.

3. The respondent resisted the petition on several grounds. One of the grounds is that they highlighted the property over which the plaintiff laid claim did not form part of the mortgage property and that was the property derived by them as per the partition in tarwad from among the

sharers who obtained property.

4. For the purpose of interlocutory application, the court below marked Exts. A1 to A12 from the side of the petitioners.

5. The trial court, after addressing to the contention raised by the contesting defendants that the property obtained by the plaintiff was the property dealt with under Exts. A1 to A3 and not under the mortgagee, thought it improper at this point of time to decide about the title to the property but, however felt that there cannot be injunction restraining the first defendant from alienating the property or making construction in the property but however, felt that he should be restrained from committing waste in the property. Therefore an injunction to that effect followed.

6. The aggrieved first defendant, though the order may look very innocuous at the first blush, since injunction was only against commission of waste, went up in appeal as C.M.A.No. 27/2012 before the Sub Court, Neyyattinkara. The

lower appellate court felt that the balance of convenience, prima facie case and irreparable loss and injury, the three ingredients necessary for granting interim order of injunction went in favour of the first defendant in the suit who was the appellant before it, it formed the opinion that therefore it will not be proper to restrain the first defendant even though injunction granted by the trial court was only regarding the commission of waste. The order passed by the trial court was vacated.

7. Sri. T. Krishnanunni, the learned senior counsel appearing for the petitioners contended that the lower appellate court was not justified in vacating the injunction order regarding the commission of waste in the sense that even assuming that a co-owner is entitled to put up structures or even going to the extent that he is entitled to alienate his share of property, he is certainly not entitled to commit waste as a matter of right and preservation of the property being the prime concern of the court in a partition

suit ought not to have vacated that portion of the order.

8. Sri. S. Sreekumar the learned senior counsel appearing for the respondent, by relying on Ext.P1 order produced along with the petition, pointed out that the very title of the plaintiff itself is in considerable doubt and under such circumstances, it will be imprudent on the part of the court to restrain the first defendant who admittedly is the person in possession of the property and who is entitled to his share of the property. Further, it is contended that he being a co-owner is entitled to put up structures, may be at his risk and cost and while constructing the building, it may happen that he may also have to cut and remove certain trees and carry out digging in the property, which acts cannot be prohibited. The learned counsel went on to point out that the plaintiff is a person who has no right over the suit property and for that purpose, he relied on the earlier document of title.

9. Be as it may, though the order passed by the trial court may look innocuous at the first blush, one or two facts are to be borne in mind. It is not in dispute that the petitioner before this Court is the successor-in-interest of the mortgagee. It is also not in dispute that the mortgagor had deposited the entire value of improvements and the mortgagee had received the same. The contention now taken is that the plaintiff obtained shares of the co-mortgagor's rights assigned in his favour and therefore he is entitled for partition.

10. There is considerable controversy regarding the above claim made by the plaintiff. The respondent would very vehemently contend that in fact in Ext.P1, there is a categorical finding by this Court that property obtained as per Ext.A5, did not take in any portion of the mortgage property. If that be so, suit has only to fail and rightly so, court would not be ventured for a finding in that regard as that requires extensive probe into the matter and also conclusion can be

drawn only after evidence is adduced.

11. However, the fact remains that even assuming that the plaintiff is entitled to a share in the property, considering the number of shares that is to be given, it could be said to be very very small in extent. There is no evidence as of now as to the improvements in the property. Attempt was made by the plaintiff to see that the first defendant does not put up any construction in the property in which he did not succeed.

12. In the light of the fact that the mortgagor had received the entire value of the improvements and also since it is pointed out that the title is in dispute, the courts below were justified in coming to the conclusion that the balance inconvenience, irreparable loss and injury and prima facie case go in favour of the first defendant.

13. In the light of the fact that there is total want of materials to ascertain as to what are the improvements in the property, it may not be proper for this Court to presume

that there is commission of waste in the property. No specific conduct on the part of the first defendant amounting to commission of waste in the property is pointed out.

14. For the above reasons, this Court finds no ground to interfere with the order of the lower appellate court. This original petition is without merits and it is accordingly dismissed.

It is made clear that the suit shall be disposed of based on the evidence adduced in the case untrammelled by any of the observations made by any of the courts while disposing of the interlocutory application.

Sd/-
P.BHAVADASAN
JUDGE

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//True copy//

P.A. to Judge