IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 21ST DAY OF JANUARY 2015/1ST MAGHA, 1936

OP(C).No. 2746 of 2014 (O)

C.M.A.NO.5 OF 2014 AND C.M.A.NO.6 OF 2014 OF SUBORDINATE COURT, VATAKARA.

PETITIONER(S):

CHATHAN MADHAVI, AGED 82 YEARS,
W/O.LATE T.K.NARAYANAN, TAZHE KOTTENTAVIDA,
NUT STREET.P.O, VATAKARA AMSOM DESOM, VATAKARA,
KOZHIKODE, PIN-673 513.

BY ADVS.SRI.P.B.KRISHNAN
SRI.P.M.NEELAKANDAN
SRI.P.B.SUBRAMANYAN
SRI.SABU GEORGE

RESPONDENT(S) :
----

1. M/S.DARSANA VASTHRALAYAM,
   A REGISTERED PARTNERSHIP FIRM BUSINESS AT STALL NO.5,
   OLD BUS STAND BUILDING, VATAKARA-1,
   REPRESENTED BY ITS MANAGING PARTNER T.K. RAJEEVAN,
   S/O.T.K.NARAYANAN, AGED 44 YEARS, RESIDING AT "MADHAVAM",
   PALOLIPALAM, VATAKARA KOZHIKODE, PIN-673 513.

2. T.K.CHANDRAN, AGED 82 YEARS,
   S/O. LATE T.K.NARAYANAN, TAZHE KOTTENTAVIDA,
   NUT STREET.P.O., VATAKARA AMSOM DESOM,
   VATAKARA KOZHIKODE, PIN-673 513.

   R1 BY ADVS. SRI.B.KRISHNAN
   SRI.R.PARTHASARATHY

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 21-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Msd.

OP(C).No. 2746 of 2014 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

P1: **TRUE COPY OF THE PLAINT DATED 23-05-2014 IN O.S.NO.119 OF 2014 ON THE FILE OF THE MUNSIFFS COURT, VATAKARA.**

P2: **TRUE COPY OF THE WRITTEN STATEMENT DATED 25-07-2014 IN O.S.NO.119 OF 2014 ON THE FILE OF THE MUNSIFF'S COURT, VATAKARA.**

P3: **TRUE COPY OF THE COUNTER AFFIDAVIT DATED NIL IN I.A. NO.695 OF 2014 IN O.S.NO.119 OF 2014 ON THE FILE OF THE MUNSIFF'S COURT, VATAKARA.**

P4: **TRUE COPY OF I.A.NO.744 OF 2014 DATED 29-05-2014 IN O.S.NO.119 OF 2014 ON THE FILE OF THE MUNSIFF'S COURT, VATAKARA.**

P5: **TRUE COPY OF THE COUNTER STATEMENT DATED 04-06-2014 IN I.A. NO.744 OF 2014 IN O.S.NO.119 OF 2014 ON THE FILE OF THE MUNSIFF'S COURT, VATAKARA.**

P6: **TRUE COPY OF THE ORDER DATED 14-07-2014 IN I.A.NO.695 OF 2014 AND I.A.NO. 744 OF 2014 IN O.S. NO.119 OF 2014 ON THE FILE OF THE MUNSIFF'S COURT, VATAKARA.**

P7: **TRUE COPY OF THE JUDGMENT DATED 11-11-14 IN CMA NO. 5 OF 2014 AND CMA NO. 6 OF 2014 ON THE FILE OF THE SUBORDINATE JUDGE'S COURT, VATAKARA.**

RESPONDENT(S)' EXHIBITS
--

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

P. BHAVADASAN, J.

\- -

O.P.(C). No. 2746 of 2014

\- -

Dated this the 21st day of January, 2015.

JUDGMENT

The mother and her children are at loggerheads. The facts absolutely necessary for the disposal of this Original Petition are as follows:

Shri. Narayanan, the predecessor-in-interest of the plaintiff in the suit and the defendants took a license from the Muncipaliity in respect of the premises shown as Stall No.5 and started a garment business which was converted into a partnership business including his wife and sons. The terms of the partnership indicate that on death of a partner, the partnership will not be dissolved and it will continue. It is not in dispute that on 3.7.2001 Narayanan passed away leaving behind his wife and eight children.

2. The allegation in the plaint is that on 19.5.2014, quite contrary to the state of affairs that was

available till then, the first defendant, with the aid of the second defendant trespassed into the premises and forcefully closed it down bringing to a halt the business that was being carried on in the premises. That made the firm to move the court for appropriate reliefs.

3. Along with the suit, the plaintiff moved I.A. 695 of 2014 seeking temporary injunction restraining the defendants from interfering with the plaintiff from carrying on business in Stall No. 5 till the disposal of the suit.

4. Defendants entered appearance and they apart from resisting the interlocutory application, have also filed an interlocutory application as I.A.744 of 2014 seeking interim relief in their favour. Both the applications were tried together by the trial court and I.A.695 of 2014 was treated as the leading petition. For the purpose of I.A.695 of 2014 Exts. A1 to A72 were marked from the side of the petitioner and Exts. B1 to B16 were marked from the side of the contesting respondents. The trial court found that the

plaintiff was carrying on business till 19.5.2014, but the plaintiff cannot seek to exclude the first defendant from participating in the business of the firm for the simple reason that she too is a partner of the firm. After discussing the tussle for getting the license in separate names, the court concluded that the plaintiff is not entitled to get any relief and dismissed the interlocutory application filed by the plaintiff. As far as the application filed by the respondents was concerned, the court below did not find favour with the defendants and dismissed that petition also.

5. Both carried the matter in appeal as C.M.A.5 of 2014 and 6 of 2014. The appellate court after reaching a conclusion that on or before 19.5.2014 the firm was conducting business and picking out a sentence from the statement in the affidavit filed by the respondents before the trial court to the effect that the business premises remained closed, went on to allow C.M.A. 5 of 2014 and dismissed C.M.A. 6 of 2014 by judgment dated 11.11.2014,

the concluding portion of which reads as follows:

"In the result,

a) CMA. 6/14 is hereby dismissed but without costs.

b) CMA.5/14 is hereby allowed as follows:

1) That the respondents/defendants are hereby restrained by a temporary injunction from obstructing the petitioner/plaintiff from carrying out its business from stall No.5 (petition schedule room) till the disposal of the suit.

2) Since the key of the shop room is presently in the custody of the respondents/defendants, they are directed to give it back to the plaintiff through court within 10 days from today.

3) That the order of injunction will come into force as and when the key is handed over by the respondents/defendants.

4) That the petitioner/plaintiff shall file weekly statement of accounts regarding the business conducted in the stall No.5 on every Monday before the lower court, with copy to the respondents/defendants."

6. Assailing the above order, learned counsel appearing for the petitioner before this Court points out that in effect what has happened is that a partner who is entitled to participate in the business of the firm is now successfully excluded from participating in the business. Further, it is contended that relief granted far exceeds the prayer in the suit and that is not something contemplated in law. It could not be said, according to the learned counsel, that the business premises now occupied by the first respondent in the suit is illegal. She, as a partner of the firm, is entitled to run the business of the firm. Attention was also drawn to the fact that there was an attempt from the side of the plaintiff in the suit to have the name of the mother excluded from the license that was sought to be renewed which was not accepted by the authority concerned. Referring to the counter affidavit filed by the respondents in I.A. 744 of 2014 filed by the petitioner before this Court, learned counsel for the petitioner went on to point out that even as per the

affidavit, from 29.5.2014 onwards the shop room has been opened and business is being carried on. The fear expressed by the plaintiff is that the assets may be squandered away. Therefore, it is contended that even going by the statement made by the plaintiff, the business is being carried on by the first defendant, who is admittedly a partner of the firm.

7. Learned counsel then went on to point out that the present order has the effect of excluding a partner from carrying on business which is not contemplated in law and the more serious contention is that a relief which was not sought for in the suit has been granted at the interlocutory stage. On these grounds, learned counsel points out that the order is clearly unsustainable in law.

8. Shri. B. Krishnan, learned counsel appearing for the respondents on the other hand contended that though it may look as if the relief granted exceeds what is sought for in the plaint, on a proper analysis of the facts of

the case and also on an appreciation of the state of affairs as on the date of the suit, would show that the relief granted is just and proper. Learned counsel went on to point out that based on a declaration said to have been made by late Narayanan, the first defendant sought to have the license renewed in her own name which was also not accepted by the statutory authority. Against an order of local authority, an appeal was filed by the respondents herein which was dismissed by the Tribunal against which W.P.(C) No. 26217 of 2014 has been preferred before this Court and an interim order has been passed in the writ petition holding that the respondents before this Court shall not disturb the business that is being carried on in the firm.

9. Relying on the decisions reported in **Dorab Cawasji Warden v. Coomi Sorab Warden** (AIR 1990 SC 867), **Padmanabhan v. Thomas** (1989 (1) K.L.T. 268) and **Appukuttan Nair v. Hydrose** (2004(1) K.L.T. 350), learned counsel went on to contend that it is not as if that

under no circumstance an interim mandatory injunction can be granted.

10. Referring to the facts of the present case, it is contended that both the courts have concurrently found that as on 29.5.2014 the plaintiff was in possession of the business and was running the business and he was ousted by the first defendant at the behest of the second defendant. After having done so, the said defendants cannot be heard to say that they should be allowed to continue and the plaintiff shall not be put back into possession. If that principle is to be borrowed, according to the learned counsel, there is no infirmity in the order passed by the court below. Learned counsel also drew the attention of this Court to the fact that the court below has been cautious enough to safeguard the interests of the first defendant by directing that the plaintiff shall account for the business carried on in the premises which would sufficiently safeguard the interests of the first defendant, who is

admittedly a partner of the firm and far too advanced in age. Learned counsel went on to point out that the court below has now suggested a workable solution in the light of the interim order passed by this Court in the writ petition referred to in the order. The only feasible method is as suggested by the appellate court and that may not be interfered with.

11. One fact is very clear that neither the plaintiff (or the firm) nor the first defendant has got a valid license as of now to conduct the business. But fortunately for the parties, by virtue of the order in the writ petition referred to above, business can be continued.

12. There is considerable controversy regarding the question as to whether the business is running and if so, who is running the business. The respondents before this Court contended that the premises remained locked and business is not being carried on. This is countered by the petitioner before this Court by referring to the statement in

the counter affidavit in I.A. 744 of 2014 filed by the respondents wherein there is a categoric admission by the respondents to the effect that from 29.5.2014 the business is being carried on by the first defendant with the aid of the second defendant. The only apprehension expressed therein as referred to by the learned counsel for the petitioners is that the business may be conducted in a haphazard manner resulting in huge loss and resulting in incurring of debts.

13. The question as to whether an interim mandatory injunction can be granted depends upon the facts of each case. The decisions referred to by the learned counsel for the respondents were all cases by which due to some mischievous act on the part of the person concerned, he came into possession and sought to retain possession. The decision in **Dorab Cawasji Warden v. Coomi Sorab Warde**n (AIR 1990 SC 867) was a case where the transferee from one of the co-owners barged into possession

of the residential building and sought to exclude others.

14. The principle in the cases referred to by the learned counsel for the respondents must be confined to the facts of those cases and it cannot be made applicable to the facts of the present case in the sense that here what the respondents seek, is to restrain the first defendant who is a partner of the firm participating in the business.

15. However, there is concurrent findings by both the courts below that at least till or before 19.5.2014, the business was actively been carried on by the other partners and the first defendant in the suit was only a passive partner. The trial court refused to grant relief to the plaintiff on the ground that what is intended in the interlocutory application is to exclude a partner from participating in the business. However, the lower appellate court was more practical in its approach and was keen to see that business is carried on. It was under these circumstances the court below directed that the key be

handed over to the plaintiff and he is made liable to file weekly statement of accounts on every Monday before the lower appellate court.

16. Regarding the right of the plaintiff or the first defendant to get a license for running the firm, as rightly noticed by the court below, it will not be in the interests of any person to close down the business. In the light of the fact that both the courts below have inclined to hold that atleast till 19.5.2014 the respondents herein were carrying on business, the court below was justified in holding that they may be allowed to continue the business.

17. The infirmity that none of the partners have an authority to run the business probably stands cured by the interim order passed by this Court in the writ petition already referred to. The person who is entitled to run the business, whether the mother, the first defendant in the suit, or other three sons, is not a matter germane for consideration in this proceedings.

18. Considering the totality of the circumstances, it is clear that the arrangement made by the lower appellate court seems to be a reasonable and just one especially in the light of the fact that it is infact appointment of a party receiver for the business carried on in the premises. In order to safeguard the interests of the first defendant in the suit, the other partners can be directed to deposit her share of the business profits in court periodically till the suit is disposed of.

19. The arrangement is made without finally determining the rights of the persons concerned to get license renewed in their name and the right to conduct business. It was in the interests of all concerned that the business is being carried on.

20. Thus, finding that there is no reason to interfere with the order of the court below except the modification that the share of the first defendant as per the partnership shall be deposited in court once in 15 days after

accounting for the business carried on in the premises, this Original Petition is dismissed.

It is also directed that at the time of handing over the key, a Commissioner shall be deputed to take inventory of the stock in the premises and the court below is directed to make every endeavour to dispose of the suit as expeditiously as possible untramelled by any observation made by any of the courts while disposing of the interlocutory applications. The first respondent shall act as a party receiver and shall account to the court for the business carried on. Appropriate orders shall be taken from the court below as and when it is necessary.

P. BHAVADASAN,
JUDGE

sb.