

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 25TH DAY OF MARCH 2015/4TH CHAITHRA, 1937

RFA.No. 526 of 2014 ()

**(AGAINST THE JUDGMENT AND DECREE IN OS.NO. 291/1995 OF SUB
COURT, KOCHI DATED 12-08-2013)**

APPELLANT/2ND DEFENDANT :

**BABU RAGHAVENDRA PAI,
KALATHIPARAMBIL, RAMESWARAM VILLAGE,
PALLURUTHY, COCHIN-682 006.**

**BY ADVS.SRI.LEGY ABRAHAM
SRI.ROY THOMAS
SRI.ABE RAJAN**

RESPONDENT(S)/PLAINTIFFS 1 TO 6 & DEFENDANTS 1,3 & 4:

- *1. V.V.GOPALAKRISHNA PRABU,
S/O. VITTALA PRABHU, VEMBRACKATTU VEETIL,
RAMESWARAM VILLAGE, PALLURUTHY,
COCHIN -682 006. (DIED).**
- 2. MOHANA PRABHU,S/O. GOPALAKRISHNA PRABU,
VEMBRACKATTU VEETIL,RAMESWARAM VILLAGE,
PALLURUTHY, COCHIN -682 006.**
- *3. KANAKAM,W/O. GOPALAKRISHNA PRABU,
VEMBRACKATTU VEETIL,RAMESWARAM VILLAGE,
PALLURUTHY, COCHIN -682 006. (DIED)**
- 4. BHASKARA PRABHU,
S/O. GOPALAKRISHNA PRABHU, VEMBRACKATTU VEETIL,
RAMESWARAM VILLAGE, PALLURUTHY, COCHIN -682 006.**
- 5. MEETHA,
D/O. GOPALAKRISHNA PRABU, VEMBRACKATTU VEETIL,
RAMESWARAM VILLAGE, PALLURUTHY, COCHIN -682 006.**
- 6. LATHA,
S/O. GOPALAKRISHNA PRABU, VEMBRACKATTU VEETIL,
RAMESWARAM VILLAGE, PALLURUTHY, COCHIN - 682 006.**
- *7. V.V.RADHAKRISHNA PRABHU,
S/O. VITTALA PRABHU, VEMBRACKATTU VEETIL,
RAMESWARAM VILLAGE, PALLURUTHY,
COCHIN -682 006. (DIED)**

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**8. SANTHARAM PRABHU,
S/O. LATE RADHAKRISHNA PRABHU,
VEMBRACKATTU VEETIL, RAMESWARAM VILLAGE,
PALLURUTHY, COCHIN -682 006.**

**9. SYAMALA,
W/O. RADHAKRISHNA PRABHU, VEMBRACKATTU VEETIL,
RAMESWARAM VILLAGE, PALLURUTHY,
COCHIN -682 006.**

***IMPLEADMENT OF LEGAL REPRESENTATIVES OF DECEASED R1,R3 & R7
ARE NOT NECESSARY AS THE LRS ARE ALREADY IN THE PARTY ARRAY
VIDE ORDER DATED 10/11/2014 IN RFA.NO.526/2014.**

R2 BY ADV. SRI.SHIJU VARGHEESE

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 25-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

sts

C.R.

P.B.SURESH KUMAR, J.

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R.F.A.No.526 of 2014.

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Dated this the 25th day of March, 2015

J U D G M E N T

The second defendant in a suit for declaration and injunction is the appellant.

2. The second plaintiff is the son of the first plaintiff and the first defendant is the brother of the first plaintiff. The plaint schedule properties belonged to the father of the first plaintiff and the first defendant. The first plaintiff obtained plaint A schedule property as per Ext.A1 Will executed by his father. According to the plaintiffs, at the time of execution of Ext.A1 Will, there were three buildings in plaint A schedule property including plaint B schedule building. Out of the said buildings, two were bequeathed to the first plaintiff and plaint B schedule building was bequeathed to the first defendant as per the terms of Ext.A1 Will. The case of the plaintiffs is that the first defendant who has no right in the land in which plaint B schedule building is constructed has transferred plaint B schedule building and the land in which the said building is constructed to the second defendant as per Ext.A2 sale deed and on the strength of the said

sale deed, the second defendant is attempting to reconstruct plaint B schedule building in plaint A schedule property. The plaintiffs have therefore, claimed a decree declaring that Ext.A2 sale deed is null and void and for a mandatory injunction directing the defendants to demolish, dismantle and remove plaint B schedule building.

3. The defendants filed a joint written statement contending that the land in which plaint B schedule building is constructed does not form part of plaint A schedule property bequeathed to the first plaintiff as per Ext.A1 Will and the plaintiffs are therefore not entitled to the decree sought in the suit.

4. The evidence adduced in the case consists of the oral evidence of PWs.1 and 2 and Exts.A1 to A7 documents on the side of the plaintiffs and the oral evidence of DWs.1 and 2 and Exts.B1 and B2 documents on the side of the defendants. Exts.C1 to C5 are the reports and plans submitted by the Advocate Commissioner appointed in the suit.

5. The trial court, on an elaborate consideration of the evidence on record, found that the first defendant had obtained only plaint B schedule building by virtue of Ext.A1 Will and the land in which the building is constructed is part of plaint A schedule property bequeathed to the first plaintiff.

Consequently, the trial court declared that Ext.A2 sale deed will not affect the rights of the plaintiffs over plaint A schedule property and directed the defendants by way of a mandatory injunction to demolish and remove plaint B schedule building, failing which the plaintiffs were permitted to remove plaint B schedule building through the process of the court at the expense of the defendants. The second defendant is aggrieved by the said decision of the trial court and hence this appeal.

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

7. The learned counsel for the appellant contended that the finding of the court below that the land in which plaint B schedule building is constructed belongs to the first plaintiff is incorrect and unsustainable. According to him, even if it is found that the land in which plaint B schedule building is constructed belongs to the first plaintiff, in so far as the said building was bequeathed to the first defendant as per the terms of Ext A1 Will, the plaintiffs are not entitled to the decree of mandatory injunction sought in the suit.

8. The first party to Ext.A1 Will is the first plaintiff. Plaint B schedule property is a building bearing No.CC XVIII/697. The description of the property bequeathed to the first defendant as per Ext.A1 Will reads thus:

ടി പറമ്പിൽ പടിഞ്ഞാറെ അറ്റം കൊണ്ട് വടക്കേ മൂലയിൽ നിന്നും 148-ഉം അവിടുന്ന് പടിഞ്ഞാറ് 105-ഉം അവിടുന്ന് വടക്കോട്ട് 82-ഉം അവിടുന്ന് 61-ഉം അവിടുന്ന് കിഴക്കോട്ട് 58-ഉം അവിടുന്ന് അളവു തുടങ്ങിയ സ്ഥലത്തേക്ക് 47 ലിംഗ്സും അളവുള്ള സ്ഥലവും 1-ാം നമ്പർകാരുന്റെ വകയിൽ 2-ാം നമ്പർകാരുന്റെ പേരിൽ ഇരുപ്പുള്ള CC-XVIII- ൽ 697-ാം നമ്പർ കടയും ഉൾപ്പെടെയുള്ള 14.300 സെന്റ് സ്ഥലവും അതിൽ ഇരുപ്പുള്ള സകല ചുമയങ്ങളും എല്ലാ അവകാശങ്ങളും”.

It is evident from the description of the property bequeathed to the first defendant as extracted above that plaint B schedule building is a building constructed in plaint A schedule property bequeathed to the first plaintiff. The plaint B schedule building is situated on the eastern boundary of plaint A schedule property. There exists a road on the eastern side of the plaint A schedule property and the plaint B schedule building. It is seen that the eastern boundary of plaint A schedule property is shown in Ext A1 Will as a road. If, as a matter of fact, the plaint B schedule building and the land in which the same was constructed had been bequeathed to the first defendant, the eastern boundary of plaint A schedule property would not have been shown in Ext A1 Will as a road. The boundary description of the property bequeathed to the first plaintiff also leads me to the conclusion that plaint B schedule building is a building constructed in plaint A schedule property bequeathed to the first plaintiff.

9. Now what remains is the question whether the plaintiffs are entitled to get a decree of mandatory injunction for

removal of plaint B schedule building from plaint A schedule property. The law in India is that he who holds a building under a bona fide title on the soil of another is entitled to remove the building or obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil. The option of taking the building or permitting removal of the materials, is with the owner of the soil. In **Vallabdas v. Development Officer, Bandra** (AIR 1929 Privy Council 163), the Privy Council quoted with approval a passage laying down the said principles from **Thakoor Chunder Poramanick and others v. Ram Dhone Bhattacharjee** [1866] 6 Weekly Reporter 228]. The said passage reads thus:

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil,— the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

Plaint B schedule building being a building bequeathed to the first

defendant as per the terms of Ext.A1 Will, it cannot be said that the first defendant was not holding plaint B schedule building under any bona fide title. As such, in the light of the principles aforesaid, the second defendant who is claiming under the first defendant is entitled to remove the building or obtain compensation for the value of the building from the plaintiffs, if they opt to retain the building for their benefit. The question is whether the plaintiffs are entitled to compel the defendants to remove the building, if they do not want the building to remain in the property for their benefit. According to me, such a right has to be conceded to the owner of the soil, as otherwise, the owner of the soil would be deprived of his right to enjoy the property perpetually and would make the transfer of property redundant and meaningless. In the circumstances, in so far as the plaintiffs do not want to retain the building for their benefit by paying the compensation to the first defendant, they are certainly entitled to direct the removal of the building from their property. The impugned decision, in the circumstances, is in order. The appeal is, accordingly, dismissed.

Sd/-P.B.SURESH KUMAR, JUDGE.

Kvs/-

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PA TO JUDGE.