

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

RSA.No. 1172 of 2013

**JUDGMENT DATED 20-06-2013 IN AS 97/2010 OF II ADDITIONAL DISTRICT COURT,
PALAKKAD**

JUDGMENT DATED 12.1.2010 IN OS 261/2008 OF MUNSIFF COURT, CHITTUR
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APPELLANT/APPELLANT/PLAINTIFF:

**SANTHAKUMARAN, AGED 61 YEARS,
S/O.DHARMANDI, R.R.RICE MILL, OOTARA
VADAVANNUR, CHITTUR TALUK, PALAKKAD DISTRICT.**

**BY ADVS.SRI.T.SETHUMADHAVAN (SENIOR ADVOCATE)
SRI.RAJESH SIVARAMANKUTTY**

RESPONDENT/RESPONDENT/DEFENDANT:

**VIVEKANANDAN, AGED 61 YERS,
S/O.DHARMANDI, KARADATHODI VEEDU, OOTARA
VADAVANNUR, CHITTUR TALUK, PALAKKAD DISTRICT.**

**BY ADVS. SRI.T.KRISHNANUNNI (SENIOR ADVOCATE)
SRI.JACOB SEBASTIAN**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
23-11-2015, ALONG WITH RSA. 1173/2013, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:**

msv/

C.R.

P.B.SURESH KUMAR, J.

R.S.A. Nos.1172 & 1173 of 2013

Dated 23rd November, 2015.

J U D G M E N T

These second appeals arise from A.S.Nos.97 and 98 of 2010 on the file of the District Court, Palakkad. A.S.No.97 of 2010 was an appeal preferred against the decision in O.S.No.261 of 2008 and A.S.No.98 of 2010 was an appeal preferred against the decision in O.S.No.410 of 2008. The aforesaid suits on the file of the Munsiff court, Chittur were tried together, treating O.S.No.410 of 2008 as the lead case. As such, I am referring to the parties in this judgment as they appear in O.S.No.410 of 2008.

2. O.S.No.410 of 2008 was a suit for mandatory injunction. The plaintiff is the brother of the defendant. The plaint schedule property is part of a larger extent of property held by the parents of the parties, viz., Dharmandi and

Dakshayani. As per Ext.A4, they assigned the property situated on the north of the plaint schedule property and the rice mill therein to the defendant. While transferring the said property, the plaint schedule property was retained for access to the said property as also to the remaining property of the vendors situated on the east of the plaint schedule property from the southern public road. Since the plaint schedule property was intended for access to the property given to the defendant, he was given one half undivided right over the same also as per Ext.A4 sale deed. The remaining property of the vendors of the defendant situated on the east of the plaint schedule property as referred to above was their residential property. As such, in view of the existence of the rice mill in the property given to the defendant, a few covenants were imposed on the defendant as per Ext.A4 sale deed itself to prevent the possible nuisance on account of the functioning of the rice mill. The said covenants obligate the defendant, among others, to construct a compound wall at a height of 8 feet separating the properties given to the defendant and retained by the vendors; to keep a

gate opening to the plaint schedule property for entry to the rice mill on the western extremity of the compound wall directed to be constructed; to construct a compound wall on the western boundary of the plaint schedule property and to maintain the gate at the southern boundary of the plaint schedule property for the use of the defendant as also the vendors by keeping one of its key with him and giving one key to the vendors. It is beyond dispute that the defendant was enjoying the property pursuant to Ext.A4 sale deed after complying with the covenants imposed on him. Later, the plaintiff purchased the residential property retained by the vendors of the defendant as per Ext.B1 document. After the death of the vendors of the parties, the remaining one half right in the plaint schedule property devolved on both the plaintiff and defendant. The case of the plaintiff is that the defendant has demolished the compound wall on the western boundary and the gate installed on the southern boundary of the plaint shedule property on 29.3.2008. He, therefore, sought a decree of mandatory injunction directing the defendant to restore the

compound wall on the western boundary of the plaint schedule property as also to erect and maintain the gate on its southern boundary. In the meanwhile, the defendant has filed O.S.NO.261 of 2008 seeking a decree of permanent prohibitory injunction restraining the plaintiff from causing obstructions to the user of the plaint schedule property as access to the property covered by Ext.A4 sale deed. As noticed above, the suits were tried together. By a common judgment, the trial court decreed O.S.No.410 of 2008 and dismissed O.S.No.261 of 2008. The defendant challenged the decision of the trial court in appeal. The appellate court, on a re-appraisal of the evidence on record, confirmed the decision of the trial court. Hence these second appeals by the defendant.

3. Heard the learned Senior Counsel on either side.

4. The learned Senior Counsel for the appellant contended that the covenants imposed on the defendant as per Ext.A4 sale deed can be enforced only by the covenantee and the suit by the plaintiff, who is the transferee of the covenantee, is not maintainable. The learned Senior Counsel

also pointed out that O.S.No.261 of 2008 was dismissed by the trial court holding that the defendant has not made out a cause of action to institute such a suit against the plaintiff. According to the learned counsel, in so far as the defendant has one half undivided right in the plaint schedule property, the trial court was not justified in dismissing O.S.No.261 of 2008 on the aforesaid ground when the plaintiff has denied the right of the defendant to use the plaint schedule property for purposes other than vehicular access.

5. The relevant portion of Ext.A4 sale deed dealing with the restrictions imposed on the defendant reads thus :

“താഴെ പട്ടികയിൽ 1-ാം നമ്പറായി ചേർത്ത വഹകളുടെ തൊട്ടുതെക്ക് വശമായി ഞങ്ങൾ താമസിക്കുന്ന വീടും വളപ്പും സ്ഥിതിചെയ്യുന്നതിനാൽ മേപ്പടി വീട്ടിലേക്ക് മില്ലിൽ നിന്നും ഉള്ള എല്ലാ ശല്യവും ഒഴിവാക്കുവാനായി താഴെ പട്ടികയിൽ ചേർത്ത 1-ാം നമ്പർ വഹകളുടെ തെക്കുഭാഗത്തായി ഇപ്പോൾ നില്ക്കുന്ന തെക്ക് ഭാഗം ഗോഡൗൺ കെട്ടിടത്തിന്റെ തെക്കെ ചുമരിൽ നിന്നും തുടർച്ചയായി പടിഞ്ഞാറെ മതിൽ വരെയും കിഴക്കെ അതിർത്തി വരെയും കിഴക്ക് പടിഞ്ഞാറ് നീളത്തിൽ എട്ടടി (8 അടി) യിൽ കൂടുതൽ ഉയരത്തിൽ ഒരു മതിൽ നിങ്ങൾ കെട്ടേണ്ടതാണ്. അപകാരം നിങ്ങൾ കെട്ടുന്ന മതിലിന്റെ പടിഞ്ഞാറെ അറ്റത്ത്

താഴെ പട്ടികയിൽ 2-ാം നമ്പറായി ചേർത്ത വഹകളുടെ വടക്കേ അതിർത്തിയിൽ മില്ലിലേക്ക് ഒരു ഗെയിറ്റ് നിങ്ങൾ വെക്കേണ്ടതാണെന്നും അതിനു പുറമെ 1-ാം നമ്പറായി ചേർത്ത വഹകളുടെ പടിഞ്ഞാറെ മതിലിൽ മുൻപറഞ്ഞ ഗെയിറ്റിന് സമീപമായോ മില്ലിന്റെ പ്രധാന കെട്ടിടത്തിനു നേരായോ ഒരു ചെറിയ ഗെയിറ്റ് കൂടി നിങ്ങൾ വെക്കേണ്ടതാണ്. താഴെ പട്ടികയിൽ ചേർത്ത 1-ാം നമ്പർ വഹകളിലേക്കും ഞങ്ങളുടെ വീട്ടിലേക്കും 2-ാം നമ്പർ വഹകളിൽ കൂടി വാഹനഗതാഗതത്തിന് ഞങ്ങൾക്കും നിങ്ങൾക്കും പിൻതുടർച്ചക്കാർക്കും അവകാശമുണ്ടായിരിക്കുന്നതാണ്. ആയതിനെ അന്യോന്യം തടസ്സപ്പെടുത്തുവാൻ പാടില്ലാത്തതും ആകുന്നു. ഈ അവകാശ സംരക്ഷണത്തിനായി 2-ാം നമ്പറായി ചേർത്ത വഹകളുടെ തെക്കേ അറ്റത്തുള്ള ഗെയിറ്റിനെ രണ്ടുതാക്കോലുകൊണ്ട് തുറക്കുന്ന ഒരു പൂട്ട് ഇട്ടു പൂട്ടി ഒരു താക്കോൽ നിങ്ങളുടേയും ഒരു താക്കോൽ ഞങ്ങളുടേയും കൈവശം വെച്ച് ഉപയോഗിച്ച് വരേണ്ടതാണ്. എന്നാൽ റൈസ് മില്ലിലെ തൊഴിലാളികൾക്ക് ഗതാഗതം ചെയ്യുന്നതിന് പടിഞ്ഞാറെ മതിലിൽ നിങ്ങൾ വെക്കുന്ന ഗെയിറ്റ് ഉപയോഗിക്കേണ്ടതാണ്. ഞങ്ങൾ താമസിക്കുന്ന വീടിനോട് ചേർന്നു കിടക്കുന്നതാണ് 2-ാം നമ്പർ വഹകൾ എന്നതിനാലാണ് നമ്മൾ അന്യോന്യം സമ്മതിച്ച് ഗെയിറ്റുകളെ സംബന്ധിച്ചും വഴിയെ സംബന്ധിച്ചും ഉള്ള നിബന്ധനകൾ ഈ ആധാരത്തിൽ ഉൾക്കൊള്ളിച്ചിട്ടുള്ളത്.

X X X X X X X

മേൽ കാണിച്ച പ്രവർത്തികൾ എല്ലാം നിങ്ങൾ തന്നെ ഇന്നുമുതൽ രണ്ടുമാസത്തിനകം ചെയ്ത് തീർക്കേണ്ടതാണ്. അപ്രകാരം ചെയ്യാതെ വീഴ്ച വരുത്തിയാൽ ആ വക പ്രവൃത്തികൾ ഞങ്ങൾ ചെയ്യുവാനും അതിനാൽ ഞങ്ങൾക്ക് വരാവുന്ന ചി

ലവുകൾക്കും നഷ്ടങ്ങൾക്കും നിങ്ങളും സ്വത്തുക്കളും ഞങ്ങളോട് ഉത്തരവാദിയും ആകുന്നു."

It is evident from the above extract that covenants were imposed as per Ext.A4 sale deed for the beneficial enjoyment of the remaining property of the vendors, which was subsequently acquired by the plaintiff. As such, in the light of the submissions made by the learned Senior Counsel for the appellant, the following questions are formulated for decision;

(i) Whether a transferee of the covenantee is entitled to enforce the covenants imposed for the beneficial enjoyment of the property acquired by him ?

(ii) Were the courts below justified in dismissing O.S.No.261 of 2008 on the ground that the defendant has not made out a cause of action when the right of the defendant to use the plaint schedule property otherwise than for vehicular access was denied by the plaintiff ?

6. Section 11 of the Transfer of property Act deals

with the enforceability of restrictive covenants imposed while effecting transfer of property. Section 11 reads thus:

“11. Restriction repugnant to interest created- Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.”

While the first part of Section 11 provides that restrictions made in the matter of enjoying the property on transfer which are repugnant to the interest created on the property are unenforceable, the second part of section 11 saves the restrictions made for the purpose of securing the beneficial enjoyment of the remaining property of the transferor. In

Rogers v. Hosegood [(1900) 2 Ch.D.388], it was held that when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land and said to run with it. When a covenant goes with the land, as being annexed to estate, and which cannot be separated from the land, and transferred without it, it is only reasonable to infer that any person who claims under the original covenantee has the right to enforce the covenant (See Restrictive Covenants Affecting Land (II Edition) by W.A.Jolly). It was also held in **Rogers v. Hosegood** (supra) that the benefit annexed to the land is available even to an assignee who is not aware of the benefit at the time of assignment. As far as the instant case is concerned, it is also seen from the extracted portion of the document that the covenants were imposed not only for the benefit of the vendors but also for the benefit of their successors. Question No.1 formulated for decision, in the circumstances, is answered in favour of the plaintiff.

7. It is seen that the plaintiff has taken the stand in his pleadings that the defendant can use the plaint schedule

property only for vehicular access. It is beyond dispute that the defendant owns one half undivided right over the plaint schedule property. As such, according to me, the trial court was not justified in dismissing O.S.No.261 of 2008 on the ground that the defendant has not made out a cause of action to institute the suit against the plaintiff. Question No.2, in the circumstances, is answered against the plaintiff.

In the result, R.S.A.No.1173 of 2013 is dismissed and R.S.A.No.1172 of 2013 is allowed and O.S.No.261 of 2008 is decreed as prayed for.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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