

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 17TH DAY OF SEPTEMBER 2015/26TH BHADRA, 1937

RSA.No. 824 of 2014 ()

(AGAINST THE DECREE AND JUDGMENT IN AS.NO. 251/2009 OF DISTRICT
COURT, THRISSUR DATED 31-10-2013)

(AGAINST THE JUDGMENT IN OS.NO. 944/2004 OF MUNSIF COURT, CHAVAKKAD
DATED 30-06-2009)

APPELLANT/APPELLANT/DEFENDANT:

GURUVAYOOR MUNICIPALITY,
REPRESENTED BY ITS SECRETARY,
GURUVAYOOR MUNICIPALITY, GURUVAYOOR.

BY ADVS.SRI.P.A.AHAMMED
SRI.M.SREEKUMAR

RESPONDENT(S)/RESPONDENT/PLAINTIFFS:

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1. MUHAMMADALI,
S/O.RAYAMARAKKAR VEETIL ABU,AGED 58 YEARS,
IRINGAPRAM AMSOM & DESOM, GURUVAYOOR P.O.,
CHAVAKKAD TALUK, PIN - 680 506.
 2. RAJESH, AGED 32 YEARS
S/O.KOTTARAPPATT RAJAN,AGED 32 YEARS,
IRINGAPRAM AMSOM & DESOM,
GURUVAYOOR P.O., CHAVAKKAD TALUK, PIN - 680 506.
 3. MUHAMMED HAJI,
S/O.KOMBATHAYIL MAMU, AGED 73 YEARS (DIED)
IRINGAPRAM AMSOM & DESOM,
GURUVAYOOR P.O., CHAVAKKAD TALUK,PIN - 680 506

*ADDL.R4 TO R7 IMPEADED

*ADDL.R4: NABEEZA, W/O.LATE MUHAMMED HAJI,
KOMBATHAYIL HOUSE, KOTTAPADI.P.O.,
GURUVAYOOR.

*ADDL.R5: SHUKKOOR, S/O.LATE MUHAMMED HAJI,
KOMBATHAYIL HOUSE, KOTTAPADI.P.O.,
GURUVAYOOR.

R.S.A.NO.824/2014

***ADDL.R6: ANWAR, S/O.LATE MUHAMMED HAJI,
KOMBATHAYYIL HOUSE, KOTTAPADI.P.O.,
GURUVAYOOR.**

***ADDL.R7: SHAMEERA, D/O.LATE MUHAMMED HAJI,
KOMBATHAYYIL HOUSE, KOTTAPADI.P.O.,
GURUVAYOOR.**

***THE LEGAL HEIRS OF THE DECEASED RESPONDENT NO.3 ARE IMPEADED
AS ADDITIONAL RESPONDENTS 4 TO 7 AS PER ORDER DATED 8/9/2015 IN
I.A.NO.1783/2015.**

R1 & R2,ADDL.R4,ADDL.R5 & ADDL.R7 BY ADV. SRI.P.RAMACHANDRAN

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 17-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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P.B.SURESH KUMAR, J.

R.S.A.No.824 of 2014

Dated 17th September, 2015.

J U D G M E N T

The defendant in a suit for injunction is the appellant.

2. The suit was a representative action. The defendant is a Municipality. The plaint schedule property belongs to the defendant. A portion of the plaint schedule property is being used as a public cemetery and the rest for dumping the waste collected by the defendant. The plaintiffs are persons residing in the neighborhood of the plaint schedule property. According to the plaintiffs, on account of the conduct of the defendant in dumping the waste in the plaint schedule property, epidemics are spread in the locality, the water in the nearby wells and ponds are contaminated and fowl smell is emanated round the clock from the property, which make life impossible in the vicinity of the plaint schedule property. In

other words, the case of the plaintiffs is that the conduct of the defendant in dumping waste in the plaint schedule property would amount to public nuisance and has to be restrained by a decree of prohibitory injunction.

3. The defendant contested the suit. According to them, the plaint schedule property is the only property available within its limits for the disposal of the waste generated within the Municipality. They also contended that they are unable to install a waste treatment plant in the plaint schedule property due to paucity of funds.

4. The trial court found that the conduct of the defendant in dumping waste in the plaint schedule property is causing nuisance to the general public including the plaintiffs and consequently, decreed the suit restraining the defendant from dumping any sort of waste material in the plaint schedule property until a modern waste treatment plant which would abate the nuisance is installed. The defendant challenged the decision of the trial court in appeal. The appellate court confirmed the finding of the trial court that the conduct of the

defendant in dumping waste in the plaint schedule property is causing nuisance to the general public including the plaintiffs. However, the appellate court modified the decree passed by the trial court by making it prospective from 1.4.2014 to enable the defendant to install the waste treatment plant in the meanwhile, as directed by the trial court. The defendant who is aggrieved by the concurrent decisions of the courts below has thus come up in this second appeal.

5. Heard the learned counsel for the appellant as also the learned counsel for the respondents.

6. The learned counsel for the appellant contended that the suit being one instituted without serving notice to the defendant as provided for under Section 544 of the Kerala Municipality Act, is not maintainable. On merits, the learned counsel contended that due to paucity of funds, the defendant is not in a position to install the waste treatment plant as directed by the courts below. According to the learned counsel, the courts below should have gone into the question as to the affordability of the defendant to install the waste

treatment plant before directing them to do so. The learned counsel further pointed out that substantial amounts are due to the defendant from Guruvayoor Devaswom situated within its limits towards the sanitary arrangements made and the waste treatment plant as directed by the courts below will be installed immediately on receipt of the amounts due from Guruvayoor Devaswom.

7. The contention raised by the learned counsel for the defendant as to the maintainability of the suit on the basis of Section 544 of the Kerala Municipality Act is not a contention raised by the defendant either before the trial court or before the appellate court. As such, according to me, the said contention cannot be raised by them for the first time in a second appeal filed under Section 100 of the Code of Civil Procedure, for, the contention is deemed to have been waived. [See **Assistant Collector of Central Excise v. Ravi & others** (1970 KLT 261)]. That apart, though a specific question was formulated in the second appeal as to the maintainability of the suit in the light of the provision in Section 544 of the

Kerala Municipality Act, notice was not ordered on the said question. As such, the defendant is not entitled to raise the said question at the time of final hearing. Further, the present suit being one for injunction, Section 544(2) of the Kerala Municipality Act exempts the plaintiffs from the requirement of Section 544(1) of the said Act.

8. Coming to the contention of the learned counsel for the defendant that the courts below were not justified in granting a decree directing the defendant to install a waste treatment plant, I am of the view that there is nothing illegal in the said direction. Under Section 38 of the Specific Relief Act, a decree of perpetual injunction can be granted by the court to the plaintiffs to prevent the breach of an obligation existing in their favour, whether expressly or by implication. The courts below have concurrently found that it is obligatory for the defendant to install the waste treatment plant at the plaint schedule property, if they choose to dump waste in the plaint schedule property. As such, the decree of perpetual injunction granted by the courts below restraining the defendant from

dumping waste in the plaint schedule property until a waste treatment plant is installed, is perfectly in accordance with Section 38 of the Specific Relief Act.

9. As noticed above, on merits, the only contention raised by the defendant is that the plaint schedule property is the only property available to the defendant to dump waste and they are unable to install a waste treatment plant due to paucity of funds. In so far as it is found that the defendant is obliged to install a waste treatment plant before dumping waste in the property, they cannot be heard to contend that they shall be absolved from the said obligation due to paucity of funds. However, the defendant being a public body, having regard to the genuine inability highlighted by them to raise the funds required for installing the waste treatment plant as directed by the courts below, I deem it appropriate to grant time to the defendant to install the waste treatment plant.

10. In the result, the impugned judgments are confirmed subject to the modification that the same will be operative only with effect from 19th June, 2016. The defendant

shall install the waste treatment plant in the plaint schedule property as directed by the courts below in the meanwhile.

The second appeal is disposed of as above. All the interlocutory applications pending in the appeal are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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(true copy)