IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

THURSDAY, THE 25TH DAY OF JULY 2024 / 3RD SRAVANA, 1946

RSA NO. 337 OF 2024

AGAINST THE JUDGMENT DATED 07.03.2024 IN AS NO.3 OF 2016 OF ADDITIONAL DISTRICT JUDGE - V, THIRUVANANTHAPURAM IN THE JUDGMENT DATED 16.10.2015 IN OS NO.1223 OF 2011 OF III ADDITIONAL MUNSIFF COURT, THIRUVANANTHAPURAM

APPELLANTS/RESPONDENTS 1 & 2/DEFENDANTS 1&3:

1 **BALAGOPAL, AGED 57 YEARS**
S/O LATE NAVAKUMAR, C/O RAJAGOPAL, SAROVARAM, OPPOSITE G G HOSPITAL, MURINJAPALAM, MEDICAL COLLEGE, THIRUVANANTHAPURAM, PIN - 695011

2 **RAJALEKSHMI, AGED 69 YEARS**
D/O LATE MADHAVI AMMA, 'KRUPA', POTHUJANAM LANE, KUMARAPURAM, MEDICAL COLLEGE P O, THIRUVANANTHAPURAM,, PIN - 695011

BY ADVS.
R.SUNIL KUMAR
A.SALINI LAL
ARUN KRISHNA
JINU P. BINU

RESPONDENTS/APPELLANT&RESPONDENT NO.3/PLAINTIFF&2ND DEFENDANT:

1 **RADHA G NAIR**
AGED ABOUT 76 YEARS, D/O LATE AMMUKKUTTY AMMA, 'GOKULAM', T C NO. 13/1744, ELANJIMOODU LANE, MURINJAPALAM, MEDICAL COLLEGE, THIRUVANANTHAPURAM,, PIN - 695011

2 **VALSALAKUMARI @ THARANUMSIDHIKKI**
AGED ABOUT 54 YEARS, D/O INDIRA DEVI, GOKULAM, T C NO. 13/1744, ELANJIMOODU LANE, MURINJAPALAM, MEDICAL COLLEGE, THIRUVANANTHAPURAM, PIN 695 011, NOW RESIDING AT GANDHI NAGAR QUARTERS NO. 19, NEEMUCH, MADHYA PRADESH., PIN - 458441

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ORDERS ON 25.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

1. The defendants 1 and 3 in a suit for declaration, perpetual injunction and mandatory injunction is the appellant in this appeal.
2. The parties are referred according to their status before the trial Court.
3. The plaintiff filed the suit for declaring easement by grant over B schedule property and for a consequential mandatory injunction directing the 1st defendant to unlock B schedule gate, to remove lock put therein allowing the plaintiff to park two cars in B schedule parking lot and for a decree for perpetual injunction restraining the 1st defendant from alienating the plaint B schedule property.
4. The suit was filed with the aaverments that the plaintiff and her niece who is impleaded as the 2nd defendant, purchased A schedule property of 1.21 Sq.mtrs of land as per Exhibit A1 document which is inclusive of a residential two storied building therein; that the 1st

defendant was having another property on the eastern side of the A schedule property, having an extent of 86 Sq.mtrs; that the plaint A schedule property did not have a motorable access; that the plaintiff and the 2nd defendant agreed to purchase the plaint A schedule property as the 1st defendant agreed to provide the B Schedule 20 Sq.ft of land for parking two cars at a time in the said 86 Sq.Meters; that on account of the same, specific clause was included in Exhibit A1 document that the plaintiff shall be provided space in the ground floor of the three storied building proposed to be constructed by the 1st defendant for permanent parking of two cars; that from the date of execution of Exhibit A1 the plaintiff, the 2nd defendant and their tenants have been parking their cars regularly in plaint B schedule property; that they used to lock the gate of the entire property with the help of the key given to them by the 1st defendant; that the 1st defendant attempted to sell the plaint B schedule property in order to defeat the right of the plaintiff and the 2nd defendant over plaint B schedule property.

5. The 1st defendant filed written statement contending the *interalia* that, at the time of execution of Exhibit A1, the plaintiff owned a car but the width of the way leading to plaint A schedule property was not sufficient for taking a car. Subsequently, the width of the way was increased as 7 to 8 feet which is more than sufficient to take a car to the plaint A schedule property. On account of the change of circumstances, the permission incorporated in the scheduled description in the sale deed became unnecessary. The plaintiff has not acquired any permanent or indefeasible right over plaint B schedule property. The provision for parking a car incorporated in the schedule description was on the basis of the circumstances then existed. The clause is not a covenant conferring absolute or indefeasible right but only a permission. The plaintiff has no right to enter into the plaint B schedule property as the permission granted has come to close on account of the change of circumstances.

6. During the pendency of the suit, the 1st defendant sold 61 Sq.mtrs out of the said 86 Sq.Meters to the 3rd defendant as per Exhibit A10 document and hence the 3rd defendant was also impleaded, making necessary amendments in the plaint.

7. After amendment of the plaint, the 1st defendant filed additional written statement contending that, the clause with respect to car parking mentioned in Exhibit A1 confers only a contingent right. Since the 1st defendant has not constructed the building, the plaintiff cannot claim any right and that in view of the alienation of the property, the construction of the three storied building in plaint B schedule property has become an impossibility and hence the clause relied on by the plaintiff is not enforceable. The 3rd defendant filed a written statement raising more or less same contentions as raised by the 1st defendant.

8. The Trial Court dismissed the suit holding that the clause relied on by the plaintiff in Ext.A1 is only a contingent contract and the same could be enforced only on

construction of a building in plaint B schedule property and that on account of the sale of plaint B schedule property, the suit itself has become infructuous.

9. The plaintiff filed appeal before the First Appellate Court and the First Appellate Court reversed the judgment and decree passed by the trial Court and allowed the suit in part declaring the plaintiff right over B schedule property and further directing the defendants 1 and 3 to unlock the gate of the B schedule property and remove the lock and allow the plaintiff to park two cars in the B scheduled parking lot at any time. With regard to the prayer for injunction from alienation, the First Appellate Court denied the same, finding that the 1st defendant being the owner of the plaint B schedule property has absolute right to transfer the same,but the same is subject to the right in favour of the plaintiff.

10. I heard the learned counsel for the appellant Sri.R.Sunil Kumar.

11. The learned counsel for the appellant contended that even the description in plaint B schedule is vague as

the location of 20 sq.mtrs. claimed by the plaintiff out of the 86 sq.mtrs. belonging to the 1st defendant is not specifically described. In such a case, the injunction cannot be granted without identification of the said 20 sq.mtrs of land. He further contended that the clause in Ext.A1 relied on by the plaintiff clearly shows that it is dependant upon the construction of a building in plaint B schedule property. The plaintiff can claim right only on construction of a building therein. According to him, on purchase of the property by the 3rd defendant, the fact is that the construction of the building by the 1st defendant has attained an impossibility and though it may be true that the 3rd defendant is bound by the said clause. Hence the plaintiff cannot enforce the clause in Ext.A1.

12. On going through the pleadings as revealed from the impugned judgments, I find that even in the written statement filed by the 1st defendant, he has admitted that the plaintiff started parking the car immediately after execution of Ext.A1. His case as per the written statement is that the same was permitted since the way

was not having any sufficient width and that the said permission could not continue, when the way has attained sufficient width for passage of the car. According to him the permission granted by the 1st defendant has come to close on account of the change in circumstances. It clearly indicates that, the understanding between the plaintiff and the 2nd defendant on the one side and the 1st defendant on the other side while executing Ext.A1 was that, the 1st defendant will permit parking of the cars in plaint B schedule property and when a three storied building will be constructed in Plaint B schedule property, two car parks will be reserved for the use of the plaintiff and the 2nd defendant. In that view of the matter, it cannot be said that the claim of the plaintiff is dependant upon the construction of the building by the 1st defendant. It is not a contingent contract as found by the Trial Court.

13. The further contention of the counsel for the appellant is that, since two car parks are given, the plaintiff is entitled to get only one car park and the other

car park is to be claimed by the 2nd defendant. Here also the Ext.A1 deed shows that, the property is jointly purchased by the plaintiff and the 2nd defendant and hence both are co-owners of the property and hence the right to have two car parks is also a co-ownership between them. So the plaintiff being one of the co-owner, can maintain an action for getting two car parks. If there is any dispute between the plaintiff and the 2nd defendant,the same is to be resolved between them and the 1st defendant has nothing to do with the same.

14. The contention with regard to the identification of 20 sq.mtrs. out of 86 sq.mtrs, the liability of the 1st defendant to provide only two car parks to the plaintiff and the 2nd defendant anywhere in the said 86 sq.mtrs. The plaintiff cannot claim a particular portion of the said 86 sq.mtrs as car park. The plaintiff has included only 20 sq.mtrs out of the said 86 Sq.mtrs in Plaint B Schedule. It indicates that only 20 Sq.mtrs is sufficient for two car parks for them. It is seen that, as per Ext.A10 the 1st defendant has sold only 61 sq.mtrs. to the 3rd defendant.

It also probabalize that the 1st defendant is accepting the right of the plaintiff and the 2nd defendant with respect to the 20 sq.mtrs claimed by the plaintiff. There is no explanation for excluding 25 Sq.mtrs in Ext.A10. In that view of the matter, there cannot be any dispute with regard to the identification of the plaint B schedule property.

15. The learned counsel for the appellant pointed out that the 2nd appellant who was the 3rd defendant in the suit is a bonafide purchaser without notice of the arrangement between the plaintiff and the 2nd defendant on the one side and the 1st defendant on the other side. Her interest is to be protected. The appeal is filed jointly by the 1st and 3rd defendants. If two car parks are possible in the land remaining with the 1st defendant after sale to the 3rd defendant as per Ext.A10, the 2nd appellant could not have any grievance with respect to the property purchased by her.

16. In view of the above discussion, the Regular Second Appeal is dismissed.

Sd/-
M.A.ABDUL HAKHIM
JUDGE

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