

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 25TH DAY OF JANUARY 2022 / 5TH MAGHA, 1943

OP(C) NO. 2487 OF 2019

AGAINST THE ORDER IN IA.NO.1771/2016 IN OS.NO.274/2016
DATED 25.06.2018 OF JUDICIAL FIRST CLASS MAGISTRATE COURT,
PARAVOOR AND JUDGMENT DATED 10.04.2019 IN CMA 40/2018 OF
III ADDITIONAL DISTRICT COURT, KOLLAM

PETITIONER/7TH DEFENDANT:

J.RAJENDRAN PILLAI
AGED 58 YEARS
S/O. JANARDHANAN PILLAI, SANGEETHA (RAJESWARI
MANDIRAM), POOTHAKKULAM VILLAGE, POOTHAKKULAM
P.O., KOLLAM.
BY ADVS.
ARUN BABU
SRI.B.DIPU SACH DEEV

RESPONDENTS/PLAINTIFF AND DEFENDANTS 1 TO 6:

- 1 B. BHASI
AGED 59 YEARS
S/O. BHASKARAN, NANDANAM, SNEHA NAGAR, 32A,
KAVALPURA, ERAVIPURAM P.O., KOLLAM-691 011.
- 2 K.SAVITHRI
AGED 79 YEARS
W/O. KARUNAKARAN, ARANINNAVILAVEEDU,
KOTTAPPURAM CHERI, KOTTAPPURAM VILLAGE,
PARAVOOR P.O., KOLLAM-691 301.
- *3 PADMAKUMAR
AGED 48 YEARS
S/O. KARUNAKARAN, ARANINNAVILAVEEDU,
KOTTAPPURAM CHERI, KOTTAPPURAM VILLAGE,
PARAVOOR P.O., KOLLAM-691 301. (*DELETED)

- 4 PADMAKUMARI
AGED 46 YEARS
D/O. SAVITHRI, KARUNAKARAN, ARANINNAVILAVEEDU,
KOTTAPPURAM CHERI, KOTTAPPURAM VILLAGE,
PARAVOOR P.O., KOLLAM-691 301.
- 5 PADMINI
AGED 37 YEARS
D/O. SAVITHRI, KARUNAKARAN, ARANINNAVILAVEEDU,
KOTTAPPURAM CHERI, KOTTAPPURAM VILLAGE,
PARAVOOR P.O., KOLLAM-691 301.
- 6 PADMARAJAN
AGED 43 YEARS
S/O. KARUNAKARAN, ARANINNAVILAVEEDU,
KOTTAPPURAM CHERI, KOTTAPPURAM VILLAGE,
PARAVOOR P.O., KOLLAM-691 301.
- 7 SREEDEVI
AGED 40 YEARS
D/O. SAVITHRI, KARUNAKARAN, ARANINNAVILAVEEDU,
KOTTAPPURAM CHERI, KOTTAPPURAM VILLAGE,
PARAVOOR P.O., KOLLAM-691 301.

(*R3 IS DELETED FROM THE PARTY ARRAY AT THE RISK
OF THE PETITIONER AS PER ORDER DATED 15.12.2020
IN I.A.NO.1/2020)

R1 BY ADV SRI.B.MOHANLAL

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON
17.01.2022, THE COURT ON 25.01.2022 DELIVERED THE
FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

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O.P(C).No.2487 of 2019
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Dated this the 25th day of January, 2022

J U D G M E N T

Order in I.A.No.1771 of 2016 in O.S.No.274 of 2016 dated 25.06.2018 which was confirmed in CMA.No.40/2018 of the III Additional District Judge, Kollam, as per judgment dated 10.04.2019, is under challenge in this Original Petition filed under Article 227 of the Constitution of India.

2. The petitioner herein is the 7th defendant in the above Suit. Original plaintiff and defendants 1 to 6 are the respondents herein.

3. Heard the learned counsel for the petitioner and the

learned counsel representing the learned counsel for the 1st respondent.

4. For easy reference, I would like to refer the parties in this Original Petition as to their status before the trial court.

5. The plaintiff filed Suit for permanent prohibitory injunction against the defendants. Along with the Original Suit, I.A.No.1771/2016 also was filed seeking temporary injunction restraining the respondents from proceeding with construction in the plaint schedule property and from inducting strangers till the disposal of the Suit.

6. The contention raised by the plaintiff before the trial court is that the plaint schedule property having an extent of 21 cents, originally belonged to one Anantharaman and on his demise, one of his sons, Sri Velu, obtained 1/8 share in the property. Velu died and his legal-heirs sold 1/8 share of Velu in favour of plaintiff as per sale deed and therefore the plaintiff is having right over 1/8 share. It has been specifically contended

that O.S.No.79/1989 was filed for partition and preliminary decree was passed allowing partition and final decree proceedings are going on. At this juncture, the defendants started construction in the entire extent of property inclusive of the share entitled by the plaintiff.

7. The 7th defendant alone contested the matter before the court below admitting his 1/8 share out of 21 cents. According to the 7th defendant/the petitioner herein, the defendants started construction in the plaint schedule property and therefore they could continue the same and the interim injunction sought for cannot be granted. As per Ext.P8 order, the learned Munsiff allowed the interim injunction application and thereby the respondents are restrained from further proceeding with the construction in the plaint schedule property and from inducting strangers till the disposal of the suit.

8. Though Ext.P8 order was challenged before the District Court, Kollam as CMA.40/2018, the appellate court also

confirmed Ext.P8 order.

9. The concurrent finding entered into by the trial court as well as the appellate court is under challenge in this petition filed under Article 227 of the Constitution of India.

10. While assailing the concurrent finding, it is argued by the learned counsel for the petitioner/7th defendant that no injunction can be granted against one co-owner in a Suit filed by another co-owner. In this connection, the learned counsel placed decision reported in [2020 (1) KHC 790], ***Omana Amma & anr. v. Thankamony Amma & Ors.*** Reading the above decision, a learned Single Judge of this Court considered the principle *lis pendens* under Section 52 of the Transfer of Property Act, 1882 and it was held that when a Suit is laid for partition over certain properties, principles of *lis pendens* would come into operation and any subsequent transaction by any other parties would be of no consequence and would not affect the right of the others. In fact, the facts of the case dealt with therein is alienation of share

by one of the co-owners. Another decision of the Honourable Supreme Court reported in [2010 KHC 4974], *Ashok Kumar T.G. v. Govindammal & anr.* also has been placed. In the above said decision, while dealing with principles of lis pendens under Section 52 of the Transfer of Property Act, the Apex Court held that the title of the pendente lite transfer is only in regard to a part of that transferred property and in regard to the remaining portion of the transferred property, the transfer is invalid and the transferor would not get any right or interest in that portion. 2 decisions in S.A.No.200 of 1998 and S.A.No.335 of 1999 also have been placed to contend the said point. Here, the plaintiff claimed 1/8 share in the plaint schedule property and his claim was upheld by a competent court in O.S.79 of 1989 and the said verdict was confirmed in appeal by this Court. Admittedly, final decree proceedings are going on and till now separation of the shares not effectuated. At this juncture, the 7th defendant started construction in one portion of the plaint schedule property,

claiming that he had right over 1.13 Ares of property out of 8.3 Ares of the total extent. It is interesting to note that the 7th defendant also is a person who purchased a portion of the entire extent of property as per a sale deed executed by the 6th defendant, who is one among the sharers.

11. In view of the argument mooted by the learned counsel for the 7th defendant, it is essential to deliberate the following seminal questions:

(i) is there any rigid and unwavering tenet that no injunction can be granted against one co-owner at the instance of other co-owner?

(ii) if it is a flexible principle, to what extent injunction can be granted against one co-owner at the instance of the other co-owner?

12. In this connection I am inclined to refer certain judicial pronouncements. In [AIR 1976 Calcutta 277], ***Sachindra Nath Sarkar & Ors. v. Binapani Bhasi and Ors.*** a

single Bench of the Calcutta High Court in para.18 observed as under:

18. *Consistent with the decisions of this Court, the position in law is as follows:-*

(a) *the co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property, absolutely and simply because he is a co-owner.*

(b) *before an injunction can be issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or accustomed user of the joint property would be inconvenienced or interfered with.*

(c) *the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.*

13. In the decision reported in [1971 JK LR 326], ***Abhai Singh v. Jain Singh***, it has been held by the Jammu & Kashmir High Court that *one co-sharer out of the many has no right to build on which is joint land without the consent of others notwithstanding that, the erection of such building may cause no direct loss to other joint owners.*

14. In [AIR 1961 Punj. 528], ***Sant Ram Nagina Ram v.***

Daya Ram Nagina Rai, a Division Bench of Punjab and Haryana High Court in paragraph No.78 laid down nine propositions in regard to the right of co-ownership. It would be appropriate to reproduce the same as under:

78. *The weight of the authorities and the principles which have been discussed above, give rise to the following propositions:-*

(1) *A co-owner has an interest in the whole property and also in every parcel of it.*

(2) *Possession of the joint property by one co-owner is in the eyes of law, possession of all even if all but one are actually out of possession.*

(3) *A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.*

(4) *The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession, of a co-owner must not only be exclusive but also hostile to the knowledge of the other; as, when a co-owner openly asserts his own title and denies that of the other.*

(5) *Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.*

(6) *Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.*

(7) *Where a co-owner is in possession of separate*

parcels under an arrangement consented to by the other co-owners, it is not open to anyone to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) *The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejection. Same is the case where a co-owner sets up an exclusive title in himself.*

(9) *Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.'*

15. Another decision of the Madras High Court reported in [2019 KHC 4009 : AIR 2019 NOC 446], ***Sivakumar v. G.Chandrasekharan & anr.***, the learned Single Judge of the Madras High Court observed in para.14 as under:

“14. xxxx xxxx xxxx *The contention of the appellant is that the co-owner cannot file a suit against another co-owner for the prayer of injunction. On co-owner cannot prevent the other from enjoying the common property. If one co-owner prevents the other from enjoying the common property the affected co-owner can certainly approach the Court for a relief. A co-owner can enjoy his right over a common property without hindrance to the other co-owner. The plaintiff has not approached the Court to prevent the right of a coowner but has approached the Court to retain his right. xxxx xxxx xxxx”*

16. In another decision reported in [2019 KHC 2039 : AIR 2019 J&K 1], ***Girdhari Lal v. Ram Lal***, Jammu & Kashmir High Court in para.13 observed as under:

“13. xxxx xxxx xxxx where one of the co-sharers is found encroaching upon the property which is jointly owned and possessed by all the c-sharers, in my humble opinion and as held in the judgments referred to above, suit for injunction simpliciter is maintainable. There is no absolute law that suit for injunction by one co-sharer against another co-sharer is not maintainable and the co-sharer approaching the Court should be relegated to the alternative efficacious remedy of seeking partition. xxxx xxxx xxxx.”

17. In another decision reported in [2019 KHC 100 : AIR 2019 NOC 184], ***Muttillath Valappil Vellachi (died) & Ors. v. Madhavi (died) & Ors.***, a learned Single Judge of this Court had occasion to consider a seminal question as to whether a co-owner should institute a suit for partition invariably in all cases where he/she is put on notice of the intention of the co-owner in possession of the property to dispossess other co-owners and held in para.14 as under:

“xxxx xxxx xxxx if one co-owner does not want to institute a suit for partition, the law does not compel him to institute a suit for partition. xxxx xxx xxxx”

18. It is in this backdrop, the question required to be answered.

19. Before that I would like to enlist the incidence of co-ownership, rights and liabilities of co-ownership and ouster.

(1) A co-owner has right and interest in the whole property and also in every parcel and infinitesimal portion of the co-ownership property.

(2) No doubt possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) One co-owner's mere occupation of a larger portion or even the entire joint property does not necessarily amount to ouster another co-owner/co-owners as the possession of one is deemed to be on behalf of all.

(4) An exception to clause (3) above is; the principle of ouster. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession, of a co-

owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other and the plea of ouster is a very weak contention.

(5) Mere passage of time does not extinguish the right of one co-owner, who has been out of possession of the joint property, except in the event of ouster or abandonment, which is a very weak claim and the proof for the said claim is superlative.

(6) Every co-owner has a right to use the joint property in a manner which shall not be inconsistent with similar rights of other co-owners in any contingency.

(7) The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment.

(8) Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent use by one co-owner; if he does

so, the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.'

20. Back on the questions raised, to sum up, I am to hold that there is no rigid or an unwavable tenet that no injunction can be granted against one co-owner at the instance of other co-owner. In the following instances, one co-owner can maintain a suit for injunction to protect his co-ownership right.

(i) If one co-owner prevents the other from enjoying the common property, the affected co-owner can certainly approach the Court for appropriate relief including prohibitory injunction to protect his co-ownership right so that one co-owner can enjoy his right over the common property without hindrance to the other co-owner/co-owners.

(ii) one co-owner out of the many has no right to build on which is joint property, without the consent of others, notwithstanding that, the erection of such building may cause no direct loss to other joint owners or its

stature can be termed as 'improvement', since on separation of sharers, one co-owner's right to enjoy his share shall not be hassled by such building.

(iii) a co-owner cannot be permitted to erect building in the common property without the consent of other co-owners, since one co-owner on separation of his share has every right to enjoy his property even as barren land for having gentle breeze or otherwise without a building therein.

(iv) one co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property, absolutely and simply, because he is a co-owner.

(v) before an injunction can be issued, the plaintiff has to establish that he would sustain, by the act he complains, which materially would affect his position as co-owner or his enjoyment or accustomed user of the joint property would be inconvenienced or interfered with by the said act of another co-owner.

(vi) What relief to be granted in such Suits shall

be decided by the court having jurisdiction guided by consideration of justice, equity and good conscience, after appraisal of the attending circumstances, the nature of injury caused and on weighing the balance of convenience.

(vii) If one co-owner feels or apprehends obstruction in the matter of enjoyment of his co-ownership right, he can very well institute a Suit restraining the other co-owner from obstructing the enjoyment within the sphere of co-ownership right, without disturbing the similar right of the other co-owner/co-owners, even without opting for partition.

21. In this matter, one co-owner/7th defendant is attempting to construct a building in the co-ownership property during the pendency of the final decree proceedings. Plaintiff, another co-owner not consented such a construction. Thus such construction cannot be permitted without the knowledge and consent of the other co-owners and such construction may cause prejudice to the right of enjoyment of the other co-owners as they

wish on separation of shares.

22. In view of the matter, the orders impugned herein cannot be interfered and therefore the Original Petition can only be dismissed.

In the above circumstances, the Original Petition is dismissed.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF OP(C) 2487/2019

PETITIONER'S EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE PURCHASE CERTIFICATE NO.856/1976 DATED 18.6.1976 ALONG WITH TYPED READABLE COPY.
- EXHIBIT P2 TRUE COPY OF THE JUDGMENT DATED 19.12.2002 IN OS NO.79/1989 OF PRINCIPAL SUB COURT KOLLAM ALONG WITH TRUE TYPED READABLE COPY.
- EXHIBIT P3 TRUE COPY OF RELEVANT PAGE OF MEMORANDUM OF RFA 52/2009 DT.25.1.2009 FILED BEFORE THE HON'BLE HIGH COURT.
- EXHIBIT P4 TRUE COPY OF THE SETTLEMENT DEED 2533/1998 DATED 21.7.1998.
- EXHIBIT P5 TRUE COPY OF THE SALE DEED NO.2033/2006 DATED 21.9.2006.
- EXHIBIT P6 TRUE COPY OF LAND TAX RECEIPT DATED 14.1.2016.
- EXHIBIT P7 TRUE COPY OF THE BUILDING PERMIT DATED 21.1.2016.
- EXHIBIT P8 TRUE COPY OF THE TEMPORARY INJUNCTION ORDER IN I.A.NO.1771/2016 OF MUNSIF COURT KOLLAM DATED 25.6.2018.
- EXHIBIT P9 CERTIFIED COPY OF THE JUDGMENT IN CMA NO.40/18 DATED 10.4.2019 OF IIIRD ADDITIONAL DISTRICT AND SESSIONS COURT KOLLAM.

- EXHIBIT P10 THE TRUE COPY OF THE PLAINT DATED
3.9.2016 IN O.S.274/2016 OF MUNSIF
COURT PARAVOOR.
- EXHIBIT P11 THE TRUE COPY OF THE PLAN PREPARED BY
THE ADVOCATE COMMISSIONER IN THE FINAL
DECREE PROCEEDINGS IN O.S.79/89 OF THE
PRINCIPAL SUB COURT KOLLAM.
- EXHIBIT P12 THE TRUE COPY OF THE RENT DEED DATED
01/10/2014 EXECUTED BY BILAL IN MY
FAVOR IN RESPECT TO THE SHOP ROOM IN
THE OLD BUILDING.
- EXHIBIT P13 THE TRUE COPY OF THE RENT DEED DATED
27/03/13 EXECUTED BY ONE SARITHA IN
RESPECT TO THE SHOP ROOM IN THE OLD
BUILDING.