

IN THE COURT OF THE ADDL. DISTRICT JUDGE -VIII, ERNAKULAM
Present:-Sri.Mohandas P.K.,Addl.District Judge -VIII
Tuesday, the 31st day of October 2023/ 9thKarthika 1945

C.M.A No.52/2022

(Against the Order dated 11.08.2022 on IA No.02/2021 in O.S.No.868/2021on the files of the 2nd Additional Munsiff's Court, Ernakulam.)

Appellant/Petitioner/Plaintiff:

M.Susil George Mathai, S/o.C.John Mathai, aged 71 years
residing at Door No.8 Thrikkakara Heights ,Kollmkudimugal,
Thrikkakara .P.O., Ernakulam, Pin -682 021.

By Advs. Reji George, Binoy Davis, Saisanakar. S.,
Ann Mary Abraham

Respondents/Respondents/Defendants:

1. Rajan Jacob, S/o.P.V.Jacob, aged 67 years, Flat
No. 301 Thrikkakara Appartments, Kollamkudimughal,
Thrikkakara. P.O.,Ernakulam, Pin -682 021.
2. T.S.Vimal,S/o.N.Sivarama Panicker,aged 43 years,
Flat.No.402,Thrikkakara Appartments, Kollamkudimughal,
Thrikkakara.P.O., Ernakulam,Pin-682 021.
3. Jayakrishnan,father's name not known,aged 35 years,
Flat.No.102,Thrikkakara Appartments, Kollamkudimughal,
ThrikkakaraP.O., Ernakulam,Pin-682 021.

By Advs. Shaji Thankappan, Subin K Sudheer.

This C.M.A is filed under OrderXLIII Rule 1 of the Civil Procedure Code .

This petition came up for hearing before me on 04.10.2023 and stood over the consideration till this date and the Court on 31.10.2023 passed the following : -

JUDGMENT

Appeal against order dated 11/8/2022 in IA.2/2021 in OS.868/2021 of

the 2nd Additional Munsiff, Ernakulam.

2. The appellant herein filed the suit for permanent prohibitory injunction restraining the defendants and their men from interfering with the plaintiff's right to use the common amenities such as lift, open space, etc and also for restraining them from obstructing him from constructing car park No.601 in plaint B schedule property and other reliefs. Along with the suit he filed IA 1/2021 for a temporary injunction. The claim of the appellant is that he was the partner of the firm by name Home Pride. One late Mary Kutty Immanuel was the said partner. The firm constructed an apartment complex by name 'Thrikkakkara Apartments' consisting of 25 apartments in 12.14 Ares of land owned by the plaintiff and late Mary Kutty Immanuel in Vazhakkala Village. Construction was completed in the year 2009. 19 apartments were sold to various purchasers and remaining six were retained by the partners. The property in which the apartment is constructed is described in A schedule to the plaint. All the apartments, except apartment No.303, were provided with car parking facility. A sketch showing parking space of each apartment was published on the notice board in December 2009 and a copy was sent to all the purchasers by email dated 7/9/2010. The car park allotted six flats were retained by the partners of the firm. All the apartment owners have the right to use the car park allotted to them. Plaintiff and Mary Kutty Immanuel and the apartment owners were using the car park space allotted to them as per the plan. The car park of

apartment No.601 was on the north eastern corner of the total property and the same is described in B schedule property to the plaint. The same was constructed using GI pipes and metal roofing raising the height of eastern and northern compound walls. Since then the plaintiff has been using the same while he visits 'Thrikkakkara Apartments'. There was dispute between the plaintiff and his partner and arbitration proceedings was initiated and an award was passed on 18/11/2016. As per the award, the plaintiff became the absolute owner of apartment No.601. The plaintiff along with his family is residing in an apartment near to 'Thrikkakkara Apartments'. The defendants are residing in the 'Thrikkakkara Apartments'. Before formation of the Residence Association, the plaintiff was taking care of the common facilities and collecting monthly maintenance. The defendants 1 and 2 and some other owners were not regular in paying the monthly maintenance. Though the plaintiff demanded them to pay the amount, they did not pay and became inimical terms with the plaintiff. In the meanwhile, the roof of car park No.601 was blown away due to heavy wind and rain in 2018. The plaintiff was in United States. The roof of car park of apartment No.001 allotted to Mary Kutty Immanuel was also blown away in that incident. She did not repair the car park due to her bad health. After the plaintiff came back, he tried to repair the roof of the park on 14/4/2019. The defendants objected the same. Thereafter in 2021, after the Covid-19 was subsided, he tried to put up the roof of the car shed on 25/10/2021.

But the defendants objected the same and they threatened that they will not permit the plaintiff to put up the car shed or use the same for parking his car. The plaintiff filed an application for temporary injunction restraining the defendants from causing obstruction in parking the vehicle in B schedule property by the plaintiff.

3. The respondents opposed the application stating that there were only 24 apartments in the approved plan. The builder converted the common area and parking space in ground floor into an apartment and sold the same. The roof top and all other open spaces are common area and the builder has no right to appropriate the same. The roof top is now illegally closed by the builder. The allegation that plaint B schedule property was allotted as car park of apartment No.601 is not true. The plaintiff did not entitled to any relief.

4. The plaintiff filed a reply affidavit reiterating the averments in the affidavit in support of the petition and stating that the Building Rules was not applicable in the Panchayath at the relevant time and the terrace of 6th and 7th floor are excluded from common area as they are part of pent house.

5. When the matter came up for consideration before the trial court, Ext.A1 to A10 and Ext.C1 were marked on the side of the petitioners. Ext.B1 to B4 were marked on the side of the respondents. The court below, after considering the materials on record found that the

petitioner is not entitled to an injunction and application was dismissed.

6. Aggrieved by the order of the trial court, the petitioner filed the appeal on the ground that order of the trial court is against evidence on record. It failed to properly appreciate Ext.A1 and also the report of the Commissioner. The court ought to have found that B schedule property was allotted to the plaintiff as car park of apartment No.601. The observation of the learned trial court that the petitioner had not paid Rs.75,000/- and the car park was not allotted to him is not correct. The court ought to have allowed the application.

7. The appeal was presented before the District Judge on 28/9/2022. After admission, the same was made over to this court for hearing and disposal. When the matter came up for consideration, both sides were heard.

8. The following points arise for consideration:

1. Whether the appellant is entitled to an order of injunction?
2. Whether there are any reasons to interfere with the order of the trial court?
3. What is the order to be passed or reliefs to be granted?

9. **Point Nos.1 and 2:-** It is the undisputed fact that the apartment complex by name 'Thrikkakkara Apartments' was constructed in 12.14 Ares of land by a firm by name Home Pride in Vazhakkala

Village. As per the case of the plaintiff, there were 25 apartments and as per the claim of the respondents there were only 24 apartments and an additional apartment was carved out in the ground floor by encroaching upon the common area. It is not clear from the records whether the apartment in the ground floor, which is in dispute, is given any separate number for identification. The case of the plaintiff/petitioner is that all the apartments were provided with covered car park. The construction of the building was completed in the year 2009. It is the case of the plaintiff that only 19 apartments were sold to third parties and six apartments were retained by the firm. It is his case that as there was some dispute between himself and his partner Mary Kutty Immanuel and arbitration was initiated and Advocate N.Sukumaran was appointed as Arbitrator and an award was passed on 18/11/2016. It is his case that as per the award apartment No.601 was allotted to him. Ext.A2 is the certified copy of the award passed by the Arbitrator. It is not in dispute that the petitioner/plaintiff was allotted with the apartment as per the award. The defendants being the owners of other apartment cannot challenge the ownership of the petitioner over that apartment. Admittedly, the apartment complex was constructed by the firm in which the plaintiff is a partner and all the respondents are claiming under the firm. So the fact that apartment No.601 belongs to the plaintiff cannot be disputed by the defendants.

10. The dispute in this case is regarding the parking space of

apartment No.601. The case of the petitioner is that on immediately after completion of the construction, a sketch showing the details of the car park allotted to different owners was published in the notice board of the apartment in December 2009 and a copy of the same was sent by email to all the owners on 7/9/2010. A copy of the email along with the sketch attached to the same is produced and marked as Ext.A1. As per Ext.A1 the car park allotted to apartment No.601 is on the north-eastern corner of the total of the property. In the email it was stated that the Thrikkakkara Apartment Residence Association may continue with the maintenance from December 2009. The defendants are not seriously challenging the email or the sketch attached to it. They have no case that apartment No.601 was allotted to any of them. It is the case of the petitioner that the roof of the car park allotted to apartment No.601 and 001 which was retained by other partner, was blown away in heavy rain and wind in 2018 and thereafter there was no roof and he could not reconstruct the same as he was not in India and the other owner was laid up. A Commissioner appointed from the court has submitted Ext.C1 series, sketch, photographs and report. In the sketch appended to the report it is marked as C1(a). The Commissioner has marked plaintiff B schedule property, the parking shed allotted to apartment No.601. He has also produced Ext.C1(b), (c) and (d) photographs which also suggests that there was a car park with roofing. The petitioner has also produced Ext.A8 series photographs which also show that there was a covered car

park on the north eastern corner of A schedule property. The commissioner's report shows that at present the covered car park is not available at the site, whereas the car park with metal sheet roofing are available on the western side of the building. As per the sketch appended to Ext.A1, there are car park allotted to 8 apartments on the western side of the building. The contention of the learned counsel for the respondent is that all the apartments are provided with car park under the main building and there was no car park in the common area of the compound. But, Ext.A1 which came into existence in 2009 and the report of the commissioner and Ext.A8 suggest that such a contention is not correct. At least some of the apartment owners are provided with car park outside the building, but within the compounds. So that suggest that there is some force in the submission of the learned counsel for the appellant that plaint B schedule property was allotted to the plaintiff as car park of apartment No.601.

11. The learned counsel for the respondents contended that from the award of the Arbitrator it can be seen that the petitioner had to pay a sum of Rs.75,000/- towards value of the car park and the same was not paid and if he had to pay value of the same, there is no question of allotment of car park to him separately. But, as stated above, the property belonged to the plaintiff and his partner. Ext.A2 award happened to be passed due to some dispute among the partners. The dispute among the partners or the award regarding payment of money

among them, has only a little bearing in this case. Whether the plaintiff has paid a sum of Rs.75000/- towards the value of the car park or not is to be considered in a separate proceedings, if any such question arises between the plaintiff and his partner. In this case, the court need not go to the details of the same. Suffice to say that in 2009, when there was no dispute among the parties a document came in to existence which will show that plaint B schedule property was set apart as the car park for apartment No.601. It is the case of the plaintiff that roof of the same was blown off in the wind and rain. The evidence on record shows that the B schedule property is situated on the north eastern corner of the compound, in front of the apartment building. Whether the roof was blown off in the wind or whether it was in existence earlier or the same was removed by the parties, etc. can be decided only after taking evidence in the matter. But, the petitioner being the owner of apartment No.601 has the right to park his vehicle in the parking slot set apart to him. Even otherwise, he being a co-owner of the common area, has the right to use the same without causing obstruction or difficulties to other owners.

12. In this case, as the B schedule property was set apart as a car park slot of apartment No.601, the petitioner/plaintiff has every right to park his vehicle in that area. The defendants being the residents of the apartment building have no right to obstruct the petitioner from parking his vehicle in the B schedule property. Whether the plaintiff has a right to

reconstruct the roof of the car park or not can be decided only after trial. But if the petitioner is not permitted to park his car in the slot allotted to him, he will be put to irreparable loss and injury. If the car is parked in that area, there is no reason for causing any difficulties to the other apartment owners as they have got separate car park of their own. So the balance of convenience and irreparable injury are in favour of the petitioner.

13. The court below has rejected the application mainly on the ground that in Ext.A2 there was a direction to pay Rs.75000/- as value of the car park facility and it does not say that the B schedule property was allotted as car park to apartment No.601. In Ext.A2, the Arbitrator was not called upon to decide the dispute among the apartment owners. The Arbitrator was considering the dispute among the partners. As per Ext.A2 apartment No.601 is allotted to the petitioner. So the owner of the apartment is entitled to park his vehicle in the slot allotted to that apartment.

14. On going through the entire records, I am of the view that the petitioner is entitled to an order restraining the respondents from obstructing parking of the car by the petitioner in B schedule property. The petitioner is entitled to an order of injunction restraining the respondents from causing obstruction in using plaint B schedule property by the petitioner. The order of the trial court is liable to be set aside and

the appeal is to be allowed. The points are found accordingly.

15. **Point No.3:** In the light of my finding on point Nos.1 and 2, the appeal is to be allowed.

In the result, the appeal is allowed. The order of the II Additional Munsiff dated 11/8/2022 in IA 2/2021 in OS 686/2021 is set aside. IA 2/2021 stands allowed. The respondents are restrained by an order of temporary injunction from causing obstruction in using plaint B schedule property by the petitioner till the disposal of the suit. Considering the facts and circumstances of the case, both parties are directed to suffer their respective costs.

Dictated to the Confidential Assistant, transcribed and typed by her, corrected by me and pronounced in open court on this the 31st day of October, 2023.

Sd/-

**P.K.Mohandas,
Addl.District and Sessions Judge -VIII.**

APPENDIX: Nil

**Id/-
Addl.District and Sessions Judge -VIII.**

JUDGMENT
in
CMA No.52/2022
Dated:31.10.2023.