

IN THE COURT OF THE MUNSIF, KAYAMKULAM

Present: Sri.Bijukumar.C.R., B.Com.,LL.B., Munsiff

Friday, the 12th April 2019 /22nd Chaithra 1941**IA.No.497/2019 in OS.No. 77/2019**

(Filed on 28/02/2019)

Petitioner/Plaintiff : Babu Sreedhar, aged 58 years, S/o.Sreedharan,
Residing at Vattakkattu House, Kappil West muri,
Krishnapuram Village.

(By.Adv.Sri.M.R.Salim)

Cr. Petitioners/Defendants:

1. Sree Subha, aged 54, W/o.Late Raju, Akhil Villa,
Kappil West muri, Krishnapuram Village.
2. Akhil Raj, aged 34, S/o.Late.Raju of do-do-
3. Anu Raj, aged 28, S/o. Late.Raju of do-do-

(By Adv.Sri.M.Adbul Khader)

This petition having been finally heard on 21/03/2019 and the court on 12/04/2019 passed the following.

ORDER

This is an application for temporary injunction filed by the plaintiff under Sec. 151 and Order XXXIX R. 1 of the Code of Civil Procedure, 1908 (for short, "the C.P.C").

2. The averments in the affidavit in support of the I.A are as follows:- Plaint A schedule property and the building therein belongs to the plaintiff under sale deed No. 149/'10 dated 10.02.2010. The residential building situates in the plaint schedule property is named Murukalayam. During the time of purchase of the plaint schedule property by the petitioner/ plaintiff, one Mr. Upendranath was residing in

the said house. Even though a sale deed was executed in favour of the plaintiff regarding the plaint schedule property, the same was not separated from the surrounding properties. Therefore, the plaintiff had instituted O.S.No. 65/'10 before this court for fixing the boundaries of the plaint schedule property and for declaring the plaintiff's right, title and possession over the plaint schedule property and the building therein. The plaint schedule property herein was plaint A schedule property in the said suit. The surrounding property was scheduled in the said suit as plaint B schedule. During the pendency of O.S.No. 65/'10, the counter-petitioners/defendants had trespassed into the plaint schedule property and building therein and thereby took forcible possession of the same. The defendants did so under the strength of some fabricated Deeds executed by one Mr. Balasubrahmanyam, who was the owner of the properties surrounding the plaint schedule property. Therefore, the defendants herein were impleaded in O.S.No. 65/'10 as additional defendant Nos. 9 to 11. Later, this court tried the said suit and passed a decree in favour of the plaintiff on 31.01.2015. This court passed a decree in favour of the plaintiff in O.S.No. 65/'10 declaring the plaintiff's right, title and possession over the plaint schedule property and directing the defendants herein to vacate the plaint schedule property and the building through the process of the court. Against the said decree, the defendants preferred an appeal before the Additional District Court, Mavelikara as A.S.No. 50/'15. The said appeal is not pending before the Additional District Court-III, Mavelikara. The plaintiff has already filed an execution petition before this court as E.P.No. 51/'16 to get the decree executed in O.S.No. 65/'10. However, the proceedings in the said E.P have now been kept in abeyance because

the Additional District Court, Mavelikara stayed the same in A.S.No. 50/'15. Even though the plaintiff's right and title over the plaint schedule property stands declared by this court, no order of injunction was granted. The plaintiff has got absolute right and title over the plaint schedule property as per the above said sale deed and the same stands declared by this court. The defendants still continue in the plaint schedule property and they are residing in the building therein due to the pendency of A.S.No. 50/'15. There is every possibility to grant a decree in favour of the plaintiff in A.S.No. 50/'15. The defendants have no right over the plaint schedule property and the building therein. They are now continuing in the plaint schedule property and residing in the building therein on the strength of the stay order issued by the Additional District Court, Mavelikara in A.S.No. 50/'15. In the said circumstances, the defendants herein are bound to maintain status quo of the plaint schedule property and the building therein till the disposal of A.S.No. 50/'15. Since the defendants have no right over the plaint schedule property and the building therein, they are not entitled to alter the present nature and characteristics of the plaint schedule property and the building therein till the disposal of A.S.No. 50/'15. Now the defendants are started to demolish portions of the building in the plaint schedule property so as to alter its present nature. Because the defendants are still residing in the plaint schedule property, the plaintiff is quite unable to prevent them from doing the said activities. In the said context, the plaintiff has no other option except to approach the court with the suit. The defendants are persons having no hesitation to commit any illegal act. Therefore, the suit is instituted and the I.A is filed to restrain the defendants/ the counter-

petitioners and their men by a temporary injunction from demolishing the portions of the building in the plaint schedule property, from causing any damages to the building in the plaint schedule property and from doing any act altering the present nature and characteristics of the plaint schedule property and the building therein. The I.A is liable to be allowed with costs.

3. The counter-petitioners/ the defendants had filed objection raising the following averments:- The affidavit and the I.A are not maintainable either in law or on facts. The affidavit and the I.A were filed by the plaintiff with an intention to obtain illegal gain in any manner against the defendants and to lower the status of the defendants in the society and to cause hardships to them. The averments in the affidavit are false and fabricated and the same lack bona fide and they are devoid of truth. All the averments in the affidavit except those which are specifically admitted are false and hence denied. The averments in paragraph No. 1 of the affidavit are false and hence denied. The plaintiff has no title or possession over the plaint schedule property. As per sale deed No. 349/'10 dated 10.02.2010, there are no buildings or improvements in the plaint schedule property. The defendants had not obtained title or possession over the plaint schedule property. There is no building in the property comprised in survey No. 549/5, which is stated in the said document or its schedule. The 1st defendant and her deceased husband, Sri. Raju had purchased the property comprised in survey No. 549/16 as per sale deed No. 2474/'12 of the Kayamkulam Sub Registrar Office and the building bearing No. XIII/ 289 of the Krishnapuram Panchayat situates in the said property. Thus, the 1st defendant and her

husband had purchased the said property, effected mutation of the same and they are residing in the residential house therein. The said Raju was died while residing in the said house. True facts being so, contrary statements are false and hence denied. The averments in paragraph No. 2 of the affidavit are false and hence denied. Deed No. 349/'10 does not state anything regarding the house named Murukalayam or any other building or its number. The said building has no consideration or stamp in the said document. The said property and about 1 ¼ Acres of properties, which lies as a compact plot within common compound wall, and building therein is in the title and possession of Sri. Balasubrahmanyam, aged 77, S/o Madhava Panicker, Flat No. 101, Vembanadu Gardens, 1531 A, Thammanam, Kochi. The 1st defendant and her husband have absolute right over the properties described in Deed Nos. 2474/'12 and 2475/'12 of the Kayamkulam Sub Registrar Office. An extent of 38 cents of property comprised in survey No. 549/5 of the Krishnapuram Village belonged to Sri. Damodara Panicker, S/o Veluthakunju Panicker, Thottathil House, Kappil East Muri and he had executed Will No. 24/ 1972 dated 18.12.1972 of the Kayamkulam Sub Registrar Office in respect of the said property and his remaining properties. All the properties described in the said Will were included as different shares in separate schedules and the same were allotted to the said Balasubrahmanyam, his siblings and their mother. The said Damodara Panicker was died on 17.09.1985 and the said Will was come into force. The properties covered under the said Will as well as the self acquired properties and the family properties of the said Balasubrahmanyam are lying as a compact plot and the same is in his possession. The legatees in the said Will had not obtained possession of

the properties covered under the same and they have not identified or measured out the same and not effected mutation or paid land tax in respect of the same. The plaint schedule property is the property allotted to Sri. Raveendranath, who is the son of Balasubrahmanyam, as per item No. 5 in the said Will. Sri. Raveendranath or his successors or the plaintiff have not obtained possession of the same, neither mutated the same into their name nor paid land tax in respect of the same. They have not identified it. The said Raveendranath, who was resided with family at Jayanthi Vihar in Kattachira Muri of Bharanickavu Village, had never enjoyed the said 10 cents of property described in the said Will. While so, the said Raveendranath was died on 17.05.2008 and after his demise, his legal heirs have not obtained possession of the said property or effected mutation of the same into their name. Sri. Raveendranath and his successors were not even aware of the said property. Legal representatives of Sri. Raveendranath, who were not aware of the said property, had executed sale deed No. 349/'10 in respect of an imaginary property. As per the said sale deed, the plaintiff had not got any right in respect of 10 cents allotted to the share of Sri. Raveendranath in the above said Will. The plaint schedule property is quite different from the 10 cents of property allotted to the share of Sri. Raveendranath as per the said Will. Since Sri. Balasubrahmanyam, who is in possession of the said property, is not made a party to the suit, the suit is not maintainable and liable to be dismissed in limine. In O.S.No. 65/'10, it was found that boundary of the property cannot be fixed. Injunction cannot be granted in respect of a property having no boundary. Since the plaintiff admitted that injunction was not granted in O.S.No. 65/'10, a suit for injunction against the same

defendants on the basis of the same title deed is legally barred. The said Raveendranath had not constructed a residential house in the plaint schedule property. After the institution of O.S.No. 65/'10, another suit as O.S.No. 454/'12 was filed in respect of the very same plaint schedule property against Sri. Balasubrahmayam, Raju and Sreesubha for a permanent prohibitory injunction alleging obstruction of way and the same was dismissed finding that the plaintiff has no possession over the plaint schedule property. The plaint schedule property has no boundaries. The plaintiff has no possession over the plaint schedule property. Therefore, the relief of injunction is not allowable. Since appeal is pending against the decree in O.S.No. 65/'10, the plaintiff is not entitled to institute another suit against the very same defendants raising the same reliefs. While the entire property was in the possession of Sri. Balasubrahmanyam within common boundaries, as per sale deed Nos. 2474/'12 and 2475/'12, he had alienated property forms portion of the property comprised in survey No. 549/16 and the two storied residential house bearing No. KP XIII/289 constructed therein by Sri. Balasubrahmanyam in favour of the 1st defendant and her husband and consequently, the 1st defendant and her children are residing in the said house. The plaintiff attempts to encroach upon the plaint schedule property and the residential building belong to the defendants and the contrary statements are false. In O.S.No. 65/'10 and O.S.No. 454/'12, possession of the plaintiff was not confirmed. The finding in the said suits is that the plaintiff has no possession over the plaint schedule property. Injunction was refused in O.S.No. 65/'10 because the plaintiff has no possession over the property. Boundary cannot be fixed as prayed in

O.S.No. 65/'10. Since injunction was not allowed in O.S.No. 65/'10, the plaintiff is not entitled to institute another suit for injunction against the same defendants in respect of the property scheduled in the said suit. The plaintiff ought to seek relief in A.S.No. 50/'15 pending against the said suit. If the defendants have done anything against the judgment in O.S.No. 65/'10 or against the order in A.S.No. 50/'15, the plaintiff ought to approach the Appellate Court and to seek remedy. He has no right to institute a new suit. Apart from the plaint schedule property, the plaintiff had caused to execute another document as Deed No. 1355/'13 by one Indiramma, who is a legatee in respect of another extent of 10 cents of property scheduled in Will No. 24/ 1972, but he has no right or possession over the same. Against the execution of he said document, Sri. Balasubrahmanyam had instituted O.S.No. 221/'16 against the present plaintiff and the children of Smt. Indiramma. The plaintiff and his men are persons engaged in encroachment of properties on the strength of false documents by exerting political and financial influence. In fact, the defendants ought to be restrained. Sri. Balasubrahmanyam, who was in possession of the properties including the plaint schedule property, and his wife had sustained severe injuries in a road traffic accident out of which his only son was died and consequently, Sri. Balasubrahmanyam and his wife are residing at Kochi for their prolonged treatment. Taking advantage of the said situation, the plaintiff is engaged in an attempt to snatch away his properties with the assistance of the brothers of Sri. Balasubrahmanyam. Since the 1st defendant had appeared before the court as the power of attorney holder of the said Balasubrahmanyam, the plaintiff had instituted the present suit with an intention to obstruct

maintenance of the residential house of the defendants and to obstruct the marriage of the 2nd defendant, who is the son of the 1st defendant and to lower the status of the 1st defendant and her family in the estimation of the public. The I.A is liable to be dismissed with costs.

4. The following points were formulated for consideration:-

1. Whether the petitioner/ plaintiff has a prima facie case ?
2. In whose favour, balance of convenience lies?
3. Whether the petitioner would suffer irreparable injury and hardships if order of injunction is refused?
4. Reliefs and costs?

5. Exts. A1 to A5 are marked on the side of the plaintiff/petitioner. Exts. B1 to B8 are marked on the side of the defendants/counter-petitioners. Commission report on I.A.No. 498/'19 is marked as Ext. C1. Heard both the sides.

6. **Point Nos. 1 to 3:-** For the sake of convenience, these points are considered together. The plaintiff claims title over the plaint schedule property as per sale deed No. 349/'10 of the Kayamkulam Sub Registrar Office, which is marked as Ext. A3. The said document was executed on the basis of Will No. 24/1972 of the said Sub Registrar Office. In the written objection, the counter-petitioners/ defendants admitted that the testator in the said Will was died on 17.09.1985 and the same was come into force. At the same time, the counter-petitioners contended that despite the execution of the said will, the predecessor-in-interest of the petitioner, one Raveendranath, who is a legatee in the said Will, had not possessed and enjoyed the plaint schedule property at any point of time. Thus, from the contentions in the written objection, it can be seen that to

certain extent, the plaintiff approbate the said Will whereas he reprobate the same so far as the right of the predecessor of the petitioner over the plaint schedule property is concerned. Admittedly, there was an earlier suit in respect of the plaint schedule property as O.S.No. 65/'10 and the same was decreed in favour of the plaintiff herein. The plaint schedule property in the instant suit was plaint A schedule property in the said suit. Ext. A4 is a plaint therein. From Ext. A4, it can be seen that the said suit was instituted for the reliefs of fixation of boundary and permanent prohibitory injunction. Ext. A1 is a common judgment in O.S.No. 65/'10 and O.S.No. 359/'12. O.S.No. 359/'12 was instituted by one Balasubrahmanyam from whom the defendants claim title against the legal representatives of deceased Raveendranath and the plaintiff herein. As per Ext. A1, O.S.No. 359/'12 was dismissed and O.S.No. 65/'10 was partly decreed declaring the plaintiff's title over plaint A schedule property and the structures therein under Ext. A3 sale deed herein, which was Ext. A1 in the said suit. It was further decided in the said judgment that the plaintiff is entitled to dispossess additional defendant Nos. 9 to 12 from the plaint schedule property and the house situates therein. Thus, from Ext. A1, it can be seen that the title over the plaint schedule property was found in favour of the plaintiff. From the other reliefs granted as per Ext. A1 judgment, it can be seen that the plaintiff was allowed to recover possession of the said property and the building. True that the said judgment is under challenge before the Additional District Court, Mavelikara. In the present suit and I.A, the only relief sought against the defendants is that they are to be restrained from demolishing any portion of the building in the plaint schedule property, from causing

any damages to the building therein and from doing any acts altering the present nature and characteristics of the plaint schedule property and the building therein. Considering the right of the plaintiff over the plaint schedule property found affirmative in Ext. A1 judgment, it can be seen that the present injunction is one to protect the title of the plaintiff only and the same would not cause any hardships or prejudice to the defendants. Since Ext. A1 judgment is in favour of the plaintiff, such an injunction would not cause any harm to the defendant. In fact, the said injunction is one giving aid to the plaintiff to swallow the fruits of the decree on the basis of Ext. A1. The merit of the contentions put forward by the defendants that bequeath in favour of the predecessor of the plaintiff, Sri. Raveendranath, was not taken place and he had not enjoyed the plaint schedule property at any point of time can be adjudicated only after adducing evidence. Further, the decision in A.S.No. 50/'15 is decisive on that point because the same would give finality regarding the question of title of the plaintiff over the plaint schedule property. Whether the relief of injunction sought in the plaint is barred by Order II Rule 2 of the C.P.C also can be decided only after adducing evidence in trial. Since the relief of injunction sought in the plaint is not in connection with the physical identity of the plaint schedule property or its boundaries, the fact that the plaint schedule property has no clear boundaries is not a ground to refuse the injunction. Further, the said aspect has no relevance because O.S.No. 65/'10 is one for the relief of fixation of boundary also. In the said circumstances, it can be seen that so far as the relief of injunction sought in the plaint is concerned, the plaintiff has a prima facie case and the balance of convenience is in

favour of granting an injunction. Unless such an injunction is granted, the plaintiff would suffer irreparable injury and hardships. Point Nos. 1 to 3 are found in favour of the plaintiff.

7. **Point No. 4:-** On point Nos. 1 to 3, it is found that the relief of injunction is allowable. Considering the facts and circumstances of the case, the parties are liable to bear their respective costs.

In the result, the I.A is allowed and the interim injunction granted on 28.02.2019 is made absolute by restraining the counter-petitioners/ the defendants and their men by a temporary injunction till the disposal of the suit from demolishing the portions of the building in the plaint schedule property, from causing any damages to the building in the plaint schedule property and from doing any act to alter the present nature and characteristics of the plaint schedule property and the building therein. Parties are directed to bear their respective costs.

(Dictated to the confidential assistant, transcribed and typed by her, corrected and pronounced by me in open court on 12th day of April, 2019.)

BIJUKUMAR.C.R.,
MUNSIFF

Appendix

Exhibits for the petitioner :-

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| A1 | 31/01/2015 | : Certified copy of Common Judgment in O.S.No.65/10 and OS.No.359/12 |
| A2 | 04/09/2012 | : Photocopy copy of Commission Report in OS.No.65/10 |
| A3 | 10/02/2010 | : Photocopy copy of Sale deed No.349/10 |
| A4 | 18/02/2010 | : Certified copy of plaint in OS.No.65/10 |
| A5 | 21/11/2013 | : Photocopy of Judgment in O.P (c) No.4005/2013 |

Exhibits for the Counter Petitioners:-

- B1 10/10/2012 : Certified copy of Sale deed No.2474/12
B2 10/10/2012 : Certified copy of Sale deed No.2475/12
B3 19/10/2015 : Certified copy of Decree in OS.No.454/12
B4 19/10/2015 : Photocopy of Judgment in OS.No.454/12
B5 07/01/2013 : Photocopy of Tax receipt
B6 05/11/2011 : Photocopy co Building Tax receipt
B7 07/03/2018 : Building Tax receipt
B8 31/01/2015 : Certified copy of Decree in OS.No.65/10

Court Exhibits:-

- C1 16/03/2019 : Commission Report prepared by Commissioner
Adv.Smt.K.S.Rajalekshmi

MUNSIFF