
(2011) 07 KL CK 0156

In the High Court Of Kerala

Case No : Regular Second Appeal . No. 728 of 2011 (C)

Pennamma " Mareena, Jossy and Metilda

APPELLANT

Vs

Joshewa and Others

RESPONDENT

Date of Decision : 20-07-2011

Acts Referred:

Easements Act, 1882 — Section 60

Citation : (2011) 07 KL CK 0156

Hon'ble Judges : Sasidharan Nambiar, J

Bench : Single Bench

Advocate : Jimmy George Vattathara, for the Appellant; N. Ratheesh, for the Respondent

Final Decision : Dismissed

Judgement

M. Sasidharan Nambiar, J.—Defendants in O.S.100 of 2006 on the file of Munsiff Court, Kochi are the Appellants. Respondents are the Plaintiffs. Respondents instituted the suit to set aside Ext.B1 partition deed contending that plaint schedule property having an extent of 13.775 cents in Survey No. 108/3 of Edakochi Village belong to them under the will dated 5.8.1989 executed by their grand father Mathai. Respondents 1 and 2 filed LA(OP)608 of 1993 before District Court for granting Letter of Administration with the will annexed. As the OP was contested and hence converted as O.S.14/1996. Under Ext.A2 decree letter of administration was granted with the will annexed. Grand mother of Respondents 1 and 2 alone was residing in the house in the plaint schedule property. First Appellant occasionally stayed with the grand mother. That stay is only a permissive one. In 1991 Respondents vacated the tarawad house. On 22.12.2005, Respondents orally RSA 728/2011 2 terminated the permission granted to the first Appellant to reside in the house. His residence thereafter is unlawful. In view of the contentions of the Appellants in O.S.132 of 2006, the plaint was amended contending that Appellants instituted O.S.132 of 2006 relying on the partition deed 937/2006 and they have no right to divide the

property in view of the decree in O.S.14 of 1996 upholding the will and therefore the partition deed is null and void and not binding on the Respondents and it is to be declared void.

2. Appellants resisted the suit contending that the will was not executed by the deceased and it was fabricated one and though the third Respondent had filed LA(OP) 608 of 1993 for granting letter of administration with the will before the District Court and it was converted as O.S.14 of 1996 and a letter of administration was given, Appellants intend to file an appeal against the decree. On the request of the mother of the first Appellant, first Appellant and her children are residing in the plaint schedule property for the last thirteen years. It was contended that spending Rs. 3.25 lakhs, Appellants effected RSA 728/2011 3 modifications of permanent nature and hence due to the valuable constructions of permanent nature, license has become irrevocable and therefore Respondents are not entitled to seek possession of the property. It was also contended that the Respondents are not entitled to challenge the partition deed.

3. First Appellant had filed O.S.132 of 2006, a suit for injunction contending that under Ext.B1 partition deed, Appellants have right over the property and there are clear boundaries on all the four sides and Appellants have been enjoying the plaint schedule property and Respondents 1 and 2, the children of third Respondent have no right to trespass into the property and spending Rs. 3.25 lakhs, Appellants have modified the building and additional structure was also put up in the tarwad house and the license has become irrevocable and therefore Respondents are not entitled to trespass into the property and a decree for injunction was sought for. Respondents resisted the suit raising the same contentions raised in O.S.100 of 2006.

4. Learned Munsiff tried both the suits together and by RSA 728/2011 4 common judgment dated 30.6.2007, dismissed O.S.132 of 2006 and granted a decree declaring Ext.B1 null and void and not binding on the Respondents and directed the Appellants to surrender vacant possession of the plaint schedule building within one month. Appellants challenged the common judgment in A.S.59 of 2007 and A.S.60 of 2007. A.S.59 of 2007 was filed challenging the decree granted in O.S.100 of 2006 and A.S.60 of 2007 challenging the dismissal of O.S.132 of 2006. Learned Sub Judge, as per common judgment dated 12.4.2011, dismissed both the appeals. The second appeal is filed only against the decree in A.S.59 of 2007, viz, the judgment confirming the decree in O.S.100 of 2006. No appeal was filed as against the decree in A.S.60 of 2007.

5. Learned Counsel appearing for Appellants was heard. The argument of the learned Counsel is that in paragraph 5 of the plaint where details of the cause of action has been pleaded by the Respondents, it is admitted that Appellants are licensees and the license was revoked and in the written statement, it was specifically pleaded by the Appellants that they have effected RSA 728/2011 5 valuable improvements of permanent nature by incurring expenses of 3.25 lakhs and it was with the consent of the Respondents and therefore the license has

become irrevocable u/s 60(b) of Indian Easment Act. Learned Counsel would argue that evidence would establish that Appellants have effected the said improvements and therefore when the status of the Appellants as licensees is admitted, it is to be found that license has become irrevocable. Learned Counsel would also argue that though Appellants did not challenge Ext.A2 decree granting administration of the will in favour of Respondents 1 to 3, an application is now pending before the District Court filed by one of the legal heirs challenging the granting of Letter of administration and in such circumstances, Respondents are not entitled to the decree granted by the courts below.

6. On hearing the learned Counsel, I do not find any substantial question of law involved in the appeal. First of all, Appellants have not challenged the decree in A.S.60 of 2007. A.S.60 of 2007 is filed against decree in O.S.132 of 2006 and O.S.132 of 2006 was tried jointly with O.S.100 of 2006. The case RSA 728/2011 6 of first Appellant Plaintiff in O.S.132 of 2006 is the very same contentions raised in defence of O.S.100 of 2006 viz, the license has become irrevocable in view of Section 60(b) of Indian Easement Act. When both suits were tried and the issue has been answered against the Appellants finding that the license has not become irrevocable, as claimed by them, the finding in O.S.132 of 2006 would definitely operate as a bar on the plea raised by the Appellants in this case, as the finding in the common judgment in A.S.60 of 2007 has become final. Therefore, for that sole reason, it is to be held that the finding of learned Munsiff as confirmed by learned Sub Judge in A.S.60 of 2007 that license has not become irrevocable would operate as a bar against the plea in A.S.59 of 2007 which is challenged in the judgment.

7. Whatever it be, the question is whether Appellants are entitled to challenge the right of Respondents in view of Ext.A2 decree and whether the Appellants are licensees and the license has become irrevocable. Admittedly, Appellants are parties to the LA(OP) which was subsequently converted as By Ext.A2 decree, upholding the will whereunder the property was bequeathed in favour of Respondents 1 and 2, Additional District Judge, Ernakulam granted a letter of administration with the will annexed rejecting the challenge made by the Respondents. Though in the plaint in O.S.132 of 2006 and in the written statement in O.S.100 of 2006, Appellants contended that they are filing appeal against Ext.A2, admittedly no appeal was filed. In such circumstances, Appellants are not entitled to contend that under Ext.A2, Respondents 1 and 2 did not derive title to the property.

8. The contention raised by Respondents in O.S.100 of 2006 is that the first Appellant was permitted to reside in the plaint schedule property and that permission is only a license which was later revoked. Therefore, even if there is a license as claimed by the Appellants, it is only a license to reside in the building. The question is whether Appellants are entitled to claim that the license has become irrevocable u/s 60(b) of Indian Easement Act.

9. Section 60(b) of the Indian Easement Act provides that a RSA 728/2011 8

license may be revoked by the grantor unless the licensee acting upon the license has executed a work of permanent character and incurred expenses in the execution. A copy of the written statement made available by the learned Counsel appearing for Appellants show that there is no pleading that acting upon the license Appellants have executed a work of permanent character. The only pleading is that with the consent of Respondents, the building was reconstructed spending Rs. 3.25 lakhs. When the license is only to reside in the building, Appellants cannot be heard to contend that they executed a work of permanent character incurring expenses " acting upon the license". In such circumstances, the finding of the courts below that the license has not become irrevocable and Respondents are entitled to get vacant possession of the building is perfectly correct. As no substantial question of law is involved, the appeal is dismissed.

10. The learned Counsel appearing for Appellants then submitted that Respondents may be granted two months" time to vacate the building as they are residing thereon. If Appellants file an affidavit undertaking unconditional surrender of the building, RSA 728/2011 9 on or before 20.9.2011, delivery of the property shall be postponed to a day after 20.9.2011, if the Appellants file the affidavit before the trial court within ten days from today. If the affidavit is not filed, Respondents are entitled to take delivery of the property.