

**(2009) 03 KL CK 0039**  
**In the High Court Of Kerala**  
**Case No : S.A. No. 515 of 2000 (C)**

Princy and Others

APPELLANT

Vs

Jose

RESPONDENT

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**Date of Decision :** 13-03-2009

**Acts Referred:**

Transfer of Property Act, 1882 — Section 11, 40

**Citation :** AIR 2010 Ker 1 : (2009) 2 ILR (Ker) 533 : (2009) 2 KLJ 335 : (2009) 2 KLT 426 : (2010) 7 RCR(Civil) 2425

**Hon'ble Judges :** Thomas P. Joseph, J

**Bench :** Single Bench

**Advocate :** V.M. Krishnakumar, for the Appellant; P.R. Venketesh and P.R. Raja, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Thomas P. Joseph, J.—The substantial questions of law raised for a decision are as to the character and enforceability of a covenant by the assignee of the covenantee.

2. Short facts necessary for a decision of these second appeals are: The building, portions of which are involved in these appeals together with the land whereon it was situated originally belonged to Cherchi (hereinafter called "the covenantee"). She, as per Ext.A1, assignment deed No. 2449/1968 dated 13-8-1968 sold the southern half of the building and land to Enasu with a covenant which is as follows:

...though one half of the northern wall of the building in the schedule property is included in this (deed), in case of reconstruction of the said building (in the portion assigned under Ext.A1), separate wall shall be constructed in such a way as not to cause damage to the northern wall and leaving a space of 12 fingers towards south from the said wall....

On the same day the northern portion of the building and the land was assigned

to the respondent/defendant as per assignment deed No. 2450/1968 (the date mentioned at the beginning of the document is 18-3-1968 which is obviously a mistake), the certified copy of which is Ext.A2. A similar covenant as provided in Ext.A1 and extracted above was made in Ext.A2 also directing the respondent to leave the same space towards north from the common wall. Enasu who got the southern portion to John as per Ext.A3, assignment deed dated 7-7-1973. John reconstructed the building in the southern portion complying with the covenant contained in Exts.A1 and A3 and assigned the reconstructed building and land to the deceased first appellant (first plaintiff) as per Ext.A4, assignment deed dated 29-5-1974. Second appellant/second plaintiff is the husband of the first appellant. While they were in possession and enjoyment of the building and land as per Ext. A4, respondent started reconstructing his portion of the building on the northern portion. Appellant Nos. 1 and 2 instituted the suit for a decree for prohibitory injunction to restrain the respondent from constructing the building without leaving space at a width of 12 fingers as directed in Ext. A2, the assignment deed in his favour. No interim order was passed in the suit. Even when the suit was pending, respondent proceeded with the construction. Thereon plaint was amended incorporating a prayer for mandatory injunction to direct the respondent to remove the portion of the building allegedly constructed with the space of 12 fingers from the boundary wall. Learned Munsiff held that the intention of the covenantee was to safeguard the remaining portion of the building, there was no intention to retain the common wall for ever without any support and without making it as part of the building and since both sides have reconstructed the portion of the building in the lands assigned to them it is not necessary to leave any space as per the covenant. However since the respondent was found to have trespassed into the land belonging to the appellant, mandatory injunction was granted directing the respondent to demolish the construction he made within the southern half of the common wall. Respondent took up the matter in appeal. Appellant Nos. 1 and 2 preferred Cross Appeal in so far as learned munsiff refused to enforce the covenant. The first appellate court while agreeing with the learned Munsiff as to the intention of the covenantee, held that as the covenantee (transferor) has assigned the remaining portion of the property without leaving anything to be enjoyed further, the assignee from the covenantee cannot enforce the covenant. The first appellate court also held that the common wall became the exclusive wall of the respondent, the allegation of trespass is not proved and accordingly allowed the appeal, dismissed the cross appeal and non-suited appellant Nos. 1 and 2. Hence these second appeals.

3. Learned Counsel for appellants contended that the view taken by the first appellate court that the covenant is nor enforceable by the assignee of the covenantee is not sustainable in law and placed reliance on the decisions in *Leela v. Ambujakshy* 1989 (2) KLT 142 and *Joseph George v. Chacko Thomas* 1992 (1) KLT 6. Learned Counsel also assailed the finding of the courts below as to the interpretation given to the covenants in Ext.A1 and A2 and the finding of the first

appellate court that the common wall now exclusively belongs to the respondent and that the trespass alleged is not proved.

4. In Ext.A3. assignment deed in favour of John executed by Enasu (the assignee under Ext.A1), it is stated that in case the assignee (John) is reconstructing the building (in the southern portion) he shall comply with the covenant contained in Ext.A1. Admittedly, John reconstructed the building complying with the covenant in Ext. A1 in the southern portion he took as per Ext.A3 and later sold to appellant No. 1 as per Ext. A4. Exts A1, A3 and A4 which conferred title and possession of the southern portion of the building on appellant No. 1, and her assignors there is no specific assignment of the benefit of the covenant imposed on the respondent as per Ext. A2 learned Counsel for the respondent therefore argued that the covenant in Ext. A2 being positive in character, cannot be enforced by an assignee from the covenantee since according to the learned Counsel, a positive covenant though for the beneficial enjoyment of the property of the transferor (covenantee) binds only the parties to the contract (Ext.A2 in this case). The character of the covenant in Ext.A2 is required to be decided.

5. *Tulk v. Moxhay* (1848) 2 Ph. 774 : (1843-60) All E.R. 9, is one of the earliest decisions concerning the nature, character and enforceability of covenants. A covenant between vendor and purchaser on the sale of the land that the purchaser and his assigns shall use or abstain from using the land in a particular way was held to be enforceable in equity against all subsequent purchasers with notice. It was then thought whether the rule laid down in *Tulk's* case as to the enforceability of covenant against an assignee of the covenantor on the doctrine of equity applied regardless of whether the covenant is affirmative or restrictive (negative) in character. The question was answered in the decisions in *Haywood v. The Brumswick Permanent Benefit Building Society* (1881) 8 QBD 403), *London and South Western Railway Co. v. Gomm* (1882) 20 Ch.D. 562 and *Austerberry v. Corporation of Ordham* (1885) 29 Ch.D. 750). Brett, L.J. said in *Haywood's* case on the rule in *Tulk's* case that:

...it seems to me that the case decided that an assignee taking the land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced....

(emphasis supplied)

Jessel M.R. said in *London and South Western Railway Company's* case that:

...the covenant in *Tulk v. Moxhay* was affirmative in terms, but was held by the court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes on one or other of the above grounds....

Sir James Hannen said in the same case that the decision in *Hay wood's*

case(referred supra).

put a wholesome restriction upon the application of Tulk. v. Moxhay by laying down this rule that is only applies to restrictive covenants, and does not apply to an affirmative covenant such as....

Austerberry"s case also held that the doctrine in Tulk v. Moxhay is limited to restrictive (negative) covenants. The Indian law follows the law in England relating to enforceability of covenants as laid down in Tulk v. Moxhay and the later decisions. Sections 11 and 40 of the Transfer of Property Act (for short, "the Act) deal with enforcement of covenants.

6. Section 11 of the Act reads thus:

11. Restriction repugnant to interest created- Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

Section 40 of the Act reads thus:

40. Burden of obligation imposing restriction on use of land-Where, for the more beneficial enjoyment of his own immovable property, a third person has independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Section 11 refers to positive covenants and Section 40, negative covenants. Even between the transferor and transferee a condition that the property would be enjoyed by the transferee in a particular manner would be void. But such a restriction will be saved if it is for the beneficial enjoyment of the property retained by the transferor, by the second part of Section 11. In *Leela v. Ambujakshy* (referred supra) this Court considered the scope of application of a positive covenant under the second part of Section 11 of the Act. In *Joseph*

George v. Chacko Thomas (referred supra) the Division Bench ruled that a positive covenants for the beneficial enjoyment of the property of the transferor is saved only as between the parties to the transfer as per Section 11, but a negative covenant for such beneficial enjoyment would be binding not only the original parties but even on subsequent transferees.

7. Are the covenants provided in Exts. A1 and A2 and extracted above, negative in character? The covenant is that while reconstructing the building, the assignees (covenanters) of Exts.A1 and A2 shall leave a space having width of 12 fingers to their respective side from the common wall. It is true that negative words are not invoked in Exts. A1 and A2 while describing the covenant. But the absence of negative words cannot by itself always indicate that the covenant is of positive character. To decide that one has to look into the substance of the covenant. The Calcutta High Court held in Kumar Chandra v. Narendra Nath AIR 1930 Calcutta 357:

absence of negative form of expression in a covenant is immaterial when from the substance of the agreement a negative agreement can be seen to be implied and the principle of restrictive covenants will then apply.

Similar view was taken by the same Court in Mati Lal Daga and Others Vs. (Sri Sri) Iswar Radha Damodar Chandra Jew Thakur, . There, the covenant sought to be enforced was to keep pillars of 12 cubits in dimension in the land. It was held (on admission by the parties) that it was a negative covenant although positive in form. In this case, the covenant is to leave a space having width of 12 fingers to the respective sides from the common wall in case the assignees of the respective portions wanted to reconstruct their portion of building. The covenant forbids the assignees under Exts.A1 and A2 from constructing any portion of the building within the space having width of 12 fingers from the common wall. The covenant though positive in form, is truly negative in its essence and character.

8. In this case the covenants is sought to be enforced by an assignee from the covenantee (transferor under Exts. A1 and A2) against the covenantor (respondent), he being the assignee from the covenantee (transferor) under Ext. A2. The covenant is sought to be enforced against the covenantor himself. Even without reference to the second-part of Section 11 of the Act the covenant could said to be enforceable against the respondent as it satisfied the requirements of Section 40 of the Act.

9. Then the question is whether the deceased first appellant being an assignee from the covenantee the additional appellants could enforce the negative covenants in Ext.A2 without a specific assignment of the benefit of the covenant in favour of the deceased first appellant? Exhibits A1 ,A3 and A4 as per which she acquired title do not specifically assign the benefit of the covenant provided under Ext. A2. Collins L.J. stated in Rogers v. Hosegood (1900) 2 Ch.D. 388 thus:

...these authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land,

and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such cases it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in, or was annexed to, the land bought.

(emphasis supplied)

Following these observations the Calcutta High Court in *Mathewson v. Ram Kanai Singh Deb.* ILR (1909) Cal 675 held thus:

...one very important test whether the benefit or burden of a covenant of contract in any particular case runs with the land or not is whether such covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees, if it does not, it is incapable of passing by mere assignment of the land....

(emphasis supplied)

Therefore, if the covenant bound the land at the inception it goes with the land for the benefit of the assignee of the covenantor and a specific assignment of the covenant in favour of the assignee (of the covenantor) is not required.

10. Halsbury's Laws of England, Vol. 14, 3rd Edn. (Page 564) states as regards covenants running with the land in equity that the equitable doctrine relating to restrictive covenants is confined to covenants of a negative nature. It states that:

Where a vendor retains land which is sufficiently defined and which is capable of being benefited by the covenant at the time when it is imposed, and the covenant is expressed to be for the benefit of that land and every part thereof, then the benefit of the covenant is annexed to the land and passes on a subsequent conveyance of the land or any part thereof without express mention, even though the purchaser is not aware of the existence of the covenant. It constituted an equitable interest in the land and passes, not on the ground that a subsequent purchaser has expressly bought it, but because it inheres in or is annexed to the land which he has bought. Moreover, although the covenant is not taken for the benefit of the defined land "or any part thereof, yet the benefit will pass on an assignment of part, if the conveyance shows an intention that the covenant should be annexed to each part of the land.

In this case it is seen from Ext. A1 and A2 that the covenant not to construct any portion of the building within a space of 12 feet from the common wall on either side was stipulated for the protection of the common wall (as it then stood) which was necessary for enjoyment of the respective portions of the building. That covenant being negative in character bound the land at the very inception and hence in my view runs with the land for the beneficial enjoyment of which it was imposed. Hence, a specific assignment of the benefit of the covenant in favour of the assignees of the covenantor is not required. The facts, Exts. A1, A3 and A4 show that while assigning the southern portion of the

building and the land to Enasu, John and appellant No. 1, respectively all rights of the vendor (which should include the benefit of the covenants imposed on the respondent under Ext.A2) in the property was conveyed to the purchasers. Hence the assignee of the covenantee was entitled to enforce the covenant against the respondent.

11. Then the question is whether in enforcement of the negative covenant in Ext. A2 a mandatory injunction could be issued directing the respondent to demolish the building constructed within the space having the width of 12 fingers? Learned Counsel for respondent contends that a reading of the covenant in Exts. A1 and A2 would show that it is only for protection of the common wall so long as it existed that the covenant has life. The covenant imposed by the covenantee on the assignees of the two portions of the building, as could be understood on a reading of the relevant documents (Exts. A1 and A2) was intended for the protection of the common wall. If any of the assignees under Exts.A1 and A2 wanted to reconstruct his part of the building, he was required to leave a space of 12 fingers from the common wall. I have no reason to think that the covenantee wanted the common wall to remain as such for all times to come without any support from either side and even after the assignees of the two portions reconstructed their portion of the building. In this case it is admitted by the appellants that John, the assignor of appellant No. 1 has reconstructed the building in his part of the land. The common wall is not retained by the parties. Therefore at the time when the respondent was reconstructing the building in the northern portion it was not necessary to leave the space having width of 12 fingers. In that situation appellants could not enforce the said covenant against the respondent. I do not find anything illegal or irregular in the first appellate court taking that view on an interpretation of the relevant covenant in Exts. A1 and A2. Hence the prayer for mandatory injunction directing the respondent to remove the portion of the building falling within the space of 12 fingers cannot stand.

12. It is contended by the learned Counsel for appellants that there are other positive covenants in Ext. A2 which required the respondent to provide sluice gutter to prevent water falling on the common wall etc. According to the learned Counsel, respondent is bound to comply with those covenants. I do not consider it necessary to go into the question of enforceability of those positive covenants in these appeals since no relief in that line is asked for in this suit. The question whether those covenants are enforceable by the assignees of covenantee has to be decided in appropriate proceedings.

13. It is lastly contended by the learned Counsel for the appellants that at any rate, respondent trespassed into the half portion of the common wall belonging to the appellants and that the trespass being after the institution of the suit, first appellate court was not justified in interfering with the mandatory injunction granted by the learned Munsiff directing the respondent to demolish that part of the building. Learned Counsel invited my attention to Ext.C1, report of the

Advocate Commissioner.

14. I have gone through the report of the Advocate Commissioner. It is not clear whether there was any trespass areally or otherwise. Moreover, there was no order of injunction in force at the time the alleged construction was made. I do not forget that the court is not powerless to mould relief taking into account events that took place after the institution of the suit. But the mandatory injunction prayed for being on the strength of title claimed by the appellants, that relief could not be granted on surmises and conjectures. The alleged trespassed area must be measured and properly identified before relief is granted. Such evidence is not available in this case. First appellate court therefore was justified in interfering with the mandatory granted by the learned Munsiff. But the observation made by the first appellate court in paragraph 9 of its judgment that the common wall became the exclusive wall of the respondent, on the facts, evidence and circumstances of the case was not warranted. That question has to be decided in appropriated proceeding. I make it clear that it will be open to the appellants to sue for recovery of possession or mandatory injunction as the case may be, in case there is any trespass into the portion of the land belonging to them if they are otherwise entitled to such a course.

With the above observation these second appeals are dismissed. No costs.