

Saidalavi vs Aboobackar

Saidalavi vs Aboobackar

SooperKanoon Citation : sooperkanoon.com/1446280

Court : Kerala

Decided On : Jan-28-2022

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : OP(C)/177/2022

Appellant : Saidalavi

Respondent : Aboobackar

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
FRIDAY, THE 28TH DAY OF JANUARY 2022 / 8TH MAGHA, 1943
OP(C) NO. 177 OF 2022 AGAINST THE ORDER DATED 19.01.2022 IN
E.P. No.315/2018 IN O.S.No.181/2006 OF THE MUNSIFF COURT,
MANJERI PETITIONER/5TH RESPONDENT/5TH DEFENDANT:
SAIDALAVI AGED 62 YEARS SON OF KALLUTHODI MUHAMMED,
KODIYAMPILAKKAL HOUSE, BY ADV C.M.MOHAMMED IQUABAL
RESPONDENTS/PETITIONER AND OTHER
RESPONDENTS/PLAINTIFF AND OTHER DEFENDANTS:

1 ABOOBACKAR AGED 60 YEARS S/O PARAMMAL AMBADI
POCKER HAJI, KODIYAMPILAKKAL HOUSE, KUMMINIPARAMBA
P.O., 2 KABEER S/O THAZHATHU PALLIYALI ASSAIN HAJI,
THAZHATHU PALLIYALI HOUSE, 3 VEERAN AGED 49 YEARS S/O
THAZHATHU PALLIYALI ASSAIN HAJI, THAZHATHU PALLIYIL
HOUSE, 4 FAROOK AGED 57 YEARS SON OF THAZHATHU
PALLIYALI ASSAIN HAJI, THAZHATHU PALLIYALI HOUSE,
KUMMINIPARAMBA P.O., MALAPPURAM, PIN - 673638 5 NISHAD
AGED 39 YEARS S/O KODIYAMPILAKKAL KUNHAHAMMAD,
KODIYAMPILAKKAL HOUSE, 6 SUBAIR AGED 38 YEARS
S/O.THAZHATHU PALLIYALI ASSAIN HAJI, THAZHATHU PALLIYALI
HOUSE, THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON

28.01.2022, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JUDGMENT

Dated this the 28th day of January, 2022 The 5th defendant/5th judgment debtor in E.P.No.315/2018 in O.S.No.181/2006 on the file of the Munsiff's Court, Manjeri, has filed this Original Petition under Article 227 of the Constitution of India, challenging Ext.P11 order viz., order dated 19.01.2022 passed by the learned Munsiff in the above execution petition.

2. Heard the learned counsel for the petitioner on admission.

3. The learned counsel read out relevant documents

placed along with the Original Petition to contend that no evidence was adduced by the petitioner to prove the demolition of the wall alleged to be constructed by the decree-holder and the execution court allowed the prayer for constructing the compound wall without support of evidence. He argued further that the decree-

holder has no locus-standi to file this execution petition as he transferred the property in favour of his third wife, Smt.Bushra. It is argued further that another suit as O.S.284/2018 was filed by Suneera and Others against the third wife of the

decree-holder and an interim injunction was obtained to protect the B schedule pathway.

4. While analysing the grievance of the petitioner herein, a

perusal of the decree in O.S.181/2006 is necessary. As per relief No.2 granted in the decree, defendants 1 to 3, 5, 6 and 10 were directed by way of mandatory injunction to restore the laterite wall demolished in the area shown in Ext.C2 sketch within a period of two months. Further as per relief No.3, it was provided that if the defendants No.1,3, 5, 6 and 10 fail to comply the above direction, plaintiff is at liberty to restore the wall at the cost of the defendants.

5. The case put up by the decree-holder in E.P.315/2018 is enforcement of the mandatory injunction. In the execution

petition, the petitioner herein filed objection admitting the mandatory injunction prayer granted in the decree as per the averments in paragraph 3 of the objection produced as Ext.P3 herein. In paragraph 4 of Ext.P3, it has been contended that when the wife of the decree-holder obstructed the way covered by the decree in O.S.181/2006 and in E.P.315/2018 Suneera, Subaida

and Abdul Kareem filed a suit as O.S.248/2018 and the Commissioner deputed in the said case also reported existence of this way in his report. When the execution petition was closed on a wrong assumption that the wall was constructed, decree-holder filed E.A.1/2020 to revive the execution petition to consider the same in terms of relief No.2 granted in the decree. In E.A.1/2020, the decree-holder prayed for revival of the decree to execute the same as the wall was not constructed. In para No.3 of E.A.1/2020 (Ext.P6 herein), the decree-holder specifically contended that on 17.02.2018 the decree-holder reinstated the wall, but the same was destroyed by the judgment-debtors and it is at this juncture, the execution petition was filed. In the objection filed by the petitioner herein to Ext.P3 petition produced as Ext.P7 herein, the petitioner reiterated the contentions highlighting filing of suit as

O.S.284/2018 in respect of the same subject matter covered by the decree herein, as already pointed out. Thus, it appears that the petitioner herein who is the contesting 5 th judgment-debtor admitted that no wall in existence and the area is lying as road at present. If so, the petitioner also admitted non-existence of wall at present. This is the context in which the order impugned is to be evaluated. As per the impugned order, the learned Munsiff directed to reinstate the wall in accordance with relief No.2 granted in the decree. Therefore, the contention raised by the learned counsel for the petitioner to the effect that no evidence produced before the court to the effect that the compound wall was demolished cannot sustained.

6. According to the learned counsel for the petitioner,

subsequently, the plaint schedule property was transferred in the name of the third wife of the decree-holder and therefore, decree- holder cannot execute the decree. While arguing this point, the learned counsel submitted that the decree-holder himself produced two documents to show the transfer. However, the learned Munsiff did not accept this contention for want of proof.

7. Another question regarding limitation raised by the

petitioner in the matter of execution of relief No.2 also was addressed by the learned Munsiff and it was found that the execution petition has been filed within the period of limitation. After observing as under, I have considered the rival contentions. As pointed

out by the learned counsel for the petitioner, the order

of the trial court shall merge with the decision by the superior forum and it is the later which subsist. Here the appeal is dismissed on 06.02.2016. The E.P. is filed on 20.06.2018. Hence, E.P. is filed within the time limit. So, the E.P. is maintainable. As rightly pointed out by the learned counsel for the petitioner, the main prayer of the E.P. was to restore the laterite wall demolished by the respondents. It is true that the costs is already deposited by the other respondents and that part is already over.

So, the petition is allowed to the remaining extent and Amin is deputed to execute the decree.

8. To sum up, the decree-holder approached the court

below in the year 2006 when his property was encroached and the compound wall was destroyed. After a successful battle till 06.02.2016 (11 years) he got a decree including relief Nos.2 and 3 as already pointed out. When the decree-holder constructed the wall in obedience to relief No.3 thereafter, the judgment-debtors destroyed the wall and the same led to filing of this present execution petition. Apprehending construction of wall, another suit was filed in a matter which attained finality by operation of the decree in this case. Thus the court below after appraising the entire matter allowed to reinstate the compound wall to effectuate the decree. In fact, the said order is within the ambit of law and I could not find any perversity or arbitrariness in the said order. It is discernible that the petitioner herein has been obstructing enjoyment of the decree by the decree-holder without any justification and the present petition itself is one of the same status, in a case the decree attained finality.

Therefore, this Original Petition is devoid of any merit and is accordingly, dismissed. Sd/- A.BADHARUDEEN JUDGE nkr APPENDIX OF OP(C) 177/2022 PETITIONER EXHIBITS Exhibit P1 THE TRUE COPY OF THE DECREE IN O.S NO.181/2006 OF THE MUNSIF COURT, MANJERI DATED 31/01/2013 Exhibit P2 THE TRUE COPY OF E.P NO.315/2018 IN O.S NO Exhibit P3 THE TRUE COPY OF THE COUNTER IN E.P.NO. COURT, MANJERI DATED OCTOBER/2018 Exhibit P4 THE TRUE COPY OF THE ORDER IN E.P.NO 315/2018 IN O.S.NO.181/2006 OF THE MUNSIF COURT, MANJERI DATED 23/01/2020 Exhibit P5 THE TRUE COPY OF THE ORDER IN I.A.NO.1853/2018 IN O.S.NO. 284/2018 OF THE MUNSIF COURT, MANJERI DATED 26/09/2018 Exhibit P6 THE TRUE COPY OF E.A.NO.1/2020 IN E.P.NO COURT, MANJERI DATED 31/01/2020 Exhibit P7 THE TRUE COPY OF THE COUNTER OF THE 5TH

RESPONDENT IN E.A.NO. 1/2020 IN E.P.NO.315/2018 IN O.S.NO. 181/2006 OF THE MUNSIF COURT, MANJERI DATED 26/01/2020

Exhibit P8 THE TRUE COPY OF THE JUDGMENT IN O.P. (C).NO.938/2020 OF THIS HON'BLE COURT DATED Exhibit P9 THE TRUE COPY OF THE ORDER IN E.A.NO.1/2020 IN E.P.NO.315/2018 IN O.S.NO.181/2006 OF THE MUNSIFF COURT, MANJERI DATED 13/12/2021 Exhibit P10 THE TRUE COPY OF THE JUDGMENT IN O.P. (C).NO.149/2022 OF THIS HON'BLE COURT DATED Exhibit P11 THE TRUE COPY OF THE ORDER IN E.P.NO.315/2018 IN O.S.NO.181/2006 OF THE MUNSIFF COURT, MANJERI DATED 19.01.2022

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com