

**Aboosa Vs. Ashraf**

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**SooperKanoon Citation :** [sooperkanoon.com/729845](http://sooperkanoon.com/729845)

**Court :** Kerala

**Decided On :** Nov-11-2005

**Reported in :** 2006(1)KLT282

**Judge :** J.M. James, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 97, 97(1), 97(2) and 98

**Appeal No. :** Ex. SA No. 1 of 2005

**Appellant :** Aboosa

**Respondent :** Ashraf

**Advocate for Def. :** M. Balagovindan, Adv.

**Advocate for Pet/Ap. :** K. George Varghese Kannanthanam and; Tony George Kannanthanam, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**J.M. James, J.**

1. The claim petitioners in E.A.No. 208/2003 on the file of the Munsiff Court, Varkala, who were the petitioners in I.A.No. 1642/2004, the petition to condone the

delay, and the appellants in an unnumbered appeal which had accompanied I.A.No. 1642/2004, are the appellants before this Court.

2. The facts revealed from the records are that, the appellants herein, are the wife and children of the 2nd respondent. Original Suit No. 210/1984 was filed before the Munsiff Court, Varkala, for a permanent prohibitory injunction restraining the defendants therein, from trespassing into the plaint schedule property. It was decreed. However, the defendants, judgment debtors, trespassed into the plaint schedule property and the building therein. The decree holders in O.S.No. 210/1984 filed O.S.197/1990 before the same court, praying to recover the possession of the property scheduled therein. The same was decreed granting the prayer of recovery of possession as could be seen from the judgment and decree dated 4.12.1991. It was challenged in A.S.No. 90/1992 before the Sub Court, Attingal. That was also dismissed. The decree holders in O.S.No. 197/1990 filed E.P.No. 80/1992 before the Munsiff Court, Varkala. The execution court ordered delivery of the execution schedule property and an Amin was deputed for effecting delivery. But the Amin returned the order of the execution court, as the appellants herein had obstructed the delivery, on the plea that the obstructors had got an independent right over the execution schedule property from 1984 onwards. Accordingly, the appellants herein had filed E.A.No. 208/2003 under Order XXI Rule 97(1) of the Code of Civil Procedure. The execution court as per the order, dated 4.9.2003, dismissed the claim petition, holding that the 1st appellant, claim petitioner, has got no independent right over the execution schedule property and the building therein, that the claim petition had been filed at the instigation of the 2nd judgment debtor, the husband of the 1st appellant and father of the other appellants, and that there is no bona fide in the claim petition.

3. The order of the Munsiff Court, Varkala was challenged before the Sub Court, Attingal, and the appeal was unnumbered. Meanwhile, W.P.(C).No. 22209/2004 was preferred before this Court. However, the records show that the same was withdrawn on 25.11.2004, without any prejudice to the right of the writ petitioners to seek their relief before the appropriate forum. Thereafter, the appellants filed W.P.(C).No. 34446/2004 before this Court. Disposing the same on 5.1.2005, the learned Single Judge directed the Sub Court, Attingal, to issue a certified copy of

the judgment in the unnumbered appeal, sustaining the order passed by the learned Single Judge on 3.12.2004, in I.A.No. 16718/2004, setting aside the delivery of the execution schedule building, and directing redelivery, till the disposal of the time granted by the learned Single Judge for taking further remedial steps, within 15 days from the date of the receipt of the copy of the judgment of the unnumbered appeal.

4. In accordance with the directions contained in W.P.(C).No. 34446/2004, the unnumbered appeal was presented before the Sub Court, Attingal, with a delay. Therefore, I.A.No. 1642/2004 was filed before that court. The learned Sub Judge, dismissed the LA. and consequently the unnumbered appeal as well, but discussing the facts on merit. The same is under challenge through this second appeal.

5. The following questions of law had been framed by this Court at the time of the admission of the execution second appeal.

1. Is the lower appellate court right in not independently considering the reasons put forward in I.A. No. 1642/2004 for condoning the delay in filing the appeal before that court?

2. Is the lower appellate court right in considering the merits of the appeal while disposing of the petition to condone the delay, viz. I.A.No. 1642/2004?

6. The 1st appellate court had dismissed the Interlocutory Application for condonation of delay in preferring the unnumbered appeal. In the same order, after discussing the matter on merit, the unnumbered appeal was also dismissed. That is the reason why the appellants had prayed to frame the questions 1 and 2 in this appeal. In *Madan Naik (Dead) by Legal Representatives and Ors. v. Mst. Hansubala Devi and Ors.* : AIR 1983 SC676 the Apex Court considered a similar situation. In it, the 1st appellate court had considered an application filed by the defendants appellants therein, for not filing an application in time for substitution of the legal heirs of one Jogendra Naik. The 1st appellate court, therefore, declined to condone the delay, and thus, rejected the application for substitution, as time barred. The appeal was also disposed of, as having abated as a whole. The same

was challenged in the second appeal. The Division Bench held that the second appeal was not incompetent because the 1st appellate court had made an order dismissing the appeal on contest. The Apex Court, discussing on facts and law, held that the order of the 1st appellate court in disposing of the appeal on merit, was contrary to law, without jurisdiction and non est, once the learned Single Judge held the appeal before him had abated. In the case at hand, as the petition to condone the delay itself was found to be lacking in sufficiency of reasons, it was dismissed. A reading of the order of the Sub court, show that, it considered the interlocutory application, for condoning the delay first, and continued with the discussion on the disposal of the appeal on merit, owing to the directions contained in W.P.(C).No. 34446/2004. In view of the principles discussed in Madan Naik's case (supra), the disposal of the appeal on merit, when that court held that the reasons for condonation of delay was insufficient, is without jurisdiction, and hence, non est.

7. The learned Counsel for the appellants relied on *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and Anr.* : [1997]1SCR463 and argued that, when a claim petition is filed by an obstructor, the execution court can pass appropriate orders only after adjudicating the controversy between the parties as enjoined by Order XXI Rule 97 Sub-rule (2) read with Order XXI Rule 98 of C.P.C. Only when the obstructions are found to be without a just cause, or the same was filed at the instigation, or on behalf of the judgment debtor, the obstructions of the respondents would be removed and the decree holder be permitted to put in possession. It is, therefore, contended that in the case at hand, the execution court has not conducted any enquiry as contemplated under Order XXI Rule 97(2) of Code of Civil Procedure. Therefore, prayed to remand the matter to the execution court for adjudication.

8. The evidence reveal that the 1st appellant, the wife of the 2nd judgment debtor and the claim petitioner, was examined as PW.1. Six documents were also marked on behalf of her. The evidence of PW. 1 as well as the materials otherwise made available before the execution court and reappreciated by the sub court show that the claim petitioners had no independent right other than through the 2nd judgment debtor. PW. 1 had conceded, while at the box, that she is being

maintained by her husband, 2nd judgment debtor. Even in the claim petition, E.A.No. 208/2003, the claim petitioners had not put forward any independent right, except submitting that the old building described in O.S.No. 210/1984 was demolished, and a new building had been put in by the claim petitioners, and therefore, the decree in O.S.No. 210/1984, cannot be executed through E.P.No. 80/1992.

9. The next question that, therefore, arise is if the claim petitioners or the judgment debtors put up a new structure in the property of the owner, whether the judgment debtors or the claim petitioners have any right over the property or any independent right over the building.

10. In *Narayan Das Khettry v. Jatindra Nath Roy Chowdhry and Ors.* AIR 1927 Privy Council 135 the maxim 'quicquid plantatur solo, solo cedit', meaning, fixture to the soil, goes with or belongs to the soil, had been considered and concluded that the said principle is not the law in India. Further the court also considered the question that when a building is put up in the property of another owner what is the right of that person on the building so put up. The Privy Council held that when the defendants are found to be the owners of the building, the plaintiff would have the right to call upon the defendants to remove the building. The plaintiff, the owner of the land, would be the possible purchaser also, willing to give more than the mere demolition value of the building to the defendants. If the defendants were called upon to remove the building, they would be entitled to a reasonable time for such removal and during such time, the plaintiff would be kept out of enjoyment of the land.

11. In *Chellappan Nadar v. Krishnan Nair* 1963 KLT 750, *Narayan Das Khettry v. Jatindra Nath Roy Chowdhry and Ors.* (supra) was relied on. Further *Thakur Chandra Poramanick v. Ram Dhone Bhattacharju* 1866 (vi) Weekly Reporter 228, a Full Bench decision delivered in the year 1866 was not found applicable to the facts of *Narayan Das Khettry* case, cited above, but a statement of the judgment was extracted, wherein it was said that:

We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil

becomes a part of it, and is subjected to the same rights of property as the soil itself.

We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil - the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.

12. The above principles discussed reveal that the only right of a person who constructed a building in another person's property may either be to remove it, on his eviction, at his own cost or he be paid compensation for the construction.

13. In *R.S. Maddanappa (deceased) after him by his legal representatives v. Chandramma and Anr.* : [1965]3SCR283 also there was a discussion of making improvements in another man's property and the remedy thereof. The Apex Court held:

No man who spends money on improving property, knowing fully well that he has no title to it can be permitted to deprive the original owner of his right to possession of the property except upon the payment for the improvements which were not effected with the consent of that person. The doctrine of acquiescence is of no help to such a man, for he who knows the true state of affairs cannot say that any mistaken belief was caused in his mind by reason of what the owner said or did.

14. As discussed above, the original suit O.S.No. 197/1990, for recovery of possession, was filed when the judgment debtors trespassed into the property

following the decree of prohibitory injunction granted through O.S.No. 210/1984. Thus, the judgment debtors were fully aware that the building in which they were occupying was not belonging to them, and the recovery of the same with the property there around, was decreed in favour of the plaintiffs. The claim petitioners, who have got no independent right either over the execution schedule property or the building therein other than through the 2nd judgment debtor of the execution petition, cannot claim that they have put in a new building in the property and therefore, they are entitled to obstruct the eviction and hence the delivery cannot be effected. The principles of law discussed in *Narayan Das Khettry v. Jatindra Nath Roy Chowdhry and Ors.* *Chellappan Nadar v. Krishnan Nair (supra)* and *R.S. Maddanappa (deceased) after him by his legal representatives v. Chandramma and Anr. (supra)*, are squarely applicable in this case as well. In view of the above facts and law, the appellants herein have got no independent right, except to vacate the building, as they have reconstructed the building without the legal sanction of the decree holders as the original buildings which situated was the subject matter of a suit which was legally decreed.

15. In *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and Anr.(supra)*, the Apex Court laid down, as discussed above, to adjudicate the controversy between the parties, and if it is found that the obstruction was occasioned without just cause or at the instigation of the judgment debtor, such obstruction or resistance should be removed, and the decree holder be put in possession of the building. The 1st appellant had entered the box, and gave evidence. She had got no case that, it was she, who put up the building, or she got an independent right. Her husband was in the party array and had lost the matter. There being no independent right to the appellants, other than that of the 2nd judgment debtor, their obstructions cannot be sustained. Therefore, on reappraisal of the facts and law, I hold that the courts below were legally right in dismissing the claim petition, and allowing the decree holder to take possession of the building. The arguments that the mere examination of PW.1 and marking of the documents are insufficient, and therefore, the matter has to be remanded for a detailed enquiry, cannot be accepted, as the obstruction petitioner got herself examined during enquiry and did not opt to examine anyone else or prayed to allow to adduce any further evidence. The provisions contained in Order XXI Rule 97(2) has thus been

fully complied with by the execution court. No further enquiry, in the circumstances of this case, is necessary. Therefore, I find there is no need to interfere with the order of the court below. Hence, this appeal is without any merit.

16. In the light of the above discussions, and considering the circumstances of the case, I grant time up to 31.1.2006 for the appellants to vacate the building situated in the execution schedule property, provided the appellants file an undertaking to that effect, before the execution court, within three weeks from today, failing which the decree holders shall be entitled to proceed with the execution from the stage at which it was stopped. The stay, if any, granted by this Court is hereby vacated.

Hence, this appeal is hereby dismissed. The parties are directed to bear their respective costs.

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