

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE C.K. ABDUL REHIM  
&  
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

MONDAY, THE 25TH DAY OF JANUARY 2016/5TH MAGHA, 1937

OP (FC).No. 575 of 2015 (R)  
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PETITIONER:  
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K.K.DIVAKARAN, AGED 63 YEARS, S/O. KESAVAN, KANIYADATHU HOUSE,  
KIZHATHADIYOOOR KARA AND P.O., LALAM VILLAGE, MEENACHIL TALUK.

BY ADV. SRI.P.C.HARIDAS

RESPONDENT:  
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SUMATHY DIVAKARAN, W/O. K.K.DIVAKARAN, AGED 49 YEARS,  
KANIYADATHU HOUSE, KIZHATHADIYOOOR KARA AND P.O.  
LALAM VILLAGE, MEENACHIL TALUK - 686 574.

R1 BY ADV. SRI. JOSEPH T. JOHN

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 25-01-2016,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF O.P.51/2015 ON THE FILES OF THE FAMILY COURT, PALA.

EXT.P2: TRUE COPY OF I.A.NO.116/2015 IN O.P.NO.51/2015.

EXT.P3: TRUE COPY OF THE OBJECTION TO EXT.P2

EXT.P4: TRUE COPY OF PLAINT IN O.S.NO.281/2014 ON THE FILES OF THE MUNSIF'S COURT, PALA.

EXT.P4(A): TRUE COPY OF THE WRITTEN STATEMENT FILED IN O.S.NO.281/2014.

EXT.P5: TRUE COPY OF THE COMMISSION REPORT IN O.S.NO.42/15 ON THE FILES OF THE MUNSIF'S COURT, PALA.

EXT.P6: TRUE COPY OF L.A.223/15 IN O.P.NO.51/15.

EXT.P7: TRUE COPY OF THE COMMISSION REPORT FILED IN O.P.51/15.

EXT.P8: TRUE COPY OF THE OBJECTION TO EXT.P5:

EXT.P9(2 IN NOS): TRUE COPIES OF PROFESSIONAL TAX RECEIPTS.

EXT.P9(a): TRUE COPY OF THE APPLICATION DATED 12/12/2012 OF THE PETITIONER TO CANCEL THE LICENSE.

EXT.P9(b): TRUE COPY OF THE CERTIFICATE DATED 29/08/2014 ISSUED FROM THE PALA MUNICIPALITY.

EXT.P9(c): TRUE COPY OF THE INJUNCTION ORDER IN O.S.NO.42/15 OF THE MUNSIF'S COURT, PALA.

EXR.P10: TRUE COPY OF THE SALE DEED NO.147/71 OF MEENACHIL SRO

EXT.P10(a): TRUE COPY OF THE BUILDING PERMIT ISSUED TO THE RESPONDENT

EXT.P10(b): TRUE COPY OF THE MEMBERSHIP CARD ISSUED TO THE RESPONDENT

EXT.P10(c): TRUE COPY OF THE TAX RECEIPT DATED 07/08/2014

EXT.P10(d): TRUE COPY OF THE DEMAND NOTICE FROM PALA MUNICIPALITY

EXT.P10(e): TRUE COPY OF THE NOTICE FROM KIZHATHADIYOOR SERVICE CO-OPERATIVE BANK.

EXT.P11: TRUE COPY OF THE COMMON ORDER DATED 18/11/2015 IN IA.NOS.116/15 AND 223/15 IN OP.NO.51/15 OF THE FAMILY COURT, PALA.

RESPONDENT(S)' EXHIBITS

//TRUE COPY//

smv

P.A. TO JUDGE

**C.K. ABDUL REHIM  
&  
SHAJI P. CHALY, JJ.**

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**O.P.(FC) No.575 of 2015**  
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**Dated this the 25<sup>th</sup> day of January, 2016.**

**JUDGMENT**

Abdul Rehim,J.

The respondent in an original petition filed before the Family Court, Pala as O.P.No.51/2015, is the petitioner herein. The original petition was instituted by the respondent herein seeking a permanent prohibitory injunction against the petitioner restraining from entering into the petition schedule properties and from causing any obstruction to the business conducted by the respondent in the said premises under the name "Kaniyadathu Stores". The parties are husband and wife respectively, their marriage being solemnized on 28.11.1971. There are 3 children born out of the wedlock who are living separately. The scheduled property is having an extent of 2.822 cents and a three storied building situated therein. The property in question was purchased in the name of the respondent herein through a sale deed executed in the year 1979. Allegation of the

respondent in the original petition is that, eldest son of the parties made a demand for giving possession of the shop room, wherein she is now conducting business, for the purpose of his wife to conduct business therein. Based on such a demand the eldest son had locked the shop room. The respondent has removed the lock with the help of police authorities. She had filed a suit before the Munsiff Court against the son, as O.S No.281/2014, in which a temporary injunction was granted. According to the respondent, the petitioner herein was compelling her to assign the business to the eldest son. Since the respondent has not yielded to such request, the petitioner is creating obstruction for conduct of the business, is the allegation. Therefore, she sought for the relief of permanent injunction.

2. Along with the original petition the respondent had filed I.A. No.116/2015 before the Family Court, seeking temporary injunction restraining the petitioner herein and his men from causing any obstruction to the business conducted by the respondent in the stationary shop. Initially the Family Court was not inclined to grant any ad-interim injunction. On receipt of

notice the petitioner appeared and filed objections to I.A. No.116/2014. Thereafter, the respondent had filed I.A.No.135/2015 seeking appointment of an Advocate Commissioner to conduct a local inspection and I.A. No.223/2015 seeking temporary mandatory injunction, raising an allegation that, subsequent to filing of the original petition the petitioner had forcefully evicted the respondent from the stationary shop and locked the shop rooms and also caused obstruction by putting two loads of M-sand in front of the shop rooms. Direction was sought for against the petitioner to open the shop rooms and also to remove M-sand put in front of the building. The court below had appointed an Advocate Commissioner. Based on the report submitted by the Advocate Commissioner, I.A. Nos.116/2015 and 223/2015 were disposed of through Ext.P1 common order granting a mandatory injunction in I.A No.223/2015 against the petitioner herein directing to open the locks of the rooms in the petition schedule property and to remove the obstructions placed therein, including clearing of the M-sand, forthwith. The petitioner is also restrained through a temporary prohibitory injunction from disturbing peaceful

possession of the property by the respondent. It is aggrieved by the said order, the petitioner is approaching this court by invoking the supervisory jurisdiction vested under Article 227 of the Constitution of India.

3. Heard; counsel appearing on both side. Learned counsel for the petitioner had drawn attention of this court to a suit filed by the petitioner against the brother of the respondent, before the Munsiff Court, as O.S. No.42/2015. According to the petitioner, the property in question was purchased by utilizing his money and he only constructed the shop rooms contained therein, with his own expenses after obtaining building permit in his name. It is pointed out that the building stands assessed in his name before the local authority, Pala Municipality. He had leased out one room in the ground floor and is receiving rent therefrom. The remaining two rooms were under his possession and he was conducting business in the said shop rooms, till 2012. The petitioner and the respondent are residing together in the said building. According to the petitioner, the business was stopped in the year 2012 due to difference of opinion between the petitioner and the respondent, and the balance

goods of the business were kept in the shop room. He had denied the allegations that the rooms are in possession of the respondent. According to him, the respondent had never conducted any business in the shop rooms. It is stated that the building materials were collected only for the purpose of renovation of the building. According to the petitioner, on 6.2.2015, the brother of the respondent and his children made an attempt to trespass into the building and to take possession of the shop rooms by breaking open the locks. At this juncture the petitioner has filed O.S. No.42/2015 before the Munsiff Court, Pala against the brother and children of the respondent and obtained an order of injunction against them. It is contended that another suit O.S. No.281/2014 was filed by respondent against her son, raising false allegations that she is conducting business in the shop room. It was only as part of her attempts to establish claim over the shop rooms that the said suit was filed. The son had filed written statement making it clear that the respondent is not conducting business in the shop room, but the business is conducted by the petitioner herein. It is also mentioned that, Ext.P5 Commission Report filed before the

Munsiff Court in O.S No.42/2015 would reveal that the shop rooms were in the possession of the petitioner, at the time when the inspection was conducted by the Advocate Commissioner, since he only opened and showed the shop room to the Commissioner. The petitioner had denied the allegation that on 6.2.2015 he had forcefully dispossessed the respondent from the shop room. The petitioner had produced various documents indicating that he was paying Professional Tax for conduct of the business and submitted application for cancellation of the licence to the Municipality, after closing of the business. He has also produced documents to show that the assessment of the building stands in his name.

4. In order to substantiate her possession and the conduct of business, the respondent had produced membership certificate issued from the 'Vyapari Vyavasayi Samithi'. Tax Receipt of the property and certain other documents which would indicate that a loan for conduct of the business was taken by her from a Bank. According to the petitioner, the Commission Reports prepared by the very same Advocate Commissioner, both in O.S. No.42/2015 and in the present original petition



before the Family Court, would clearly indicate that the business in the shop room was not conducted by the respondent, as alleged. Hence it is contended that the temporary mandatory injunction granted by the Family Court had resulted in causing severe prejudice and irreparable legal injuries to the petitioner. Hence the above Original Petition is filed seeking cancellation of the order impugned.

5. Prima facie, we are satisfied that the factual aspects involved in the case are strongly under dispute between the parties. Pleadings on both side would indicate contradictory versions on the aspect regarding possession and conduct of business in the shop rooms in the scheduled building. Version put forth by the petitioner is that he was conducting business which was stopped since the year 2012. It is his specific case that after filing of the original petition before the Family Court, the respondent had trespassed into the business premises and attempted to take forcible possession, which was resisted by him. It is contended that O.S. No.42/29015 was filed before the Munsiff Court only to resist such an attempt made by the respondent along with her brother and his children. It is pointed

out that, the report of the Advocate Commissioner filed in O.S.No.42/2015 would clearly indicate that the shop was opened for inspection by the petitioner. On the contrary, case of the respondent is that the petitioner had forcefully entered the business premises on 6.2.2015 and evicted her and locked the premises and also caused obstruction by putting M-sand in front of the shop room at the parking area. Therefore she is seeking a mandatory injunction to get the room opened and to restrain the petitioner from causing any obstruction to the conduct of the business.

6. On the above premise, this court need to be cautioned that, jurisdiction exercised herein is neither appellate nor revisional. The visitorial jurisdiction, which is supervisory in nature, conferred under Article 227, does not contemplate any appreciation on the factual aspects which are in dispute between the parties in order to decide sustainability of the findings entered by the subordinate courts. On the other hand, this jurisdiction can be exercised only if there is any grave error committed by the court below in its proceeding or when the proceedings was issued despite the court lacks jurisdiction or in

a case where the order impugned is patently illegal and perverse, which would strike conscientious of this court. But in the case at hand, it is a factual aspect regarding the possession of the business conducted in two shop rooms situated in the plain schedule building. The court below after comparison of both the commission reports had noticed that there were articles seen kept for sale within the building. It is the specific case of the petitioner that he has not conducted any business after the year 2012. Hence on a factual appreciation, the court found that it is necessary to permit the respondent to continue business, without being obstructed in any manner by the petitioner. Specific contention of the petitioner herein is that, while passing the impugned interim order the court below had failed in having proper advertence to the documents produced and also to appreciate the contentions based on such documents. We are of the considered opinion that in deciding the question of preserving the physical status in schedule property pendente lite, the court need not go into the threadbare analysis of any documentary or oral evidence. On the other hand questions like balance of convenience, chance of irreparable legal injury etc.

are the parameters which should be weighed in deciding such issues. Therefore we are not inclined to cancel the interim order in any manner or to substitute it with any other findings on the factual aspects.

7. We take note of the fact that, the interim application, I.A. No.223/2015 was strictly confined to the business activity conducted in two shop rooms in the scheduled building, under the name and style "Kaniyadathu Stores". Therefore, we restrict the order of injunction, impugned in this original petition, to the extent of directing the petitioner herein through a mandatory injunction to open the locks of those two rooms in the petition schedule property and to the extent of restraining him from causing any obstruction to the business activity conducted therein by the respondent.

8. Considering the nature of dispute between the spouses, we are of the considered opinion that an early disposal of the original petition before the Family Court itself will protect the interest of justice. It is submitted by counsel on both side that the pleadings remain completed and attempts for conciliation could not achieve any positive result. Therefore, the Family

Court is directed to take expeditious steps for disposal of the case at the earliest. All earnest endeavour shall be taken to dispose of the original petition based on the evidence which will be adduced at the earliest. It is made clear that none of the findings contained in the impugned order shall be taken into consideration for the purpose of deciding issues involved in the original petition. At any rate the original petition, O.P.No.51/2015, shall be disposed of within a period of six months from the date of receipt of a copy of this judgment.

The above original petition is hereby disposed of in accordance with the above observations and directions.

Sd/-

**C.K. ABDUL REHIM**  
**JUDGE**

Sd/-

**SHAJI P. CHALY**  
**JUDGE**

//true copy//

P.A. To Judge

smv  
25.1.2016