IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 26TH DAY OF JUNE 2024 / 5TH ASHADHA, 1946

RSA NO. 1406 OF 2004

AGAINST THE JUDGMENT DATED 29.09.2004 IN AS NO.134 OF 1995 OF III ADDITIONAL DISTRICT COURT, THIRUVANANTHAPURAM ARISING OUT OF THE JUDGMENT DATED 21.02.1994 IN OS NO.1532 OF 1991 OF THE ADDITIONAL MUNSIFF COURT, THIRUVANANTHAPURAM

APPELLANT/7TH RESPONDENT/7TH DEFENDANT:

M.A.SATHAR, PROPRIETOR (DIED)
SHEEFA ELECTRICALS AND FORT BAKERY,,
PAZHAVANGADI, THIRUVANANTHAPURAM.
(ADDITIONAL APPELLANTS 2 TO 5 ARE IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED SOLE APPELLANTS AS PER THE ORDER DATED 23.01.2009 IN I.A.NO.288/2008)

ADDITIONAL APPELLANTS:

2. **A. MOHAMMED IQBAL, S/O LATE M.A.SATHAR**
   TC45/667 (1), BEEMAPPALLY,
   THIRUVANANTHAPURAM
3. **A. ZAFARULLA KHAN,**
   S/O LATE M.A.SATHAR
   TC45/667 (2), BEEMAPPALLY,
   THIRUVANANTHAPURAM
4. **A.ZAKIR HUSSAIN**
   S/O LATE M.A.SATHAR
   TC45/667 (1), BEEMAPPALLY,
   THIRUVANANTHAPURAM
5. **KAMARUNNIZA, D/O M.A.SATHAR**
   KARIM MANZIL, NEAR KADINAMKULAM PANCHAYATH
   CHITTATTUMUKKU, KANIYAPURAM
   THIRUVANANTHAPURAM

BY ADVS.
SRI.GOPAKUMAR R.THALIYAL
SRI.EBY GEORGE

RESPONDENTS/APPELLANT, RESPONDENTS 1 TO 6/ PLAINTIFF, DEFENDANTS 1 TO 6:

1 THIRUVANANTHAPURAM CITIZENS PROTECTION FORUM, REGISTERED UNDER THE CHARITABLE AND SCIENTIFIC AND CULTURAL SOCIETIES ACT, REP. BY ITS, PRESIDENT M.KRISHNA NAIR, RESIDING AT PLOT NO.18,LEKSHMI VIHAR, PADMA NAGAR, FORT, THIRUVANANTHAPURAM

2 STATE OF KERALA REP. BY ITS CHIEF SECRETARY, SECRETARIAT,, THIRUVANANTHAPURAM.

3 THE DISTRICT COLLECTOR THIRUVANANTHAPURAM.

4 THE CITY CORPORATION OF THIRUVANANTHAPURAM, REP. BY ITS COMMISSIONER,, CORPORATION BUILDINGS, NEAR MUSEUM,, THIRUVANANTHAPURAM.

5 CITY POLICE COMMISSIONER THIRUVANANTHAPURAM, THYCAUD P.O.

6 DIRECTOR OF ARCHEOLOGY SASTHAMANGALAM, THIRUVANANTHAPURAM.

7 THE COMMANDANT MADRAS REJIMENT NILAGIRIS, WHO IS IN THE MANAGEMENT OF, GANAPATHY TEMPLE, PAZHAVANGADI,, THIRUVANANTHAPURAM.

BY ADVS.
R4 BY SRI N. NANDAKUMARA MENON (SR)
SRI SUMAN CHAKRAVARTHY
R1 BY SRI JOHN K JOSEPH
SMT MANJUSHA MOHANDAS
SMT K NITHYA
R2 BY SRI R.S. AJITH KUMAR
R2,R3,R5 AND R6 BY GOVERNMENT PLEADER SRI JAYAN

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 26.06.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

K. BABU, J

R.S.A. No. 1406 of 2004

Dated this the 26th day of June, 2024

JUDGMENT

This Regular Second Appeal is directed against the judgment and decree dated 29.09.2004 in A.S.No.134 of 1995, passed by the III Additional District Court, Thiruvananthapuram, which arose from the judgment and decree dated 21.02.1994 in O.S.No.1532 of 1991 of the Additional Munsiff’s Court (Rent Control Court), Thiruvananthapuram.

2. The plaintiff and defendant Nos. 1 to 6 are the respondents.

3. The appellant died during the proceedings, and his legal representatives were impleaded as additional appellants 2 to 5.

4. The suit was instituted for mandatory injunction. The plaintiff is a society, registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, XII of 1955. It is primarily engaged in uplifting the living conditions of Thiruvananthapuram city and also in promoting the citizens' welfare in scientific, literary and cultural aspects.

5. The Pazhavangadi Fort is very ancient. It is situated adjacent to Sreemahaganapathy Temple at Pazhavangadi. The Fort has been declared as an ancient monument by the Archaeological Department. Any injury caused to the ancient Fort is a cognizable offence punishable under Section 32 of the Kerala Ancient Monuments and Archaeological Sites and Remains Act, 1958. Defendant No.7 obtained Kuthakapattom rights in a property adjacent to the Fort. He made a structure encroaching upon the Government land using the western wall of the Fort as the eastern wall. The ancient Fort has

been tampered with. The prestige, beauty and dignity of the Fort is hence endangered.

6. The plaintiff pleaded that the City Corporation issued a licence to defendant No.7 to put up the construction in violation of the Building Rules. The construction is liable to be demolished. Defendant No.7 instituted two suits, O.S.Nos.858 of 1989 and 2561 of 1990, and obtained interim orders in his favour. The Government and the City Corporation have not taken any steps to remove the unauthorised structure. Therefore, the plaintiff sought a mandatory injunction directing defendant Nos. 1 to 6 to remove the encroachment upon the plaint Fort.

7. The City Corporation pleaded that defendant No.7 unauthorisedly extended the structure and the Corporation has initiated steps against the unlawful extension. It is further pleaded that none of the defendants had rendered any assistance or help to defendant No.7 in making the unauthorised construction.

8. Defendant No.7 resisted the suit, contending that the attempt of the plaintiff was to ruin his business. A communal clash occurred near the Fort, and the structure erected by defendant No.7 was damaged. He has not made any unauthorised encroachment as pleaded. The eastern wall of the shop room is not the western wall of the Pazhavangadi Fort as alleged. There is enough space between his shop's eastern wall and the western wall of the Pazhavangadi Fort. Defendant No.7 pleaded that the construction of the said room was made in terms of the order issued by the Government during the year 1984 as the shop building was destroyed in the fire that occurred in the communal riot on 30.12.1982.

9. The trial Court framed the following issues:-

1. Whether the plaintiff society is in existence, and has it got locus standi to maintain the suit?
2. Is the 6th defendant a necessary party to the suit?
3. Did the 7th defendant make any unauthorised construction?
4. Whether the 7th defendant has committed any illegal act tampering with the ancient Fort.

5.Is the plaintiff entitled to the mandatory injunction prayed?

6.Whether the 7th defendant is entitled to claim compensatory costs.

7.Reliefs and costs.

10. The parties went to trial. On the side of the plaintiff, PWs 1 and 2 were examined and Exts. A1 to A9 were marked. Defendant No.7 gave evidence as DW1 and Exts. B1 to B6 were marked. Ext.C1 was marked as Court Exhibit.

11. The Trial Court dismissed the suit, holding that there is no satisfactory evidence to show that defendant No.7 has effected any unauthorised construction and he has made any illegal act of tampering with the ancient monument.

12. The plaintiff challenged the decree and judgment passed by the Trial Court in A.S.No.134 of 1995. The First Appellate Court reversed the judgment of the Trial Court. The operative portion of the judgment passed by the First Appellate Court reads thus:-

> "16.In the result the appeal is allowed. In reversal of the decree and judgment of the Munsiff's Court, Thiruvananthapuram in O.S.No.1532/1991 dated 21.2.1994, the said suit is decreed as follows. The first defendant is directed by way of mandatory injunction to take steps to resume the land given on kuthakapattom to the 7th defendant, after demolishing the unauthorised construction thereon in accordance with the kuthakappattom rules. The 3rd defendant is directed by way of mandatory injunction to take steps to demolish the unauthorised construction made by the 7th defendant violating the provisions of the Municipalities Act and the rules there under and the Building Rules. In the circumstances of the case the parties are directed to suffer their costs."

13. I have heard the learned counsel for the plaintiff, the learned Government Pleader and the learned Standing Counsel appearing for the City Corporation.

14. After hearing both sides, this Court re-framed the substantial questions of law as follows:-

(1)Has not the First Appellate Court committed an illegality when it granted a relief of mandatory injunction to the Government to

resume the land given on kuthakappattom to defendant No.7 in a suit where the violation of the conditions of the kuthakappattom was not at all an issue ?

(2)Has the First Appellate Court drawn necessary inferences and presumptions based on the pleadings and evidence?

15. The learned Counsel for defendant No.7 contended that the First Appellate Court had committed an illegality when it granted a mandatory injunction which had not been sought by the plaintiff, and defendant No.7 was not given an opportunity to resist or oppose that relief. The learned counsel further contended that Ext.C1 Commission Report would show that there was no encroachment as pleaded.

16. The learned Government Pleader submitted that there is evidence to show that defendant No.7 unauthorisedly extended the construction. The learned Standing Counsel appearing for the City Corporation

submitted that the Corporation had not issued a permit to defendant No.7 to make any construction.

17. The cause of action for seeking the relief is that defendant No.7 put up a construction in violation of the Building Rules, and the City Corporation, the District Collector and the Government have taken no steps to demolish the illegal construction.

18. PWs 1 and 2 gave evidence in support of the pleadings in the plaint. Defendant No.7 gave evidence as DW1. Ext.C1 Report would show that defendant No.7 constructed a pucca two room building. In one of the rooms, defendant No.7 was running a bakery, and in the other room, he was conducting an electric shop. In Ext.C1, the Commissioner reported that when viewed from the Padmavilasam road, the western wall of the Fort and the eastern wall of the bakery would appear to be the same. But there is a marginal difference of 11 inches between the two walls. It is further reported that in between the western wall of the Fort and the eastern wall

of the bakery, on the portion adjacent to the Padmavilasam road, a pillar is constructed at a width of 14 inches and at a height of 10 feet. The Commissioner specifically reported that this would conceal the view of the Fort. It has further come out in evidence that a window on the western wall of the Fort is also hidden due to the acts of defendant No.7. The Commissioner further reported that since the construction hides the view of the Fort, the natural beauty of the ancient Fort is lost.

19. The City Corporation pleaded that defendant No.7 unauthorisedly extended the existing construction without obtaining the necessary permit. The Corporation failed to take action in view of the pendency of two suits filed by defendant No.7.

20. The State of Kerala pleaded that 444sq.links of purampoke land comprised in Sy.No.650 of Vanchiyoor Village was given to defendant No.7 as per the terms and conditions in the Kuthakapattom Rules for a period of 5 years from 1979. Later, as per the Government order

dated 27.03.1982, permission was also granted to defendant No.7 to construct a temporary shed on the land leased to him. The Government specifically pleaded that when defendant No.7 constructed a permanent building, it violated the conditions of the lease. The Government had ordered the cancellation of the lease as per order dated 30.07.1987 with a direction to the District Collector to resume the leased land. But, no further action was taken due to the pendency of O.S.No.1267 of 1987.

21. After meticulously analysing the pleadings and evidence, the First Appellate Court recorded a finding that defendant No.7 effected an unauthorised construction without obtaining a permit from the local authority and violated the conditions of the Kuthakapattom lease.

22. I have gone through the pleadings and evidence. I hold that the Court below has drawn necessary inferences and presumptions based on the

pleadings and evidence to hold that defendant No.7 effected an unauthorised construction.

23. The plaint has been framed on the cause of action that defendant No.7 put up a construction in violation of the Building Rules, and the unauthorised construction affected the natural beauty of the ancient Fort. Based on the pleadings, the plaintiff prayed for a mandatory injunction directing the official defendants to remove the unlawful construction touching the western wall of the 'Fort' and to restore it to its original position.

24. However, the First Appellate Court, apart from granting the above relief, ordered a mandatory injunction to resume the land given on kuthakappattam to defendant No.7. It is pertinent to note that there is no prayer for the relief of mandatory injunction to resume kuthakappattam and there are no pleadings to support such a relief. It is also relevant that defendant No.7 had no opportunity to resist or oppose such a relief.

25. It is trite that consideration of the grant of relief when there is no prayer for that relief or no pleading to support such a relief, and also when the defendant had no opportunity to resist and oppose such relief would amount to miscarriage of justice.

26. In ***Sri. Mahant Govind Rao v. Sita Ram Kesho and Ors***. [MANU/PR/0028/1898] while considering the question whether a relief, a right to which is not disclosed in the plaint and which is not asked for in the plaint, may be granted, the Privy Council observed thus:-

> "19.Their Lordships quite agree with the High Court that as a rule relief not found ed on the pleadings should not be granted. But in this case, as their Lordships have been at pains to show, the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court is right in treating the case as not within the rule. As between Plaintiff and Defendant the case has been thoroughly tried out, indeed Mr. Mayne for the Defendant does not now dispute that the other members of the family are entitled to a moiety. It is quite right to make a declaration on the subject. But then their Lordships think that the terms of the declaration may be advantageously modified, and that the Court may found on the declaration an inquiry into the Plaintiffs title."

27. In ***Ram Ratan Sahu and Ors. v. Bishun Chand and Ors***.[MANU/WB/0128/1907] the High Court of Calcutta observed that a Court of appeal in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered, and will not take notice of any facts which may have arisen subsequently. But it is equally well-settled that the Court will, in exceptional cases, depart from this rule, especially where, by so doing, it can shorten the litigation and best attain the ends of justice.

28. In ***Trojan & Co. Ltd v. N.N.Nagappa Chettiar*** [AIR 1953 SC 235=MANU/SC/0005/1953] the Supreme Court held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the court was not entitled to grant the relief not asked for.

29. In ***Nedunuri Kameswaramma v. Sampati Subba Rao*** [AIR 1963 SC 884=1962 SCC OnLine SC 41] while dealing with the question whether the suit should be dismissed on the ground of want of proper pleas by the appellant in answer to the written statement, the Supreme Court observed thus:

> "7. ....No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion....."
>
> [Emphasis supplied]

30. In ***Bhagwati Prasad v. Chandramaul*** [AIR 1966 SC 735 = (1966) 2 SCR 286] on the circumstances in which deficiency in, or absence of pleadings could be

ignored, the Constitution Bench of the Supreme Court held thus:

> “10.But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which

the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

[Emphasis supplied]

31. In ***Pasupuleti Venkateswarlu v. The Motor & General Traders*** [AIR 1975 SC 1409 = MANU/SC/0415/1975] the Supreme Court held thus:-

"5. .....It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice — subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or

justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed....."

[Emphasis supplied]

32. The principle was reiterated by the Supreme Court in ***Ram Sarup Gupta (Dead) by LRS. v. Bishun Narain Inter College and Others*** [(1987) 2 SCC 555], wherein it was observed thus:-

"6.....It is well settled that in the absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings

however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Some times, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal.“

[Emphasis supplied]

33. In ***Om Prakash Gupta V. Ranbir B. Goyal*** [AIR 2002 SC 665 = MANU/SC/0035/2002] the Supreme Court held thus:-

“11.The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord

with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (*i*) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (*ii*) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (*iii*) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In ***Pasupuleti Venkateswarlu v. Motor & General Traders*** [(1975) 1 SCC 770 : AIR 1975 SC 1409] this Court held that a fact arising after the lis, coming to the notice of the court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the court cannot be blinked at. The court may in such cases bend the rules of procedure if no specific provision of law or rule of fair play is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that the court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned: (*i*) the event should be one as would stultify or render inept the decretal remedy, (*ii*) rules of procedure may be bent if no specific provision or

> fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (*iii*) such cognizance of subsequent events and developments should be cautious, and (*iv*) the rules of fairness to both sides should be scrupulously obeyed."
>
> [Emphasis supplied]

34. The principles declared in ***Om Prakash Gupta*** was reiterated in ***Kedar Nath Agrawal (Dead) and Another. v. Dhanraji Devi (Dead) by Lrs. And Another*** [(2004) 8 SCC 76 = MANU/SC/0887/2004], ***Seshambal (Dead) through Lrs v. Chelur Corporation Chelur Building and Ors.*** [(2010) 3 SCC 470 = MANU/SC/0115/2010] and ***Ram Kumar Barnwal v. Ram Lakhan (Dead)*** [(2007) 5 SCC 660 = MANU/SC/7670/2007].

35. In ***Bachhaj Nahar v. Nilima Mandal and another*** [(2008) 17 SCC 491] the Supreme Court held that when there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a

relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. The Supreme Court, referring to ***Bhagwati Prasad*** and ***Ram Sarup Gupta*** observed that those decisions cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. The Court further held that a Court of appeal can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. The Supreme Court cautioned that where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, *suo motu.*

36. In the present case, for granting a mandatory injunction to resume the lease, there were no pleadings and evidence, and defendant No.7 was not given any

opportunity to resist and oppose such a relief. Defendant No.7 did not participate in the trial with the knowledge that the conditions of kuthakappattam would be an issue in the trial. The plaintiff has not even prayed to the Court to take notice of the alleged violations in the kuthakappattam and mould the relief accordingly. No circumstance was brought out for the First Appellate Court to take note of the violations in the kuthakappattam.

37. Defendant No.7 was taken by surprise when the First Appellate Court directed cancellation of the kuthakappattam. The First Appellate Court has not obeyed the rule of fairness to defendant No.7.

38. Therefore, the mandatory injunction to resume the land given on kuthakapattam to defendant No.7 is set aside. The mandatory injunction directing defendant No.3 to take steps to demolish the unauthorised construction put up by defendant No.7 in violation of the provisions of the Municipality Act and Rules thereunder

and Building Rules is confirmed. However, the Government is at liberty to take steps to resume the land given on kuthakapattam to defendant No.7 in accordance with law.

The Regular Second Appeal is partly allowed.

Sd/-
K.BABU, JUDGE

kkj