

**(1991) 07 KL CK 0063**

**High Court Of Kerala**

**Case No:** A.S. No. 415 of 1990

A.J. Joy and others

APPELLANT

Vs

A.J. Antony

RESPONDENT

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**Date of Decision:** July 16, 1991

**Acts Referred:**

- Succession Act, 1925 - Section 368

**Citation:** (1991) 2 KLJ 781

**Hon'ble Judges:** M.M. Pareed Pillay, J

**Bench:** Single Bench

**Advocate:** T.P. Kunju Vareed and T.P Joseph, for the Appellant; N. Viswanatha Iyer, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

M.M. Pareed Pillay, J.

Appellants are the defendants 1 to 4 in O. S. 71 of 1989 of the Sub Court, Trichur. They challenge the judgment and decree of the Sub Judge. The Sub Judge granted decree in favour of the respondent-plaintiff allowing him to recover possession of the building and also items 2 and 3 of the plaint A schedule from the defendants. Plaintiff and first defendant are the children of late Mrs. Margret Joseph. They have a sister by name Etty. Their mother executed Ext. A1 will in 1974. In accordance with the terms of the will plaint A schedule properties were bequeathed to the plaintiff. Item No. 1 of plaint A schedule is a building standing in item No. 2. Item No. 2 has the extent of 9 cents. Item No. 3 is a portion of a compound in" Cherur village. As per the will 20 cents of property is bequeathed to the plaintiff out of the total extent of 80 cents. The case of the plaintiff is that in the building allotted to him (Old No. 618/25 of Trichur Municipality) defendants have no right and as per the terms of the will first defendant has to vacate the premises and give him peaceful possession of the building.

2. First defendant contended that the building bequeathed to him under the will for his residence was in the occupation of a tenant, that the tenant was willing to surrender the building to him, that the plaintiff who has been appointed as the executor under the will resisted him from taking surrender of the building, that the plaintiff was responsible for obtaining stay of the proceedings in R. C. O. P. 80 of 1986 and that on account of it he could not get possession of the building and as the executor as per the will did not take any steps to give him possession of the building and as the building has been completely ruined on account of the mismanagement and maladministration of the executor he has virtually lost the legacy.

3. The question to be considered is whether the first defendant could claim any right over the property bequeathed to the plaintiff on the ground that he could not get possession of the building from the tenant or on account of the ruination of the building due to the maladministration and callous neglect of the plaintiff, the executor under the will. Ext. C2 commission report shows that the building has been completely ruined and it is beyond repairs. But there is no evidence to hold that it was on account of the maladministration or mismanagement of the plaintiff that the building fell into ruins. The recitals in the will, Ext. A1 do not show that the plaintiff was liable to effect repairs to the building allotted to the first defendant. Testator has not made any such indication in Ext. A1 will. What has been stated in Ext. A1 is that the first defendant has been residing with her and that on her death he should surrender possession of the building No. 618/25 to the plaintiff. Hence first defendant is not entitled to remain in possession of the property bequeathed to the plaintiff on the ground that the building set apart to him lay in ruins. He cannot legally contend that due to mismanagement by the executor he has lost his legacy and so he is entitled to retain possession of the property bequeathed to the executor.

4. There is no provision under the Indian Succession Act which forfeits the legacy in favour of an executor if on account of his maladministration or neglect the property bequeathed to a co-legatee is ruined or destroyed. In such a situation the legatee whose property was destroyed by the inaction or negligence or mismanagement of the executor cannot claim any right over the property bequeathed to the executor. He can at best claim that the executor should make good the loss caused to him. He cannot insist upon getting the legacy in favour of the executor. Or he may claim damages. Section 368 of the Indian Succession Act makes the position clear. Section 368 provides that when an executor misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned. An executor is in a sense a trustee and for all breaches of trust he is personally liable u/s 368. He is definitely answerable for maladministration or mismanagement of the estate of the deceased. In case of any wilful default or mismanagement on the part of the executor and if a legatee suffers on account of it the executor cannot absolve himself of the loss or damage caused to the legatee. As there is no provision under the Indian Succession Act which makes the executor

liable to lose his legacy in favour of another legatee who has suffered on account of the maladministration or callous mismanagement of the estate of the testator, first defendant cannot lay any claim to the property of the plaintiff on the ground that his inaction and mismanagement resulted in the destruction of the property bequeathed to him as per the will. In the counter filed to R. C. P. 80 of 1986 (Ext. A7) first defendant has stated that the building is dilapidated and that the tenant is bound to pay damages to him. In view of the aforesaid contention, his present stand that the damages to the building were caused on account - of the negligence or mismanagement of the plaintiff cannot be accepted. As per the will plaintiff is entitled to get possession of the building No. 618/25 with the appurtenant site and that right cannot be defeated by the first defendant merely because the building bequeathed to him is in a state of disrepair. Plaintiff is entitled to get recovery of possession of item No. 3 property as well.

Judgment and decree of the Court below do not warrant interference. They are confirmed. Appeal is dismissed with costs.