

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

FRIDAY, THE 26TH DAY OF JUNE 2015/5TH ASHADHA, 1937

CRP.No. 321 of 2013 ()

AGAINST THE ORDER IN EP NO.66/2011 IN OS NO.342/2005 OF MUNSIFF COURT,
CHENGANNUR DATED 05.12.2012

REVISION PETITIONER(S)/DEFENDANTS:

1. SOMAVALLY
SREE BHAVANIL, LAHASSERY MURI, CHENGANNUR VILLAGE.
2. SREEKUMAR
SREE BHAVANIL, LAHASSERY MURI, CHENGANNUR VILLAGE.
3. ANIL
SREE BHAVANIL, LAHASSERY MURI, CHENGANNUR VILLAGE.
4. AJAYAKUMAR
SREE BHAVANIL, LAHASSERY MURI, CHENGANNUR VILLAGE.
5. ANIYAKUNJU @ PODIYAN,
SREE BHAVANIL, LAHASSERY MURI, CHENGANNUR VILLAGE.

BY ADV. SRI.IYPE JOSEPH

RESPONDENT(S)/PLAINTIFFS:

1. PRASANNA KUMAR
KRISHNAPRIYA VEETIL, LAHASSERY, CHENGANNUR.
2. LATIKA PRASANNA KUMAR
KRISHNAPRIYA VEETIL, LAHASSERY, CHENGANNUR.

R1 & R2 BY ADV. SRI.N.ASHOK KUMAR

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 26-06-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

“C.R.”

A.HARIPRASAD, J.

C.R.P. No.321 of 2013

Dated this the 26th day of June, 2015

ORDER

An interesting legal question pop up for determination:

Can a decree in a suit for fixation of common boundary of the properties belonging to the plaintiffs and defendants be executed at the instance of the defendants?

2. Brief facts: Petitioners are the defendants in O.S.No.342 of 2005 on the file of the Munsiff's Court, Chengannur. Challenge in this revision petition is against the order passed by the executing court in E.P.No.66 of 2011, wherein the defendants in the suit for fixation of boundary claimed demarcation of a common boundary between their property and that of the plaintiffs. In this context, it is relevant to note that the suit was one for declaration of the plaintiffs' right over plaint schedule property, prohibitory injunction against the defendants from trespassing into the property and also for fixation of common boundary. The suit was partly decreed by the trial court declaring the plaintiffs' right over the plaint schedule property and also holding that the line IOM in Ext.C6 plan

submitted by the commissioner is the boundary line separating the properties of the contesting parties. Certified copy of the plan has been made a part of the decree. It is noteworthy that the prayer for injunction was declined by the trial court. Court below dismissed the execution petition on the sole reason that the defendants cannot seek execution of a decree for fixation of boundary as they cannot be termed either as “decree holders” or “holders of the decree”. I shall deal with the correctness of this logic in the succeeding paragraphs. True, the defendants cannot seek execution of one part of the decree, viz., the relief of declaration granted to the plaintiffs, for two reasons. Insofar as the declaratory relief is concerned, the defendants cannot be held to be the “decree holders” as defined in Section 2(3) of the Code of Civil Procedure, 1908 (in short, “CPC”). In Section 2(3) of the CPC, the term “decree holder” has been defined as “any person in whose favour a decree has been passed or an order capable of execution has been made”. Firstly, on a mere reading of the decree, it is clear that the relief of declaration granted is for the exclusive benefit of the plaintiffs and, in fact, it is against the defendants. Logically, therefore, that part of the decree cannot be executed by the defendants as it may be an execution proceedings against themselves. Further reason to hold that a declaratory decree cannot be executed at the instance of the defendants is that such a decree is incapable of execution.

Viewing from any angle, that part of the decree granting a declaratory relief is inexecutable, not only at the instance of the defendants, but also by the plaintiffs themselves. The definition of the term "judgment debtor" in Section 2(10) CPC is also relevant. "Judgment debtor" means any person against whom a decree has been passed or an order capable of execution has been made. So far as the declaratory decree is concerned, It is passed against the defendants, though it is incapable of execution. This is yet another reason to find that the decree of declaration is incapable of execution at the behest of the defendants.

3. The point germane for consideration is about the executability of the decree for demarcation of a common boundary separating the properties of the plaintiffs and defendants at the instance of the defendants. I am unable to agree with the view expressed by the court below that such a decree cannot be executed by the defendants for the following reasons. The court below failed to consider the marked difference in the expressions used by the CPC in Section 2(3) and Order XXI Rule 10. The term "decree holder" is defined in Section 2(3) CPC. The expression used is "holder of a decree" in Order XXI Rule 10 CPC. At first blush, it may appear to be synonymous. But, according to me, there is a legal distinction between these two expressions. The expression "holder of a decree" occurring in Order XXI Rule 10 CPC takes in a transferee of a

decree and a legal representative of the decree holder also. Order XXI Rule 16 CPC deals with an application for execution by transferee of a decree. Such a person also comes within the expression "holder of a decree". In this context, I may refer to a decision of the Supreme Court in **Dhani Ram v. Sri Ram (AIR 1980 SC 157)**. Answering a question as to whether the property in a decree passes as intended in the deed of assignment, without the recognition of transfer by the court as a pre-condition, the Supreme Court held that the property in a decree must pass to the transferee under a deed of assignment when the parties to the deed intend such property to pass and it does not depend on the court's recognition of the transfer. It goes without saying that such a transferee is also entitled to execute the decree. Therefore, the expression "holder of a decree" in Order XXI Rule 10 CPC takes in parties other than whose name appear on the decree. Likewise, a legal representative of the decree holder, though his name may not be inscribed in the decree, can execute it as provided in the CPC. The term "decree holder" defined in Section 2(3) CPC takes in persons whose names appear on the record as the persons in whose favour the decree was made. It includes persons who have been recognized by the court by order as the decree holder from the original plaintiff or his representative (**see Paupayya v. Narasannah (ILR 2 Madras 216)**).

4. The aspect then comes up for consideration is about the implication of the usage "or" in Section 2(3) CPC to separate the two portions of the provision. Decree holder means any person in whose favour a decree has been passed. This is the first limb of the provision. Thereafter, the expression "or" appears. Then it further says that the decree holder means any person in whose favour an order capable of execution has been made. On a careful reading, it can be seen that the word "or" occurring between two limbs of the provision has to be read as "or" itself. It shall not be read as "and" because the term "decree holder" as defined in the above provision takes in two category of persons, viz., any person in whose favour a decree has been passed and any person in whose favour an order capable of execution has been made. In this backdrop, the question whether fixation of boundary can be executed at the instance of defendants will have to be considered.

5. A Division Bench of this Court in **P.Narayanan Nair v. E.Achuthan Nair (1972 KLJ 769:1973 KLT 299)** has clearly held that a suit for determining the boundary dispute is maintainable under Section 9 CPC. This Court in clear terms found that such a legal action is a suit of a civil nature falling within the scope of Section 9 CPC.

6. There are very many instances in which a decree can be said to be in favour of the parties to the litigation, irrespective of the fact whether

they are the plaintiffs or defendants in the suit. In such cases, the decrees can be said to be capable of execution at the instance of any of the parties to the suit. Examples of such decrees are those passed in suits for partition, specific performance of a contract, suits under Section 92 CPC, etc. I may hasten to add that the list is not exhaustive.

7. A Division Bench of the Calcutta High Court in **Iswar Sridhab Jew v. Jnanendra Nath (AIR 1960 Calcutta 718)** has laid down the law that where a scheme decree is executable and gives any rights to any party, which can be enforced by execution, the fact that the person seeking execution was formerly a defendant in the suit and a judgment debtor under the decree cannot possibly prevent him from working out the decree by execution. Learned Judges have drawn an analogy from a decree in a suit for partition to arrive at the conclusion.

8. I may immediately refer to Section 28 of the Specific Relief Act, 1963 (in short, "Act") to vouchsafe the point that under certain circumstances, even the defendant can seek indulgence of the court for reliefs subsequent to the decree. Section 28 of the said Act deals with the rescission of a contract after passing of a decree in a suit for specific performance. It is well settled that a suit for specific performance does not come to an end on passing of a decree. Section 28(1) of the Act empowers a vendor or lessor to apply in the same suit in which the decree

is made to have the contract rescinded, if the purchaser or lessee, as the case may be, does not, within the period allowed by the decree, or such further period as the court may extend, pay the purchase money or other sum. From this provision, it is clear that despite the vendor or lessor was a defendant in the suit, such a person gets an opportunity to seek rescission of the contract even after passing the decree. This principle has been approved by the Bombay High Court as early as in 1923 in the decision in **Bai Karimabibi v. Abderehman Sayad Banu (AIR 1923 Bombay 26)**. Learned Single Judge of the High Court of Patna in **Kanu Charan Deep v. Bimla Deep (II (1996) DMC 214)** has held that a decree in a proceeding under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights is executable even at the instance of the respondent as the decree is in favour of both the parties. Division Bench of the Allahabad High Court in **Ajudhia Prasad v. The U.P. Govt. through the Collector (AIR 1947 All. 390)** has considered the scope of the expression “decree holder” occurring in Section 2(3) CPC and held as follows:

“Now it is clear from this that a person in whose favour an order capable of execution has been made is also a decree holder. It is also evident from this definition that a decree-holder need not be a party to the suit. He may be 'any person'.”

For the said reasons, there cannot be any dispute that the decree passed

in a suit for fixation of common boundary of the plaintiff and defendant, being one intended to put an end to the dispute between the parties and to achieve the object of common good, should be allowed to be executed by a defendant in the suit too. According to me, the sum and substance of the legal principles to be borne in mind regarding the terms “decree holder” and “holder of a decree” can be stated like this. The term “decree holder” denotes a person (i) in whose favour a decree has been passed (ii) in whose favour an order capable of execution has been passed and (iii) whose name appears in the decree, either as plaintiff or defendant, and the following conditions are satisfied:

(a) the decree must be one capable of execution and

(b) the said person, by the terms of the decree itself or from its nature, should be legally entitled to seek its execution.

Similarly, the term “holder of a decree” takes in not only the “decree holder”, but other rightful persons like transferee of a decree, legal representative, etc.

9. Therefore, I am of the definite opinion that the view taken by the executing court that a decree for fixing common boundary of the properties of the plaintiffs and defendants cannot be demarcated in an execution proceeding moved at the instance of the defendants is clearly illegal and hence unsustainable.

In the result, the petition is allowed. The impugned order is set aside. Court below is directed to take the execution petition No.66 of 2011 in O.S.No.342 of 2005 back to file and proceed with it in accordance with the law.

A. HARIPRASAD, JUDGE.

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