

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 5TH DAY OF MARCH 2015/14TH PHALGUNA, 1936

CRP.No.571 of 2014

(Against common order dated 29.08.2014 in E.P.No.56/2014 in
O.S.200/1992 of Sub Court, Kochi)

REVISION PETITIONER/IST JUDGMENT DEBTOR/1st DEFENDANT:

A.D SUDHAKARAN
S/O. DAMODARAN, ATHIPARAMBIL HOUSE, PULLARDESOM ROAD
PALLURUTHY, KOCHI - 6.

BY ADVS.SRI.N.K.SUBRAMANIAN
SRI.S.ANANTHAKRISHNAN

RESPONDENT/DECREE HOLDER/PLAINTIFF:

A.D BHANUMATHI
W/O. REGUVARAN, PARATHAMPARAMBIL HOUSE, PULLARDESOM
PALLURUTHY VILLAGE, KOCHI - 6.

R1 BY ADV. SRI.N.RATHEESH
R1 BY ADV. SMT.SUMA RATHEESH

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON
05-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.BHAVADASAN, J.

Civil Revision Petition No.571 OF 2014

Dated this the 5th day of March, 2015.

O R D E R

Aggrieved by the order dated 29.08.2014 in E.P.No.56/2014 in O.S.No.200/1992, the 1st respondent before the court below has come up before this Court in revision.

2. The matter arises from execution of decree. It is not disputed that the respondent herein is the sister of the petitioner. A suit for partition was instituted as O.S.No.200/1992 in which a preliminary decree was passed followed by a final decree. In the final decree proceedings in I.A.No.1205/1996, plot 'A' in Ext.C1(a) was allotted to the respondent. In execution, she obtained delivery of the property and on the motion of decree holder that decree is satisfied, the execution petition was closed.

3. It may be noticed here that from the final decree, there was a Regular First Appeal pending before this Court and that was dismissed on 15.06.2010 and a review petition filed against the same was also dismissed as per order dated 07.02.2014.

Later the respondent herein came forward with the present petition i.e. E.P.No.56/2014 purportedly under Section 47 of the Code of Civil Procedure complaining that the petitioner is obstructing the enjoyment of the property which was allotted to her and seeking arrest and detention of judgment debtors in civil prison.

4. The petitioner who was the 1st respondent before the court below resisted the petition and pointed out that the present petition has been filed only with the intention to harass him and that he was never obstructed the enjoyment of the property set apart and taken delivery of by the respondent. It is also pointed out that if there is such a complaint, a separate suit will have to be filed and the remedy now sought for cannot be obtained in execution of decree passed in a partition suit. The lower court observing that the property was delivered through court and there was stay of delivery of property from High Court and thus the petitioner before the court below was precluded from enjoying the property went on to allow the petition and directed that the property allotted to the petitioner before the court below be identified by an Advocate Commissioner with the help of

village authorities and compound wall be put up in the presence of a commission. The said order is under challenge in this Civil Revision Petition.

5. Learned counsel appearing for the petitioner pointed out that the two premises based on which the impugned order has been passed namely, (1) that the petitioner has admitted that he has caused obstruction and (2) that there was stay from High Court are erroneous and neither of them are true. It is pointed out that before the review petition was taken up for consideration by the High Court, delivery of the property allotted has been taken by the decree holder and interim order in the review petition was only to the effect that the respondent herein was restrained from alienating the property and there was no stay of execution of final decree proceedings at all. Learned counsel went on to point out that at any rate petition under Section 47 CPC is not maintainable and if at all a remedy is available, that is by way of a separate suit.

6. Learned counsel appearing for the respondent pointed out that in the light of the decision in **Illyas vs. State of Kerala** (2014 (4) KLT 362), the court below was perfectly justified in

passing the impugned order. After having obstructed the respondent before this Court from enjoying the fruits of the decree, the petitioner cannot be heard to say that he is not liable for the consequences thereof. Accordingly, it is contended that there is no justification to interfere with the impugned order.

7. At the outset, it may be noticed that the prayer sought for by the petitioner before the court below is quite different from the prayer granted by the court below. The prayer seems to be one for detention of judgment debtor in civil prison. But what has been granted by the court below is almost another decree directing that the property allotted to the petitioner in the final decree proceedings be identified by an Advocate Commissioner with the help of village Officer and permitting her to put up compound wall.

8. It is not disputed before this Court that in the final decree proceedings execution was taken out and the property allotted to the respondent herein was delivered to her and the execution petition was closed noting that decree was satisfied.

9. The finding of the court below without ascertaining whether there was stay from High Court also does not appear to

be correct. It appears that there was only an order of injunction restraining the respondent herein from alienating the property. On going through the objection filed by the petitioner, the observation of the court below that there is an admission by the petitioner that he had obstructed the enjoyment of the property obtained by the respondent does not appear to be true.

10. Thus it could be seen that the two premises based on which the order has been passed are not available on hand. There can be no manner of doubt that if, as a matter of fact, there was a stay from High Court or the petitioner had in fact obstructed the respondent from enjoying the fruits of the decree, the petitioner is liable for the consequences and the order passed is sustainable. That aspect is to be gone into in the light of the facts mentioned above.

11. The two basic facts based on which the impugned order has been passed do not exist. If that be so, the petitioner has to succeed. But that does not mean that the respondent has to be relegated to file another suit. The matter needs a fresh consideration at the hands of the lower court.

12. Learned counsel appearing for the petitioner pointed that after having recorded satisfaction of the decree, a second execution petition is not maintainable nor is a petition under Section 47 CPC maintainable. For the above proposition, learned counsel relied on the decisions in **Varghese vs. Chacko** (1964 KLT 226) and in **State of Travancore-Cochin vs. Lekshmi Ammal Meenakshi Ammal** (1957 KLT 1094). In the light of the decision in **Illyas vs. State of Kerala** (2014 (4) KLT 362), how far the above decisions can apply to the facts of the present case is a matter to be looked into.

In the result, this petition is allowed and the impugned order is set aside and the matter is remanded to the execution court for fresh disposal in the light of what has been stated above. The parties shall appear before the lower court on 08.04.2015.

**P.BHAVADASAN
JUDGE**

smp