

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 12TH DAY OF MARCH 2015/21ST PHALGUNA, 1936

OP(C).No. 19 of 2015 (O)

AGAINST ORDER ON EA NO.411/2014 IN EP NO.331/2013 IN OS NO.876/2012 OF 1ST
ADDITIONAL MUNSIF COURT, THIRUVANANTHAPURAM

PETITIONER(S):

SREENIVASAN, S/O.SADASIVAN NAIR, TC 37/629, WEST STREET
FORT P O, VANCHIYOOR VILLAGE, THIRUVANANTHAURAM

BY ADV. SRI.RAJESH P.NAIR

RESPONDENT(S):

MAHADEVAN
S/O.SADASIVAN NAIR, TC 37/628, WEST STREET, FORT P O
VANCHIYOOR VILLAGE, THIRUVANANTHAPURAM-695023.

BY ADV. SRI.PRATHAP PILLAI

BY ADV. SRI.C.R.SIVAKUMAR

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 12-03-2015, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 19 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1:-TRUE COPY OF THE JUDGMENT AND DECREE DTD 26/11/2012 IN OS NO 876/2012
PASSED BY THE COURT OF THE IST ADDITIONAL MUNSIF ,THIRUVANANTHAPURAM

EXT.P2:-TRUE COPY OF THE EXECUTION PETITION EP NO 331/2013 IN OS 876/2012

EXT.P3:-TRUE COPY OF THE EA NO 411/2014 PRAYING TO APPOINT AN ADVOCATE
COMMISSIONER

EXT.P4:-TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENT IN EP 331/2013 IN
OS 876/12

EXT.P5:-TRUE COPY OF THE REVIEW PETITION FILED BY THE RESPONDENT IN EA
411/2014 IN EP 331/2013 IN OS 876/12

EXT.P6:-TRUE COPY OF THE ORDER DTD 12/11/2014 IN EA NO 411/2014 IN EP NO 331/13 IN
OS NO 876/2012

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

A.HARIPRASAD, J.

O.P. (C) No.19 of 2015

Dated this the 12th day of March, 2015

JUDGMENT

Original Petition with the following prayers:

“(i) Call for the records leading to Ext-P6 order dated 12/11/2014 in E.A.No.411/14 in E.P.No.331/2013 in O.S.No.876/2012 on the file of Court of 1st Additional Munsiff, Thiruvananthapuram and to quash the same order and to allow the prayer in E.A.No.411/2014 appointing the advocate commissioner to implement the construction of the common wall as per the plan appended along with the Ext-P1 decree.

(ii) Pass such other order or direction which this Hon'ble Court may deem fit and proper to grant in the circumstances of the case.”

2. Petitioner is the brother of the respondent. They crossed swords in O.S.No.876 of 2012 on the file of the I Additional Munsiff, Thiruvananthapuram. Ext.P1 is the compromise decree passed thereon. Thereafter the petitioner approached the executing court with the following prayer:

“The width of the defendant's property on the western side and on the eastern side is 2.05 metres. The common wall is to be demolished and a new

wall is to be constructed as per the plan appended along with the decree on the straight line as per the plan on the correct common line of 2.05 metres width on the western side as well as eastern side through the southern common wall of the JD which is the northern common wall of the decree holder and the cost of the new construction is to be borne by both the decree holder and the JD. Since the JD declined to implement the said construction even after repeated requests of the decree holder, it is humbly prayed that the decree holder may be allowed to enforce the same through the process of this Hon'ble Court by appointing an Advocate Commissioner and direct the Advocate Commissioner to implement the construction of the common wall as per the plan appended along with the decree."

3. Heard the learned counsel for the petitioner and respondent.

4. Admittedly the entire plaint schedule is occupied by a tiled building having three separate portions. The terms of the compromise would show that each party has agreed to take separate portions of the building, which is lying in a straight line. The width of each portion taken by the parties has been specifically mentioned in Ext.P1. Grievance now projected by the petitioner is that subsequent to the compromise, some change in the lie of the building has been effected by the respondent. Regarding this contention, learned counsel for the respondent submitted

that such a contention was not taken up in the pleadings either before the executing court or before this Court. The request of the petitioner is to appoint an advocate commissioner to find out and measure out the lie of the building allotted to the petitioner. Originally the request for issuance of commission was allowed by the executing court. Later, the executing court passed Ext.P6 order finding that the request for issuance of commission was not allowable for the reason that there is no agreement in the compromise to demolish the wall and, therefore, no commission need be issued. Learned counsel for the petitioner contended that the prayer is innocuous and the scope of commission is only to collect details regarding the lie of the building obtained by the petitioner by way of Ext.P1 compromise decree. Learned counsel for the respondent opposed the application contending that the petitioner is not entitled to get any relief because the condition specified in the compromise is only that if the common wall is to be demolished, cost of new construction shall be borne by the defendant and the plaintiff equally. It is also submitted that for constructing a new common wall, approved plan as per Section 11 of the Kerala Building Rules, 1999 is necessary. It is nobody's case that any of the parties either applied for a building permit or intending to make a new construction. The first question to be decided, according to me, is whether the execution petition itself is maintainable when the terms of the compromise are considered. On a reading of the compromise, one may

have a feeling that the compromise only declares the rights of parties. So the predominant question to be decided by the executing court is regarding the maintainability of the execution petition. The question whether a commission has to be appointed or not is only ancillary. Without expressing any opinion regarding the legal right of the parties that can be raised before the executing court, I dispose of the original petition with a direction that the court below shall consider the maintainability of the execution petition as a preliminary issue. Parties are directed to appear before the trial court on 31.03.2015.

Original petition is disposed of as above.

A. HARIPRASAD, JUDGE.

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