

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

OP(C).No. 482 of 2015 (O)

CHALLENGING EXT.P3 ORDER PASSED BY THE SUB COURT, KANNUR IN
E.P.67/2013 IN O.S.NO.101/2005 DATED 16.12.2014

PETITIONER(S) :

K.SAJAN @ SUJAN AGED 50 YEARS
S/O.KUNHIRAMAN NAIR, SANJAY BHAVAN, P.O.NETTUR
THALASSERY.

BY ADVS.SRI.B.KRISHNAN
SRI.R.PARTHASARATHY
SRI.RAJESH V.NAIR

RESPONDENT(S) :

1. K.V.KARUNAKARAN, AGED 64 YEARS,
S/O.P.KANNAN NAIR, RETD.TEACHER, REMALAYAM,
PERUMACHERRY (P.O.), KOLANCHERRY, KANNUR DISTRICT-
670001.

2. K.KUNHIRAMAN, AGED 60 YEARS
S/O.APPUKKUTTY, 'SOUMYARRAM', P.O.PALLIKUNNU,
KANNUR DISTRICT-670001.

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 14-09-2015,
ALONG WITH OP(CIVIL) NO.1701 OF 2015 THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

OP(C).No. 482 of 2015 (O)

APPENDIX

PETITIONER(S) ' EXHIBITS

EXHIBIT-P1: A TRUE COPY OF E.P.67/2013 IN O.S.NO.101/2005
FILED BEFORE THE SUB COURT, KANNUR.

EXHIBIT-P2: A TRUE COPY OF COUNTER FILED BY RESPONDENT NO.2 IN
E.P.67/2013 IN O.S.NO.101/2005 FILED BEFORE THE
SUB COURT, KANNUR.

EXHIBIT-P3: A TRUE COPY OF ORDER PASSED IN E.P.67/2013 IN
O.S.NO.101/2005 BY THE SUB COURT, KANNUR DATED.

RESPONDENT(S) ' EXHIBITS: NIL

// TRUE COPY //

PA TO JUDGE

K.ABRAHAM MATHEW, J.

O.P.(C) Nos.482 & 1701 of 2015

Dated this the 14th day of September, 2015

COMMON JUDGMENT

The initial and essential question arising for consideration in these petitions is simple: Is an Execution Petition filed by a stranger to a decree on whom it confers a right maintainable ? Petitioner in O.P.(C). No.482 of 2015 was the 1st defendant and the petitioner in the other O.P. (C).No.1701 of 2015 the plaintiff in O.S.No.101 of 2015 on the file of Sub Court, Kannur. The suit was for partition of the properties which belonged to their predecessor, Divakaran Nair. He had deposited money in certain banks, who were also made defendants. A compromise decree was passed on 12.11.2007. The decree authorised petitioners in these O.Ps to withdraw Rs.5 lakhs from the banks and to pay it to the 1st respondent in these O.Ps towards maintenance of the family temple and 'taravadu' and towards the expenses incurred after the death of Divakaran Nair. They were liable to pay the amount on the date of its withdrawal from the banks, or within one month from the date of recording of the compromise. Though they withdrew the amount, they did not pay it to the 1st respondent. So the 1st respondent filed E.P.No.67 of 2013 before Sub Court, Kannur for its realisation with

interest. The petitioners in these O.Ps raised a contention that the 1st respondent is not a decree holder, he being not a party to the suit and the E.P filed by him is not maintainable and his remedy is only to file a suit for recovery of the amount. There is also a contention that the 1st respondent is not entitled to interest as claimed by him in the E.P. The executing court rejected their objections.

2. Heard.

3. Admittedly, the 1st respondent is not a party to the decree.

The submission of the learned counsel for the petitioners is that as he is not a party to the decree he cannot maintain an execution petition. The Code of Civil Procedure mentions three categories of persons who are entitled to apply for execution of a decree. They are decree holder as mentioned in Order 21 Rule 10, transferees of decrees as mentioned in Order 21 Rule 16 and legal representatives of a decree holder as mentioned in Section 141.

4. The 1st respondent does not come under the last two categories. The question that falls for consideration is whether he is a decree holder as provided in Order 21 Rule 10 CPC. Section 2(3) of the Code defines decree holder as follows:

“Decree-holder means any person in whose favour

a decree has been passed or an order capable of execution has been made;”

The legislature has consciously used the words 'any person in whose favour a decree has been passed' instead of 'a party to the suit in whose favour a decree has been passed'. If the intention of the legislature was that only a party to the suit can be a decree holder, it would have specifically stated so.

5. The same question came up for consideration before the Madras High Court in ***Vythilinga Pandarasannadhi vs. Board of Control Thiagarajaswami Devathanam (AIR 1932 Madras 193)*** and the Allahabad High Court in ***Ajudhia Prasad vs. The U.P. Government (AIR 1947 Allahabad 390)*** and the Mysore High Court in ***S.Thimmappa and another vs. Gopiamma (AIR 1964 Mysore 276)***. In all these cases the view taken is that if a decree confers a right on a person who is not a party to the decree he is a decree holder as defined in Section 2(3) of the Code and he has the right to maintain an E.P for execution of the decree. The learned counsel for the petitioner could not bring to my notice decision of any High Court taking a contrary view. The question came up for consideration in ***Ram Juwan vs. Devendranath Gupta (AIR 1960 MP 280)*** which was cited by them is a

different one.

6. Learned counsel submits that after the above first mentioned three decisions were rendered Order 23 Rule 3 C.P.C was amended in 1976 and now it provides that the court shall pass a compromise decree only so far as it relates to the parties to the suit. The argument is that a compromise decree cannot confer a right on a stranger to the compromise. The term 'so far as it relates to the parties' was considered by the Supreme Court in ***Hussainbhai Allarakhbhai Dariaya Vs. State of Gujarat and Others(2010) 8 SCC 759***. The apex court has said, "Further under Order 23 Rule 3 a decree can be made in terms of the compromise only in so far as it relates to the parties to the suit. Where either the appellant-plaintiff or the respondent- defendants were not parties, it cannot be said that there was a compromise between the parties to the suit or appeal". What can be understood from the decision is that the rule only mandates that only the parties to the suit can be made parties to the compromise. In other words, a stranger cannot be made a party to it. The rule cannot be read to mean that the decree cannot confer a right on a stranger to the decree. I hold that if there is an enforceable decree in favour of a stranger to a decree, he comes under the definition of decree holder and he can execute it. The

executing court was right in holding that the E.P filed by the 1st respondent is maintainable though he is not a party to the decree.

7. The next contention of the learned counsel is that since there is no provision in the decree for payment of interest on the amount payable to the 1st respondent, he cannot claim interest. But the fact that the petitioners were bound to pay the amount to the 1st respondent on the date of its withdrawal itself or within one month from the date of recording of the compromise cannot be ignored. They withdrew the amount years ago. They have retained it illegally. They are only trustees. On the principle of unjust enrichment they should be directed to pay interest at the rate at which the amount stood deposited at the time of its withdrawal. So I do not find anything illegal in the claim for interest made by the 1st respondent in the E.P.

8. Learned counsel for the petitioner in O.P.No.1701 of 2015 submits that in execution of the decree his property is sought to be proceeded against though he is not liable to pay the entire amount. The liability of that petitioner and the petitioner in the other O.P is joint and several. The decree holder is entitled to realise the whole amount from any of them.

9. The last submission of the counsel is that the petitioners may

be allowed to pay the amount in instalments. The provision which requires notice in this context is Order 20 Rule 11(2) C.P.C, which is extracted below:

“After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.”

A judgment debtor who desires the court to allow him to pay the decree debt shall file an application for the purpose and if the decree holder consents to it the court may grant the prayer. Consent of the decree holder is essential to allow the judgment debtor to pay the amount in installments. The court has no discretion in the matter and it cannot arbitrarily allow instalment facility to the judgment debtor. The prayer of the petitioner is only to be rejected.

In the result, these O.Ps are dismissed.

**K.ABRAHAM MATHEW
JUDGE**