

IN THE COURT OF THE MUNSIFF, KOCHI

Present :-Sri.Praveen Kumar .G, B.A.L., LL.B, Principal Munsiff

Friday, the 4th day of September, 2015/13th Bhadra , 1937

E.A.No.145/2013 in E.P. No.69/2007 in O.S.No.517/2004

Petitioner/Decree Holder/Plaintiff:-

Dineshan, aged 69 years, S/o. Late Kandan, Nikathithara house, Nedungad North, Nayarambalam Village, Kochi Taluk.

By Adv. C.T. Jestin

Respondent/Judgment Debtor/Defendant:-

K.A. Suresh, S/o. Sukumaran, Kaithavalappil House, Nayarambalam Village, Nayarambalam.

By Adv. Paul Parakkal .D

This petition filed under Order 26 Rule 10A, r/w Section 151 of CPC to issue a commission for scientific investigation.

The petition having been finally heard on 04.09.2015 and the court on the same day, passed the following:-

ORDER

Application under O 26 R 10A CPC for the issuance of a commission for scientific investigation.

2. Petitioner is the decree holder and the respondent is the J.D. According to the petitioner, as per the compromise decree passed in the above case, the JD is bound to construct a protective wall on the northern boundary of the decree holder's property and when a dispute arose as to the northern boundary, a commissioner was appointed and the boundary was fixed on the basis of ExtC2 (b) sketch. It is contended that the JD is trying to make the construction according to his whims and fancies, to show that the decree is complied with. The executing court is duty bound to see that the decree is legally and effectively complied with. For that, it must be ensued that the

protection wall should be with such specifications to meet the situation. The advocate commissioner does not have the technical know-how in that respect. The Irrigation Department is the department in charge of construction of river embankments and having sufficient experience in this field. So a Competent Officer of the Department has to be appointed to make a scientific investigation and prepare a plan for the construction.

3. Judgment Debtor filed a statement of objection contending that the Hon'ble High Court had directed the work to be done by an advocate commissioner and pursuant to it, a commissioner was appointed also. Appointment of another commission, therefore, offends the aforesaid direction. The irrigation engineer need not dictate as to what materials should be used for the construction. Such a direction was not given by the court. A bund, in tune with the other bunds in the locality, alone need be constructed. The petition lacks bona fides and hence, should be dismissed.

4. Heard both sides.

5. The developments till the passing of the compromise decree as well as the acceptance of Ext.C2(b) sketch as the northern boundary line are facts which are either disputed nor relevant for the purpose of the present application. Clause (2) of the compromise provides that the JD shall construct a protective wall in east-west direction on the northern boundary in such a way that any kind of damage shall not be caused to the plaintiff's property and his house therein due to the activities in the "Chemmeen kettu". On behalf of the decree holder, it is contended that the expression "protective wall" implies the essence of the decree and the JD may not be permitted to make the execution proceedings, an eye wash. Learned counsel for the JD, on the other hand, contended that the Hon'ble High Court had already appointed Taluk Surveyor and commissioner to execute the decree and issuance of another commission, runs in contravention of the order of the High Court. He argued that it is for the Taluk surveyor to say that whether an expert engineer should be deputed and unless the Taluk Surveyor says so, the petition shall not be allowed.

Relying on R 10A of O 26 CPC, it is also argued that the court should 'find it necessary" that a commission as sought by the decree holder should be appointed.

6. The Execution Court, though not permitted to go behind the decree, is obliged to give full effect to the terms of the decree passed by it. It is settled law that for construing a decree to find out its true meaning, the court could take into consideration the pleadings of the parties and to ascertain the meaning of the words in the decree, the circumstances under which those words happened to be used, should be weighed. It is to be noted that the subject matter of the dispute was erosion of the northern boundary of the decree holder's property. The decree holder, in his plaint, has averred that there is a "chemmeen kettu" on the northern side of his property and at the time of high tides, water forcefully enters into the "chemmeen kettu" and strike on the northern boundary of the decree holder's property and cause severe damage to the literate protective wall. The same thing happens during the time of low tides also. The decree holder has sought for a decree to protect his property, on its northern side, on these aspects. Therefore, it is clear that the decree holder was aggrieved by the soil erosion on the northern side, as a result of the prawn farming conducted by the JD. It must be noted that the Hon'ble High Court, vide Order dtd: 10.03.2008 had directed the assistance of Taluk Surveyor and Commissioner for the fixation of the northern boundary. It was specifically directed that after fixing the boundary, the JD should construct the wall and for that, a commissioner or "a person who is permissible to both sides", can be appointed. So, the appointment of an expert, if circumstances warrant, wont be in violation of the direction of the Hon'ble High Court. Decree holder has specifically stated that the protective wall has to be constructed with the required specifications to protect the property from soil erosion and the advocate commissioner does not have the required technical know-how in that respect. The terms of the compromise clearly indicate construction of a protective wall so as to prevent erosion of soil. If so, the advocate

commissioner, who does not have a sufficient scientific knowledge in those matters, may not be able to make assistance effectively, according to the terms and conditions of the decree. Learned counsel for the JD did not make a claim that the advocate commissioner has such an expertise in the field. So, a commission for scientific investigation is necessary to inspect the site and prepare plan with the required specifications and allied matters and the Executive Engineer, Ernakulam Irrigation Division, Kakkanad is appointed in that behalf. Petition is allowed as above.

Dictated to the Confdl. Asst. transcribed and typed by her corrected and pronounced by me in open Court on this the 4th day of September, 2015.

Praveen Kumar .G
Principal Munsiff

APPENDIX:- Nil.

Principal Munsiff

sks
compd.by