

IN THE COURT OF THE MUNSIFF, PERUMBAVOOR

Proceedings in E.P. 93/2019 in O.S. No. 152/2010

Decree Holders/ Plaintiffs:-

1. M.M. Sam @ Mathew Sam, S/o Esow Mathew, Mamoottil House, Vilangu Kara, Kizhakkambalam Village, Kunnathunadu Taluk.
2. Beena George, W/o M.M. Sam @ Mathew Sam, Mamoottil House, Vilangu Kara, Kizhakkambalam Village, Kunnathunadu Taluk.

By Adv. Sri. Hashim Althaf

Judgment Debtor/ Defendant:-

Pathrose, S/o Paily, Chemmala House, Vilangu Kara, Kizhakkambalam Village, Kunnathunadu Taluk.

By Adv. Sri. P.T. Geevarghese

PROCEEDINGS DATED 09/03/2020

1. The above number E.P is filed for executing the decree passed in O.S 152/10 by the decree holder/plaintiff. Judgment debtor filed objection.

2. Both sides were heard.

3. The suit is decreed in part and counter claim is allowed as per the decree. It is decreed that plaintiffs are entitled to recover possession of plaint B schedule property on the strength of their title. They can recover possession of the same on the basis of Ext. C4(a) through the process of the court. The defendant is restrained from trespassing into plaint A schedule property, committing waste therein, causing obstruction to the plaintiffs in user and enjoyment of plaint A schedule property. The relief of mandatory injunction is disallowed. Further, it is decreed that counter claim schedule item No. 2 property is the property of defendant. The defendant is entitled to recover possession of counter claim schedule item No. 2 property on the strength of Ext. B1. He can recover possession of the same on the basis of Ext. C4(a) through the process of the court. The plaintiffs are restrained from causing obstruction to the defendant in construction of compound wall on the western boundary of counter claim schedule item No. 2 property and they shall not cause obstruction to the natural flow of water passing through the channel lying on the north-west side of the gate of the defendant. Hence, the decree holder prayed to recover possession of the plaint B schedule on the basis of Ext. C4(a) as well as Ext. A1, A2 by demolishing the boundary wall separating plaint B schedule and A schedule. Further, the decree holder prayed to permit him to construct boundary wall on the eastern side of A schedule from the road

to the northern side of B schedule with the assistance of the Advocate commissioner.

4. Judgment debtor/defendant filed objection stating that the 2nd prayer to permit decree holder to construct boundary wall on the eastern side of the plaint schedule property from the road on its southern side to the northern side of the B schedule with the assistance of the commissioner could not be allowed since, it is beyond the scope of the decree. Further, it is stated that in Ext. C4(a) plan the slab shown on the southern side of the plaint schedule property is road. Further, there was no prayer in the plaint permit the decree holder/plaintiff to construct such a road. Hence, the 2nd prayer in the E.P is to be dismissed.

5. During the time of hearing the learned counsel for the decree holder relying on the decision of the Hon'ble High Court of Kerala in **Varghese v. T.K. Sivaraman** reported in **2011 (1) KHC 773** would argue that the prayer is only an incidental right of the decree holder to put up a fence or boundary wall and it can be permitted since there need not be a separate decree permitting to put up a compound wall. Further, the counsel for the decree holder argued that the B schedule property is identified by the commissioner and it is clearly shown in Ext.C4(a) plan. As per the decree plaintiff is permitted to recover the said portion from the possession of the defendant. Hence, the boundary of the A schedule and B schedule properties are specified and decree holder has the right to put up boundary

separating the plaint schedule property and defendant's property. Further, the learned counsel for the decree holder would argue that the plaintiffs have a decree of injunction and recovery of B schedule as per Ext. C4(a) plan. The decree holder/plaintiff has the right to full and proper enjoyment of recovered property from the defendant. After recovery of the counter claim item No. 2 property, the defendant is permitted to construct boundary wall of the recovered portion of his property. Even though the decree does not direct construction of the boundary wall along the eastern portion of the decree holder's property after recovery of B schedule, they have every right to construct compound wall without filing separate suit since it is an incidental right of the owner of the property.

6. It is to be noted that the judgment debtors/defendants filed E.P 123/2016 for the execution of the decree passed in the counter claim and it is pending. The main objection of the judgment debtor is that the prayer sought by the decree holder is beyond the scope of the decree and in the plaint there was no prayer to permit the decree holder/plaintiff to construct such a boundary wall. Further, in Ext. C4(a) plan it is stated that on the southern side of the slab shown on the southern side of the plaint schedule property is road. It is true that there is no decree permitting the decree holder/plaintiff to construct a wall as requested in the 2nd prayer of the execution petition. In paragraph 12 of the decision of the Hon'ble High Court of Kerala in RSA No. 336/2019 preferred against the decree herein it is held that as the relief of recovery of possession of the B schedule

property has been granted in favour of the plaintiff's, the compound wall separating it from the A schedule property cannot be retained. Further, it is held that it will have to be demolished and removed when the decree for possession of the B schedule property is executed and the plaintiff's can demolish it. At the same time it is to be noted that as per the decree the plaintiffs are restrained from causing obstruction to the defendant in construction of compound wall on the western boundary of counter claim item No. 2 property and they shall not cause obstruction to the natural flow of water passing through the channel lying on the north-west side of the gate of the defendant.

7. On going through the plan appended along with decree it can be seen that plaint A schedule, B schedule, counter claim item No.2 and defendant's properties are clearly specified. Hence, in the light of the decision in **Varghese v. T.K. Sivaraman** reported in **2011 (1) KHC 773** of the Hon'ble High Court of Kerala, I am of the view that as argued by the counsel for the decree holder/plaintiff the 2nd prayer is only an incidental right of the decree holder/plaintiff and there is no legal impediment in permitting the decree holder to construct such a boundary wall without causing obstruction to the natural flow of water passing through the channel lying on the north-west side of the gate of the defendant as ordered in the decree. There is no need to file any separate suit as argued by the learned counsel for the judgment debtors.

8. In the result, the E.P is allowed as follows:-

- a). Ameen is appointed to deliver the B schedule property to the decree holder/plaintiff in accordance with the decree.
- b). The decree holder/plaintiff is permitted to construct compound wall on the eastern side of the B schedule property in accordance with the decree and without causing any obstruction to the natural flow of the water as stated in Clause No. 5 of the decree.
- c). Adv. P.G Dileep Kumar is appointed as the commissioner to supervise the said work and surveyor Sri. T.D. Cheriyan is also appointed to assist the commissioner. Pay commission batta of Rs. 3,000/- and surveyor batta of Rs. 2,500/- directly and file memo. Commissioner shall file report after executing the work. For report, call on 23.03.2020.

Sd/-

MUNSIFF

(By Order)

// True Copy //

(Carbon copy issued as per order in E.A. 64/2020 dated 10/03/2020)

Examiner

Jb/-

Compd.by :

Carbon Copy of Proceedings
in E.P. 93/2019 in O.S.152/2010
Dated :03/03/2020