

IN THE HIGH COURT OF KERALA

PRESENT: P.A. MOHAMMED J.

Mathai Kunhu (a) Princess Mathew v. Varghese (a) Sunny

Code of Civil Procedure 1908 - Section 47 - Decree holder in a suit for partition obtaining possession of his share of property in execution - E.P. dismissed - subsequent putting up of fence obstructed to by the judgment - debtor application by decree holder to measure and fix the boundaries by appointing commissioner thereby enforcing the decree . Petition for enforcement of a decree by a decree- holder cannot be said to be incompetent after the dismissal of execution petition by the executing court. Section covers the questions which are relevant at the anterior as well as the posterior stages of execution of the decree - Inherent power under section 151 invoked.

Held:- When there is a competent decree and its executability is no longer in dispute, can this court forestall the decree holder from enjoying the fruits of the decree? Section 47 C.P.C. covers the questions which are relevant at the anterior as well as posterior stages of execution of the decree. It embraces all matters connected which the execution of an existing decree between the parties or their representatives and also covers all questions relating to the execution, discharge or satisfaction of the decree. It is immaterial whether such question arise before or after the decree has been executed. Therefore a petition for enforcement of a decree by a decree holder cannot be said to be incompetent after the dismissal of execution petition by the executing court

(Para 3)

AIT 1956 S.C. 87, AIR 1967 S.C. 1193 }
1973 KLT 557, AIR 1976 S.C. 1152 }

Relied on

Code of Civil Procedure 1908 - Section 115 -Undertaking made earlier to surrender possession unconditionally - Violation of the undertaking by raising disputes at the time of actual surrender - Person who has violated the undertaking made by him before the court should not be allowed to take undue advantage through the process of the court.

Held:- It can be safely said that the judgment - debtor has not respected the

undertaking given before the court. When there is an undertaking to surrender possession unconditionally there is no question of any dispute being raised at the time of actual surrender. The raising of such dispute would amount to violation of the order of the court. A person who has violated the order of court cannot be allowed to take advantage of such violation when it clearly comes to the notice of the court. He cannot be allowed to take an undue advantage through the process of the court. No person shall be allowed to flourish on violation of an order of court which he is bound of implement. In that view of the matter, I am not satisfied that this is a fit case where this court should interfere in exercise of its power under section 115 of C.P.C.

(Paras 6)

C.S. Narayanan

- For Petitioner

P. Kochupappu Achan

- For Respondent

ORDER

The revision petitioner is the judgment -debtor in O.S. No. 261 of 1981 on the file of the Principal Sub Court, Ernakulam. The respondent - decree holder filed E.A. No. 418 of 1994 to depute an experienced commissioner for fixing the boundary separating the plots C IIA and C IIB specified in the plan appended to the decree with the assistance of the Village Officer as well as the local police. This petition has been filed under section 151 of the Code of Civil Procedure. After the enquiry it was allowed by the court below by the order dated 6.1.1995. It is against the said order the present revision petition has been filed.

2. The facts which are necessary to resolve the dispute in this case, are capsulized thus: The suit, O.S. No. 261 of 1981 was laid for partition of the Plaintiff's schedule property having 64 cents and separate possession of the plaintiff's half share. A final decree for partition was passed on 18.9.1992. The judgment -debtor was in possession and occupation of the property throughout. The Commissioner divided the plaintiff property into two equal halves and filed a report demarcating the shares to be allotted to each of the sharers and marked the plots as C II-A, and C IIB. The plot C II-A was allotted to the decree -holder whereas plot C II-B was allotted to the judgment -debtor. After the final decree, the decree-holder filed E.P. No. 671/93 for executing the decree and thereby obtaining possession of the plot C II-A. The judgment -debtor who was in possession of the entire property requested the court that he should be granted six months time to hand over possession of plot C II-A to the decree-holder in terms of the