

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.1660 of 2013

ORDER:

This Civil Revision Petition is filed challenging the order dt.30.11.2012 in EP.No.67 of 2011 in O.S.No.211 of 1999 of the Principal District Judge, R.R. District at L.B. Nagar, Hyderabad.

2. The petitioner herein is the Decree Holder in O.S.No.211 of 1999. The said suit had been filed by the petitioner against the respondent and others for partition of the suit 'A', 'B' and 'C' schedule properties into three equal shares and to allot one such share each to the petitioner and the respondent/2nd defendant and their brother T.Sharanappa/1st defendant; for partition of the suit 'D' schedule property into two shares and to allot one such share each to the petitioner and respondent; and for recovery of money from the respondent and for other reliefs.

3. After contest, the suit was decreed on 31.01.2007 and the following decree was passed.

"That the suit of plaintiff be and the same is hereby preliminarily decreed without costs in favour of the plaintiff, 1st defendant and the defendants 3 to 6 and against the defendants 2 and 3 and a preliminary decree for (i) partition is passed directing for the partition of the plaint 'A', 'B' and 'C' schedule properties, and the said properties shall be partitioned into six (6) equal and equitable shares according to good and bad qualities and one such share shall each be allotted to the plaintiff, 1st defendant, 2nd defendant and the defendants 4 to 6 and (ii) it is further decreed that the plaintiff and the 1st defendant shall be exclusively entitled to the plaint 'D' schedule property and the same shall be partitioned into two equal and equitable shares according to good and bad qualities and one such share each shall be allotted to the plaintiff and the 1st defendant and it is (iii) further decreed that the plaintiff is entitled to recover from the 2nd defendant personally and his family properties a sum of Rs.3,94,436/- (Rupees Three lakhs Ninety Four thousands Four hundred and Thirty Six only) with proportionate costs and with interest @ 7.5% per annum simple from the date of the suit till the date of the decree and with subsequent interest at 6% per annum simple from the date of the decree till the date of payment or realization."

4. Challenging the said decree, petitioner filed A.S.No.402 of 2007 before this Court and in AS.MP.No.1528 of 2007 this Court stayed passing of final decree alone, subject to the petitioner/appellant therein depositing the suit costs within four (04) weeks, clarifying that there cannot be any impoundment in taking steps in pursuance of the preliminary decree.

5. Respondent also filed A.S.No.340 of 2007 but no stay order was granted therein, though AS.MP.No.1262 of 2007 was filed seeking stay of execution of partition alone.

6. Therefore, since the High court had not stayed the execution of the latter part of the decree which entitled the petitioner to recover a sum of Rs.3,94,436/- from the respondent with proportionate costs and interest, the petitioner filed E.P.No.67 of 2011 under Order 21 Rules 30 and 43 CPC, for attaching the movables belonging to the respondent, for auctioning the same, for recovery of the sum of Rs.6,90,000/-.

7. In the said application, petitioner had clarified that he is only seeking recovery of money against the respondent and not making any claim in respect of the other part of the decree which dealt with the partition of 'A', 'B', 'C' and 'D' schedule properties.

8. Counter affidavit was filed by the respondent opposing the execution petition. He contended that entire decree is subject matter of appeal A.S.No.340 of 2007 and equities have to be worked out in the final decree proceedings. It was contended that decree in O.S.No.211 of 1999 is only a preliminary decree for partition and even assuming that some moneys are to be recovered from the

respondent/Judgment Debtor, the same has to be worked out in the final decree proceeding by making adjustments at the time of allotment of specific shares to the parties to the suit, pursuant to the preliminary decree.

9. By order dt.31.11.2012, the Court below dismissed E.P.No.67 of 2011. It observed that the High Court on 13.07.2007 in A.S.MP.No.1528 of 2007 in AS.No.402 of 2007 granted stay of passing of final decree. Since granting of money in favour of the petitioner/Decree Holder against the respondent/Judgment Debtor is part and parcel of the preliminary decree for partition, and in the final decree, equities have to be worked out between the three brothers and the liability of the Judgment Debtor to pay the decree amount will subsist through out. It observed that pending disposal of appeal AS.No.402 of 2007 before this Court, it will not be proper to permit execution of the decree in part, since it is subject matter of appeal before the High Court. It also observed that the present E.P. cannot be ordered only against the respondent/Judgment Debtor/2nd defendant, while the rest of the decree is subject matter of further appeal. It therefore held that the petitioner or other defendants in the suit can take appropriate steps for execution as and when dispute between the parties is finally determined either by the High Court or by the passing of a final decree.

10. Challenging the same, this Revision is filed.

11. Counsel for the petitioner contended that, in fact, in A.S.No.340 of 2007 filed by the respondent challenging the preliminary decree dt.31.01.2007 in O.S.No.211 of 1999, no stay order was granted by the High court, though ASMP.No.1262 of 2007 was filed seeking stay of execution as regards the partition portion of the decree; that AS.MP.No.1528 of 2007 referred to by the Court below was in fact

filed in AS.No.402 of 2007 filed by the petitioner against the same decree and even the said appeal was filed only as regards findings in respect of 'B' and 'C' schedule properties claiming larger share therein and not in respect of other findings; and therefore, the respondents cannot take advantage of the order passed in AS.No.1528 of 2007 and stall execution of the decree of the Court below insofar as his liability to pay a sum of Rs.3,94,436/- with interest and proportionate costs is concerned.

12. Counsel for the respondent however refuted the above contentions and supported the order passed by the Court below.

13. I have noted the submissions of both sides.

14. This Court summoned the record of both AS.Nos.402 and 340 of 2007 on the file of this Court. As stated above, these appeals were filed against the preliminary decree dt.31.01.2007 in O.S.No.211 of 1999.

15. On verification of the record, it is revealed that AS.No.340 of 2007 was filed by the respondent/J.Dr./2nd defendant challenging the said decree. In this appeal he had filed AS.MP.No.1262 of 2007 seeking only stay of execution of partition of 'A', 'B' and 'C' schedules. He has not sought stay of execution of the decree in so far as it directed him to pay a sum of Rs.3,94,436/- with interest to the petitioner. The said ASMP was actually posted along with the appeal by order dt.11.03.2008 and there was in fact no interim order therein in favour of the respondent.

16. The verification of the record also revealed that AS.No.402 of 2007 was filed by petitioner only in so far as the findings regarding suit 'B' and 'C' schedule properties in granting shares to defendants 4

to 6 and not in respect of other findings. The petitioner, having succeeded in obtaining a decree for a sum of Rs.3,94,436/- with interest against the respondent, naturally had not sought for any stay of that portion of the decree of the Court below. In fact in AS.MP.No.1528 of 2007 petitioner had actually sought for suspension of the portion of the judgment and decree dt.31.01.2007 in O.S.No.211 of 1999 in respect of 'B' and 'C' schedule properties only pending disposal of the appeal. But while passing order in AS.MP.No.1528 of 2007, this Court had directed stay of passing of final decree alone. Hence, the stay of passing of final decree granted in AS.No.1528 of 2007 of the judgment and decree dt.31.01.2007 in O.S.No.211 of 1999 cannot be construed as stay of execution of the decree insofar as it directed the petitioner to recover the sum of Rs.3,94,436/- with interest from the respondent.

17. In my considered opinion, while the first two portions of the preliminary decree dealt with the grant of relief of partition and could be construed as a preliminary decree for partition, the last portion in the decree cannot be so construed. It has to be treated as a severable part, unrelated to the decree for partition, particularly in view of the foregoing reasoning of the trial Court while considering grant of this relief to the petitioner against the respondent.

18. The basis of the decree of the trial Court for payment of Rs.3,94,436/- in favour of the petitioner against the respondent was that a loan was taken from State Bank of Hyderabad, Ibrahimpatnam for a sum of Rs.3,94,436/- for the benefit of the respondent, who was running a poultry form for his livelihood; since the respondent had not discharged the said loan, there was a threat of 'C' schedule property, which was mortgaged for discharge of the said loan, being sold through Court auction by the bank; and in order to save the said property from being sold, at the instance of the State Bank, the petitioner discharged the said loan. Therefore, the Court below held

that he was entitled to a right of subrogation and recovery of said amount from the respondent.

19. In this view of the matter, I am of the opinion that the Court below was not correct in dismissing the E.P.N.67 of 2011 by the impugned order.

20. Accordingly, the Civil Revision Petition is allowed. Order dt.30.11.2012 in EP.No.67 of 2011 in O.S.No.211 of 1999 of the Principal District Judge, R.R. District at L.B. Nagar, Hyderabad is set aside. The Court below is directed to decide the E.P. in accordance with law within a period of four (04) months from the date of receipt of a copy of this order. There shall be no order as to costs.

21. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

M.S.RAMACHANDRA RAO, J

09th September, 2015.

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