

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION Nos. 273 AND 278 OF 2016

COMMON ORDER:

Both these revisions are filed against the common order dated 03-11-2015 passed in I.A.Nos. 940 and 1127 of 2015 in O.S.No. 52 of 2003 on the file of the Court of VIII Additional District Judge, Nizamabad, challenging the appointment of advocate commissioner to measure and divide suit schedule property as per preliminary decree into three shares by metes and bounds and good and bad qualities, workout equities to allot the property sold to third parties to the share of their vendor, allot 1/3rd share to the plaintiff and 1/3rd share to the 2nd defendant, divide the share of the deceased 1st defendant into two equal halves as per good and bad qualities and allot one such share to the plaintiff and the 2nd defendant, and to determine *mesne* profits.

Both these revisions are filed raising the following contentions:

- (a) Division of 1/3rd share of the deceased 1st defendant and direction to allot half of it to the plaintiff and the 2nd defendant without impleading legal-heirs, who succeeded the estate of the deceased 1st defendant, is an apparent error on the face of the record;
- (b) When the plaint and preliminary decree are silent as to grant of *mesne* profits, issuing direction to ascertain *mesne* profits to the commissioner by the trial Court is traveling beyond the preliminary decree which is impermissible under law. Therefore, the order, for division of 1/3rd share of the 1st defendant into two and allotting one such half to the plaintiff and the 2nd defendant

each and direction to ascertain *mesne* profits *etc.*, is without jurisdiction and beyond the scope of the preliminary decree;

- (c) A direction was given to ascertain as to who are legal-heirs of the deceased 1st defendant in the earlier order passed by this Court in C.R.P.Nos. 5973 and 6007 of 2012 and 168 of 2013 as no enquiry was held as to who are entitled to the share of the deceased 1st defendant. Therefore, the order under challenge in both the revisions is erroneous and prayed to set aside the order passed by the trial Court.

During hearing, Sri V.Ravi Kiran Rao, learned senior counsel for the 2nd defendant, contended that the trial Court did not take into consideration the direction issued by this Court in C.R.P.Nos. 5973 and 6007 of 2012 and 168 of 2013 dated 28-11-2014 and direction to ascertain *mesne* profits is *prima facie* erroneous since no relief for grant of *mesne* profits was claimed and no preliminary decree was passed. As such, the direction issued to the commissioner is erroneous and prayed to set aside the same.

Learned counsel for the plaintiff argued totally in support of the findings recorded by the trial Court contending that while both he and the 2nd defendant asserted that the 1st defendant died without leaving any legal-heirs, issuing direction to divide 1/3rd share of the deceased 1st defendant into two halves and allot one such share each to him and the 2nd defendant is in accordance with law and such direction is given strictly adhering to the direction in C.R.P.Nos. 5973 and 6007 of 2012 and 168 of 2013 dated 28-11-2014. It is further contended that though no preliminary decree was passed for grant of *mesne* profits, still the plaintiff is entitled to claim *mesne* profits as he is out of possession. Thus, learned counsel supported the order of the trial Court in all respects and prayed to dismiss both the revisions.

Considering rival contentions and perusing material available on record, the points that arise for consideration are as follows;

- "(1) *Whether the plaintiff claimed mesne profits in the plaint while claiming partition of schedule property, if so, whether the trial Court passed the preliminary decree both for partition and mesne profits, if not, whether the direction to the commissioner to ascertain mesne profits is in accordance with law?*
- (2) *Whether the plaintiff and the 2nd defendant alone are the legal-heirs of the deceased 1st defendant to succeed his estate equally, if so, whether issuing direction to divide 1/3rd share of the deceased 1st defendant into two halves and allot one such share to the plaintiff and the 2nd defendant is in accordance with law?"*

In Re. Point No. 1:

The first and foremost contention urged before this Court by learned senior counsel for the 2nd defendant is that allotment of property to the share of the parties to the suit and ascertainment of any profits must be in terms of the preliminary decree but the trial Court directed the commissioner to ascertain *mesne* profits even without specifying which the defendants are liable to pay *mesne* profits. Therefore, issuing such direction is beyond the scope of the preliminary decree. Whereas, learned counsel for the plaintiff contended that when defendant Nos. 3 to 7 are in unlawful possession, the plaintiff and defendant Nos. 1 and 2 are entitled to claim *mesne* profits. As such, there is no error in the order.

Curiously, the revision petitioner in both the petitions is the 2nd defendant in whose favour the order was passed for allotment of half share in the share of the deceased 1st defendant and for ascertainment of *mesne* profits payable to their respective shares. However, it is relevant at this stage to find out whether the plaintiff claimed *mesne* profits against the defendants for any period and granted by the trial Court while passing the preliminary

decree. As per the preliminary decree, the claim of the plaintiff was only for partition and separate possession of joint family property which is described in A to E schedules but no relief of *mesne* profits was claimed. The operative portion of the judgment is extracted hereunder for better appreciation:

"In the result, the preliminary decree is passed in favour of the plaintiff as follows:

- 1. that the plaintiff is entitled to 1/3rd share in plaint 'A', 'B' and 'E' schedule properties.*
- 2. that the division of plaint 'A', 'B' and 'E' schedule properties and allotment of 1/3rd share to the plaintiff shall be made on the application of the plaintiff filed under Order 26 Rule 13 of C.P.C.*
- 3. that the claim of the plaintiff for partition and separate possession of his 1/3rd share in respect of plaint 'C' and 'D' schedule properties is dismissed.*
- 4. that the second defendant shall pay costs of the suit."*

The operative portion of the judgment is reflecting in the preliminary decree but quantified the suit costs at Rs.40,522/- payable by the 2nd defendant. Thus, the preliminary decree is totally in consonance with the operative portion of the judgment. The plaintiff had neither claimed *mesne* profits nor granted by the trial Court while passing preliminary decree. That apart, the plaintiff, while claiming to be in joint possession and enjoyment of the property, paid fixed Court fee of Rs.200/- under Section 34 (2) of the Andhra Pradesh Court Fee and Suits Valuation Act, 1956 (for short, 'the Act of 1956'), and the same was accepted by the trial Court. If really the 2nd defendant is in exclusive possession of the property, Court fee payable on the share of the plaintiff must be on Rs.25,10,133/- under Section 34 (1) of the Act of 1956. Moreover, when no claim is made and no preliminary decree is passed granting *mesne* profits or any other profits, issuing direction to the commissioner to ascertain *mesne* profits is erroneous on the face of the record.

According to Section 2 (12) of the Code of Civil Procedure (for short, 'C.P.C.'), "*mesne profits*" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. From a bare look at the definition, *mesne profits* mean profits payable by person in wrongful possession but here it is not even the case of the plaintiff that the 2nd defendant was in wrongful possession. In ***Mahant Narayana Dasjee Varu and others Vs. Board of Trustees, The Tirumalai Tirupathi, Devasthanam***^[1], the Supreme Court, considering the definition of *mesne profits*, held as follows:

"Under Section 2 (12) of the Civil Procedure Code which contains the definition of "mesne profits", interest in an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. The proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on which income."

Even according to the Apex Court, *mesne profits* include interest and *mesne profits* mean person in wrongful possession is expected to receive profits from such property. Hence, applying the principle, the 2nd defendant's wrongful possession is *sine qua non* to claim *mesne profits* as defined under Section 2 (12) of C.P.C.

Strangely, in the present case, it was not the plaintiff's case that the 2nd defendant was in wrongful possession and received or expected to receive any profits from schedule property. Apart from that, no preliminary decree was passed for grant of *mesne profits* on the share of the plaintiff. In the absence of any relief claimed by the plaintiff for grant of *mesne profits* and preliminary decree for ascertainment of *mesne profits*, issue of direction to the commissioner to ascertain *mesne profits* is nothing but traveling beyond pleadings and preliminary decree which is impermissible under law.

Therefore, the order of the trial Court to the extent of issuing direction to the commissioner to ascertain *mesne* profits is hereby set aside.

Learned counsel for the plaintiff contended that the plaintiff is entitled to profits as the 2nd defendant is in exclusive possession and enjoyment of the property but the same cannot be accepted for the reason that the plaintiff asserted that he is in joint possession of the property along with defendant Nos. 1 and 2 and paid Court fee under Section 34 (2) of the Act of 1956. On the other hand, no claim was made either for grant of *mesne* profits or for accounting profits. In the absence of any such relief in plaint and preliminary decree, the contention of learned counsel for the plaintiff cannot be accepted for such relief.

In view of my foregoing discussion, the direction issued to the commissioner for ascertainment of *mesne* profits is hereby set aside.

In Re. Point No. 2:

One of the contentions of learned senior counsel for the 2nd defendant is that, while disposing C.R.P.Nos. 59573 and 6007 of 2012 and 168 of 2013 by this Court, a direction was given to the trial Court to ascertain as to who are legal-heirs of the deceased 1st defendant to succeed his estate; on such determination, the Court has to arrive at a conclusion as to whom 1/3rd share of the deceased 1st defendant has to be allotted and appoint an advocate commissioner. In the common order under challenge before this Court, the trial Court, basing on the representation of both counsel, concluded that there is none to succeed the estate of the deceased 1st defendant except the plaintiff and the 2nd defendant and, therefore, issued such direction.

It is the contention of learned senior counsel for the 2nd defendant that the 2nd defendant never accepted that he and the plaintiff alone are legal-heirs of the deceased 1st defendant. In the absence of any enquiry as to who

succeeded the estate of the deceased 1st defendant as directed by this Court in C.R.P.Nos. 59573 and 6007 of 2012 and 168 of 2013, appointing advocate commissioner; for division of the property into three equal shares as per good and bad qualities by metes and bounds, allot one such share to the plaintiff and the 2nd defendant and further divide the share of the deceased 1st defendant into two halves and allot one such share to the plaintiff and the 2nd defendant; is erroneous. The trial Court even did not invite memos from the 2nd defendant and the plaintiff that they are the only legal-heirs to succeed the estate of the deceased 1st defendant. Across the bench, learned senior counsel denied the admission recorded by the trial Court as observed in para No. 2 at page No. 4 of the common order. Thus, the order passed by the trial Court, appointing advocate commissioner for division of the property as stated above, without adverting to the direction given by this Court in C.R.P.Nos. 59573 and 6007 of 2012 and 168 of 2013, is erroneous and the same is liable to be set aside. Accordingly, the point is held in favour of the 2nd defendant and against the plaintiff.

In view of my finding on point Nos. 1 and 2, the trial Court is directed as follows:

"Invite written undertaking or communication from all the parties to the effect that the plaintiff and the 2nd defendant alone are the legal-heirs of the deceased 1st defendant to succeed the estate of the deceased 1st defendant and the details, if any, of legal-heirs of the deceased 1st defendant. If the plaintiff did not file any application to implead legal-heirs of the deceased 1st defendant, subject to permissibility, to allot the share of the deceased 1st defendant to such legal-heirs, the trial Court can appoint an advocate commissioner with a direction to divide the property into three equal shares, allot one such share to the plaintiff and the 2nd defendant and allot the share of the deceased 1st defendant to his legal-heirs, whoever may be, after determining his

legal-heirs."

In the result, both the civil revision petitions are allowed with the above direction. Pending miscellaneous petitions in these revisions, if any, shall stand closed in consequence. No order as to costs.

Date: 26-02-2016.

MURTHY, J.

JSK

M.SATYANARAYANA

[\[1\]](#) AIR 1965 SC 1231