

**THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI**

**Civil Revision Petition No.3411 of 2014**

**ORDER:**

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908 ('the Code', for brevity), by the 2<sup>nd</sup> defendant is directed against the orders dated 19.02.2013 of the learned Principal Senior Civil Judge, Warangal passed in IA.no.1203 of 2008 in OS.no.162 of 1984 filed by the plaintiff/preliminary decree holder under Order XXVI Rule 13 of the Code requesting to appoint an advocate commissioner to partition the plaint 'A', 'B' and 'C' schedule properties into four shares and allot  $1/4^{\text{th}} + 1/8^{\text{th}}$  i.e.,  $3/8^{\text{th}}$  share to the plaintiff and award costs.

2. I have heard the submissions of the learned counsel for the revision petitioner/2<sup>nd</sup> defendant ('the 2<sup>nd</sup> defendant', for brevity) and the learned counsel for the 1<sup>st</sup> respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The case of the plaintiff in support of the request in the aforementioned application, in brief, is this:

The plaintiff filed the suit for partition of plaint 'A', 'B' and 'C' schedule properties into four shares. However, during the pendency of the suit, the 1<sup>st</sup> defendant, who is the father of the plaintiff, had died. During the life time, the father/1<sup>st</sup> defendant had executed a Will and bequeathed his undivided  $1/4^{\text{th}}$  share in the plaint schedule properties to the plaintiff and the 3<sup>rd</sup> defendant. The trial Court while decreeing the suit in respect of plaint 'C' schedule property had dismissed the suit in respect of plaint 'A' and 'B' schedule properties. The first appeal was also dismissed. However, the second appeal preferred by the plaintiff was allowed and a preliminary decree was passed for partition of plaint 'A' & 'B' schedule properties also by confirming the decrees of the Courts below insofar as plaint 'C' schedule property. The

SLP nos. 27324 and 27325 filed by the 2<sup>nd</sup> defendant before the Supreme Court were dismissed vide judgment dated 21.11.2011. Therefore, the present application is filed by the plaintiff for appointment of an advocate commissioner for partition of the plaintiff A, B & C schedule properties into four shares and allot 3/8<sup>th</sup> share ( $\frac{1}{4}^{\text{th}} + \frac{1}{8}^{\text{th}}$ ) in the said properties to the plaintiff and pass a final decree in terms of the preliminary decree.

4. Pursuant to the request made in that application for appointment of a Commissioner, the trial Court had appointed Mrs. Malathi, advocate for effecting partition by metes and bounds. The Commissioner having executed the warrant had submitted a report on 10.09.2009. In her report to which a plan was enclosed, she had allotted properties to the parties. No objections are filed to the Commissioner by the plaintiff and the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant filed his objections to the report of the Commissioner. However, his further attempt to seek reopening of the matter and file further objections to the Commissioner's report was negated in view of the dismissal of IA.no.384 of 2012 on 07.08.2012 by the trial Court. Having examined the objections filed by the 2<sup>nd</sup> defendant, the Court below by the orders impugned in this revision had over ruled the objections of the 2<sup>nd</sup> defendant. Having thus accepted the report of the Commissioner, the Court below had allowed IA.no.1203 of 2008 in terms of the preliminary decree. Aggrieved of the said orders, the 2<sup>nd</sup> defendant had preferred this revision.

5. The relevant contentions of the 2<sup>nd</sup> defendant as advanced before this Court, in brief, are to the following effect: - 'This court in the second appeal had set aside the preliminary decree. This court had not recorded a finding in regard to exhibit A1-Will dated 05.12.1984, that is, the Will executed by the father, the 1<sup>st</sup> defendant. The judgment of this Court in second appeal in SA.no.574 of 1997 was affirmed by the Supreme Court in special leave to appeals (Civil Nos.27324-27325 of 2010) by judgment dated 21.11.2011. Therefore, the judgment in the second appeal of this Court has become final. In the absence of a finding in regard to exhibit A1 Will in this Court's judgment, which is affirmed by the Supreme Court, the Commissioner ought

not to have adopted the procedure, which was adopted for partitioning the 'C' schedule property, for partitioning the 'A' and 'B' schedule properties also. Even assuming for a moment that exhibit A1-Will is valid; the share allotted to the 2<sup>nd</sup> defendant is far less than the 1/4<sup>th</sup> share to which he is entitled to. There is no specific finding in the judgment of this Court with regard to validity of the Will. The Commissioner's report is based on surmises and conjectures and is not based on facts and evidence. The Commissioner had divided the 'B' schedule property into three equal shares. Similar yardstick was not applied in regard to partition of 'A' schedule property. The same yardstick ought to have been applied to 'A' schedule property; and, the plaintiff ought to have been allotted Ac.9.97 guntas whereas the Commissioner had allotted Ac.4.37 guntas only. The Commissioner exercised her own discretion. It is incorrect and is contrary to the judgment and the said Will of the father. The Court below erred in confirming the report of the Commissioner. Pursuant to the judgment and preliminary decree, which have become final, the shares ought to have been re-adjusted. The Commissioner's report is not in accordance with the judgment and decree of this court, which is affirmed by the Supreme Court. Hence the order impugned is liable to be set aside. The order of the Court below is unsustainable both under facts and in law being contrary to facts, the judgment of this Court in the second appeal, which is affirmed by the Supreme Court and also the recitals in the Will of the father, which in fact is not held to have been proved.

**5.1** In support of his contentions, he had placed reliance on the following decisions: (1) **Rachakonda Venkat Rao v. R. Satya Bai**<sup>[1]</sup>; (2) **Baliram Atmaram Kelapure v. Indirabai**<sup>[2]</sup>; and (3) **T.S. Swaminatha Odayar v. Official Receiver of West Tanjore**<sup>[3]</sup>. The decision in Baliram (2<sup>nd</sup> supra) deals with the onus of proof in regard to a Will in a suit for partition. The facts of the case show that the High Court modified the shares having accepted the Will relied upon by the 1<sup>st</sup> defendant and that the Supreme Court having opined that the High Court was not justified in modifying the shares had directed the 1<sup>st</sup> defendant to establish the truth and validity of the Will in an

appropriate proceeding as the Will executed by Rama Bai being relied upon by the 1<sup>st</sup> defendant was not in issue in the suit nor was its truth and validity established and no finding about its truth and validity were recorded while adjudicating the application for bringing legal representatives of Rama Bai on record. The decision in Rachakonda Venkata Rao (1<sup>st</sup> supra) was relied upon in support of the legal principles, which the Court has to follow while dealing with a decree for partition of immovable property. In this decision it was held that in a suit for partition, the Court is required to define the shares of the parties, identify the joint family properties, which are to be partitioned, allocate the properties to the parties as per their respective shares and put the parties in possession of the properties allocated to them. The facts in the decision in T.S Swaminatha Odayar (3<sup>rd</sup> supra) are as follows: “The appellant before the Supreme Court was not satisfied with the final decree and he had preferred an appeal before the High Court of Madras. In that appeal, the High Court of Madras passed the judgment varying the decree of the lower Court. Further, the 3<sup>rd</sup> defendant, during the pendency of the matters, that is, during the pendency of an appeal which was taken against the preliminary decree, became an insolvent, and, therefore, the official receiver concerned represented the 3<sup>rd</sup> defendant having been impleaded as a party to the suit.’ Therefore, it appears that the ratio in the decision is not applicable to the facts of the case.

6. On the contrary, the learned counsel for the plaintiff while supporting the orders of the Court below would mainly contend that the Court below having adverted to the objections filed by the 2<sup>nd</sup> defendant in detail had overruled the objections and that for valid and sustainable reasons the Court below had accepted the Commissioner’s report and had finally allowed the petition of the plaintiff in terms of the preliminary decree granted by this Court and affirmed by the Supreme Court and that in view of the fact that a final decree was already passed, the present revision is not maintainable and the only remedy open to the 2<sup>nd</sup> defendant is to prefer an appeal or an appropriate proceeding before a higher forum challenging the final decree

and that unless such a course is adopted the 2<sup>nd</sup> defendant cannot dispute the shares allotted by the Commissioner, as a final decree has already been passed allotting the shares. He would also submit that mere challenging the allotment of shares by the Commissioner in her report would be of no avail to the 2<sup>nd</sup> defendant as the final decree has already been passed.

6.1 He had placed reliance on a decision in **Shub Karan Bubna v. Sita Saran Bubna**<sup>[4]</sup>. In this decision the Supreme Court while pointing out the fundamental difference between a mortgage suit and a partition suit and the preliminary decrees in a mortgage suit and a partition suit had, at paragraphs 17, 18 & 21, held as follows: -

17. Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by the court itself as a continuation of the preliminary decree. Sometimes either on account of the pendency of an appeal or other circumstances, the court passes the decree under Rule 18(1) or a preliminary decree under Rule 18(2) and the matter goes into storage to be revived only when an application is made by any of the parties, drawing its attention to the pending issue and the need for referring the matter either to the Collector or a Commissioner for actual division of the property. Be that as it may.

18. The following principles emerge from the above discussion regarding partition suits :

18.1. In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible). Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

18.2. In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of

division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under [Article 136 of the Limitation Act](#)) nor an application seeking a fresh relief (falling under [Article 137 of Limitation Act](#)). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

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21. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds.

7. I have given earnest consideration to the facts and the submissions.

The learned counsel for the 2<sup>nd</sup> defendant having read the order impugned contends that the shares are not allotted as per the preliminary decree granted by this Court and also as per the alleged Will of the father and that the Will of the father is not proved as required under law in any legal proceedings till date including the present *lis* and that therefore, the reliance placed on the Will while allotting the shares, even though the said Will is not proved caused great injustice to the 2<sup>nd</sup> defendant. Per contra, the learned Counsel for the plaintiff having read the contents of the order impugned would contend that a reading of the judgment of the trial Court would show that the trial Court had first adverted to the preliminary decree granted by this Court in the second appeal, which was confirmed by the Supreme Court, and that later, the Court below had adverted to the various contentions raised by the 2<sup>nd</sup> defendant and also his objections to the Commissioner's report and that it had dealt with the objections and had also examined the correctness of

allotment of shares by the Commissioner and the reasons for such allotment. He would further submit that the Court below having thus examined the objections of the 2<sup>nd</sup> defendant had over ruled the same stating that there is no force in the contentions of the 2<sup>nd</sup> defendant and that the objections are untenable.

8. Be that as it may, the learned counsel appearing for the 2<sup>nd</sup> defendant had submitted that an appeal has been preferred before an appropriate forum/Court at Warangal and that the matter is at the stage of numbering. Since the 2<sup>nd</sup> defendant has preferred an appeal against the final decree before an appropriate forum/Court and since an efficacious remedy is already availed for assailing the final decree granted by the trial Court, this Court is of the well considered view that this Court need not express any opinion either way, that is, in regard to the correctness or otherwise of the contentions of the 2<sup>nd</sup> defendant and the plaintiff as it is for the appropriate forum/Court at Warangal to consider the said contentions and rival contentions and adjudicate the appeal that is said to have been preferred by the 2<sup>nd</sup> defendant on merits and in accordance with the procedure established by law.

9. Viewed thus, this Court finds that this revision can be disposed of leaving open the questions raised by the 2<sup>nd</sup> defendant to be decided in the aforementioned appeal said to have been preferred and yet to be registered.

10. Accordingly, the Civil Revision Petition is dismissed. It is needless to say that this Court did not express any opinion on the correctness or otherwise of the contentions of the 2<sup>nd</sup> defendant and/or the plaintiff. Therefore, the 2<sup>nd</sup> defendant is at liberty to raise all the contentions, which the law permits, in the appeal said to have been preferred. It is needless to state that the forum/Court concerned shall register the appeal of the 2<sup>nd</sup> defendant, if not yet registered, if it is otherwise in order, and shall dispose of the same on merits and in strict accordance with the procedure established by law.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed.

**M. SEETHARAMA MURTI, J**

01<sup>st</sup> June 2016

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[\[1\]](#) (2003) 7 SCC 452

[\[2\]](#) (1996) 8 SCC 400

[\[3\]](#) AIR 1957 SC 577

[\[4\]](#) (2009) 9 SCC 689