

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.4219 of 2015

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ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful respondents/defendants 14 to 16 is directed against the orders dated 11.08.2015 of the learned I Additional Senior Civil Judge, Ranga Reddy District at L.B.Nagar, passed in I.A.No.1507 of 2013 in O.S.no.471 of 1987 filed by the plaintiffs/petitioners therein under Order XXVI Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 requesting to appoint an Advocate Commissioner to affect partition of the preliminary decree schedule properties in terms of the preliminary decree with the assistance of a Mandal Surveyor.

2. I have heard the submissions of *Sri P.Sri Raghuram*, learned senior counsel appearing for the revision petitioners/defendants 14 to 16 ('the petitioners', for brevity), *Sri M.V.S.Suresh Kumar*, learned counsel appearing for respondents 2 to 7, *Sri V.L.N.G.K.Murthy*, learned senior counsel appearing for respondents 18 to 20, *Sri Danthu Srinivas*, learned counsel for respondent no.9 and *Sri M.A.K.Mukheed*, learned counsel for the other respondents.

3. The parties shall hereinafter be referred to as arrayed in this civil revision petition and also as originally arraigned in the suit, for convenience and clarity.

4. To begin with it is necessary to state the pleadings of the parties.

4.1 The case of the plaintiffs/respondents 1 to 7 herein, as stated in the affidavit of their GPA Holder, in brief, is as follows:

The plaintiffs/respondents 2 to 6 are the children of the sole plaintiff (since died) i.e., the 1st respondent herein and the 2nd plaintiff/2nd respondent herein. The suit O.S.no.471 of 1987 before mentioned was originally

brought by the said sole plaintiff against the defendants 1 to 12 for partition of the plaint schedule properties, i.e., the land in Sy.nos.41,42, 43 admeasuring Ac.49.27 guntas situated at Kokapet village and for allotment of a 1/4th share to the sole plaintiff/1st respondent herein. By a judgment dated 16.10.1990, the trial Court had dismissed the suit. The sole plaintiff/1st respondent herein brought an appeal in A.S.no.734 of 1991 before this Court. During the pendency of the said appeal, the 13th defendant/20th respondent herein was added as per the orders dated 25.01.1996 in CMP no. 925 of 1996. This Court allowed the said first appeal by a judgment dated 25.01.1996. Thus, the suit for partition was preliminarily decreed allotting a 1/4th share to the plaintiffs 2 to 7/the respondents 2 to 7 herein who are LR's of the deceased 1st plaintiff/1st respondent. The aggrieved late Sri Hari, the 12th defendant, who is the 19th respondent herein, had preferred an LPA 72 of 1996 before this Court. By a judgment dated 29.12.1998, a Division Bench of this Court dismissed the said LPA and confirmed the preliminary decree and the judgment passed in A.S.no.734 of 1991. The review petition in Review CMP No.3830 of 1999 filed by the said respondent-Sri Hari was allowed on 13.08.2001 and the judgment dated 29.12.1998 of the Division Bench of this Court in LPA 72 of 1996 was recalled. Thereafter, the original plaintiff's LR's, that is, the respondents 2 to 7 herein had filed SLP (Civil) 22591 of 2001 assailing the orders passed in the review CMP aforementioned. And the said SLP was allowed by the Supreme Court by an order dated 10.02.2003 giving liberty to challenge the original order dated 29.12.1998 in LPA 72 of 1996. The SLP (civil) CC 2962 of 2003 was again filed by the 12th defendant/19th respondent herein against the original orders in the LPA 72 of 1996. The same was dismissed by a three Judge Bench of the Supreme Court on 07.04.2003. Thus, the preliminary decree and the judgment of this Court in A.S.no.734 of 1991 stood confirmed and became final. In the preliminary decree, there was no specific term for separation of the shares of the 11th defendant and the other defendants. Therefore, the 11th defendant and the 10th defendant had filed A.S.M.P.nos.11880 of 2004, 1098 of 2005 and 1099

of 2005 in A.S.no.734 of 1991 seeking separation and allotment of their respective shares. This Court had allowed the said petitions by a common order dated 21.04.2005. A perusal of the amended preliminary decree now makes it clear that the plaintiffs 2 to 7 (the LRs of the deceased sole plaintiff) are entitled to a 1/4th share and the legal representatives of Feroz Khan (i.e., defendants 1 to 9) are entitled to a 1/4th share and the respondents 11 and 13 are entitled to a half share in the preliminary decree schedule property. The 2nd defendant/19th respondent having been aggrieved of the said common order dated 21.04.2005 had filed SLP (Civil) 7734 of 2006 before the Supreme Court. Though *status quo* orders were granted earlier, later the *status quo* orders were vacated. The original extent of the plaint schedule land was Ac.49.27 guntas. It was purchased by one Khader Hussain Khan under a registered sale deed. He died in 1352 Fasli as a bachelor leaving behind him, his sister Shahejadi Bee and his step brothers, namely, Feroz Khan and Khader Nawaz Khan (the deceased 1st plaintiff/1st respondent herein). The defendants 10 and 11 are the sons of the said Shehadjadi Bee and the defendants 2 to 9 are the legal representatives of Feroz Khan. But, the 12th defendant claimed that Feroz Khan, who is the husband of the 1st defendant and the father of the defendants 2 to 9, had executed an agreement of sale in respect of Ac.38.25 guntas in Sy.nos.41, 42 and 43 and that the said Feroz Khan had also executed a sale deed dated 04.10.1969 in respect of Ac.21.00 guntas in Sy.nos.41 and 42 in his favour. The 12th defendant in collusion with the defendants 1 to 9 had filed O.S.no.164 of 1984 and that the said suit was decreed. The plaintiffs are in no way concerned with the decree and the judgment in the said suit as they are not parties to the said suit. In view of the preliminary decree in O.S.no.734 of 1991, the defendants 12, 13 and 14 cannot claim any better right and title than what Feroz Khan has got in the subject matter of the suit. The preliminary decree had attained finality by virtue of the orders aforesaid of the Supreme Court. During the pendency of the civil proceedings, the 12th defendant had executed registered sale deeds in favour of the defendants 13 and 14. Therefore, the said sale deeds are hit by the principle enshrined in

the doctrine of *lis pendens*. Hence, the instant application is filed by the respondents 2 to 7 herein who are the plaintiffs 2 to 7 (LRs of the original plaintiff) seeking appointment of an Advocate Commissioner for partition of the property in terms of the preliminary decree.

5. Some of the respondents in the plaintiffs' subject application, i.e., the defendants 1 to 11 and 13 filed no counters before the trial Court. The 16th defendant/3rd petitioner herein representing the deceased 12th defendant filed a counter. The said 3rd petitioner herein is the LR of the said Sri Hari, the 12th defendant. The averments in the said counter affidavit, in brief, are as follows:

The plaintiffs and the other defendants had colluded together inspite of having knowledge of the sale made in favour of the 12th defendant and the execution of the sale deeds. The present petition for appointment of a Commissioner is also filed with the knowledge of the sale deeds executed. A final decree cannot be allowed to be passed without taking into consideration the basic principles of 'working out of equities between parties' as the properties were already alienated with due consent and knowledge of the concerned including that of the plaintiffs 2 to 7 and others. Therefore, the petition of the said plaintiffs/respondents 2 to 7 herein seeking appointment of an advocate commissioner is liable to be dismissed. The shares claimed and allowed by virtue of the preliminary decree stand extinguished. The 12th defendant is the absolute owner and possessor of Ac.10.33 guntas in Sy.no.41 and Ac.9.20 guntas in Sy.no.42, i.e., a total extent of Ac.20.13 guntas by virtue of the sale deed bearing document no.648 of 1969 dated 04.10.1969. Prior to the sale deed, the possession of Ac.20.13 guntas was handed over to the 12th defendant in the presence of panchas pursuant to a panchanama dated 03.10.1969. Feroz Khan having entered into an agreement of sale with the 12th defendant for the land admeasuring Ac.18.25 guntas in Sy.no.43 had handed over possession of the same and thereafter, the said Feroz Khan had died on 22.01.1978; and, after his death, the 12th

defendant had filed O.S.no.164 of 1984 for injunction restraining the legal representatives of Feroz Khan from selling or otherwise disposing of the suit schedule property. The said suit was decreed on 30.08.1983. The appeal in A.S.no.66 of 1984 filed by the legal representatives of Feroz Khan was dismissed on 27.11.1984. The 12th defendant had also filed O.S.no.150 of 1986 on the file of the District Munsif, Hyderabad, West and South, Ranga Reddy District, seeking the relief of specific performance of the agreement of sale dated 23.03.1973 executed by Feroz Khan in respect of the land admeasuring Ac.18.25 guntas; the said suit was filed against Shahejadi Bee, wife of Feroz Khan and the defendants 1 to 9; the said suit was decreed on 02.11.1987. The said decree has become final. The 12th defendant had filed EP no.23 of 1988. In the said EP, the father of the present 1st plaintiff (since died) filed a claim petition in EA no.12 of 1989 and the said claim petition was dismissed on 13.06.1989 and therefore, the said order has become final. The preliminary decree schedule property is not joint family property and hence, partition cannot be affected by appointing an Advocate Commissioner.

6. At the hearing before the trial Court, no oral and documentary evidence was adduced. On merits and by the order under revision, the Court below had allowed the petition as already noted and had appointed an Advocate Commissioner. Therefore, the aggrieved defendants/respondents 14 to 16 therein had filed this revision.

7. The learned counsel appearing for the parties had reiterated the pleaded contentions of the respective parties, which are stated supra.

8. The learned counsel for the revision petitioners would contend as follows: "The application for appointment of a Commissioner is not maintainable as the petitioners herein are not parties to the suit O.S.471 of 1987. The Court below had erred in appointing a Commissioner even though the petitioners herein are third parties to the preliminary decree. If the Commissioner appointed is entrusted with the warrant, he would be entering

upon the property to effect partition though the property is of a person, who is not a party to the decree for partition. If the Commissioner proceeds with the work and enters upon the property of a third party, who is not a party to the suit for partition, it would result in loss to the said party and causes prejudice to the rights of the petitioners herein who are third parties. The suit for partition is filed paying a fixed court fee of Rs.200/- under Section 34 (2) of the A.P. Court Fee and the Suit Valuation Act by alleging that the property is in joint possession. The decree cannot be executed against the parties, who are not parties to the suit for partition. A preliminary decree can be granted only against the sharers even on the assumption that it is a joint property. It cannot be executed against the third party without a decree for recovery of possession. The Court below did not consider the submissions and the case of the petitioners herein in proper perspective. No opportunity was given to adduce evidence. A separate application is filed seeking permission to lead evidence in respect of the stand in regard to working out equities. No orders are passed in the said application. The documents produced are not considered. The order is erroneous and unsustainable and therefore, the order is liable to be set aside.

9. *Per contra*, the learned counsel for the contesting respondents herein while reiterating the submissions in the pleadings of the said respondents had supported the orders of the Court below.

10. The learned counsel for the 9th respondent had placed reliance on the following decisions: (i) **Maharashtra Academy of Engineering & Educational Research v. State of Maharashtra**^[1]; (ii) **State of West Bengal v. Samar Kumar Sarkar**^[2]. The learned senior counsel *appearing* for respondents 18 to 20 had produced the copy of order dated 10.02.2003 passed in SLP (civil) 22591 of 2001 on the file of the Supreme Court of India. The learned counsel for the revision petitioners had placed reliance on the following decisions: (i) **T.Saraswathi Prasad Singh v. G.V.Kalavathy**^[3]; (ii) **N.S.S.Narayana Sarma v. Goldstone Exports (P) Ltd.**^[4]; and (iii) **Shub**

Karan Bubna v. Sita Saran Bubna^[5] .

11. I have given earnest consideration to the submissions. I have gone through all the cited decisions. I have carefully perused the material record.

12. A perusal of the amended preliminary decree dated 25.01.1996 in A.S.no.734 of 1991 (which arose out of the instant suit O.S.no.471 of 1987) would show that this Court having set aside the decree and judgment of the trial Court had decreed the suit for partition preliminarily and that there is a clause in the said decree that the trial Court shall appoint a Commissioner for partition of the properties and allotment of possession of the separated shares on an application of the parties. It is not in dispute that the said decree has become final. In the suit for partition in O.S.no.471 of 1987 filed by Khader Nawaz Khan, the deceased sole plaintiff, the 12th defendant is one Sri Hari, i.e., the 19th respondent herein. 13th defendant/19th respondent was impleaded in the appeal suit A.S.No.734 of 1991. Though the suit O.S.no.471 of 1997 was dismissed by the trial Court, the appeal in A.S.no.734 of 1991 was allowed by this Court and the suit was preliminarily decreed. Since the preliminary decree granted by this Court in the said first appeal suit is silent in respect of shares of some of the sharers, as already noted, they had filed A.S.M.P.nos.11880 of 2004, 1098 of 2005 and 1099 of 2005 for declaration of their shares. All the said applications were allowed by a common order and an amended preliminary decree was granted. The appeal preferred before the Supreme Court by the said Sri Hari, the 12th defendant, against the said common orders of this Court in the aforesaid ASMPs was dismissed by confirming the amended preliminary decree. The contentions, which are now raised before this Court, were admittedly raised before the Supreme Court. But the Supreme Court while confirming the preliminary decree in A.S.no.734 of 1991 and the common order of this Court had rejected all the contentions. A perusal of the amended preliminary decree now makes it clear that the plaintiffs 2 to 7 (the LRs of the deceased sole plaintiff) are entitled to a 1/4th share and the legal representatives of

Feroz Khan (i.e., defendants 1 to 9) are entitled to a 1/4th share and the respondents 11 and 13 are entitled to a half share in the preliminary decree schedule property. The law is well settled that the Court below while giving effect to the preliminary decree cannot go behind the said decree. Admittedly, there are no stay orders or any other impediments for proceeding with the partition of the preliminary decree schedule properties in terms of the amended preliminary decree. Viewed thus, this Court finds that the objections being raised by the revision petitioners for appointment of an Advocate Commissioner are untenable and that therefore, the Court below is justified in appointing the Advocate Commissioner for the purpose desired by the respondents 2 to 7/the plaintiffs 2 to 7. Indeed, the trial Court had also observed in its orders under revision that by appointing an Advocate Commissioner to divide the shares in terms of the preliminary decree, no prejudice would be caused to the revision petitioners, i.e., respondents 14 to 16 as they can raise all the contentions in regard to their entitlement to seek equities during the further proceedings and in the application filed for passing a final decree in terms of the preliminary decree, which is pending consideration. The 12th defendant (since died) is a party to the proceedings at various stages; and the petitioners herein, who are already impleaded as party respondents to the *lis*, are claiming that they have purchased the property from the 12th defendant. The law is well settled that any decree or a preliminary decree would be binding not only on the parties but also on the representatives of the parties and the third parties claiming through the parties to the *lis*. Viewed thus, this Court is of the considered view that the observations in the order of the Court below would adequately protect the interests of the present revision petitioners and that in the facts and circumstances of the case, the revision petition is devoid of merit and is liable for dismissal.

13. Before parting, it is to be noted that since this Court is only confirming the order of the Court below appointing an Advocate Commissioner to effect partition of the preliminary decree schedule properties in terms of the preliminary decree (as amended) and as the Court below had left open the

issue in regard to working out of equities, if any, that may be claimed, it is not necessary to deal with the ratios in the decisions cited and make any observations, which will have a bearing on the merits of the application filed for passing of the final decree.

14. Accordingly, the Civil Revision Petition is dismissed. No costs.

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

M. SEETHARAMA MURTI, J

29th July, 2016
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- [\[1\]](#) (2001) 10 Supreme Court Cases 166
 - [\[2\]](#) (2009) 15 Supreme Court Cases 444
 - [\[3\]](#) 2002 (5) ALD 248
 - [\[4\]](#) (2002) 1 Supreme Court Cases 662
 - [\[5\]](#) (2009) 9 Supreme Court Cases 689