

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P.No.5069 OF 2016

AND

C.R.P.No.5183 OF 2016

%28.11.2016

C.R.P.No.5069 of 2016

Between:

Sharada Bai and others

...Petitioners

VERSUS

\$ Satyanarayana Peeti (since died per LRs) and others

...Respondents

C.R.P.No.5183 of 2016

Between:

Sharada Bai and others

...Petitioners

VERSUS

\$ Satyanarayana Peeti (since died per LRs) and others

...Respondents

< **GIST:**

> **HEAD NOTE:**

!Counsel for Petitioner: Smt Manjiri S.Ganu

^Counsel for Respondents 1 to 4: Sri O.Manohar Reddy

? Cases referred

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

Case Nos. **C.R.P.No.5069 OF 2016**
AND
C.R.P.No.5183 OF 2016

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Between:

Sharada Bai and others

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C.R.P.No.5183 of 2016

Between:

Sharada Bai and others

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\$ Satyanarayana Peeti (since died per LRs) and others

...Respondents

DATE OF JUDGMENT PRONOUNCED: **28.11.2016**

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

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|---|--|-----|
| 1 | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes |
| 2 | Whether the copies of judgment may be marked to Law Reporters/Journals | Yes |
| 3 | Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? | Yes |

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO**C.R.P.No.5069 OF 2016****AND****C.R.P.No.5183 OF 2016****COMMON ORDER :**

These two revision petitions are arising out come of the respective orders dated 29.08.2016 of the IX Additional Chief Judge, City Civil Court, Hyderabad, passed in I.A.No.785 of 2016 in I.A.No.344 of 2008 and I.A.No.499 of 2016 in I.A.No.794 of 2016 in O.S.No.7 of 2001, which are the applications filed to examine advocate commissioner.

2. The suit was filed for partition and separate possession of plaint schedule property into two equal shares maintained by sole plaintiff against the three defendants and in the course of contest by defendants 1 to 3, they stated that all the properties not included in the plaint schedule to be partible, thereby, the properties shown in the written statement schedule also to be included as partible properties. Pursuant to which the suit was decreed on 23.08.2004 including in the written statement schedule, one of the items as Item 'e' of the written statement besides that of plaint schedule. The plaintiffs' vis-à-vis the defendants' viz. sole plaintiff Satyanarayana Peeti since died pending suit, his legal representatives plaintiffs 2 to 6 were impleaded including the minors represented by the 2nd plaintiff as next friend.

3. The first appeals maintained by the plaintiffs' vis-à-vis the defendants' against the preliminary decree are still pending before this Court with direction for proceeding with ascertainment of profits and division of properties, but for stay in passing of final decree to some extent. It is pursuant to the extent of no stay granted of the trial Court's preliminary decree, sought for passing of final decree by the plaintiffs and some of the defendants by filing two applications in I.A.Nos.344 of 2008 and 499 of 2016. Therein an advocate commissioner was appointed for the two purposes viz. (i) ascertainment of the profits by conducting enquiry as contemplated under Order 20 Rule 12/18 of C.P.C. (ii) division of the properties. The commissioner submitted report so far as the division of properties concerned. Ascertainment of properties is not the subject matter of the revisions. It is pursuant to the report of the commissioner dividing the properties into equal shares taken into consideration of good or bad qualities objections were filed by some of the defendants. Said defendants, who filed objections to the report of the commissioner showing division of properties, sought for examination of the commissioner before the lower Court by filing applications in I.A.No.785 of 2016 in I.A.No.344 of 2008 and I.A.No.499 of 2016 in I.A.No.794 of 2016 respectively. Those, applications by orders dated 29.08.2016 were ended in dismissal.

4. The observations in the result of the two applications ended in dismissal is one and the same by referring to two single Judge expressions of this Court in **Damodar Reddy (died) per LRs and anothers v. M.Mohan Reddy and others**¹, and **Karri Marriyamma and another v. Penumatcha Ramamma and another**²

5. The observations in the impugned dismissal orders covered by the two revisions were that since the Commissioner's report is forms part of Court record as is evident from Order 26 Rule 9 and 10 CPC, the necessity of examination arises only parties dispute correctness of report and thus, mere fact that the Commissioner was not examined, does not disentitle the Court from considering the report into account. Whereas, so far as preliminary decree enforcement in seeking to pass final decree and appointment of Commissioner is concerned, it is for the Court to pass final decree to bring about just and equitable partition of the properties and no purpose would be served by subjecting cross examination of the Commissioner apart from not contemplated in the partition suits where the Commissioner discharges functions of the Court and as a matter of convenience, the work is entrusted to the Commissioner treating as officer of the Court and legislature did not provide to subject him to be examined as witness, that too when

¹ 2006(5) ALD 735 = AIR 2007 AP 31

² 2006 SCC ON LINE AP 725 = (2007) 1 ALD 127

report of the Commissioner is not the final word, from the ultimate power of the Court to pass final decree by taking into account the report of the Commissioner with such objections or suggestions of the parties thereon. In the case of reporting physical features or undertaking scientific investigation, the Commissioner does not vouch for any particular state of affairs. From the discernable difference between the two, notwithstanding the fact that both are subject to accept or reject or vary to the report of the Commissioner in passing of final decree by Court, which can be even made subject matter of appeal remedy. It was also observed by the lower Court that these two decisions supra of the High Court are binding on the trial Court when compared to the four expressions of other High Courts of persuasive value even permitting therein examination of a commissioner in a partition final decree proceedings and therefrom dismissed the applications.

6. It is same impugned in the revisions with the contentions in the grounds of appeal and by oral submissions reiterating what is laid down in the expressions placed reliance of the other High Courts by the learned counsel for the revision petitioners/defendants.

7. Whereas, it is the submission of the learned counsel for the respondents/plaintiffs that the impugned orders of the lower Court no way require interference for said difference between the wording of Section 75 read with Order 20 Rule

12/18 C.P.C and Order 26 Rules 1 to 10 and 13 and 14 vis-à-vis Rule 16 C.P.C and thereby sought for dismissal of the revisions.

8. Heard both sides at length with reference to the facts, provisions and propositions supra and perused the material on record.

9. In deciding the revisions, coming to the provisions of Section 75 C.P.C, Order 26 Rules 9 and 10 and 13 and 14 C.P.C. and Order 20 Rules 12 and 18 CPC are relevant which reads as follows:

(A) "75. Power of Court to issue Commissions:- Subject to such conditions and limitations as may be prescribed, the Court may issue a commission-(a) to examine any person; (b) to make a local investigation; (c) to examine or adjust accounts; or (d) to make a partition; (e) to hold a scientific, technical, or expert investigation; (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit; (g) to perform any ministerial act."

(B) Order 26 Rules 9 and 10 CPC:

Rule 9. *Commission to make local investigation:- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits of damages or annul net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.*

Rule 10 Procedure of Commissioner:-

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit:-

The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Commissioner may be examined in person:-

Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.”

(C) Order 26 Rules 13 and 14 CPC:

“13. Commission to make partition of immovable property:

Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separate according to the rights as declared in such decree.

14. Procedure of Commissioner: *(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directly by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.*

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or report it shall either issue a new commission or make such other order as it shall think fit.”

10. From the above Order 20 Rules 12 and 18 speak on decree for possession or partition and separate possession and *mesne* profits which read as follows:

“Order 20 Rule 12 CPC”

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

- (a) for the possession of the property.*
- (b) For the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit, or directing an enquiry as to such rent or mesne profits;*
- (c) Directing an enquiry as to rent or mesne profits from the institution of the suit into—*
 - (i) the delivery of possession to the decree-holder, or*
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the courts.*

(2) Where an inquiry is directed under clause (b) or clause (c) of sub-rule (1) above, a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry.

Order 20 Rule 18 CPC:

Decree in suit for partition of property or separate possession of a share therein:-

Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

- (1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf in accordance with such declaration and with the provisions of Section 54.*
- (2) if and in so far as such decree relates to any other immovable property, or to movable property the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring*

the rights of the several parties interested in the property and giving such further directions as may be required.

11. Now a reading of Order 20 Rule 12 and 18 CPC mainly confine partition and separate possession or for possession and also for determination of the profits pursuant to the preliminary decree as the case may be. Now coming to the other important provision covered by Order 26 C.P.C among Rules 1 to 22 Rule 18 is for issuing notice and appearance of parties and in case of non appearance to proceed by commissioner in their absence pursuant to the warrant entrusted within the scope of execution. Rules 1 to 8 speak in relation to examination of witness on interrogatories or otherwise of the witness in local area or non local area and the difference therefrom to consider including from the Rule 4(a) of the amended C.P.C. with non absentee clause the power of the Court to examine to issue commission for examination on interrogatories or otherwise as person within the local limits of its jurisdiction which is to be read with Order 18 Rule 19 C.P.C.

12. Order 26 Rule 9 speaks in relation to commissions to make local investigation where the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damage or annual net profits. Rule 10 which

speaks of the procedure of Commissioner appointed under the Rule 9 supra that the report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the court or, with the permission of the Court, any of the parties to the suit may examine the commissioner personally in open Court touching any of the matters referred to him or mentioned in the report in relation to such investigation for the purpose of elucidating any matter in dispute etc. It is to say Rule 10 specifically provides for right of parties for examination of the commissioner.

13. We are now mainly concerned with Order 26 Rules 13 and 14 CPC in relation to commission to make partition under Order 20 Rule 18 CPC pursuant to Section 75(d) CPC.

14. From the above, no doubt in Rule 14 there is no specific mention like in Rule 10 for examination by the parties of the commissioner in open Court touching any of the matters referred and mentioned in the report in relation to the investigation.

15. Here one thing cannot be forgotten from the wording Sub-Rule 3 of Rule 14 of Order 26 which what is reproduced above say where the Court confirms or varies the report/s it shall pass a decree in accordance with the same as confirmed or varied..... Thus, power is conferred on the Court either to

confirm the report or to vary and differ with the report. It is needless to say from wording of Rule 14(3) that the further power if at all is to set aside the report and to issue second commission only thereafter.

16. Once the power is conferred on the Court to confirm or vary the report of commissioner same is undoubtedly from considering the report with reference to the preliminary decree/s and scope of the warrant and work memos if any and objections of the parties filed if any.

17. Once the Court got the power to vary on considering the material or any of that referred supra, it equally enables the Court if at all it thinks fit to call for the commissioner to examine as a Court witness, even no similar provision to Order 26 Rule 10 of any of the parties may examine the commissioner to ask by any party to examine. The power of the Court to examine a Court witness can be traced for that purpose from said wording of Order 26 Rule 14(3) read with Order 16 Rule 14 CPC apart from the inherent power of Court which inheres in the very constitution of Court with all elasticity to the necessity with its width, breadth, and lengths to exercise under Section 151 C.P.C.

18. In this regard, Order 16 Rule 14 CPC speaks that the Court may of its own accord summon that witnesses strangers to suit. It says the Court at any time if it thinks

necessary to examine any person including a party to the suit and not called as a witness by a party to the suit, of its own motion, cause such person to be summoned as a witness to give evidence or to produce any document in his possession and may examine him as a witness or require him to produce such document on the day to be appointed.

19. Further, Section 30 CPC says, subject to such conditions and limitations as may be prescribed the Court may, at any time, either of its own motion or on the application of any party. (a) (b) issue summons to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid (c) order any fact to be proved by affidavit.

20. Thus, the Court got the inherent power from the very appointment, including for partition of properties a commissioner with reference to any objections if at all either to re-entrust the warrant pursuant to the objections after hearing to clear any cloud or without any such necessity of entrusting warrant to clear any ambiguity as the Court witness to file affidavit in chief and then if parties want to cross examine in view of the power under Order 19 CPC or to come to witness box and depose with right of cross examination to both parties. The very wording of Order 26 Rule 9 CPC for the purpose of elucidating any matter in

dispute can also be strategy to that apart from all above enabling provisions.

21. Apart from as observed in para 12(b)(vi) of the expression in **Cheedella Padmavathi (died) per L.Rs v Cheedella Lakshmi Narasimha Rao died per LRs**³ referring the expression of the Apex Court in **Rajendra Prasad Gupta v A.Prakash Chandra Mishra and others**⁴ relying upon ILR 153 All (FB) and **Raj Naraian Saxena v Bhimsen**⁵ that courts got inherent power with elasticity to the necessity and for that power to exercising act on the principle that every proceedings permitted unless expressly prohibited. Thus, Court cannot say Order 26 Rule 14 not permitted but to say permitted for not prohibited to examine such commissioner as Court witness.

22. From this, now coming to the legality and correctness of the impugned order of the lower Court referring to the expressions of this Court and other High Courts; in (i) **Karri Marriyamma's** case supra is in relation to the appointment of Advocate commissioner in a pending suit for injunction relief and under Order 26 Rule 9 CPC for local investigation/inspection and measurement and demarcation of plaint schedule property. For that as referred supra Order 26 Rule 10 specifically enables any party subject to objections

³ 2015(5) ALT 634

⁴ 2011 SC 1137

⁵ AIR 1966 ALT 84 (FB)

filed if any to cause examine the commissioner on their side even, thereby that decision no way help at all to decide the lis.

(ii) Coming to the other expression in **Damodar Reddy (died) per LRs's** supra, the Court referred therein scope of Order 26 Rules 18, 13 and 10 and laid the distinction between them that Rule 10 CPC specifically speaks the right of parties to cause examine the commissioner as a witness on their side and same is silent so far as Rule 13 is concerned. A perusal of the judgment shows that it referred earlier expression of this Court in **Simma Krishnamma v. Nakka Latchumanaidu and others**⁶ at para 15 that says the Court can consider the feasibility of more final decrees than one. It also referred saying that the properties which can be divided without much of controversy, can be partitioned and allotted to the parties, and such of the properties, where there exists serious disputes or where the Court feels that a detailed and meticulous exercise is to be undertaken, can be dealt with under a separate final decree. The only thing, which must be kept in mind is, that the final decree passed as regards certain items of property, must be complete in all respects, and nothing must be left to be dealt with, at a later point of time. The expression in Simha Krishnamma supra only deals with the issue of when case there be more than one final decree and nothing beyond and thereby of no use to decide the lis. Thus, one must advert to Rules 13 and 14 of Order

⁶ AIR 1958 AP 520

26 and Order 16 Rule 14 and Sections 30 and 151 C.P.C. The expression in **Damodar Reddy (died) per LRs** referred supra did not refer either Order 16 Rule 14 or Sections 30 and 151 C.P.C, but for mention of Order 26 Rule 10 specifically enables any of the parties to the lis to summon and cause examine as their witness a Court Commissioner appointed for the purpose of local investigation and in a partition suit for there is no specific wording in Rules 13 and 14 like in Rule 10. It is the only distinction drawn in saying a commissioner is officer of the Court appointed by the Court to discharge the functions of the Court in recording evidence under Order 20 Rule 12 C.P.C. in ascertainment of profits thereby in such matter, the Commissioner cannot be called by any of the parties to cause examine.

23. In fact the enquiry to be conducted by a commissioner to be appointed for determination of profits by stepping into the shoes of the Court from the power conferred by the Court is different from division of properties by the Commissioner appointed, by his local inspection of visiting the properties and consider on identification and divisibility by showing on paper division i.e. with all the requirements of the feasibility in existence of good or bad qualities. Once such is the prudence the Commissioner has to exercise within his individual wisdom, it is some thing more than the duty to be discharge by the Court sitting within the four walls of court

hall and chamber. It is practically, as referred supra, a part of purpose of elucidation of the matter in dispute, as to what are the properties available, to what extent to be divided and how it represents good and bad in quality for consideration. Once such is the case, when the commissioner has to exercise his prudence and wisdom in doing division of the properties and submitting report, even there is no specific provision like in Rule 10 to cause examine the commissioner as a witness on either side by any party, it is the duty of the Court from any objections if at all necessary by re-entrustment or to ask him to clarify by coming to the witness box as Court witness and said power of Court no way takes away from any silence in this regard in Rules 13 and 14, when there are other enabling provisions as referred supra. In fact, that was not considered by the learned Judge of this Court in **Damodar Reddy (died) per LRs** case referred supra. Thereby, even though it is one of the submissions of the learned counsel for the revision petitioner that the matter requires to refer to a Division Bench it no way requires any such reference as from Order 16 Rule 14 apart from Sections 30 and 151 C.P.C. the Court is able to examine any witness besides Section 165 of the Indian Evidence Act also enables as a Court witness to call for and examine that power when no way takes away from the wording of Order 26 Rules 13 and 14 C.P.C. from mere silence, though Order 26 Rule 10 enables so far as Rule 9 purpose and that aspect once not

considered in the said expression in **Damodar Reddy (died) per LRs's** case supra, it is hit by the doctrine of subsilentio and thereby for no cloud in law no reference is required to answer by a Division Bench vide decision of this Court on the principle **G.Narayana Reddy v P.Narayana Reddy**⁷. Further, in the very recent expression of this Court on the aspects of what is meant by elucidation of matters in dispute it is answered in detail including as to when and in what matter and at what stage a commission can be appointed and for what purpose and within what scope to execute and consider the report in **Bandi Samuel and another v Medida Nageswara Rao**⁸.

24. In this regard, among the four expressions of the other High Courts particularly, the Division Bench of the Calcutta High Court delivered way back in **Gourhari Das and another v Jaharlal Seal and another**⁹ speaks with reference to Order 26 Rule 13 and 14 particularly at para 4 that the commissioner whose report is under consideration, if proposed to be examined by either of the parties, should be called. In fact, to that extent that observation though followed in other single Judge expressions of the other High Courts, among **Gopal Dass and others v Bismanchali**¹⁰, **Dhadi Barik and others v Arjun Barik and others**¹¹,

⁷ 2016(3) ALT 12

⁸ CRP No.338 OF 2016, DATED 04.11.2016

⁹ 1956 SCC ONLINE CAL 27= AIR 1957 Cal 90

¹⁰ MANU/HP0332/2009

¹¹ MANU/OR/0067/1986

Bhupinder Kishore v Fateh Singh Yadav and others¹² and **Sulochana and others v Vijay Kumar and others**¹³ , they also did not draw the distinction between Order 26 Rule 10 and Order 26 Rule 14. If both the provisions taken into consideration, Rule 10 is an enabling provision as right of the party to call for commissioner to be examined on their side; whereas, Rules 13 and 14 no way provide any such right to any party and in view of the legislative conspicuous silence specifically no right can be conferred to any party to claim by any party as of right and same is the conclusion in fact rightly arrived by the learned single Judge of this Court in **Damodar Reddy (died) per LRs's** case referred supra.

25. Thus, as discussed supra the power of the Court which is paramount and available to summon as a Court witness by reading with several other provisions of the Rules 13 and 14 of Order 26, though there is on any right of a party to claim as if in Rule 10 of Order 26 that no way takes away the power of the Court to consider if at all necessary even in any partition final decree proceedings, from the report of the commissioner with reference to the objections of the parties to call for the commissioner as a Court witness to cause examine with a right of cross examination to both parties.

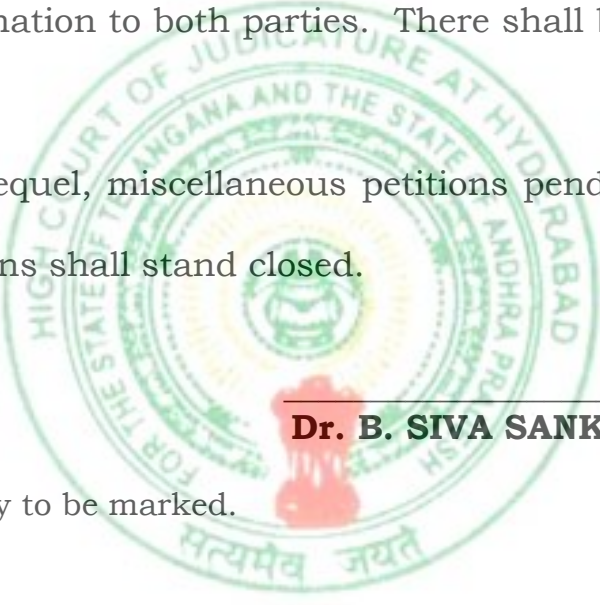
26. Accordingly and in the result, these two revision petitions are disposed of directing the trial Court, irrespective

¹² MANU/PH/3740/2014

¹³ MANU/KA/0821/2015

of dismissal of the earlier petitions on the application of the parties to call for the commissioner to be examined with reference to the report in relation to the division of properties for the parties have no such right to consider the objections of parties to the report and if necessary to re-entrust the warrant to the commissioner and after hearing where found such necessity does not arise and still there is any necessity of any cloud to be cleared by the commissioner, to cause examine the commissioner as a Court witness, with right of cross examination to both parties. There shall be no order as to costs.

As a sequel, miscellaneous petitions pending, if any, in these revisions shall stand closed.



Dr. B. SIVA SANKARA RAO, J

28.11.2016

Note: L.R copy to be marked.

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