

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION Nos.3525 OF 2015

ORDER:

Heard the learned counsel for revision petitioner, who is the 3rd defendant in O.S.No.777 of 2002, among the nine respondents to the revision, 1st respondent is the plaintiff in the suit and 2nd respondent is D1, other respondents are D2 to D9 and respondent served with notice, even as per the docket order.

2. From death of D1 pending suit, initially D4 to D7 were added as per orders in I.A.No.782 of 2004, dated 14.09.2004 and D8 and d9 also subsequently added as per orders in I.A.No.778 of 2008, dated 24.10.2008. In the suit for partition of the plaint schedule property consisting of the house with apurtinent site no way now required to describe, but for to say of Pedana Village in a total extent of the site of 478 square yards within the boundaries, the trial court judgment particularly in Para 25 as part of answering issue numbers 3, 4 and additional issue No.2 as to whether there was any earlier partition and if so D1 was given possession of the entire share of late Sivudu, excluding plaintiff and whether plaintiff is entitled to partition prayed for and whether the defendants 8 and 9 are also entitled to any shares in the property; it is observed that out of the original

owner Kotaiah's three sons by name Perilingam, whose sons are D1 and D2, Subbarayudu, who died issueless testate by making a bequeath under exhibit B1 will dated 01.01.1965 in favour of the 3rd defendant no other than the brother of the plaintiff one among the two sons of the Sivaiah, while observing Sivaiah's son D3 was adopted or fostered by Subbarayudu, his paternal uncle made the bequest for his 1/3rd of the plaint schedule property by referring to the earlier oral partition between the three brothers and he got there under 159 square yards of the site with D.No.6/145 within the boundaries of East: P.Subba Rao, South: road leading to Paidammatallim Temple, West: Bandar to Gudivada road and North: the property of Pichuka Venkata Sivudu (father of plaintiff and D1). Thereby, the remaining 2/3rd of the plaint schedule is liable to be partitioned between plaintiff and the defendants 1 to 3 if any representing the two branches of the three brothers excluding Subbarayudu by names Perilingam and Sivaiah respectively and it is thereby decreed for the remaining excluding the 1/3rd covered by the bequest in the will executed by Subbarayudu in favour of D3.

3. The preliminary decree of the trial court is not before this Court. Generally in such event, the trial court, pursuant to those observations in the operative portion must clearly describe without any ambiguity in the judgment to reflect the said operative portion as a decree or to read that portion as a

decree including from Order XX Rule 6(a) CPC, that is lacking in this case.

4. However, that is not the be all, but for to say, if at all the decree drafted is only with such ambiguity from Para 26 of the judgment, the remedy of the parties is in the absence of trial court appending to the preliminary decree as a decree schedule for the remaining 2/3rd excluding the 1/3rd of the property that is covered by the testament from the bequest therein under Ex.B1 that is not done, to seek for amendment of the preliminary decree and to incorporate decree schedules specifically apart from giving of plaint schedule. That was not done, that was the confusion or cloud before the lower court in passing the order in I.A. 106 of 2015 for sale of the entire property from the commissioner's report saying the property is not capable of division and distribution among the shareholders in I.A.NO.1132 of 2010. Thereby the impugned order is liable to be set aside by remanding the matter to the trial court for the petitioner to work out his rights pursuant to the observations supra if necessary to seek for amendment of the preliminary decree and sought for passing of fresh orders for any such sale in need for the 2/3rds of the plaint schedule property (after excluding the 1/3rd area covered by the will with the specific description supra) if not capable of division for respective shares.

5. Miscellaneous petitions pending consideration, if any, in this case shall stand closed in consequence. There shall be no order as to costs.

DR.B.SIVA SANKARA RAO, J

03.11.2017
SS

