

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P. No.359 of 2017

ORDER:

The revision petitioner is defendant No.2 in O.S.No.47 of 2003 on the file of the Senior Civil Judge, Kovuru, Sri Potti Sriramulu Nellore district. Respondents 1 and 2 in the Civil Revision Petition are plaintiffs in the said suit. In the suit, filed for partition, there was a preliminary decree dated 12.09.2007 in favour of the plaintiffs for division of the plaint schedule items 1 to 3 into two equal shares and to allot one such share to defendant No.1 and the remaining half share allotted to the father of plaintiffs and defendants therein and that was to be divided into four equal shares and to allot one such share to each of two plaintiffs and two defendants respectively, and by canceling the registered Settlement Deed-Ex.B2 dated 20.05.2002 executed by defendant No.1 in favour of defendant No.2. The appeal, filed by defendant No.2 against the said decree and judgment of the trial Court, in A.S.No.172 of 2007 before the learned V Additional District Judge, Nellore, was ended in dismissal confirming the trial Court's preliminary decree and judgment, dated 12.09.2007, in O.S.No.47 of 2003. Pending the appeal defendant No.1 died and defendant No.2-appellant is also recorded as the legal representative of defendant No.1. Defendant No.2 even

went unsuccessful in S.A.No.535 of 2011 vide dismissal judgment dated 18.12.2012 of this Court.

2. The plaintiffs filed I.A.No.613 of 2010 before the trial Court for passing of final decree by division of the plaint schedule items 1 to 3, pursuant to the preliminary decree, by appointment of an Advocate Commissioner and the learned Senior Civil Judge, Kovur, by order dated 07.09.2015, appointed the Advocate Commissioner under Order XXVI Rule 13 and Section 75 C.P.C., though in the petition mentioned under Order XXVI Rule 18 (1) and Sections 54 and 75 of C.P.C. Aggrieved by it, as if the appeal maintainable instead of revision, A.S.No.94 of 2015 was filed by defendant No.2-Smt. Gundra Indiramma showing the plaintiffs as respondents 1 and 2. The said appeal was also ended in dismissal on 10.11.2016 by holding the appeal is not maintainable besides on merits. The present Civil Revision Petition is later filed impugning the order in I.A.No.613 of 2010, dated 07.09.2015. The grounds of revision, impugning the order appointing the Advocate Commissioner passed in I.A.No.613 of 2010, dated 07.09.2015, are that, the trial Court appointing the Advocate Commissioner in I.A.No.613 of 2010 with a direction to divide the property into three shares is unsustainable, the final decree should be in accordance with the preliminary decree,

to allot the shares pursuant to the preliminary decree, the preliminary decree was passed allotting 1/8th share each to the plaintiffs out of the plaint schedule and preliminary decree schedule, instead of so in the final decree the Court erred in directing the Advocate Commissioner to divide the schedule property into three shares rather than eight shares that too without even recording any reason for such a change. The trial Court should have seen that pending the appeal in A.S.No.172 of 2007, filed by defendant No.2 against two plaintiffs and defendant No.1, defendant No.1 died and the first appellate Court did not modify the decree of trial Court so also by the second appellate Court in dismissal confirming the decree and judgment of the trial Court with grave findings. The trial Court is of the view that defendant No.1 got half share in the suit schedule property, for which defendant No.1 already executed the Gift Settlement Deed of his entire properties to go to defendant No.2; and even though the said Gift Settlement Deed is declared as null and void defendant No.2 is entitled to the properties of defendant No.1 and thereby should have been allotted the share of defendant No.1 to defendant No.2 and thereby the impugned order of the lower Court is not sustainable.

3. The learned counsel for the revision petitioner reiterated the same, whereas the respondents 1 and 2 to the Civil Revision Petition being the plaintiffs and petitioners in I.A.No.613 of 2010 supported the order of the lower Court.

4. Heard both sides and perused the material on record.

5. So far as the correctness of the order of lower Court, dated 07.09.2015, in I.A.No.613 of 2010 is concerned, the averments of plaintiffs in the interlocutory application are that pending the appeal in A.S.No.172 of 2007 defendant No.1 died thereby to defendant No.1 the petitioners 1 and 2 and defendant No.2 are the legal heirs, who are already on record, and therefore, they are entitled to the estate of defendant No.1 equally; thereby the plaint schedule property is to be divided into three equal shares and to allot one such share each to the plaintiffs 1 and 2 and the other one such share to defendant No.2. The counter, filed by defendant No.2, in opposing the interlocutory application is that once the preliminary decree of the trial Court speaks division of plaint schedule property into two equal shares and allots one such share to defendant No.1 and the other to be divided into four equal shares among two plaintiffs and two defendants, plaintiffs are entitled to $1/8^{\text{th}}$ share each and defendant No.2

also got $1/8^{\text{th}}$ share and the remaining $5/8^{\text{th}}$ share belongs to defendant No.1, and as defendant No.1 already executed the Gift Settlement Deed, dated 20.05.2002, giving his entire property and also in view of the registered Partition Deed, dated 16.10.1994, entered into between himself and his deceased father Induru Ramana Reddy, even the decree for partition passed by canceling the Partition Deed and the Gift Settlement Deed supra. From the first Appellate Court in A.S.No.172 of 2007 and the second Appellate Court in S.A.No.535 of 2011 dismissed the respective appeals confirming the trial Court's decree, the plaintiffs are entitled to only as per the trial Court's preliminary decree confirmed therefrom each $1/8^{\text{th}}$, but not $1/3^{\text{rd}}$ each as claimed. The order of first Appellate Court says from the death of defendant No.1, pending the Second Appeal in A.S.No.172 of 2007, on 22.09.2009 what defendant No.2 get according to her as if $6/8^{\text{th}}$ share, though otherwise $1/8^{\text{th}}$ in claiming $5/8^{\text{th}}$ of defendant No.1 also, pursuant to the so-called registered Gift Settlement Deed, dated 20.05.2002, even once the said Settlement Deed was cancelled as prayed for in the plaint, which was decreed in the suit and confirmed in the First Appeal and Second Appeal, the question of again claiming of the right under the cancelled Settlement Deed by defendant No.2 from defendant No.1 does not arise and thereby the

petitioners and defendant No.2 from the change the parties on record in the First Appeal and the Second Appeal supra are entitled to $1/3^{\text{rd}}$ share each and thereby the Advocate Commissioner is to be appointed to divide the plaint schedule items 1 to 3 into three equal shares and to allot one such share each to the plaintiffs 1 and 2.

6. Once the settlement is undisputedly cancelled by the preliminary decree of the trial Court and even pending the First Appeal, the executant of the cancelled Settlement Deed (defendant No.1) died, no rights under the cancelled Settlement Deed accrue in favour of defendant No.2-appellant for appeal, which appeal was ended in dismissal and the Gift Settlement was not validated either in the First Appeal or in the Second Appeal. As a consequence, what the rights defendant No.1 was having of $5/8^{\text{th}}$ share, once equally entitled by the plaintiffs and defendant No.2, when that fact is not in dispute from the change of circumstances that can be taken note of, the filing of application for passing of final decree, to allot $1/3^{\text{rd}}$ share each to the plaintiffs 1 and 2 and also to allot the remaining $1/3^{\text{rd}}$ share to defendant No.2 not any way requires interference with the impugned order of lower Court by sitting in revision, but for dismissal of the Civil Revision Petition.

Accordingly and in the result, the Civil Revision Petition is dismissed, confirming the order of lower Court in I.A.No.613 of 2010, dated 07.09.2015. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

Dr. B. SIVA SANKARA RAO, J

27.12.2017
MVA

