

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.613 of 2016

ORDER:-

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by the petitioners/defendants, assailing the order, dated 28.12.2015, of the learned Senior Civil Judge, Puttur, passed in I.A.No.384 of 2005 in O.S.No.28 of 1992 filed by the plaintiff under Order XXVI Rule 13 of the Code of Civil Procedure, 1908, to appoint an advocate commissioner to divide the decree schedule properties into two equal shares according to good and bad qualities and to allot one such separated share to the plaintiff and to pass the final decree accordingly.

2. I have heard the submissions of Sri V.Jagapathi, learned counsel for the revision petitioners/defendants ('defendants', for brevity) and of Sri M.Janardhan Rao, learned counsel for the respondent/plaintiff ('plaintiff', for brevity). I have perused the material record.

3. The facts which are necessary to be stated as a prelude to this order, in brief, are as follows:-

The sole plaintiff filed the suit against the defendants for partition of the suit schedule properties. The said suit was decreed. The plaintiff filed the instant application for appointment of an advocate commissioner for division of the properties by metes and bounds in terms of the preliminary decree and to pass final decree. That application was allowed and a commissioner was appointed. The

commissioner executed the warrant and filed his report. Thereafter, the commissioner was directed to revisit the property and file a fresh report. The commissioner, having revisited the property, filed a fresh report along with a sketch/plan showing the division of the properties. Since the division of the property made by the commissioner is not in accordance with the terms of the preliminary decree and the schedule of the decree, the defendants filed objections to the commissioner's report. The Court below, having noted that the objections of the defendants have to be considered at an appropriate stage, held that the commissioner's report and the objections to it will be considered at an appropriate stage. However, without considering the objections, the Court below passed orders holding that as per the commissioner's report, the property will be allotted; and the Court below listed the matter for casting of lots. Therefore, the revision petitioners/defendants are aggrieved.

4. At the hearing, the learned counsel for the revision petitioners/defendants pointed out the items of the property in the schedule and the plan and also the items of the property in the schedule of the preliminary decree and then pointed out the defects in the sketch/plan of the commissioner's report after making a detailed reference to the objections filed by the defendants, which the trial Court failed to consider. The learned counsel also brought to the notice of this Court that the appeal preferred by the defendants is pending, but no stay orders were granted in the said first appeal.

5. A plain reading of the schedules which are brought to the notice of this Court would show that as regards item No.1 of the schedule, there is some ambiguity as to whether it is one item of property or two items of property. Further, the sketch/plan of the Commissioner does not tally with the decree schedule and the extents of shares to which the parties are entitled to as per the preliminary decree. That apart, the commissioner's sketch/plan also does not tally insofar as item No.2 with regard to its measurements, as mentioned in the preliminary decree schedule. Therefore, the matter requires reconsideration by the trial Court after examining the objections filed by the defendants and also on examination of the decree schedule with the sketch/plan and the report of the commissioner in juxtaposition. Unless the defects that are pointed out by the defendants are rectified, even if the final decree is passed, there would be complexity at the time of delivery of the property is fairly conceded by the learned counsel for the respondent/plaintiff. In that view of the matter, this Court is of the considered view that the order impugned in this revision is unsustainable and is liable to be set aside.

6. In the result, this Civil Revision Petition is allowed and the order impugned is set aside. The matter is remitted to the Court below for giving opportunity of hearing to both parties to make their submissions and to consider the objections of the defendants to the commissioner's report and passing appropriate orders; It is made clear that before passing appropriate orders in strict accordance with the procedure established by law, the Court below shall, if necessary, re-entrust the

warrant to the same commissioner for division of the properties in terms of the preliminary decree, after clarifying the ambiguity or confusion regarding the description of item No.1 of the plaint schedule property.

There shall be no order as to costs.

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

M. Seetharama Murthi, J

04th January, 2017
Bvv

