

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.5761 OF 2017

ORDER:

This revision petition is filed under Article 227 of the Constitution of India questioning the propriety and legality of the order dated 11.09.2017 in I.A.No.292 of 2012 in O.S.No.96 of 2010 passed by the Senior Civil Judge at Sathupally in allowing the application filed by the respondents under Order VI Rule 17 of C.P.C. permitting the amendment to add an item in the schedule of the property.

2. The respondents/petitioners-plaintiffs filed suit for partition and the petitioners raised an objection about the maintainability of the suit on the ground that suit for partial partition of property is not maintainable. But the respondents realized the mistake and filed the petition under Order VI Rule 17 of C.P.C. contending that due to oversight they did not include the land in item No.3 of the schedule property, which is sought to be included by way of amendment to the schedule.

3. The petitioners/respondents-defendants filed counter denying the material allegations made in the affidavit filed along with the petition *inter alia* contending that the land in Survey No.1385/AA to an extent of Ac.3.20 guntas of mango garden, which is situated at Vemsoor Village and Mandal, is not at all joint family property. It is a self-acquired property of late Arisepalli Gopalam, son of Lingaiah. During his lifetime an extent of Ac.2.00 guntas situated at Vemsoor Village and Mandal, purchased by his daughter Mysa Sakkubai from him on 01.02.2010 under a

registered sale deed bearing document No.416/2010 registered with the Sub-Registrar's Office, Sathupally, for a consideration of Rs.2,50,000/-. Since then, she has been in possession and enjoyment of the same in her own right. The said Gopalam gifted the land in Survey No.1385/AA of an extent of Ac.1.00 guntas to his daughter under a registered gift settlement deed bearing document No.675/2010, dated 10.02.2010 and the same was accepted by her. Since then, she has been in possession and enjoyment of the property in her own right. The property proposed to be added to the schedule is not the joint family property and it was the separate property of late Gopalam and in view of alienation of the property during his lifetime, the property is not available for partition. Therefore, the proposed amendment cannot be allowed and prayed for dismissal of the petition.

4. The trial Court upon hearing arguments of both the counsel, allowed the application on the ground that whether the property is ancestral or separate property of late Gopalam is a question to be decided during trial and at this stage, such question cannot be gone into and permitted the respondents-plaintiffs to add additional item to the schedule so as to acquire right in the property.

5. Aggrieved by the said order, the present revision is filed on various grounds mainly contended that when the suit is coming up for trial, the respondents-plaintiffs wanted to take away the valuable right that accrued to the petitioners-defendants and therefore, such amendment cannot be permitted at this stage in view of the dispute regarding nature of the property, which is

sought to be partitioned and the trial Court committed an error in allowing the petition and prayed to set aside the same.

6. Sri K.Lakshman, the learned counsel for the petitioners, reiterated the contention urged before the trial Court while raising a contention that the main suit itself is not maintainable as proper and necessary properties were not included. Apart from that the property proposed to be added to the schedule is the self-acquired property of late Gopalam, who alienated the property during his lifetime, thereby, the said property is not available for partition. At this stage, if that item is included in the schedule, the petitioners will be put to serious inconvenience to face the trial of the suit and prayed to set aside the impugned order, except the above contention no other ground is raised.

7. Considering the contentions of the learned counsel for the petitioners, the point that arises for consideration is: "Whether the order passed by the trial Court in I.A.No.292 of 2012 in O.S.No.96 of 2010 is in accordance with law, if not, liable to be set aside by exercising the power under Article 227 of the Constitution of India?"

POINT:

8. As seen from the material available on record, the respondents-plaintiffs filed the suit for partition claiming partition of various items of the property shown in the schedule i.e., item Nos.1 and 2. The petitioners-defendants filed written statement raising specific plea that the other properties of joint family were not included in the schedule, thereby, the respondents-plaintiffs

are disentitled to claim partition of the property. No doubt, the trial Court after completion of pleadings, framed issues and one of the issues is about the maintainability of the suit for partition without including all joint family properties. If that is the case, the respondents, being the plaintiffs in the suit, are entitled to add the additional properties, since the proposed amendment would not change the nature of the suit and not take away the valuable right that accrued to the petitioners. Therefore, claiming relief under Order VI Rule 17 of C.P.C. by the respondents is not strictly prohibited, but even as per the amended procedure of C.P.C. for obtaining order under Order VI Rule 17 of C.P.C., the petitioners are required to prove that despite exercise of due diligence, the respondents could not amend the plaint. Here also, the respondents explained the reasons for their failure to include the proposed item in the schedule of the property, but now they realized the availability of other properties belonging to late Gopalam and filed the petition. Therefore, the explanation offered by the respondents for their failure to include the proposed item of the property in the schedule at the time of filing of suit is sufficient.

9. The other contention raised by the learned counsel for the petitioners is that the proposed inclusion of property was self-acquired of late Gopalam and during his lifetime he sold and gifted the entire property to his daughter both under registered sale deed and gift deed respectively thereby, the said property cannot be included in the schedule in a suit for partition. According to the contention of the petitioners, Ac.2.00 guntas of property was sold under registered sale deed dated 01.02.2010

bearing document No.416/2010 for Rs.2,50,000/- and another extent of Ac.1.00 guntas was gifted to his daughter by late Gopalam during his lifetime on 10.02.2010 vide document bearing No.675/2010, delivered possession of the property to his daughter. Since then, she has been in continuous possession and enjoyment of the same in her own right thereby, she would get right only subject to litigation and when the respondents are contending that the property is the joint family property, it is for them to establish during trial that it belongs to the joint family and liable for partition. At this stage, the Court cannot decide the nature of property and whether such property is liable for partition or not. If for any reason, the respondents-plaintiffs fail to establish that the property is the joint family property, then the purchaser under sale deed and donee under the gift deed will get absolute rights as purchaser and donee under two documents referred supra. But at the stage of deciding the application filed under Order VI Rule 17 of C.P.C., this Court cannot decide the nature of property, whether it is self-acquired or the ancestral property of late Gopalam. Therefore, the trial Court rightly postponed the decision as to the nature of the property and such finding cannot be interfered with by this Court while exercising jurisdiction under Article 227 of the Constitution of India, which is supervisory in nature. Therefore, I find no error in the order passed by the trial Court. However, it is left open to the petitioners to raise the contention that it was the self-acquired property of late Gopalam and he had absolute right to execute a sale deed and gift deed in favour of Mysa Sakkubai.

10. Hence, giving liberty to the petitioners to raise the pleas stated above, the Civil Revision Petition is dismissed at the stage of admission. There shall be no order as to costs.

11. Consequently, Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

M.SATYANARAYANA MURTHY, J

Date: 29.11.2017
Ivd

