

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P.No.3391 OF 2012

ORDER:

This revision petition is filed under Section 115 C.P.C. challenging the order dated 08.06.2012 passed in E.A.No.378 of 2011 in E.P.No.118 of 2006 in O.S.No.250 of 2001 by the Junior Civil Judge, Kaikaluru, Krishna District appointing advocate commissioner with a direction to determine E.P. schedule property i.e. Ac.0.06 cents out of Ac.0.09 cents in R.S.No.1058/7 of Guravaipalem Village with the assistance of Mandal Surveyor, Kalidindi accompanied by Field Assistant of the Court and if he found the alleged fencing was constructed within E.P. schedule property, show the same to the Field Assistant of the Court for removal as directed by the Court.

The respondent herein filed petition for appointment of advocate commissioner contending that he is in possession of 0.03 cents of land out of 0.09 cents and in fact, the Court below passed decree and the same was affirmed by the appellate Court, but still he raised contention that he is in possession of 0.03 cents out of 0.09 cents of land described in the schedule annexed to the plaint and sought for appointment of advocate commissioner for the purpose of dividing 0.06 cents out of 0.09 cents in terms of delivery warrant entrusted to the Court Ameen.

Learned counsel for the petitioners opposed the same contending that this issue has already been raised and decided by the Courts below and it is not open to the respondent to raise such issue before executing Court and prayed for dismissal of the petition.

The suit schedule property is an extent of 0.09 cents shown in the schedule annexed to the plaint. The Junior Civil Judge, Kaikaluru decreed the suit i.e. O.S.No.250 of 2001 in their favour granting perpetual injunction. The said judgment and decree was challenged in A.S.No.7 of 2001 before the I Additional District Judge, Machilipatnam, which was ended in dismissal in favour of the petitioners and it is curious to note that the appellate Court also framed points for consideration with regard to the dispute regarding 0.02 cents of land in R.S.No.1058/10 as claimed by the defendant and also about the right of the petitioners in an extent of 0.06 cents land in R.S.No.1058/7 and also with regard to the possession of 0.09 cents by the petitioners in the same survey number vide Point No.5. The appellate Court answered Points 1 to 5 in favour of the petitioners and against the respondent. When these issues were raised and decided by the Courts below, this respondent is not entitled to raise same contentions in the execution petition having suffered a finding before the appellate Court and the trial Court and that this contention cannot be entertained by the executing Court and that appointment of advocate commissioner is illegal since it is hit by principles of *resjudicata* in view of the explanation VII of Section 115 C.P.C., but the executing Court did not consider the specific plea raised by the petitioners in the counter regarding bar of claim by principles of *resjudicata* and committed an error. When the impugned order passed by the executing Court is erroneous and passed exercising jurisdiction not conferred on it, this Court can exercise jurisdiction under Section 115 C.P.C. and consequently, the impugned order is liable to be set aside.

In the result, the civil revision petition is allowed setting aside the order dated 08.06.2012 passed in E.A.No.378 of 2011 in E.P.No.118 of 2006 in O.S.No.250 of 2001 by the Junior Civil Judge, Kaikaluru, Krishna District. There shall be no order as to costs.

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

JUSTICE M. SATYANARAYANA MURTHY

16.03.2018
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