

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.2796 of 2017

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful petitioners/ defendants 14, 15 & 16 is directed against the orders, dated 22.03.2017, of the learned I Additional Senior Civil Judge, Ranga Peddy District at L.B.Nagar, passed in I.A.No.551 of 2016 in I.A.no.1507 of 2013 in O.S.no.471 of 1987.

2. I have heard the submissions of *Sri P. Sri Raghu Ram*, learned senior counsel appearing for *Sri P.Sri Ram*, learned counsel for the petitioners 1 to 3; *Sri Sunil B.Ganu*, learned counsel appearing for the 3rd petitioner, with the consent of the learned counsel for the said petitioner; *Sri M.V.S Suresh Kumar*, learned senior counsel appearing for *Sri M.V.Pratap Kumar & A.Srinivasa Rao*, learned counsel appearing for the respondents 2 to 7; *Sri Dantu Srinivas*, learned counsel for respondent no.9; *Sri M.A.K.Mukheed*, learned counsel for respondent no.16; and of *Sri V.L.N.G.K.Murthy*, learned senior counsel appearing for *Sri P.Nageswara Rao*, learned counsel appearing for respondent nos.18, 20 & 21. I have perused the material record.

3. The parties shall hereinafter be referred to as arrayed in this civil revision petition and also as originally arraigned in the suit, for convenience and clarity.

4. To begin with it is necessary to state the introductory facts, which are as follows: 'The petitioners 1 and 2 herein are the defendants 14 and 15 in the aforestated original suit. The sole plaintiff/ Khader Nawaz Khan (since died) brought the suit for partition initially against defendants 1 to 12 for partition of the property, that is, land in Sy.nos.41, 42 & 43 admeasuring Ac.49.24 guntas at Kokapet village and for allotment of 1/4th share to him. The plaintiffs 2 to 7, that is, respondents 2 to 7 are his wife and children. The trial Court dismissed

the suit. While the sole plaintiff's appeal was pending, 13th defendant/ Syed Hussain Shaw was impleaded. The first appeal, A.S.no.734 of 1991, was allowed by this Court, by judgment, dated 25.01.1996, and the suit for partition was preliminarily decreed allotting 1/ 4th share to the said plaintiffs 2 to 7. 12th defendant/ 19th respondent/ Sri Hari (since died) preferred LPA 72 of 1996 before this Court. A Division Bench of this Court dismissed the said LPA, on 29.12.1998. His review petition in Review CMP no.3830 of 1999 was allowed, on 13.08.2001, and the judgment of the Division Bench in the above LPA was recalled. Thereafter, the plaintiffs 2 to 7 (LRs of deceased sole plaintiff) filed SLP (Civil) 22591 of 2001 assailing the said orders passed in the review CMP. The said SLP was allowed by the Supreme Court, by order, dated 10.02.2003, giving liberty to challenge the original order, dated 29.12.1998, in LPA 72 of 1996. The SLP (Civil) CC 2962 of 2003 was again filed by the 12th defendant against the original orders in the said LPA. The same was dismissed, on 07.04.2003, by a Bench of three Hon'ble Judges of the Supreme Court. Thus, the preliminary decree and judgment of this Court in A.S.no.734 of 1991 stood confirmed and became final. Thereafter, the 11th defendant and the 10th defendant filed A.S.M.P.nos.1188 of 2004, 1098 of 2005 and 1099 of 2005 in A.S.no.734 of 1991 seeking separation and allotment of their respective shares. This Court had allowed the said petitions by a common order, dated 21.04.2005. Accordingly, the preliminary decree in A.S.no.734 of 1991 was amended allotting a half share to the 10th and the 11th defendants and 1/ 4th share to the plaintiffs 2 to 7/respondents 2 to 7 herein. The 12th defendant/ 19th respondent herein having been aggrieved of the said common order, dated 21.04.2005, had filed SLP (civil) 7734 of 2006 before the Supreme Court. Though *status quo* orders were granted earlier, later the *status quo* orders were vacated. The original extent of the plaint schedule land was Ac.49.24 guntas. It was purchased by one Khader Hussain Khan under a registered sale deed. He died in 1352 Fasli as a bachelor leaving behind him,

his sister Shahejadi Bee and his step brothers, namely, Feroz Khan and Khader Nawaz Khan (the deceased 1st plaintiff/ 1st respondent herein). The defendants 10 and 11 are the sons of the said Shehadjadi Bee and the defendants 2 to 9 are the legal representatives of Feroz Khan. But, the 12th defendant claimed that Feroz Khan, who is the husband of the 1st defendant and the father of the defendants 2 to 9, had executed an agreement of sale in respect of Ac.38.25 guntas in Sy.nos.41, 42 and 43 and that the said Feroz Khan had also executed a sale deed, dated 04.10.1969, in respect of Ac.21.00 guntas in Sy.nos.41 and 42 in his favour. The plaintiffs contended that the 12th defendant in collusion with the defendants 1 to 9 had filed O.S.no.164 of 1984 and that the said suit was decreed. The plaintiffs are in no way concerned with the decree and the judgment in the said suit as they are not parties to the said suit and that in view of the judgment and decree in A.S.no.734 of 1991, the defendants 12, 13 and 14 cannot claim any better right and title than what Feroz Khan has got in the subject matter of the suit. Eventually, the preliminary decree had attained finality by virtue of the orders aforesaid of the Supreme Court. During the pendency of the civil proceedings, the 12th defendant had executed a registered sale deed in favour of the defendants 13 and 14. The plaintiffs contend that therefore, the said sale deeds are hit by the principle enshrined in the doctrine of *lis pendens*. Now final decree proceedings are initiated. Hence, the application in I.A.no.1507 of 2013 was filed by the respondents 2 to 7 herein, who are the plaintiffs 2 to 7 (LPs of the original plaintiff) seeking appointment of an Advocate Commissioner for partition of the property in terms of the preliminary decree (as amended). That application was allowed by the trial Court, by its orders, dated 11.08.2015. That order of the trial Court has become final after this Court dismissed CRP no.4219 of 2015, by orders, dated 29.07.2016. In the above said orders, it was also observed that it is not necessary to go into the merits of the matter as the trial Court left open

the issue in regard to working out of equities, if any, that may be claimed. The Commissioner executed the warrant and filed his report.

5. The present application, I.A.no.551 of 2016, is filed by the defendants 14 and 15 requesting to summon the Advocate Commissioner for the purpose of cross-examination. The case of the defendants 14 and 15 in support of the said request is as follows: 'The Advocate Commissioner submitted his report on 20.10.2016. The said defendants filed their objections to the report of the Commissioner. The Commissioner did not act fairly and discharge his duties properly as he was under the influence of the decree holders and colluded with them. Playing to the tunes of the decree holders, he filed a one sided report contrary to the record and it shows non-application of his mind. The Commissioner failed to see that the defendants 14 and 15 along with the 16th defendant are having absolute possession of Ac.49.13 guntas and that in that said property, they constructed a resort way back in the year 1994 and that the same is having cottages, conference halls, restaurants, swimming pools, farm houses, go-karting track, banquet halls etcetera. Photographs and a compact disc showing the schedule property are filed along with the affidavit filed in support of the petition. In the circumstances, the subject petition is filed to summon the Advocate Commissioner for cross-examination on behalf of the said defendants 14 and 15.'

6. The case of the plaintiffs 2 to 7, who are the legal heirs of the deceased sole plaintiff, in brief, is this: 'The material allegations in the affidavit filed in support of the petition are false and the same are denied. The Commissioner is supposed to follow the directions in the warrant and is not expected to record whatever the defendants 14 and 15 seek to be recorded. The Commissioner duly executed the commission warrant and filed his report. The petition is devoid of merit and is liable for dismissal.'

7. The other respondents have not filed any counters.

8. As noted, the trial Court by the order impugned dismissed the subject petition with costs. Hence, the defendants 14, 15 & 16 are before this Court.

9. Learned senior counsel appearing for the parties reiterated the pleaded cases of the respective parties.

10. The only contention in the affidavit filed in support of the subject petition is that the Commissioner colluded with the opposite parties and filed a one sided report.

11. However, during the course of arguments, *Sri P.Sri Raghu Ram*, learned senior counsel appearing for the petitioners contended as follows: 'None of the sharers in the partition suit are in physical possession and therefore, the Commissioner visiting the property which is in the exclusive possession of the revision petitioners and filing a report for division of the property as per the terms of preliminary decree does not arise. It is imperative for the Commissioner to note down the physical features as the same, if noted, would show that the revision petitioners are in exclusive possession of the entire property. The issue decided by the Supreme Court is in respect of preliminary decree and the entitlement of the parties to such a decree. But, the present issue for consideration is the exclusive physical possession of the revision petitioners over the property, which is not the issue involved in the earlier stages up to the stage of passing of the preliminary decree. The photographs and CD show the exclusive possession of the revision petitioners over the subject property.'

11.1 In reply, *Sri V.L.N.G.K.Murthy* and *Sri M.V.S.Suresh Kumar*, learned senior counsel, and *Sri M.A.K.Mukheed*, learned counsel appearing for the contesting respondents would contend that the preliminary decree has become final and that the property is to be partitioned as per the terms of the preliminary decree and the Commissioner is appointed for the purpose of

division of the property and filing a report to facilitate passing of a final decree in terms of the preliminary decree. Therefore, the above said contentions regarding physical possession are untenable. They also contended and pointed out that the above contentions which were also earlier raised were rejected by the Supreme Court.

11.2 Dealing with the above contentions with regard to exclusive physical possession, it is to be first noted that by virtue of the orders of the Supreme Court, the preliminary decree had attained finality. The Supreme Court confirmed the amended preliminary decree is not in dispute. The contentions, which are now raised were earlier raised before the Supreme Court and also before this Court in C.R.P.no.4219 of 2015, which is filed assailing the orders of the trial Court in I.A.no.1507 of 2013 whereby, the Advocate Commissioner was appointed. The Supreme Court, while confirming the preliminary decree and the common order of this Court referred to supra, had rejected all the said and other contentions. This Court dismissed the aforestated CRP having adverted to the orders of the Supreme Court. A perusal of the amended preliminary decree makes it clear that the plaintiffs 2 to 7 (the LRs of the deceased sole plaintiff) are entitled to a 1/4th share and the legal representative of Feroz Khan (i.e., defendants 1 to 9) are entitled to a 1/4th share and the 11th and 13th respondents herein are entitled to a half share in the preliminary decree schedule property. Now, the preliminary decree has to be executed as it stands and a final decree has to be passed in terms thereof. The law is well settled that the Court below while giving effect to the preliminary decree cannot go beyond the said decree. The 12th defendant (since died) is a party to the proceedings at various stages and the revision petitioners/ defendants 14 and 15, who are already impleaded as party respondents to the *lis* are claiming that they purchased the property from the 12th defendant. They are purchasers *pendente lite* from another purchaser. The law is well settled that any decree or a preliminary decree would be binding not only on the parties but also on

the representatives of the parties and the third parties claiming through the parties to the *lis*. The order appointing an Advocate Commissioner to effect partition of the preliminary decree schedule properties in terms of the preliminary decree (as amended) has become final with the dismissal of CRP 4219 of 2015 by this Court and confirmation of the orders of the trial Court in I.A.no.1507 of 2013 filed seeking appointment of an Advocate Commissioner for the above said purpose. Hence, the revision petitioners cannot be heard to say that the Commissioner cannot enter the schedule property and execute the warrant entrusted to him by the trial Court. Hence, the said contentions stand rejected.

12. Dealing next with the pleaded contentions that the Commissioner did not act fairly and discharge his duties properly and that he was under the influence of the decree holders and that he colluded with them and that he played to the tunes of the decree holders and that he filed a one-sided report contrary to the record and that it shows non-application of his mind etcetera, what is to be noted is that except making such allegations in the affidavit, no instances much less specific instances are pointed out and averred in the affidavit filed in support of the petition filed by the revision petitioners before the trial Court. Mere such assertions without specifically pointing out any instances in support of such contentions are of no avail. Any amount of argument before this Court without any basis in the pleading is also of no avail. The revision petitioners are not supposed to make bald allegations against an Advocate Commissioner, who is an officer of the Court, without laying any foundation in the affidavit. *Sri Sunil B.Ganu*, learned counsel appearing for the 3rd revision petitioner, that is, Ch.Niveditha Reddy, contended forcefully that the Advocate Commissioner first filed a report with a plan and that after the same is returned by the trial Court, the Commissioner filed additional plans and that the same are taken on record by the trial Court and that it remains unexplained as to how those plans came to be prepared when originally the

said plans were not prepared at the time of execution of the warrant. *Sri P.Sri Raghu Ram*, learned senior counsel for the revision petitioners would contend that a part of the property, that is, about three acres, was occupied by CBIT and the Commissioner failed to take note of the same. Hence, the learned senior counsel contended that the Commissioner did not act in a fair manner. In reply, *Sri V.L.N.G.K.Murthy*, and *Sri M.V.S Suresh Kumar*, learned senior counsel, appearing for the contesting respondents herein rightly pointed out that in the affidavit filed in support of the subject petition, no such contentions are raised and that the suit for partition is of the year 1987 and that the revision petitioners 1 and 2, who are purchasers *pendente lite* knowing fully well all the facts, deliberately purchased the property, which is the subject matter of a suit for partition and made developments during the pendency of the proceedings at their own peril and that since they are purchasers in turn from a purchaser, they are not even entitled to any equities and that in the objections filed none of the plans were specifically disputed by the revision petitioners and that the contentions for the first time raised before this Court without any basis are untenable. On behalf of the contesting respondents 2 to 7/plaintiffs 2 to 7, it is also contended that if the revision petitioners allowed an encroacher to encroach a part of the property, they should only suffer the consequences and not the plaintiffs 2 to 7. Learned senior counsel and the other learned counsel finally contended that the petition filed to summon the Advocate Commissioner for cross-examination is intended to delay the proceedings by holding to the last straw and that the order of the trial Court rejecting the request of the revision petitioners is a well-reasoned order and that therefore, the same brooks no interference.

12.1 I have given earnest consideration to the submissions and I have carefully gone through the copies of sets of objections filed to the Commissioner's report by defendants 14 & 15 and defendant no.16, which are placed on record. The Commissioner was assisted by a Mandal Surveyor. The

Commissioner filed report with plans, including a location sketch, showing extents of various portions of the suit schedule property in Sy.nos.41, 42 & 43 and his report with plans on a perusal indicates that the survey work was done by the Mandal Surveyor with the help of village map in so far as Sy.no.41 and with the help of tippons and village map in so far as Sy.nos.42 & 43. The sketch also indicates that Ac.00.24 guntas shown in yellow colour was allotted to internal roads as per mutual understanding of the share holders. The sketch is in three parts, that is, Orange, Green and Blue colours. The Commissioner showed different extents of lands and also the internal roads in different colours. The Mandal Surveyor noted in the sketch that the same is prepared as per the directions of the Commissioner in the presence of petitioners and respondents. The revision petitioners 1 & 2/defendants 14 &15 and the 3rd revision petitioner did not specifically say what internal measurements noted by the Advocate Commissioner are incorrect. In fact, in the affidavit, they did not dispute specifically any measurements either external or internal or the physical features noted in the plans submitted by the Advocate Commissioner to the trial Court. Even before this Court, the revision petitioners could not point out as to what internal measurements noted in the plans of the Commissioner are incorrect except baldly stating that the plans are filed later. The constructions were made by the defendants 14 & 15 deliberately and intentionally during the pendency of the partition suit proceedings and with full knowledge that any such acts would be subject to the final result in the suit. Hence, such acts will not clothe the said defendants with a right to dictate terms simply because they developed the property into a resort, way back, in the year 1994, that is, during the pendency of the suit. The sale and the purchase transactions during the pendency of the suit for partition are directly hit by the principle of *lis pendens* envisaged under Section 52 of the Transfer of Property Act, 1882, and hence, parties to the partition suit are at liberty to work out their *inter se* rights in accordance with law as per the

preliminary decree (as amended). The view of this Court finds support from the decision of the Supreme Court in Nadiminti Suryanarayan Murthy (dead) through LRs v. Kothurthi Krishna Bhaskara Rao¹. The trial Court noted in its orders that the Commissioner executed the warrant in accordance with the directions in the warrant and that there is no violation of the directions in the warrant and that the revision petitioners failed to establish a *prima facie* case and that there is no merit in their request to summon the Advocate Commissioner for cross-examination. This Court after a careful consideration of the facts & submissions and for all the reasons assigned supra finds itself in agreement with the conclusion of the trial Court that this application to summon the Advocate Commissioner for cross-examination on the bald allegations that the Commissioner did not act fairly in the matter etcetera is misconceived and is liable for dismissal. Accordingly, this Court finds that this revision petition is liable for dismissal.

13. Before parting, it is to be noted that *Sri M.V.S Suresh Kumar*, learned senior counsel appearing for the respondents 2 to 7 relied upon a decision in *Damodar Reddy (Died through LRs) v. M.Mohan Reddy and others*² in support of the contention that an Advocate Commissioner appointed for effecting partition of the preliminary decree schedule property and filing a report with the plan shall not be subjected to cross-examination. Per contra, *Sri Sunil B.Ganu*, learned counsel appearing for the 3rd revision petitioner relied upon a decision in *Sharada Bai and others v. Satyanaryan Peeti (died) by LRs and others*³ in support of the contention that a Commissioner can be summoned for cross-examination. Since, on facts, this Court found that this is not a fit case to summon the Advocate Commissioner for the purpose of cross-examination, there is no need to further dilate on the ratios in the cited decisions.

¹ 2017 (9) SCC 622 E

² AIR 2007 AP 31

³ 2017 (2) ALD 232

14. In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

However, considering the fact that the suit is several decades old, it is needless to state that the trial Court shall proceed further in the matter and complete the further proceedings, in accordance with the procedure established by law, however, as expeditiously as possible and preferably within three weeks from the date of receipt of a copy of this order.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

18th January, 2018

Note: - Issue CC by 22.01.2018
(B/o)
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