

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

C.C.C.A. No.176 of 2017

JUDGMENT :

The appellants are the plaintiff and defendant Nos.8 and 10 of O.S.No.441 of 1984. The appeal maintained is against the order in I.A.No.304 of 2015, dated 24.04.2017. The respondents to the appeal are other defendants to the suit including the legal heirs of some of the defendants died.

2. The grounds urged in the appeal impugning the said order, dated 24.04.2017, are that the impugned order is passed by the learned IV Additional Senior Civil Judge, City Civil Courts, Hyderabad, is not in compliance with the orders of the High Court in C.C.C.A.No.94 of 1996 and C.C.C.A.No.139 of 2000, dated 20.03.2015, and out come of wrong understanding of the material on record, that had the lower Court allotted $5/84^{\text{th}}$ share each to the plaintiff and defendant Nos.8 to 10, it would be crystal clear that in 'B' schedule property, the parties allotted to the eastern side would not have any ingress or egress and it would also clear that there was proper logic in the parties requesting for western side portion of the 'B' schedule property. Allotting $20/84^{\text{th}}$ share to the plaintiff and defendant Nos.8 to 10 is not in strict compliance with the order of the High Court supra, for the lower Court is bound to allot $5/84^{\text{th}}$ share to the plaintiff and defendant Nos.8 to 10. It is also contended that although the allotment of western side portion is proper as regards to 'A' schedule property, the lower

Court ought to have divided the same into 5/84th share each and should have demarcated the portions falling to the share of the plaintiff and defendant Nos.8 to 10, rather allotting enmasse of 20/84th share by leaving the parties to further litigation is untenable.

3. Besides, for 'A' 'B' schedule properties, what is contended supra in the grounds, it is further contended that defendant Nos.2 to 6 have to render true and correct account of income from 'A' schedule property as the High Court directed them to do so and the lower Court did not address this issue in the final decree proceedings despite plaintiff and defendant Nos.8 to 10 brought to the notice of the trial Court, this aspect regarding payment of rents/profits when the record of the trial Court clearly shows the tenants paying rents that were collecting by defendant Nos.2 to 6.

4. The observation of the trial Court that the petitioners of the final decree proceedings contended of no objection to relinquish the A.C. sheet roof situated towards the eastern side portion of 'B' schedule property, that may be utilized by respondent Nos.1, 8 to 10 is unsupportable, for there is no such structure in the 'B' schedule property in existence, for it was a dilapidated condition, that no one living in it. It is also contended, the lower Court did not properly considered the sketch plans submitted by Sri K.Pradeep Kumar, Advocate, when all the parties filed their objections.

5. Heard both sides at length and perused the material on record.

6. It is not in dispute of the preliminary decree in O.S.No.441 of 1984 speaks of the plaintiff is entitled to $1/7^{\text{th}}$ share and defendant Nos.2 to 6 render account of the income from 'A' schedule property as per the decretal order. In the appeals filed against the said preliminary decree judgment, dated 10.04.1996, passed by the IV Additional Senior Civil Judge, City Civil Court, Hyderabad, i.e., C.C.C.A.No.94 of 1996 filed by defendant No.11 to 15 and C.C.C.A.No.139 of 2000 filed by defendant Nos.2 to 6, it is observed that the plaintiff and defendant Nos.8 to 10 are entitled to $5/84^{\text{th}}$ share each in 'A' and 'B' schedule properties. So far as 'B' schedule property in the joint possession and enjoyment of all legal heirs of deceased Rama Swamy, the High Court held question of deriving any income from 'B' schedule property does not arise. However, so far as 'A' schedule property concerned, defendant Nos.2 to 6 are in enjoyment of the 'A' schedule property and derived income therefrom by letting out the same, they are under obligation to render true and correct account of income from 'A' schedule property and pay the $5/84^{\text{th}}$ share each to the plaintiff and defendant Nos.8 to 10 from the date of decree till delivery of possession and plaintiff is at liberty to file application for ascertainment of the income from 'A' schedule property against defendant Nos.2 to 6. It is also observed by the High Court in the common judgment supra that defendant Nos.2 to 6 entitled to $32/84^{\text{th}}$ share and defendant Nos.11 to 15 entitled to $32/84^{\text{th}}$ share, which is the remaining after $20/84^{\text{th}}$ share put together of

plaintiff and defendant Nos.8 to 10 at 5/84th share each, in saying parties are at liberty to apply for partition of the final decree for division and profits respectively. It is consequent to the doctrine of merger of the trial Court's and lower appellate Court's decree to final decree for division of the properties and profits to be passed and so far as I.A.No.304 of 2015 concerned, it is filed for division of properties pursuant to the High Court's common judgment, dated 20.03.2015, (supra), said application is filed by defendant Nos.11 to 15 only for separation of their 32/84th share. What the lower Court observed in passing the impugned order particularly from para 8 of the impugned order, that 'A' schedule property is in an extent of 927.27 sq. yards undisputedly and 'B' schedule is in an extent of 750 sq. yards undisputedly. It is observed at para 8(b) that plaintiff and defendant Nos.8 to 10 are not in physical possession of the 'A' schedule property. Defendant Nos.12 to 15 agreed and willing to take eastern side of 'A' schedule property subject to allotment of the western side of 'B' schedule property as they are residing by raising pucca constructions and compromise took place between the parties basing on the mutual consent and defendant Nos.12 to 15 filed rough sketch plan with memo to allot the western side of 'B' schedule property to defendant Nos.12 to 15 shown in the rough sketch plan in Green colour and to allot Yellow colour marked to the rough sketch to the share of respondent Nos.2 to 6/defendant No.2 to 6 and red colour marked to the shares of respondent Nos.1, 8 to 10 (plaintiff and

defendant Nos.8 to 10). The counsel for the petitioners in the final decree stated no objection to relinquish the A.C. sheet roof situated towards eastern side of 'B' schedule to utilize by plaintiff and defendant Nos.8 to 10. It is observed there is no dispute of defendant Nos.12 to 15 are residing in western side portion of 'B' schedule property, the western portion of 'A' schedule is allotted to plaintiff and defendant Nos.8 to 10, which is having two side roads and said property on ground is squarely and clearly located as per the understanding arrived by parties irrespective of Commissioner in his report shown for plaintiff and defendant Nos.8 to 10 eastern side of 'A' schedule, adjacent to the school building.

7. Coming to the 'B' schedule property, the proposal of plaintiff and defendant Nos.8 to 10 to allot for western side of 'B' schedule property shown in their plan is rejected as it is against the principles of equity in its consideration on metes and bounds to have unfair advantage, therefrom held allotted Yellow colour portion, filed by defendant Nos.2 to 6 in respect of 'A' schedule property, to defendant Nos.12 to 15 of 353.29 sq. yards= $32/84^{\text{th}}$ share, green colour portion to defendant Nos.2 to 6 property of such 'A' schedule of 353.29 sq. yards= $32/84^{\text{th}}$ share and the red colour portion to the plaintiff and defendant Nos.8 to 10 (respondent No.1 and 8 to 10) of 220.69 sq. yards is $20/84^{\text{th}}$ share.

8. Even in the ground of appeal supra, so far as 'A' schedule property concerned, allotment of the red marked portion, there is no

dispute, but for saying instead of saying 20/84th share to the plaintiff, defendant Nos.8 to 10 together, the trial Court should have been directed the Commissioner to divide the same to each of them of 5/84th share. In fact, it is not their application wherein the division was effected and if at all they want, they can file, by virtue of this order, a fresh application out of red marked portion of 'A' schedule property of 220.69 sq. yards to sub-divide and separate 1/4th share of each of them.

9. So far as the profits on the 'A' schedule property concerned, the present application filed by defendant Nos.11 to 15 for division of the properties. Therefore, it is left open to the plaintiff and defendant Nos.8 to 10 to ask for determination of profits by filing application under Order XXVI Rules 13 and 14 read with Order XX Rule 18 C.P.C. by appointment of Advocate Commissioner to enquire into the profits and to fix for their respective shares each.

10. So far as 'B' schedule property concerned, the main impugment is, for the Court not considered to allot eastern side portion out of 'B' schedule property as sought by the appellants herein/plaintiff and defendant Nos.8 to 10. In this regard this Court after elaborate hearing on 29.03.2018 passed the following interim order:

“At request of counsel for petitioner, post under the caption 'for orders' on 06.04.2018, for any further submissions with reference to page No.113-A of the petitioners material

papers, equal to page No.27 of the respondents material papers in relation to B-schedule property allotment regarding the so-called non providing of right of way, when southern side passage road is very clear. For no dispute, according to both sides, in the allotment in so far as A schedule concerned leave about what the 20/84 share allotted from this Court's common decree and judgment dated 20.03.2015 of plaintiff gets 5/84 and defendants 8 to 10, each gets 5/84 and in the commissioner's report from the final decree petition for allotment of shares by division of properties applied other than by them, their 20/84 share shows it is left open to the plaintiff and defendants 8 to 10 if at all for internal division out of the 20/84 share into 5/84th share for the four of them each.

Interim order granted earlier by this Court stands extended in the meantime.

Post on 06.04.2018.”

It is now in continuation to it, from what the appellants/plaintiff and defendant Nos.8 to 10 contended of the requirement to direct the lower Court to consider the plan in relation to 'B' schedule property covered by '3B', which was filed by Sri Pradeep Kumar, Advocate Commissioner, after hearing both sides as to the viability from availability of passage in respect of 5/84th share each of plaintiff and defendant Nos.8 to 10 in so far as 'B' schedule property concerned.

11. With these observations, the appeal is allowed directing the lower Court to consider only in relation to 'B' schedule property so far as availability of passage, in respect of 5/84th share concerned, for division and decide within three months from the date of receipt of a copy of this judgment.

Miscellaneous petitions pending, if any, shall stand closed. No costs.

Dr. B. SIVA SANKARA RAO, J

9th April 2018

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