

**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CIVIL REVISION PETITION No.4096 of 2011**

**ORDER:**

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed challenging the Order dt. 18.08.2011 in I.A.No.289 of 2006 in O.S.No.18 of 1981 passed by the Senior Civil Judge, Gudur, appointing an Advocate Commissioner for the purpose of dividing the decree schedule property in terms of preliminary decree and file a report.

Respondent No.1 herein/plaintiff filed suit No.18 of 1981 and obtained preliminary decree for partition and thereafter he filed a petition under Order 26 Rule 13 CPC to appoint an Advocate Commissioner to partition/divide the schedule property in terms of preliminary decree.

Respondent No.1 therein filed Counter denying the right of the petitioner to claim appointment of Advocate Commissioner being a purchaser during *pendent lite* and the property was orally divided into six equal shares and the petitioner was allotted 4/6<sup>th</sup> share as he purchased the same from the other original sharers and hence, the petition is not maintainable.

Respondent No.3 therein filed separate counter, which was adopted by Respondent No.2 by filing a memo, disputing the *locus standi* of the petitioner to file an application for appointment of Advocate Commissioner being purchaser after passing preliminary decree without prior permission of this Court and that the suit in O.S.No.28 of 2004 on the file of III Additional District Judge, SPSR Nellore District, for declaration and possession of the property that filed by him against respondent Nos. 2 and 3, was dismissed for default and thereafter a petition in I.A.No.289 of 2006

was filed to set aside the default Order and it is pending for adjudication and prayed to dismiss the petition.

The trial Court after hearing both the counsel, relying on the judgment of Apex Court in *Khemchand Sankar Chowdary and another v. Vioshnu Hari Patel and others*<sup>1</sup>, appointed an Advocate Commissioner for the purpose raised in the petition for dividing the property in terms of preliminary decree.

The petitioners herein/respondent before the trial Court being aggrieved by the Order filed this Revision under Article 227 of the Constitution of India on the main ground that suit in O.S. No.28 of 2004 was filed before III Addl. District Judge, Nellore, and this Court granted stay of delivery of possession in the said suit in the first appeal and thereby the Advocate Commissioner cannot be appointed for division of the property in terms of the preliminary decree and that the petitioner is a 3<sup>rd</sup> party purchaser, after passing preliminary decree, is not entitled to claim such relief.

During hearing, learned counsel for the petitioners reiterated the contentions mentioned in the grounds of revision.

The present petition is filed only for dividing the property in terms of the preliminary decree appointing an Advocate Commissioner under Order 26 Rule 13 CPC since the petitioner was 6<sup>th</sup> defendant in the main suit, who purchased the share of 1<sup>st</sup> defendant after passing preliminary decree and now claiming division of the property in terms of preliminary decree and allot the property, which he purchased, claiming equities by appointing an Advocate Commissioner. The petitioner though 6<sup>th</sup> defendant in the main suit, who purchased the share of Defendant No.1, became entitled to get the share of himself and 1<sup>st</sup> defendant being the

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<sup>1</sup> AIR 1993 SC 124,

purchaser of the property, which is in dispute. Therefore, the petitioner being 6<sup>th</sup> defendant in the main suit having purchased the share of 1<sup>st</sup> defendant is entitled to claim appointment of Advocate Commissioner in view of the judgment of the Apex Court referred above, wherein the Apex Court held that “ the transferees during the pendency of a suit for partition of parts of an estate assessed to payment of land revenue to the Government which is the subject matter of the suit have *locus standi* to appear before the revenue authorities in proceedings u/s 54 and asked for an equitable partition of the lands even though they had not been impleaded as parties to the suit in the civil Court.

But here, the situation is better than the facts of the above judgment for the reason that the petitioner was 6<sup>th</sup> defendant in the suit before the trial Court, who purchased the share of 1<sup>st</sup> defendant also after passing preliminary decree and therefore he is entitled to seek relief under Order 26 Rule 13 CPC as he is a party to the suit. Therefore, the contention that the petitioner being a purchaser of the share of 1<sup>st</sup> defendant not entitled to seek the relief under Order 26 Rule 13 CPC is turned down and on this ground, the petition filed before the trial Court cannot be dismissed.

The second ground urged before this Court is that in view of the stay granted by this Court in A.S No.952 of 2010 against the decree and judgment in O.S.No.28 of 2004 on the file of III Additional District Judge, SPSR Nellore, the commissioner cannot be appointed. According to the ground No.2 of the grounds of revision, this Court granted stay of delivery of possession of the schedule property in O.S.No.28 of 2004. Even assuming for a moment that the property in both the suits is one and the same, the delivery of possession alone stayed, but not otherwise. Therefore, there is no impediment to appoint Advocate Commissioner for

division of the property in terms of the preliminary decree and the Order of stay will come in the way of delivery of possession alone. Hence, the alleged stay of delivery of possession passed by this Court in A.SNo.952 of 2010 is not a ground to deny the relief claimed under Order 26 Rule 13 CPC to appoint an Advocate Commissioner for a limited purpose of dividing the property in terms of preliminary decree in O.SNo.18 of 1981 on the file of Senior Civil Judge, Gudur. Therefore, I find no illegality in the order passed by the trial Court warranting interference of this Court while exercising power under Article 227 of the Constitution of India as the powers of this Court are limited and this Court cannot interfere with such orders unless the Court comes to the conclusion that the trial Court passed such order transgressing the limits of jurisdiction in view of the full bench Judgement of Apex Court in *Raj Kumar Bhatia v Subhash Chandra Bhatia*<sup>2</sup> consequently, this Civil Revision Petition is liable to be dismissed as it devoid of merits.

Accordingly, this Civil Revision Petition is dismissed.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

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**M. SATYANARAYANA MURTHY, J**

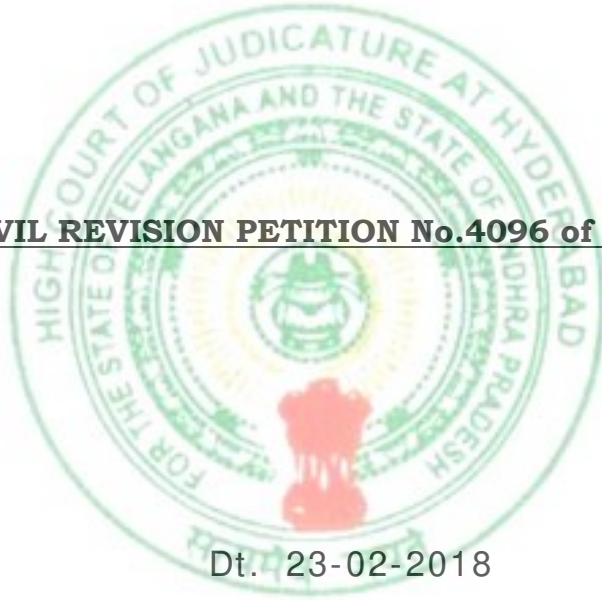
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<sup>2</sup> 2018 (2) SCC 87 (FB)

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Dt. 23-02-2018

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