

HON HON'BLE SRI JUSTICE M.S.K.JAISWAL

A.S.No.1844 of 1993

And

A.S.M.P.No.485 of 2014

Date: 20th June, 2014

Between :-

Tirumala Nagaratnam

... Appellant

And

Vonteddu Satyavathi

And others

.. Respondents

HON HON'BLE SRI JUSTICE M.S.K.JAISWAL

A.S.No.1844 of 1993

And

A.S.M.P.No.485 of 2014

JUDGMENT:-

The appellant is the 2nd respondent/2nd defendant in I.A.No.226 of 1988 in O.S.No.89 of 1987 on the file of the Subordinate Judge, Pithapuram. Respondents No.1 and 2 herein were the plaintiffs whereas the 3rd respondent was the 1st defendant. Respondents 1 and 2/plaintiffs filed I.A.No.226 of 1988 under Order XX Rule 12 of C.P.C. for passing a final decree in terms of the preliminary decree passed in the suit. Through Order, dated 20-04-1992, the learned Subordinate Judge passed the final decree in terms of the preliminary decree and allotted portions marked as 'A' and 'C' to the plaintiffs and to deliver possession to them. The trial Court further directed that the defendants should pay future mesne profits @ Rs.100/- per month to each of the plaintiffs from the date of the suit viz., 13-03-1984 till the delivery.

2. Aggrieved by the said order, the 2nd defendant/respondent No.2 filed the appeal contending that the final decree passed by the trial Court is incorrect, that the Court should have seen that the plaintiffs are not entitled to delivery of possession of 'A' and 'C' portions as they do

not have a right to possess the same, that the Court should have accepted the case of the appellant that one V.Annapurnamma executed a will, dated 09-03-1950, giving life interest to the 3rd respondent -1st defendant and since she is still alive, the plaintiffs are not entitled to delivery of possession of 'A' and 'C' portions. It is further contended that the learned Judge should have seen that the plaintiffs have no present right to possess the property. It is lastly submitted that the appellant-D.2 has filed O.S.No.30 of 1991 on the file of the Subordinate Judge, Pithapuram, against the plaintiffs and D.1 for declaring that the Judgment and Decree in the present suit bearing O.S.No.89 of 1987 was obtained by fraud and therefore invalid. Hence, the appeal.

3. Learned Counsel for the respondents-plaintiffs submits that the final decree passed by the trial Court is in accordance with the preliminary decree, which has become final, and the contentions that are raised by the appellant-D.2 cannot be raised in the proceedings initiated for passing of a final decree. The learned Counsel further submits that so long as the final decree is in accordance with the preliminary decree, which became final, the Court cannot adjudicate any other controversies, which have already been adjudicated in the suit at the time of trial. It is further submitted that in pursuance to the passing of the final decree, E.P. was filed and the plaintiffs have been put in possession of the schedule property on 17-05-2013 and 03-07-2013.

4. The point for consideration is as to whether the Judgment under appeal is in accordance with the preliminary decree passed in the suit or whether it needs to be set aside, modified, or, varied?

5. **Point:-** Admitted facts are that the plaintiffs, who are respondents No.1 and 2 herein, have filed the suit for partition, which was registered as O.S.No.89 of 1987, as long back as on 13-03-1984. The plaint schedule property comprised of the property bearing door No.10-1-37 together with open site situated at Pithapuram, East

Godavari District. The suit was decreed on 23-07-1987 dividing the suit property into three shares and allotting two shares to the plaintiffs. Thereafter, the plaintiffs filed I.A.No.226 of 1988 for passing of a final decree. On contest, the said application was allowed and initially an Advocate-Commissioner was appointed for dividing the schedule property by metes and bounds. The Advocate-Commissioner made suit property into three portions and identified them as 'A', 'B' and 'C'. In the trial Court, lots were drawn in the presence of the parties, in which, the portions marked as 'A' and 'C' were allotted to the shares of the plaintiffs. Thereafter, the proceedings were initiated for delivery of possession. E.P.No.24 of 2002 was filed. After obtaining necessary orders, with the aid of the Ameen of the Court, the possession of the schedule property was delivered to the plaintiffs on 17-05-2013 and 03-07-2013 under panchanama through the process of Court.

6. The appellant herein is the 2nd defendant. She filed the suit subsequently bearing O.S.No.30 of 1991 against the plaintiffs for setting aside the Judgment and Decree in O.S.No.89 of 1987 as having been obtained by fraud and misrepresentation. That suit was dismissed and became final. The grounds that were urged in the present appeal were raised in the suit filed by the appellant-D.2, which stood dismissed on 07-06-1993. Once again, similar objections were raised by the appellant-D.2 at the time of passing of the final decree. Those objections were considered and negated by the trial Court.

7. When a preliminary decree was passed on 23-07-1987, it appears that no appeal there against was preferred. Instead of carrying the matter in appeal, the 2nd defendant in the suit has filed an independent suit to declare the decree as null and void. That suit was dismissed. As per Section 97 of C.P.C., no appeal can be entertained questioning the correctness of the final decree when the preliminary decree was not challenged by way of any appeal. At the time of passing of the final decree, what is required to be seen is that it should be strictly in accordance with the preliminary decree that was granted.

The objections that were raised before the trial Court as well as in the present appeal are outside the scope of the enquiry contemplated under the Code of Civil Procedure at the time of passing of the final decree. The objections that were raised at the time of passing of the final decree, which are reiterated in the present appeal are that one Annapurnamma executed a will on 09-03-1950 giving life interest to the 3rd respondent/1st defendant and since she is alive, the possession of 'A' and 'C' portions cannot be delivered to the plaintiffs. The other objection is that the plaintiffs have no right to possess 'A' and 'C' portions of the schedule property. These objections are clearly outside the purview of the enquiry at the time of the passing of the final decree. Those are the issues, which are to be raised at the time of the trial of the suit or in the appeal. As already stated, instead of doing that the appellant-D.2 has filed an independent suit wherein she raised the similar contentions and which were negated by the Court in O.S.No.30 of 1991, which was dismissed on 07-06-1993. Once again the self-same objections cannot be raised or sustained. Therefore, the trial Court has rightly discussed the same and rejected the objections.

8. With regard to the mesne profits, the appellant contends that the plaintiffs are not entitled to the same. After due enquiry by the Advocate-Commissioner and ascertaining the prevailing market value, the mesne profits were fixed at Rs.100/- per month from the date of the suit till the possession was delivered. This is based on proper enquiry conducted by the Advocate-Commissioner as approved by the trial Court.

9. Upon consideration of the entire material on record, I see no substance in the contentions raised by the appellant. It is not open to the appellant to question the correctness of the preliminary decree at the time of enquiry for passing of the final decree. There are no merits in the appeal and the same is liable to be dismissed.

10. The respondents/plaintiffs filed A.S.M.P.No.485 of 2014 to receive the certified copy of the proceedings in E.P.No.24 of 2002

together with the report of the Ameen. It is no doubt true that they are the certified copies of the Court proceedings, but since they are in respect of the same litigation, the certified copies thereof need not be received by way of additional evidence. The entire record including the original record the certified copy which is sought to be filed, is part of the record and the same has been perused. Therefore, I see no reason to admit the certified copies of the E.P. proceedings by way of additional evidence. The petition is dismissed.

11. In the result, the appeal and A.S.M.P. are dismissed. There shall be no order as to costs.

M.S.K.Jaiswal, J

Date:- 20-06-2014

smr