

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF MARCH, 2019

BEFORE

THE HON' BLE MR. JUSTICE B. VEERAPPA

WRIT PETITION No.14135/2019(GM-CPC)

BETWEEN:

SRI. L. MUNIKRISHNA
S/O H. LAKSHMINARASIMHAIAH
AGED ABOUT 63 YEARS,
R/AT NO.22, SANJEEV NAIK LANE
AVENUE ROAD CROSS,
BANGALORE-560002. ... PETITIONER

(BY SRI VIJAY BHONSLE, ADVOCATE FOR
SRI CHIDANANDA P., ADVOCATE)

AND:

1. SRI. SURYANARAYANA
S/O H. LAKSHMINARASIMHAIAH
AGED ABOUT 55 YEARS,
R/AT NO.22, SANJEEV NAIK LANE
AVENUE ROAD CROSS
BENGALURU-560002
2. SRI H. LAKSHMINARASIMHAIAH
SINCE DEAD BY HIS LR
SMT JAYALAKSHMAMMA
W/O LATE H. LAKSHMINARASIMHAIAH
AGED ABOUT 91 YEARS,
R/AT NO.22, SANJEEV NAIK LANE,
AVENUE ROAD CROSS,
BENGALURU-560002
3. SMT. L. HEMAVATHI
W/O S. N. RAMESH
D/O LATE H. LAKSHMINARASIMHAIAH
AGED ABOUT 65 YEARS,

R/AT NO.38, 38TH CROSS,
11TH MAIN, JAYANAGAR 'T' BLOCK
BENGALURU-560041. ... RESPONDENTS

...

THIS WRIT PETITION IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA PRAYING TO SET ASIDE/QUASH THE IMPUGNED ORDER DATED 5.1.2019 IN FDP NO.203/2011 PASSED BY THE HON'BLE CITY CIVIL JUDGE, [CCH-10] AT BENGALURU ON IA NO.V AT ANNEXURE-G.

THIS WRIT PETITION COMING ON FOR PRELIMINARY HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The 3rd defendant has filed the present writ petition against the order dated 5.1.2019 made on I.A.V in FDP No.203/2011 by the City Civil Judge, Bengaluru allowing the application filed by respondent No.1-plaintiff - decree holder appointing Civil Engineer attached to the Office of BBMP as Court Commissioner to measure and divide the suit schedule property in respect of respondent No.1-plaintiff's share as per the judgment and decree passed in O.S.No.7413/1997.

2. The plaintiff-respondent No.1 filed a suit for partition and mesne profits with costs in

O.S.No.7413/1997. The said suit came to be decreed on 29.10.2007 which is the subject matter of appeal before this Court in RFA No.141/208 preferred by the present petitioner-defendant No.3. This Court in turn stayed drawing up of final decree proceedings only in so far as suit 'A' schedule property is concerned on 27.2.2008. On the application filed by the petitioner and considering the objections, the Executing Court has allowed the application and appointed Civil Engineer, BBMP as Court Commissioner. Hence, the present Writ Petition.

3. I have heard the learned Counsel for the petitioner.

4. Sri Vijay Bhonsle the learned Counsel for petitioner contended that the appointment of Court Commissioner to measure the suit properties as preliminary decree inspite of granting stay by this Court is not permissible. He would further contend that the

impugned order cannot be sustained. Hence, he sought to allow the writ petition.

5. Having heard the learned Counsel for petitioner, it is not in dispute that the Court has recorded a finding that the final decree proceedings is filed against the judgment and decree dated 29.10.2007. As of now already 10 years has lapsed after passing of the decree and the appeal is pending since 10 years. Apart from that, the appeal is only in respect of 'A' schedule property. It has further recorded that on perusal of the decree, it makes out that both 'A' schedule as well as 'B' schedule are the house properties whereby plaintiff, defendant Nos.2 and 3 and legal representatives of defendant No.1 are entitled for 1/4th share each in the plaint 'A' schedule property. It has also held that plaintiff, defendant Nos.2 and 3 are entitled for 5/16th share and legal representative of 1st defendant by name Jayalakshamma is entitled for

1/16th share in the plaint 'B' schedule property. So in such circumstances, it has held that if the Commissioner is appointed, he can very much make out whether the property is feasible for division or not. On the other hand, if it is not divisible, the Commissioner can also assess the market value of the property and so in the event of non-divisibility considering the extent of property then any one party can opt for purchasing as per Section 2 of the Partition Act.

6. It has also observed that, in the meanwhile, till the disposal of the appeal, if all the process are completed, then the Court can immediately proceed on the basis of the report of the Court Commissioner as the present FDP proceedings is also 10 years old. Hence, it thought it just and appropriate to appoint the Commissioner for measurement and division as per the preliminary decree and to report whether the property is feasible for division and if not, what was the market

value of the property. Accordingly, the Executing Court allowed the application – I.A.5 and appointed the Civil Engineer attached to the Office of BBMP of the concerned jurisdiction as Court Commissioner. Infact, this Court in Regular First Appeal has stayed only drawing up of final decree proceedings in so far as 'A' schedule property is concerned taking into consideration that the suit was filed in the year 1997 and decree came to be passed in the year 2007 against which RFA preferred is of the year 2008 and we are in the year 2019. In view of the above, the impugned order passed by the Executing Court is just and proper.

7. The petitioner has not made out any good ground to interfere with the impugned order in exercise powers under Article 227 of the Constitution of India. Accordingly, writ petition is dismissed.

**Sd/-
Judge**

Nsu/-