

ORDER ON I.A.No.1

The petitioner has filed this application U/O.XXVI Rule 18A r/w Sec.151 of C.P.C., seeking appointment of an Advocate as court commissioner to execute registered cancel gift deed on behalf of Judgment Debtor in favour of Decree Holder in respect of petition schedule property.

2. The Decree Holder has sworn to an affidavit stating that, he has filed petition for enforcement of Decree dated:01.03.2023 passed in O.S.No.233/2015 on the file this Hon'ble Court. In the Decree, this Hon'ble Court has directed Judgment Debtor to execute registered cancel gift deed in favour of Decree Holder within three months from the date of Decree and in case of failure to do so, Decree Holder can obtain the same through Court. Accordingly, Decree Holder has waited for three months, but the Judgment Debtor has not executed the registered cancel gift deed. Hence, it is necessary to appoint an Advocate for execution of registered cancel gift deed. On these grounds, the Decree Holder has sought to allow the application.

3. On the other hand, Judgment Debtor has filed objections by contending that this Hon'ble Court has not directed the Judgment Debtor to execute cancellation of gift deed. Hence, the question of appointment of Court Commissioner does not arise. As per the

Judgment and Decree dated:13.01.2022 passed in O.S.No.85/2016 on the file of Addl. Civil Judge and JMFC., Challakere, the petition schedule property is the ancestral and joint family property of D.Hr, J.Dr, Renukumar, Jayamma, Kalpana and Indiramma and the Hon'ble Court has already passed preliminary Decree by allotting 1/6th share each. Accordingly, the J.Dr had filed FDP No.1/2024 and the same is pending for adjudication. Petitioner has filed this petition and application by suppressing true facts. On these grounds, J.Dr prays to reject the application.

4. Heard. Perused materials available on record.

5. I have perused the decree passed in O.S.No.233/2015 wherein it is declared that the plaintiff is the absolute owner in possession of the suit schedule property and the defendant obtained cancellation deed dated:18.06.2011 by playing fraud on the plaintiff. Further, in the said Decree, permanent injunction is granted against the J.Dr by restraining him from interfering with the peaceful possession and enjoyment of the suit schedule property. However, the Decree does not contain any specific directions directing the defendant to execute any document. The decree is purely declaratory in nature.

6. It is a settled principle that an executing Court cannot go beyond the decree or grant a relief which has not been expressly granted by the Decree. The executing Court is bound to execute the decree as it stands and cannot add to or modify its terms. Since there is no executable direction contained in the decree, the relief sought in the present application cannot be granted in execution

proceedings. Therefore, the application is not maintainable. Accordingly, Court proceeds to pass the following:

ORDER

The I.A.No.1 filed by the D.Hr under O.XXVI Rule 18A r/w Sec.151 of C.P.C. is dismissed as not maintainable.

Accordingly, since the decree sought to be executed does not contain any executable direction, the execution petition filed under O.XXI R.11 of C.P.C. stands dismissed as not maintainable.

Prl. Civil Judge & JMFC.,
Challakere

On perusal of the records, it is clear that the a final decree has been passed by this court.

*** Further, the records disclose that the said decree has been drawn and engrossed in accordance with law. In a partition suit, once a final decree is passed, the rights of the parties are conclusively determined and the proceedings attain finality. Thereafter, the court becomes functus officio and cannot reopen the proceedings by entertaining another final decree petition.

6. In the present case, since the final decree has already been passed and engrossed, the question of appointing a commissioner at this stage does not arise. If at all the petitioner has any grievance with regard to the implementation or demarcation, the proper remedy lies in initiating execution proceedings under law. Therefore, this Court is of the opinion that the present final decree petition is not maintainable. In view of the foregoing discussion, this Court proceeds to pass the following:-

In the present case, the respondents have not filed any objections. There are no records before the court to infer about the filing of any appeal before the appellate Court challenging the preliminary decree. Therefore, at this stage it can be inferred that no stay has been granted for execution of preliminary decree. Therefore, decree passed in OS.No.85/2016 attained its finality. The petition schedule properties are landed properties. Thus, to suggest the scheme of partition it is absolutely necessary to appoint Taluka

Surveyor. Otherwise, both the petitioners and respondents could not be able to enjoy the fruits of decree. In considered opinion of this Court, the application filed by the petitioners deserves to be allowed. For the forgoing reasons, Court proceeds to pass the following:

ORDER

I.A.No.1 filed by the petitioners U/Order 26 Rule 13 of C.P.C. is allowed.

Thereby, Taluka Surveyor attached to the Taluka Office, Challakere, is hereby appointed as the Court Commissioner to effect division of the suit schedule properties.

It is directed to the Court Commissioner to prepare scheme for partition in tune with the shares declared in the preliminary decree dated:13.01.2022 passed in O.S.85/2016 with respect to the suit/petition schedule properties and to file the report in that connection to the Court as earlier as possible.

The Court commissioner fees is fixed tentatively at Rs.3,000/-.

Office is hereby directed to send the certified copy of petition, preliminary decree passed in O.S.No.85/2016 to the Court Commissioner if proper step is furnished by the petitioners in the office.

Call on:

Addl. Civil Judge & JMFC,

Challakere.