

ORDERS ON APPLICATION FILED U/O 26 RULE 13 CPC

The 2nd petitioner has come up with the instant application and sought for appointment of Tahasildar as court commissioner to effect the partition as per the preliminary decree passed in the original suit on the grounds that they had filed the original suit for the reliefs of partition and separate possession against the respondents/defendants in respect of the petition schedule properties. After contest, the court has passed the decree holding that the petitioners are entitled for a share in the petition schedule property. The respondents have not preferred appeal against the judgment and decree passed in the original suit. Though the petitioners have made several requests and demands for the respondents to allot their legitimate share in the petition schedule property, respondents have flatly refused for the same. Hence, this application and accordingly, sought to allow the application.

2. The respondent No.5 has filed the objections and contended that the application is not at all maintainable either in law or on facts of the case. This respondent has not received any notice in the original suit. Subsequently, this court has placed the respondent No. 5 as *ex parte* based on

the office note. This respondent is not aware of the institution of the case. Hence, he has not contested the original suit. On 20.04.2017 when the respondent came near the suit schedule property, the petitioners have avoided the respondent and abused the respondent in a filthy language. Then only the respondent came to know about the passing of judgment and decree. Hence, he has constrained to maintain mis petition and is pending for adjudication. The petitioners have no right, title over the suit schedule property . The petitioners are not in joint possession and enjoyment of the suit schedule property along with the respondents. The respondents have purchased the suit schedule property for valuable consideration of Rs. 45,75,00,000/- through a registered sale deed. The petitioners have comeup with this petition only to harass the respondents and to grab the suit schedule property from this respondent. The petitioners have suppressed the institution of mis petition by this respondent. Accordingly, sought for dismissal of the application.

3. Heard. Perused the material on record.

4. The points that arise for my consideration are:

1. Whether the application deserves to be allowed?

2. What order?

5. My findings on the above points are as follows.

Point No.1: In the Affirmative.

Point No.2: As per final order
for the following:

REASONS

6. **Point No.1** : On perusal of the material on record it reveals that the petitioners have maintained the instant petition against the respondents for the reliefs of drawing up of final decree as per the preliminary decree passed in the original suit. Now, he has come up with the instant application for allotment of their shares as per the preliminary decree passed in the original suit. Whereas, the said application has been resisted by the respondent No. 5 alleging that he has not served with the summons in the original suit and the petitioners have come up with the instant petition and application by suppressing the material facts and he is a bonafide purchaser and now this respondent has filed mis petition and is pending for adjudication. Accordingly, sought to dismissal of the application.

7. Though the material on record i.e., the averments of the objections reveal about the alleged institution of the Mis. Pet. No. 10/2017 by the respondent No. 5, the respondent No. 5 has not produced any documents to substantiate the same. Further, the respondent No. 5 has not produced any order of stay in respect of drawing up of final decree in the instant petition.

8. Admittedly as on today there is no stay whatsoever in the instant petition for execution and operation and judgment passed in the original suit. If at all, he is a bonafide purchaser, he ought to have speed up the alleged mis petition and declared his right over the suit schedule property. Further mere pendency of miscellaneous petition is not a ground for rejection of the application filed by the petitioners.

9. However, the material on record reveals that the petitioners have filed original suit against the respondents and the said decree passed in favour of the petitioners holds the field as on today. As such in order to enjoy the fruits of decree there is a necessity of demarcation of shares of the petitioners as per the preliminary decree. Averments of the affidavit reveal about the failure of the respondents to hand over the

separate possession of the petitioners as per the preliminary decree. Accordingly, this court is of the considered opinion that the petitioners have made out grounds to allow the application. Accordingly, Point No.1 is answered in the Affirmative.

10. **Point No.2:** For the aforesaid reasons, I proceed to pass the following:

ORDER

Application filed under Order 26
Rule 13 CPC is hereby allowed.

No orders as to cost.

Accordingly, Taluka Surveyor is
appointed as court commissioner to
demarcate the shares of the petitioners
as per the preliminary decree.

His fee is fixed at Rs.1,000/- and
commissioner is directed to file his
report along with sketch, demarcating
the shares of the petitioners.

Office to issue commissioner's
warrant if commissioner's fee and PF are
deposited returnable by 15.04.2020.

Prl. Senior Civil Judge & J.M.F.C.,
Hunsur.