

21.12.2021
Petr.by SGN
R1to10by PGH
For orders

The petitioners filed the present petition for effecting division of the properties in accordance with the terms of the preliminary decree by appointment of court commissioner. In the petition, it is contended that one Jattappa Iraiah Naik instituted the suit against the respondents in O S No 55 / 2003 seeking for partition and separate possession and the said suit was decreed and accordingly, preliminary

decree also passed. Against the said decree, appeal has been preferred before Hon'ble Senior Civil Judge, Kumta, in R A No 33/2017 which came to be dismissed by upholding the judgement and decree passed by the trial court. No appeal has been preferred against the order passed by Hon'ble Senior Civil Judge, Kumta in R A No 33/2017. On the said grounds, petitioner sought for demarcation and division of properties by appointment of court commissioner.

Respondents appeared through the counsel and filed objections to the petition. In the objections, it is stated that the petition filed by the petitioner is not tenable since all the parties in the original suit have not been made as parties in the present suit. Further, RTC extract reflects name of other persons and without impleading them, the petition is not tenable one. The respondents also sought for demarcation of the properties in which they are in possession. Based on the said grounds, respondents sought to pass appropriate order.

Heard counsel for petitioners and respondents. Perused the materials on record.

The materials on record reveal that Jattappa Iraiah Naik filed the suit in O S No 55/2003 which came to be decreed by virtue of judgment and decree dated 03.08.2017. Against the said judgment, appeal has been preferred in R A No 33/2017 which came to be dismissed on 24.09.2019 by upholding the judgment passed by Trial court. No appeal appears to have been preferred against the said decree passed by Hon'ble Appellate court and the same remains to be unchallenged. No materials have been placed for having preferred any appeal against the judgment and decree.

It is the contention of the respondents that the parties appearing in the original suit have not been made as parties in the present petition. It is pertinent to note that in the decree passed in O S No 55/2003, the shares of petitioner and respondent no 1 to 8 have been determined and rights of defendant no 9 to 16 in the original suit has not been

determined in the said suit. The right and interest of Defendant no 9 to 16 has not been determined and adjudicated in the original suit and as such, they cannot be considered to be necessary parties to the suit. The defendant no 9 to 16 in the original suit does not appear to have put forth any claim with respect to the suit properties and as such, they cannot be considered as necessary parties to the present petition. There is no adjudication of right of defendant no 9 to 16 and as such, the contention of respondents does not sustain for consideration.

It is also sought by respondents to allot the shares to the respective parties pertaining to the properties in which they are in possession and enjoyment. With respect to the said aspect, appropriate direction can be given to the court commissioner in that regard. The contentions raised by respondents does not sustain for consideration. The share of the parties needs to be demarcated and divided for which appointment of commissioner appears just and necessary. There appears necessity of appointing the

Thahsildar as court commissioner for the purpose of suggesting the scheme of partition in order to demarcate and divide the properties in accordance with the terms of the preliminary decree. Hence, on consideration of the said aspects, this court deems it appropriate to pass the following

ORDER

The Thahsildar, Kumta is hereby appointed as commissioner to suggest scheme of partition for division of the properties mentioned in the schedule of the petition, in accordance with the terms of the preliminary decree with the assistance of surveyor or any of his subordinate.

The commissioner shall follow due procedure while demarcating the schedule properties and submit report to the court along with duly prepared sketch providing scheme of partition which will enable to identify the shares of the parties in the properties.

Further, the commissioner shall have regard to the possession of the parties in the properties and make a note pertaining

to the said aspect. The commissioner shall consider the aspect of possession of parties as far as possible while suggesting the scheme of partition and demarcate the shares in the which the respective parties are in possession, if permissible.

Office is directed to send the copy of the petition, preliminary decree to the court commissioner.

The parties are at liberty to file memo of instructions at the office within one week from the date of this order.

Sd/-

Prl Civil Judge, Kumta