

**THE HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO**

**APPEAL SUIT No.572 OF 2009**

**JUDGMENT:**

- 1.** Aggrieved by the Final Decree dated 15.07.2009 in I.A.No.879 of 2006 in O.S.No.14 of 2003, passed by the learned Senior Civil Judge, Pithapuram (for short "the trial Court") the appellant/respondent/plaintiff preferred this appeal questioning the correctness of the Final Decree passed by the trial Court.
- 2.** For the sake of convenience, the parties will hereinafter be referred to as arrayed in the Final Decree.
- 3.** The respondent/plaintiff filed a suit in O.S.No.14 of 2003 for partitioning the plaint schedule properties into three equal and equitable shares to allot one such share to him and grant future profits. After considering the evidence on record, the trial Court preliminarily decreed the suit on 10.07.2006, directing that the plaint schedule properties in O.S.No.14 of 2003 shall be divided into three equal and equitable shares and one such share shall be allotted to the plaintiff and defendants 1 and 2 each.
- 4.** Subsequently, the petitioners/defendants filed a petition in I.A.No.879 of 2006 in O.S.No.14 of 2003, with a request to pass a final decree for partition of plaint schedule properties into three equal and equitable shares and allot to separate shares to the petitioners by appointing an Advocate-Commissioner as per the directions of the Court, in the preliminary decree.

The trial Court appointed Sri A.V.Koteswar Rao, learned counsel, as Advocate Commissioner, directing him to divide the plaint schedule properties as per the decree terms. The Advocate Commissioner filed his report after the execution of the warrant. The plaintiff and defendants filed their objections on the Advocate Commissioner's report.

**5.** The respondent/plaintiff filed his counter denying the averments and contends that the petitioners/defendants filed the petition for final decree and another petition for appointing a receiver with contra allegations. He further contended that when he has no objection to allowing the final decree petition, the appointment of receiver petition is not necessary and contra to the law.

**6.** No oral or documentary evidence is adduced on either side before the trial Court.

**7.** After considering the report of the Advocate-Commissioner and the objections filed by both parties, the trial Court allowed the petition by passing a final decree for items 4 to 8 and 10 by dividing them into three equal shares as per the field measurement sketch prepared by Mandal Surveyor of Gollaprolu by allotting lots between the petitioners and respondent.

**8.** Heard the arguments of the learned counsel appearing on both parties.

**9.** Sri T.V. Jaggi Reddy, learned counsel for the appellant/respondent, contends that the trial court ought to have considered the objections raised

by the petitioners about the water rights, passage rights etc. while allotting the shares. He further contends that the final decree passed on 15.07.2009 reflects the allotment of shares regarding Item No.4 of the plaint schedule property, but the Advocate-Commissioner demarcated six items of the property. In contrast, a perusal of the final decree shows that it is in respect of one Item only. The trial Court ought to have seen Item Nos.4 and 5 in the plaint schedule property are contiguous lands, and like that, Items 7 and 8 are contiguous. Instead of dividing the lands at a stretch, each Item of the property was divided by the Advocate-Commissioner into three, as per the survey numbers. He further contends that the trial Court ought to have specified the passage rights and drawing of water etc., in the final decree proceedings,

**10.** *Per contra*, the learned counsel appearing for the respondents/petitioners would contend that the trial Court correctly appreciated the facts of the case and reached a correct conclusion. The reasons given by the trial Court do not require any modifications regarding the Final Decree.

**11.** Having regard to the pleadings in the final decree petition and the findings of the trial Court and in light of the rival contentions and submissions made on either side before this Court, the point that would arise for consideration is:

***Whether the objections raised by the appellant/respondent were duly considered by the trial Court while passing the Final Decree?***

**POINT:**

**12.** The Advocate Commissioner's report reveals that he divided items 4 to 8 and 10 of the plaint schedule properties into three equal shares while the other items could not be divided for specific reasons, which the trial court accepted. The trial court observed that the field measurement sketch prepared by the Mandal Surveyor clearly indicated the division of items 4 to 8 and 10 into three equal shares. However, the appellant's main objection is that the Advocate Commissioner mechanically divided the properties without considering important factors such as water rights, easement rights, and passage rights, which are crucial for agricultural operations. The trial court considered and overruled the other objections raised by the appellant. Having reviewed the trial court's order, there seems to be no reason to interfere with its findings. Thus, there is no need to reiterate the reasons stated by the trial court in this order.

**13.** At this juncture, it is pertinent to refer the Section 30 of the Indian Easements Act, 1882 as under:

**30. Partition of dominant heritage.**-Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not to increase substantially the burden on the servient heritage: Provided that such annexation is consistent with the terms of the instrument, decree or revenue-proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period. Illustrations

(a) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B, A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

*© A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.*

**14.** This Court acknowledges that the responsibility of passing the final decree lies with the trial court, and it must carefully consider the Commissioner's report and the objections presented by both parties. The primary objective of the trial court in passing the final decree is to ensure that the rights of all parties involved in the proceedings are not adversely affected. However, it is evident that the trial court failed to address the appellant's main objection concerning water rights and passage rights essential for the reasonable enjoyment of the properties. Upon a thorough examination of the Commissioner's report and the impugned order passed by the trial court, it becomes apparent that the report did not mention anything about water, easement rights, or passage rights. Furthermore, the plan submitted by the Commissioner also lacks any reference to these rights.

**15.** Given that, the 1st respondent/plaintiff raised this crucial objection, the trial court was obligated to provide a clear finding on this contention. For the reasonable enjoyment of the properties, the trial court should have acknowledged that all parties are entitled to their respective easementary rights, including water and passage rights, as they were enjoyed at the time of the partition of the properties. These rights are vital for the equitable distribution and utilization of the properties in question.

**16.** As a result, the appeal is **allowed in part** by holding that both parties shall retain all their respective easementary rights, including water and passage rights which they possessed before the division of the properties. This applies specifically items 4 to 8 and 10 of the plaint schedule properties which were divided according to the report submitted by the Advocate Commissioner. The order passed by the trial Court is confirmed to the extent of division of Items 4 to 8 and 10 and allotment of Lots. There shall be no order as to costs.

Consequently, miscellaneous petitions pending, if any, shall also stand closed.

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**JUSTICE T.MALLIKARJUNA RAO**

Dt.21.07.2023

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**THE HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO**

**APPEAL SUIT NO.572 OF 2009**

**DATE: 21.07.2023**

**MS**