

(1970) 01 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 355 of 1962

Keshao Raghunath Deosant and Others	APPELLANT
Vs	
Waman Keshao Deosani and Another	RESPONDENT

Date of Decision : 12-01-1970

Acts Referred:

Arbitration Act, 1940 — Section 21
Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 20 Rule 18(1), Order 20 Rule 18(2), Order 26 Rule 13, Order 26 Rule 14

Citation : AIR 1971 Bom 26 : (1971) 73 BOMLR 820 : (1970) MhLj 801

Hon'ble Judges : Nain, J

Bench : Single Bench

Advocate : V.R. Padhye, for the Appellant; N.S. Nandedkar, for the Respondent

Judgement

1. This is an appeal against the appellate judgment dated 27th March 1962 of the learned District Judge, Bhandara.
2. The plaintiff filed the suit, from which this appeal arises, in the Court of the learned Civil Judge, Senior Division, Bhandara for partition and separate possession of his 1/6th share in the joint Hindu family properties described in Schedules A to E attached to the plaint. Defendant No. 1 is the father of the plaintiff. Defendant No. 2 is the second wife of the defendant No. 1 and is the step-mother of the plaintiff. The plaintiff is the son of defendant No. 1 from his first wife. Defendants 3 and 4 are the sons of the defendant No. 1 from the defendant No. 2. Defendant No. 5 is the son of defendant No. 1 from his first wife and is the full brother of the plaintiff.
3. During the pendency of the suit, the parties arrived at an agreement inter alia to the effect that the properties shown in Schedules A, B and C be divided into 6 shares. Accordingly, on 30th January 1960 a decree in terms of the compromise was passed. The matter was thereafter referred to a Commissioner who in due course made a report effecting partition. While the plaintiff and defendant No. 5 accepted the report of the Commissioner the defendants 1 to 4, who are present

appellants, objected to the said report. The grounds of objections were inter alia that the civil court could not partition agricultural lands and that the partition was Unfair and unequitable.

4. The trial Court held that the partition was fair and partition on revenue paying lands could be effected by Civil Court; it, therefore, passed a decree confirming the report of the Commissioner.

5. The defendants 1 to 4 filed an appeal in the District Court at Bhandara. The District Court also found that the Court was competent to effect partition of land-revenue paying lands in the manner it had been done by the Commissioner and that the partition was fair.

6. Before me, the contentions taken are that the Civil Court had no jurisdiction to effect partition of revenue paying estate, that the partition was contrary to the decree passed by the Court on 30th January 1960 inasmuch as it did not divide the lands into 6 shares but gave 1/3rd share to the plaintiff and the defendant No. 5 jointly and 2/3rd share to the defendants 1 to 4 jointly and lastly that the partition was unjust and unfair.

7. I shall first deal with the first contention of the appellants. Section 54, Civil P. C., provides that where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law, if any, for the time being in force relating to the partition, or the separate possession of shares, of such estates. Order 20, Rule 18 (1) of the Civil P. C. provides that where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54, Civil P. C. Sub-rule (2) of Rule 18 pertains to Immovable property other than an estate assessed to the payment of revenue to the Government and provides that in such a case the Court may pass a preliminary decree and give further directions. Order 26 Rule 13 of the Civil P. C. provides that where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54. issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

8. The above provisions will show that in case of a decree for the partition of revenue paying estate there is not to be a preliminary decree but a decree which shall be forwarded to the Collector for effectuating the partition. In case of other Immovable property, the decree is to be a preliminary decree. In case of revenue

paying estate the partition is to be carried out by the Collector and not by a Commissioner. After a decree for partition is passed in respect of revenue paying estate, the Court has nothing to do with it by way of execution. The execution of the decree is entirely in the hands of the Collector. It is only when the Collector contravenes the decretal command of the Court or transgresses the law relating to partition that his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution. An order directing partition by the Collector is not a preliminary decree. It is so far as the Court is concerned a final decree and an order transmitting the papers to the Collector is ministerial and not a judicial act.

9. The nature of a decree u/s 54 of the Civil P. C. and Order 20. Rules 18 (1) of the Civil P. C. has been discussed in the Full Bench case of Ramabai Govind Vs. Anant Daji, . The Full Bench consisting of Lokur, Weston and Rajadhaksha, JJ. observed that while in case of estate other than revenue paying estate a preliminary decree is passed and a Commissioner is appointed to carry out the directions of the Court and after the Commissioner's report a final decree is to be passed and these are all proceedings in the suit, in case of land assessed to the payment of revenue, the partition is to be made by the Collector or his gazetted subordinate and nothing further remains to be done by the Court and the decree must, therefore, be deemed to be final. Section 54 of the Civil P. C. does not provide for the Collector reporting to the Court indicating that the Court has not to make any final decree on the receipt of a report of the partition by the Collector as it does on receipt of the Commissioner's report in respect of partition under Order 26, Rules 14, Civil P. C., in respect of the partition of other kinds of properties. It was further observed that the decree u/s 54, Civil P. C. was already final and the subsequent proceedings were proceedings in execution of that decree. In case of a preliminary decree for partition which is provided for by Section 54, Civil P. C. no Commissioner can be appointed for effecting a partition, since under that section the partition is to be effected by the Collector. Weston, J. observed that the suit is completely disposed of by a decree u/s 54 and there is no provision for the further decree to be made by the Court.

10. I am afraid, I am bound by the Full Bench decision of the Bombay High Court and I must come to the conclusion that the Civil Court had no jurisdiction to appoint a Commissioner or to entertain objections to the Commissioner's report or to pass a final decree in the matter.

11. Mr. Nandedkar on behalf of the defendant No. 5 and the plaintiff, who are the respondents in appeal, invited my attention to a Division Bench decision of the Nagpur High Court in the case of AIR 1954 241 (Nagpur) . In this case during the pendency of a suit for partition and separate possession, the parties had referred the suit disputes to arbitration and obtained an order of reference u/s 21 of the Arbitration Act, 1940. In due course the arbitrators partitioned the revenue paying estate not by physically dividing each item of property but making separate lots whereby entire items were given to one party or another and made

an award accordingly. The award was filed in Court and was objected to, one of the objections being that u/s 54, Civil P. C. and Order 20, Rule 18, Civil P. C. the Court could not pass a decree in terms of award and that the arbitrators must merely declare the shares of the parties and the decree must also declare the shares of parties and the question of actual partition must be referred to the Collector. It was held that merely because a claim includes revenue paying estate the Court or the arbitrators are not precluded from dealing with the case. Section 54 read with Order 20, Rule 18, CPC does not preclude a Civil Court from making a partition of land of a revenue paying estate where no separate allotment of the revenue is asked for. Where an award did not even divide any of the revenue paying properties but only allotted different items intact to the different parties a decree passed in terms of that award would not be one for "Partition of an undivided estate assessed to the payment of revenue to the Government." or "for the separate possession of a share of such an estate" as would attract Section 54, Civil Procedure, Code, read with Sub-rule (1) of Rule 18 of Order 20, thereof.

12. Mr. Nandedkar contended that In this case on the invitation of the parties. the arbitrators had divided the property into two lots; one consisting of 1/3rd share and the other of 2/3rd share by giving the 1/3rd share to the respondents and the 2/3rd share to the appellants. He has, however, been unable to point out anything in the proceedings to show that this was done with the consent of the parties or at their invitation. I think the judgment in AIR 1954 241 (Nagpur) has no application to the fact of this case. It is open to the parties to refer the question of partition even of revenue paying lands to arbitration and it is open to the arbitrators to divide the estate in such a way that the payment of revenue is not divided that is by allotting entire items of land to one party or the other. All that the Court has to do in such cases is to hear the objections to the award and either to set it aside or to pass judgment in the case. The arbitrators are not governed by Section 54 of the Civil P. C. which is a section binding on the Court In passing judgment on award, the Court does not pass a decree of partition of an undivided estate. That has been achieved by the award itself and all that the Court does is that the Court passes judgment in terms thereof.

13. I am, therefore, of the view that the action of the trial Court in referring the question of partition of revenue paying estate to a Commissioner was without jurisdiction and must be set aside. The appellate Court appears to me to be wrong in taking a contrary view.

14. Before me, Mr. Padhye on behalf of the appellants also took up contentions that the property should have been partitioned in six shares and not in two shares in accordance with the decree. In view of the fact that a fresh partition will have to be made by the Collector in accordance with the decree, I need not go into the question. Mr. Padhye also contended that the partition was unjust and unfair. This question will also not survive in relation to the revenue paying property inasmuch as there will have to be a fresh partition by the Collector.

15. The parties do not desire that the decree should be set aside with regard to the estate other than revenue paying estate. I, therefore, set aside the decree of the trial Court with regard to the revenue paying estate and direct that the decree dated 30th January 1960 be sent to the Collector for effecting actual partition. In the circumstances of the case, the parties will bear their own costs.

16. Order accordingly.