
(2004) 06 AP CK 0055

In the Andhra Pradesh High Court

Case No : CMP No. 5792 of 2004 in AS No. 3488 of 2004

M. Parvatha Vardhanamma and Others	APPELLANT
Vs	
U. Venkayamma (died) and Others	RESPONDENT

Date of Decision : 18-06-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (2004) 4 ALD 484 : (2004) 5 ALT 110 : (2004) 2 APLJ 414

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : Venkateswara Rao Gudapati, for the Appellant; Sriramachandra Murthy, for the Respondent

Judgement

P.S. Narayana, J.—The preliminary objection relating to the maintainability of this application for appointment of Receiver before this Court had been raised by Sri Sriramachandra Murthy, learned Counsel representing the Respondent Nos. 2 to 7. The learned Counsel would contend that inasmuch as O.S. No. 93 of 1979 on the file of the Senior Civil Judge at Kovvur is for partition and appeal is preferred as against the preliminary decree, the Original Court does not become functus officio and till the final decree is passed, an application of this nature shall be moved before the Original Court only and not before the appellate Court. The learned Counsel also incidentally pointed out that an application moved before the original Court for similar relief was rejected by an Order dated 6-2-2004 placing reliance on Damalanka Gangaraju v. M. Vijayalakshmi and Ors. 2002 (3) LS 162. The Counsel however, contended that the said Order cannot be sustained in law. The learned Counsel also had drawn the attention of this Court to Anirudha Adhikari Vs. Amarendra Adhikari, , Ramchandra Jeetmal and Others Vs. Jeetmal Ganpat Porwal and Another, , Al. St. An. Chidambaram Chettiar Vs. Al. Vr. P. Pethaperumal Chettiar and Others, and AIR 1940 11 (Privy Council)

2. Per contra, Sri Gudapati Venkateswara Rao, the learned Counsel representing the petitioner had drawn the attention of this Court stating that during the

pendency of the suit and during earlier litigation also, the subject-matter of the suit was being put to auction every year and receiving of deposit amounts regularly and in the said circumstances, this application was rightly moved before this Court being the appellate Court for similar relief. The learned Counsel also in all fairness would maintain that in case, this Court is of the opinion that the application of this nature may have to be moved before the Court of the first instance, only liberty may be given to the petitioner to move appropriate application before the original Court itself despite the fact that already similar application had been rejected by the Court of the first instance.

3. Heard both the Counsel.

4. It is not in controversy that an application for a similar relief was filed in O.S. No. 93 of 1979 on the file of the Senior Civil Judge at Kovvur, which was rejected as not maintainable and the said Order till now had not been questioned.

5. Be that as it may, Section 2(2) of the CPC (hereinafter in short referred to as "Code"), defines Decree as hereunder:

" "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

6. It is pertinent to note that the explanation specifies that a Decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of and it is final, when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

7. Section 97 of the Code reads as hereunder.

"Appeal from final decree where no appeal from preliminary decree.--Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

8. It is needless to say that in any partition suit, there shall be a preliminary decree and there may be one or more final decrees and as against such decrees, appeals lie. The Original Court may have jurisdiction to pass incidental or ancillary Orders till passing of the final decree. The learned Counsel for the petitioner contends that an application for appointment of Receiver shall be filed before the Court of first instance only and not before the appellate Court and since the appeal is filed as against the preliminary decree only, the original Court alone would have jurisdiction to entertain such application till passing of such final decree, this application cannot be maintained. This contention is liable to be

rejected for the reasons to be specified infra.

9. The mere fact that the original Court is not functus officio till passing of final decree cannot be taken as a bar to maintain an application for appointment of Receiver before the appellate Court. The jurisdiction of the original Court to entertain any application would depend upon the nature of the orders, which would be passed in an appeal. In *Chenna Reddi v. Peddaobi Reddi* ILR 32 Mad 416, the Full Bench of the Madras High Court held:

"Now after an appeal has been filed, the appellate Court is seized of the case and should no doubt be applied to rather than the Court of first instance unless the law expressly enjoins the contrary, as was held in ILR 18 Mad 214 *Pichuvayyengar v. Seshayyengar*; but, it is very different thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of first instance of power to dispose of an application which has been properly made to it in the exercise of its jurisdiction".

10. In *Chidambaram v. Pethaperumai* (supra) it was observed:

"I think that the Court's power to appoint a receiver is limited to the case where the proceedings are still pending before it. Either the suit must be pending and it will be pending before a preliminary decree, but before the final decree, or the proceedings in execution of a final decree must be pending. In either event the Court in which the suit or proceedings are pending will have seisin of the suit or of the property subject to execution; and this will be the basis of the Court's power to appoint a receiver of it. A decree may be partly preliminary and partly final. It was so in the present suit. But this is no reason why the principle which I have just stated should not apply."

11. Their Lordships of the Privy Council in *Jadunath Boy and Ors. v. Parameswar Mullick and Ors.* (supra) had observed that:

"A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree".

12. In *Ramchandra Jeetmal and Ors. v. Jeetmal Ganpat Porwal and Anr.* (supra), the Indore Bench while dealing with a similar question held:

"It is no doubt implicit in the provision of Order 40, Rule 1 that, in order to enable the Court to appoint a Receiver with reference to a property either before or after the decree, the Court must, before the passing of the decree, be seized of the suit itself and after the passing of the decree it must be seized of the execution proceeding. Where, therefore, the Court becomes functus officio after the passing of the decree and (here is an appeal preferred against that decree, it is the appellate Court which ought to be moved for the purpose. But, there may be cases where, in spite of the fact that there is a preliminary decree against which an appeal has been taken to the higher Court, the Court is actually seized of the further part of the trial subsequent to the preliminary decree. In such a

case, the Trial Court cannot be said to have lost its power for appointing a Receiver. It is, no doubt, true that where there are more Courts than one which can be moved for taking action under Order 40, Rule 1 and both the Courts are moved, then, in order to avoid conflict of jurisdiction, the lower Court should stay its hands, but where the only Court moved is the Trial Court, then in that case it cannot be said that any question regarding conflict of jurisdiction will arise".

13. In *Anirudha Adhikari v. Amarendra Adhikari* (supra), while dealing with this aspect, it was observed:

"In a partition suit the proceedings in the Trial Court does not come to an end on passing of a preliminary decree. The suit continues till the passing of a final decree in the case and till then the Trial Court continues to be in seisin of the matter relating to the subject-matter of the suit, and therefore, has jurisdiction to entertain an application for appointment of a receiver and dispose of the same."

14. Reliance was also placed on the decision in *Damalanka Gangaraju v. M. Vijayalakshmi and Ors.* (supra). When an appeal is pending as against the preliminary decree, normally an application of this nature may have to be moved before the appellate Court only. It may be that the original Court also may entertain such application. The mere fact that the original Court is having jurisdiction to entertain such application would not operate as a bar. But, however, the normal rule should be that the applications of this nature have to be moved before the appellate Courts since those Courts would be seized of the matters, though, such applications are preferred as against preliminary decrees in partition suits. It is no doubt true that the original Court does not become functus officio, in view of the fact, a final decree may have to be passed. But, however, that does not come in the way of the appellate Court dealing with applications of this nature. Hence, normally the appellate Court, in a matter of this nature, may have to entertain such applications unless certain specified circumstances warrant moving of such applications before the Court of the first instance. To give any contrary interpretation may lead to absurdity.

15. Hence, I am not inclined to accept with the preliminary objection relating to the maintainability of the application raised by Sri Ramachandra Murthy. Let the office list the Civil Miscellaneous Petition after two weeks for further hearing of the application on merits.