

(2000) 04 AP CK 0038

In the Andhra Pradesh High Court

Case No : CCC Appeal No. 133 of 1995

Mangalagirikhaja Mian (died) and others

APPELLANT

Vs

Chand Bee and others

RESPONDENT

Date of Decision : 17-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18
Hindu Succession Act, 1956 — Section 29
Partition Act, 1893 — Section 2, 4

Citation : (2000) 3 ALD 498 : (2000) 3 ALT 200

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : Mr. E. Manohar and Mr. T. Veerabhadrayya, for the Appellant; Mr. Ashok Anand Kumar, for the Respondent

Judgement

1. This appeal has been preferred against the final decree dated 7-6-1995 passed in IANo.182 of 1983 and 183 of 1983 in the suit OS No.96 of 1978 on the file of the III Additional Judge, City Civil Court, Secunderabad.

2. Appellants I to 6 are the defendants in the suit. The 6th defendant although died on 30-4-1984 was shown in the array of the appellants. Appellants 7 to 15 are the legal representatives of the deceased second appellant. Appellant No.16 is the legal representative of the deceased first appellant. First respondent is the plaintiff in the suit. Respondent Nos.2, 3 and 4 are the defendants 7 to 9 in the suit. Respondents 5 to 11 are the legal representatives of the deceased third respondent. Respondent Nos.12 to 15 are the legal representatives of the deceased first respondent -Plaintiff.

3. It is expedient to refer the parties as they are originally arrayed in the suit for better understanding and to avoid any confusion.

4. The suit was filed for partition as aforesaid claiming 1/16th share each by the plaintiff and defendants 7 to 9 who are all daughters of the sixth defendant and her late husband Abdul Kareem. Defendants 1 to 5 each is entitled to 1/8th share

being the sons. The defendant No.6 being the wife of late Kareem was entitled to 1/8th share. The quantum of the shares to which the parties are entitled to is not in dispute inasmuch as each of the heirs under the provisions of Mohammedan Law is entitled to a defined share. The suit was decreed and a preliminary decree was passed in favour of the plaintiff directing the suit schedule house-bearing No.3272 be divided into sixteen equal shares and allotment of 1/16th share to the plaintiff, and possession also be given thereof to the plaintiff. The decree was also passed in favour of the plaintiff for past and future mesne profits to be determined on a separate application to be filed by the plaintiff. Thereupon, the plaintiff filed IA No.182 of 1983 under Order 20, Rule 18 of the CPC for passing the final decree of dividing the property by metes and bounds and after conducting enquiry in regard to the past and future profits in terms of the preliminary decree. IANo.183 was filed seeking appointment of a Commissioner for effecting division of the property.

5. Initially a Commissioner was appointed in IA No. 183 of 1983 and that Commissioner divided the property into four units and submitted his report on profits also. Since he had not worked out the equities and apportionment of the payments to be made by each party, another Commissioner was appointed and that Commissioner submitted his report. The second Commissioner had taken the assistance of a value for evaluating the property. The Commissioner as well as the valuer were examined as witnesses during the course of the enquiry. Upon considering the evidence available on record and the reports filed by the Commissioners, the Court below ultimately passed the final decree. While passing the final decree, the Court directed that the plaintiff and her three sisters, namely, defendant Nos.7, 8 and 9 together be given 1/4th share as each of them is entitled to 1/16th, and they be given unit I, adding 1/8th share of D6, their deceased mother. The Court further directed that the defendants 1 to 5 who are entitled to 1/8th share each be allotted unit Nos.2 to 4. The Court further directed that the plaintiff and defendants 7, 8 and 9 should pay the difference amount of Rs.78,060-05 ps., to the other defendants. The decree further directed that the plaintiff and defendants 7 to 9 are entitled to the profits at the rate of Rs.126-50 ps., per month each from 26-12-1977 till the date of delivery with interest at 12% per annum. Having been aggrieved by the same, the contesting defendants filed the present appeal.

6. Sri E. Manohar, the learned senior Counsel appearing for the appellants, except appellant No.3, contends that the allotment of Unit No.I to the plaintiff and defendant Nos.7 to 9 is erroneous inasmuch as the shares of defendants 7 to 9 cannot be allotted jointly with the plaintiff as the final decree petition was filed by the plaintiff alone. The learned Counsel further contends that the request of defendant Nos.7 to 9 and the plaintiff by filing a memo to divide the property into four units should have been rejected. The learned Counsel further contends that one of the shares of the deceased sixth defendant i.e., the mother would devolve upon the sons and the Court did not take that into consideration erroneously. Sri Veerabhadrayya, the learned Counsel appearing for the third

appellant contends that the Court in a partition should work out the equities and make an endeavour to allot that share to the party, which is in possession ordinarily in preference to others. Mr. Ashok Anand Kumar, the learned Counsel appearing for the contesting respondents contends that the order passed by the Court below is equitable in view of the facts and circumstances of the case. The learned Counsel further contends that Unit No.1 of the house property was sold by the respondents in favour of the third parties and any disturbance of the allotment of shares at this stage would result in travesty of justice.

7. For brevity and better understanding of the matter it is expedient to advert to the question of law in the first instance.

8. The Apex Court in *Muthangi Ayyanna Vs. Muthangi Jaggarao and Others*, , in Para 6 held that the final decree could not amend or go behind the preliminary decree on a matter determined by a preliminary decree. But certainly the subsequent events can be taken into consideration.

9. The Apex Court again in *Phoolchand and Another Vs. Gopal Lal*, , held as follows :

"So far as partition suits are concerned, if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; and if there is a dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. However this can only be done so long as the final decree has not been passed."

Again in *S. Sai Reddy v. S. Narayana Reddy* 1991 (2) APLJ 48 the Apex Court held as follows :

"When a suit for partition is filed in a Court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree, which determines shares, does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. It is held that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefit conferred by the Act."

That was a case where the daughters claimed the share on par with the sons in view of the A.P. Amendment Act, 1986 incorporating Section 29A to Hindu Succession Act. When that was resisted on the ground that a suit for partition had already been filed and a preliminary decree had been passed, the daughters were not entitled to a share, the above judgment came to be passed repelling the defence.

10. A Bench of this Court in *Kamisetti Audilakshmana Rao v, Attnapalli*

Mallareddy (1977) 2 LS 73 held that the Court has power to modify or vary any of the terms of the preliminary decree while taking note of the subsequent events after passing of the preliminary decree, the Court held as follows :

"Where due to the process of law, certain events have transpired subsequent to the passing of the preliminary decree and it becomes impossible to pass a final decree in accordance with the literal construction of the preliminary decree, it is not only open but is the bounden duty of the Court to take into account the legal events which happened subsequently and pass a workable final decree."

11. In *Lachmi Narayan Manvary v. Balmakunda Mar-wary* AIR 1924 PC 198 the Privy Council held that it was the plaintiff who ordinarily moves the Court to initiate the supplementary proceedings after the passing of the decree, but there was no legal bar to any party to the suit taking such steps provided that his rights and interest had also been declared under the decree.

12. In *Bittan Devi v. Rudra Sen* AIR 1966 All 601 the Allahabad High Court held as follows:

"It is true that the Courts of law generally lay down in the preliminary decree the plaintiffs' share or rights in the property, but where the defendants desire that their share or interest be also declared, the preliminary decree should contain such a declaration also. If, for some reason, the defendants' rights have not been declared in the preliminary decree, the aggrieved party can challenge the decree in an appeal or can apply for review. One thing is clear that after the passing of the preliminary decree also, the defendants can apply for and have their share partitioned on payment of Court fee etc., as may be necessary under the law.

The Courts of law cannot go behind the decree and have to take further steps on the basis of the decree already passed. Consequently if the preliminary decree passed in a partition suit does not contain any declaration as to the rights of the defendants, their application for the partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified, but once the preliminary decree contains a declaration as to the defendants' share they can, even after the passing of the preliminary decree take steps for the separation of their share. "

13. The Calcutta High Court in *Sarbeswar Panda and Others Vs. Bibhabasu Panda*, has taken the view that under Order 20. Rule 18 sub-rule (2) the Court though may pass a preliminary decree declaring the rights of the several parties in the suit property in a partition suit but generally the Court declares the rights of the plaintiff and of those defendants who contest in the suit and desire their rights to be so declared. The rights and shares of the defendants being not declared in the preliminary decree, the Commissioner is not competent to partition and make separate allotment of the share in respect of the property in the suit in favour of those parties unless the preliminary decree is modified declaring the rights and shares of the petitioners either on appeal or on review of

the said preliminary decree. The Calcutta High Court relied upon the judgment of the Allahabad High Court in Buttam Devi's case (supra).

14. Coming to the judgment of the Madras High Court in S.V. Muthu and Others Vs. Veerammal and Another, it was held as follows:

"If the preliminary decree already passed does not contain any declaration as to the rights of the defendants their application for partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified. But when once the preliminary decree contains a declaration as to the defendant's share they can even after passing of the preliminary decree take steps for the actual separation of their share."

A single Judge of this Court in Kurella Rangayya Naidu v. Kurella Venkataswamy Naidu (1982) 2 AWR 92 held that where the plaintiff filed the suit for partition and a preliminary decree was passed in his favour declaring the share without there being further direction, the defendant in the suit cannot apply for allotment of his share unless he gets the preliminary decree amended by declaring his share. That was a case where suit was filed by the plaintiff for partition of the property into 30 equal shares and for allotment of one such share to him and for possession of the same. The decree was passed accordingly in favour of the plaintiff. The preliminary decree did not say that the shares of the defendants 1 and 2 should also be separated and their separation possession should be given to them. Under the circumstances, it was held by this Court that defendants 1 and 2 could not file the petition for separation and allotment of their shares.

15. Disagreeing with the above view a Division Bench of this Court in Rahmat Bee v. Maqbool Banu 1989 (3) ALT 60 held that in a partition suit every party is in a position of the plaintiff and where a preliminary decree specifies the shares and rights of the plaintiffs as well as the defendants, the defendants can file an application after passing of the preliminary decree to get their shares separated as per the decree and it is not necessary to get the decree modified. The Court further held that in fact, there is nothing to be modified since the shares were already specified and to avoid the multiplicity of proceedings the defendants were held to be entitled to have a final decree passed in accordance with the preliminary decree in their favour. That was a case where the plaintiff filed the suit for partition of the plaint schedule properties and for allotment of 1/3rd share to the plaintiff. Initially the suit was decreed in favour of the plaintiff, but in the appeal the appellate Court modified the decree and declared the share of the plaintiff at 64/38th share. Similarly, the share of each of the defendants was also specified. When the IOIh defendant in the suit filed IA No.328 of 1983 for appointment of a Commissioner and to divide his share and for allotment of the share there was an objection on the ground that the petition was not maintainable as there was no direction in the preliminary decree about the allotment and separate possession of his share. Repelling the contention of the respondents, it was held by the Bench thus:

"Where the rights of the parties are declared in the preliminary decree a Commissioner can be appointed to partition the properties as per the rights declared in the decree. In the instant case, the preliminary decree in no unmistakable terms specifies the rights of the plaintiff as well as each of the defendants. No doubt the preliminary decree does not say that the defendant should be put in possession of their shares, but that in our opinion does not make any difference. When once the shares are specified in the preliminary decree, it is open to the defendants to have a Commissioner appointed for allotment and separate possession of the properties as per the preliminary decree. In such a case, it is not necessary to get the preliminary decree modified. It is true that any number of final decrees can be passed."

16. The following principles would emerge obviously from a conspectus of the above judgments:

In a partition suit every party is in a position of the plaintiff.

That the rights of the parties are to be determined by the Court in a preliminary decree.

The Courts of law cannot go behind the decree and have to take further steps on the basis of the decree already passed. If the preliminary decree does not contain any declaration as to the rights of the defendants, their application for the partition or separation of their share shall not be maintained.

Although the decree is not passed declaring the shares of each of the parties to the suit except declaring the share of the plaintiff, the parties can maintain independent applications for separation and for allotment of their shares when it is specified in the judgment about the rights of the individual parties thereto.

But in the event of any variation in the shares declared to have been entitled to by the parties under a preliminary decree on account of the subsequent events the same can be taken note of by the Court while passing the final decree so as to bring out a total partition of the properties and once for all without driving the parties to a fresh litigation.

As a necessary corollary it is obvious that without any request from the defendants, in an application of the plaintiff for separation and allotment of his/her share the share of the defendant cannot be ordered to be allotted.

Any number of Final Decree petitions can be filed and passed.

17. The legal position is thus obvious that no party whose right has not been declared and whose share has not been specified, is entitled to maintain an application for separation of his share and for allotment of the same. The course open to him is to see that the preliminary decree is suitably modified for getting his right declared and the Court can direct the partition of the property and for separation and allotment of the share in the property when applied for the same. If the shares of the parties are specified in the judgment there is no need to get

the preliminary decree amended.

18. Coming to the instant case, it is clear from the preliminary decree that it was passed in favour of the plaintiff directing the suit house be divided into sixteen equal shares and for allotment of one such share in her favour and possession. The preliminary decree has not declared the shares of the other parties thereto. However, in the judgment passed in the suit in OS No.96 of 1978, it has been specifically observed that the plaintiff and the defendants 2 to 9 are entitled to their respective shares as set out in the plaint. Even otherwise since the parties profess Muslim religion, as per the principles of Mohammedan Law their shares having been specified, there is no difficulty in regard to the quantum of the share to which each of the parties is entitled to. The plaintiff and her three sisters are each entitled to 1/6th share and defendants 1 to 5 are each entitled to 1/8th share and their late mother alone was entitled to 1/8th share. Though there has been no direction in the decree in their favour, but their rights in regard to specified shares have been considered in the judgment. Therefore the defendants can ask for separation of his or her share and for allotment of the same coupled with possession. But only the plaintiff-petitioner has filed the final decree petition. No petition as such has been filed by the other sisters of the plaintiff for separation and allotment of their shares; similarly, the other contesting defendants.

19. In view of the direction given in the preliminary decree, the Court is obliged to direct division of the property into sixteen equal shares and for allotment of one such share in favour of the plaintiff. It is the plaintiff alone who filed the final decree petition after paying the necessary Court fee. If the property is not divisible in the opinion of the Commissioner, in accordance with the direction in the preliminary decree nothing prevented the Commissioner from seeking necessary directions from the Court in that regard. The provisions of the Partition Act, 1893 under the circumstances shall have to be taken into consideration. Section 2 of the said Act ordains that by reason of the nature of the property and number of the shareholders claiming shares thereof, division of the property cannot reasonably or conveniently be made and that the sale of the property and distribution of the profits would be more essential for all the shareholders, the Court on the request of any of the shareholders, if it thinks fit, direct sale of the property and distribution of the proceeds. According to Section 4 thereof, even if a third party filed a suit for partition for a dwelling house belonging to the undivided family claiming to be the transferee, the member of the family being the shareholder shall be given preference in the sale provided he undertakes to purchase.

20. However the Court by its order dated 16-2-1985 informed the Commissioner that the plaintiff and the defendants 7 to 9 together be allotted 1/4th share on a memo filed by the Counsel for the plaintiff to that effect while accepting and recording the same, which is contrary to the preliminary decree direction and in the absence of any decree in regard thereto in favour of the defendants 7 to 9,

and without their asking by filing necessary petition after paying the requisite Court fee thereon. Indeed allotment of the remaining three units in favour of the appellants for the self same reasons is not in accordance with law. The property seems to have been divided into four units taking into consideration the sole aspect that the plaintiff and her three sisters-defendants 7, 8 and 9 requested for allotment of their shares together. The division of the property into four units itself keeping in view 1/4th share to be allotted to the four sisters leaving the major shareholders viz., brothers and the mother appears to be inequitable. Oblivious of the situation, that tomorrow if a petition is filed by any one of the brothers for separation of his share and allotment of the same or as a matter of that all the defendants 1 to 5 individually apply for separation of their shares and allotment of the same an anomalous situation will arise and the property cannot be equally divided amongst them that, having already allotted the unit No.1 to the plaintiff and defendants 7 to 9 the remaining units 2 to 4 cannot equally be partitioned so as to allot equal shares to the defendants 1 to 5; that it is also a inequitable at that stage to resort to the provisions of the Partition Act so as order sale of the property among them, the Court below committed error in allotting the first unit to the plaintiff and her three sisters together and further allotting units 2 to 4 to other contesting defendants when there was no petition in regard thereto filed by them.

21. Question of payment of Court-fee and the necessary stamp for engraving the final decree seems to have been lost sight of by the Court. An amount of Rs. 1,686/- was paid towards stamp duty for the 1/4th share of the plaintiff and her three sisters. But the Court allotted unit 1, including the share of the deceased mother of the plaintiff for which no stamp duty was obviously collected. The total shares allotted to the plaintiff and her three sisters were besides their 1/4th share, the 1/8th share of their mother also, which is erroneous.

22. The preliminary decree was passed on 31-10-1982. D6, the mother of the plaintiff and the defendants died on 30th April, 1984 during the pendency of the final decree proceedings. Since all the legal representatives of the deceased D6, have already been there on record in one capacity or other the proceedings cannot be considered to have been abated as against D6. After the demise of D6, obviously her 1/8th share in the schedule mentioned house should be allotted to the parties who are entitled legitimately to that share. But the Court below failed to take note of the same, Consequently it had not decided the rights of the parties to claim their respective moieties in the said share. However, the Court below proceeded in allotting that share to the plaintiff along with her three sisters. It may be mentioned here that the plaintiff did not ask for the same in the final decree petition filed by her nor her sisters-defendants 7 to 9 did ask for the same. Regardless of the fact that defendants 1 to 5 alone in the suit claimed the share of their late mother under a gift deed, said to have been executed by her in their favour and regardless of the competing claims of the parties as to their entitlement of the proportionate shares in the 1/8th share of D6, the shares as originally declared by the Court in the preliminary decree would ordinarily get

themselves enlarged after adding the respective moieties in 1/8th share of D6 to those, who in the opinion of the Court are entitled to ultimately. Neither the plaintiff nor the defendants in this regard have taken any steps surprisingly. After the passing of the preliminary decree in a partition suit before passing of the final decree if there has been either enlargement or diminution of the shares or rights of the parties have been changed by reason of the rights that have been conferred by the statute or rights of the parties by a second or by subsequent purchase or by assignments of interest by whatever cause, the Court before passing its final decree has to consider and decide the matter and grant a final decree in accordance with such subsequent devolutions to avoid multiplicity of suits and give complete and appropriate relief to all the parties, notwithstanding the fact that those parties have been added subsequent to the preliminary decree and their interest has been found to be affected and they were added as necessary parties. Vide, S. Narayana Reddy and others Vs. S. Sai Reddy, . The Apex Court in Phoolchand and Another Vs. Gopal Lal, , held thus:

"We are of opinion that there is nothing in the CPC which prohibits the passing of more than one preliminary decree if circumstances justify the same and (hat it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the Court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the Court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of the Parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the Court. So far therefore as partition suits are concerned, we have no doubt if an event transpires after (he preliminary decree which necessitates a change in shares, the Court can and should do so.""

23. Without deciding the competing claims of the parties in regard to the share of D6, the Court below erroneously added that share to the plaintiffs and allotted unit No.1 to the plaintiff and defendants 7 to 9 while of course directing them to pay the difference of the amount to the defendants 1 to 5. The said course adopted by the Court is not only against the law inasmuch as the Court cannot go behind the preliminary decree may cause substantial injustice to the parties.

24. The allotment is also not in accordance with the equities since Defendant No.3's claim that he is residing in one of the units has not been considered for allotment of that portion towards his share. Sri Veerabhadrayya, the learned Counsel appearing for the third appellant, contends that the third appellant being in possession of a particular portion of the house, he should have been allotted that portion which he is claiming to be in possession and instead in ignoring the

same, the Court below erred in proceeding to allot that share to the plaintiff and her three sisters. To buttress the above contention the learned Counsel relied upon a judgment of the Madras High Court reported in P. Ponnammal and Others Vs. Mrs. Kanakavalli Srinivasan and Another, The Madras High Court held that it is a general rule of law that partition should be made with due regard to the possession of those parties and if it is possible to effect a just partition without disturbing the present possession of the parties. There can be no quarrel with the ratio enunciated in the said judgment. Equities are expected to be worked out at the time of allotment of shares to the parties. Further more allotment although is the discretion of the Court the Court cannot arbitrarily allot a particular property especially when the property has not been divided into equal shares. The Court is expected to adopt some acceptable procedure either by asking all the parties to the proceedings to participate and decide among themselves or in the event of any differences among them and consequently a reasonably acceptable solution is alluding, by drawing the lots in between them and if that is also not practicable then for reasons to be recorded the Court itself allotting the properties as a last resort by using its discretion. But in this case it is not known as to on what basis the Court below allotted unit I, to the plaintiff and defendants 7 to 9. Therefore partition of the suit house into four units and allotment of the same as has been done in this case is contrary to the principles of law and established procedure.

25. It has been the contention of Sri E. Manohar, the learned senior Counsel appearing for the appellants that the Court below erred in granting profits from 1977 onwards when there was evidence on record to show that the shop rooms on the rear side of the building had been constructed only in the year 1982. The construction of the five shop rooms on the rear side of the building according to the report of the Commissioner was evidently made in the year 1982. Awarding profits, therefore, from 1977 onwards is not justifiable for the five rooms. In view of these glaring defects and infirmities as pointed out supra, the final decree passed by the learned III Additional Judge, Secunderabad, is unsustainable under law.

26. It seems the parties pending disposal of the final decree have made alienations and third parties have purchased the shares of the plaintiff and her sisters including that of the share of their deceased mother. One of the appellants also seems to have sold his share of the property to appellant No.16. It is true that on account of the passage of time and prolonged litigation in this case, the parties have been in dire need of money could not have restrained themselves. This Court is alive of the situation that at this stage, if the final decree is set aside and the matter is directed to be considered afresh, it would cause any amount of monetary loss besides inconvenience to the parties, but having regard to the glaring defects and infirmities pointed out supra and more particularly the consequences of the death of D6-the mother there is no other alternative except to remit the matter back to the Court for consideration of the same afresh in the light of the observations made supra in the judgment, so as to avoid multiplicity of proceedings.

27. For the foregoing reasons, the appeal is allowed and the final decree passed by the Court below in IA No.182 of 1983 and 183 of 1983 in the suit OS No.96 of 1978 is hereby set aside and the matter is remitted back to the Court below for fresli disposal in the light of the observations made in the judgment supra. Having due regard to the prolonged litigation, the Court below is directed to make every endeavour to see that the matter is disposed of as expeditiously as possible within preferably three months period. Under the circumstances, there shall be no order as to costs.