

(1967) 10 KL CK 0006

In the High Court Of Kerala

Case No : Civil Revision Petition No. 475 of 1966

Mayimu alias Bambathi Bibi and Others

APPELLANT

Vs

Chariya Maliyammal Mayimu and Others

RESPONDENT

Date of Decision : 31-10-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, 115, 2(2), 96

Citation : AIR 1968 Ker 282

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J

Bench : Single Bench

Advocate : M.B. Moosakutty and V. Bhaskara Menon, for Nos. 1 to 3, for the Appellant; M.M. Abdulkhader, for Nos. 26, 28 and 61, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Krishnamoorthy Iyer, J.—A preliminary objection was raised by the respondents' counsel that the order is appealable and hence the revision will not lie. To appreciate the contention of the respondents' counsel it is necessary to state the circumstances leading to the passing of the order, which is the subject matter of revision. A preliminary decree for partition had been passed and final decree proceedings are pending. The commissioner has filed the report dividing the properties by metes and bounds. Applications were filed by some of the parties for remitting the report to the commissioner for making some alterations. On hearing those applications the learned Judge directed that since it is not convenient to divide item 1 by metes and bounds among the sharers it has to be sold in public auction and necessary directions were given to the commissioner to sell the same. The contention on behalf of the respondents was that this direction regarding the sale of item 1 is a final adjudication of the rights of the parties in regard to the mode of division of item 1 and will therefore amount to a decree and hence appealable. In support of his contention the decisions in Vissanna v. Viswa-brahamam AIR 1957 Andh Pra 25 and Krishnamma v. Latehumanaidu, AIR 1958 Andh Pra 520 were relied on.

2. The law is now well settled that in a partition suit there can be any number of preliminary decrees. This position has been affirmed by their Lordships of the Supreme Court in *Phoolchand and Another Vs. Gopal Lal*, where they observed:

"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 that 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 "

3. The order in question has directed the sale of item 1 as the court below took the view that it cannot be conveniently divided among the sharers. There is therefore a final adjudication of the rights of the parties regarding the manner in which item 1 has to be divided. It will therefore amount to a preliminary decree. The fact that no formal decree has been drawn up is no indication to show that it is not a final order coming within the meaning of Section 2 Sub-section (2) of the C. P. C. If the order in question conclusively determines the rights of parties a decree should have been drawn up. The test whether an order is one finally determining the rights of parties must depend upon the nature of the order and not whether a decree has been prepared or not. The learned counsel for the revision petitioner relied on the decision in *Shaydaban Hirachand v. Chandrasen Motichand* ILR (1966) Guj 143. There the learned Judge has proceeded on the ground that no decree has been prepared. With great respect, I am unable to follow the said view. The view I have taken is supported by the decisions in AIR 1957 Andh Pra 25 and AIR 1958 Andh Pra 520. In AIR 1957 Andh Pra 25 a preliminary decree was passed in a suit for partition directing that the properties should be divided into three equal shares and the plaintiff should be put in possession of one share. After the commissioner filed the report the trial court directed that the property should be sold among the different sharers and the highest bidder should be allotted the entire property, the others being directed to be paid their share of the price realised by the sale of the property. The question arose whether the order of the trial court is a decree within the meaning of Section 2(2) of the C. P. C. In considering the said question Viswanatha Sastri, J. observed:

"Where in a suit for partition an order has been passed adjudicating on the substantive rights of the parties with regard to the matters in controversy in the suit and depriving them of a right which normally they are entitled to enforce in a partition suit, the order is one which should be regarded as a decree open to appeal."

The decision in AIR 1958 Andh Pra 520.

4. I am not unmindful of the fact that a formal decree was prepared in the decision in AIR 1957 Andh Pra 25, But as I have already said that is not a criterion and if no formal decree is prepared the parties should move the trial court for the preparation of the decree to enable them to file an appeal,

5. In Phoolchand and Another Vs. Gopal Lal, already referred to, after the passing of a preliminary decree for partition the shares were re-distributed by an order of the trial court dated 12th of July 1961. No formal decree was prepared on the basis of the re-distribution of shares. An appeal was filed before the High Court of Rajasthan wherein a preliminary objection was taken regarding the maintainability of the appeal. The High Court adjourned the matter to enable the appellant to move the trial court for framing a formal decree. The said application was dismissed by the trial court and the appeal before the High Court proceeded without the production of a copy of the decree. A preliminary objection was raised before the High Court regarding the maintainability of the appeal on two grounds. One is that the order appealed against cannot be construed to be a second preliminary decree, and the second is that since the copy of the decree has not been produced as required by Order 41, Rule 1 C, P. C., the appeal is not maintainable. Both these grounds were overruled by the High Court and in appeal before the Supreme Court then Lordships observed thus:

So far therefore as partition suits are concerned we have no doubt that if an even, 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. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed."

(6) Regarding the non-production of the decree in the High Court as required by Order 41, Rule 1, C. P. C their Lordships observed thus:

"Learned counsel for Phool Chand appellant has attacked the findings of the High Court on all the three points. He first contends that as a copy of the decree was not filed along with the memorandum of appeal the appeal was incompetent and relied in this connection on the decision of this Court in Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others, . In that case it was observed that every memorandum of appeal has to be accompanied by a copy of the decree appealed from, that this requirement of Order XLI, Rule 1 of the CPC is mandatory and in the absence of a copy of the decree the filing of the appeal would be incomplete, defective and incompetent. That no doubt is the correct position in law; but as was pointed out in that case, there may be circumstances where an appeal may be competent even though a copy of the decree may not have been filed along with the memorandum of appeal. One such exceptional case was dealt with in Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava and Others, . We consider that the present case is another exceptional case where in the absence of the copy of decree the appeal could be maintained."

I therefore hold that the order sought to be revised is a decree within the meaning of Section 2 of the C P. C. and an appeal will lie.

7. If the order is not appealable the position will be it may not be possible to interfere with this order u/s 118, C. P. C. unless it is vitiated by any error of jurisdiction contemplated therein. Then it should be possible to question the correctness of the order by any aggrieved party if he is driven to the necessity for filing an appeal against the final decree. Before the passing of the final decree the property would have been sold in auction and the appellate court will be helpless to give relief to the party in the appeal against the final decree. That obviously shows that such orders amount to final adjudication of substantive rights of the parties, I therefore hold that the revision is not maintainable and dismiss it on that preliminary ground. Since it is pointed that no formal decree has been prepared the trial court will frame a formal decree in terms of the order sought to be revised. This decree will be treated as a second preliminary decree in the suit.