

(1973) 07 KL CK 0038
In the High Court Of Kerala
Case No : A.S. No. 385 of 1969

Mukkramkat Damodaran and Others

APPELLANT

Vs

Mukkramkat Kesavankutty and Others

RESPONDENT

Date of Decision : 17-07-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 2(2), 47
Partition Act, 1893 — Section 8

Citation : AIR 1975 Ker 16

Hon'ble Judges : P. Subramonian Poti, J;K. Bhaskaran, J

Bench : Division Bench

Advocate : K. Kuttikrishna Menon and A.P. Chandrasekharan, for the Appellant;
T.S. Venkiteswara Iyer, R.C. Plappally, N.N. Venkitachalam and C.M. Devan, for
the Respondent

Final Decision : Dismissed

Judgement

P. Subramonian Poti, J.—A preliminary objection has been taken in both these appeals as to their maintainability. The appeals have been filed to this court as if the court below has passed final decrees in partition suits and those are appealable. In A.S. 575 of 1969 the order of the court below is only one finding that the objections to the Commissioner's Report passed in final decree proceedings has not been substantiated and therefore the court sees no reason to remit the report to the commissioner. In A.S. 385 of 1969 the court below discusses the various objections to the Commissioner's Report in final decree proceedings in a partition suit and ultimately holds that all the objections fail and the Commissioner's Report and plan are accepted. There is no case that the court below has drawn up a decree pursuant to the orders nor is it the case of the appellants that the suit has been finally disposed of and there is nothing more to be done by the court. Yet they have come to this court by way of appeal and the justification is said to be the decision of this court in Mayimu alias Bibi v. Cheriya Maliyammal Mayimu & others (1968 KLJ. 103).

2. A decree is defined in S. 2(2) of the CPC as:

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 S. 47 or S. 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.

It is not every decision on every matter that comes up before the court that would amount to a decree. The court, during the pendency of the suit, is called upon to decide upon various matters in dispute between the parties. In every such decision there is adjudication. But in order to constitute a decree the adjudication must, so far as the court expressing it is concerned, be one conclusively determining the rights of parties with regard to all or any of the matters in controversy. There is something more and that is, that, it would be a decree only if, it is a formal expression of such adjudication. When the suit is pending the court is often called upon to pass interlocutory orders and also decide matters in controversy by entering findings on some or other of the issues. Neither the findings on the issues nor adjudication on matters which may arise in interlocutory applications would be conclusive determination of the rights of parties. The court, after deciding the issues in a case, deals with the reliefs to be granted to the parties to the suit. The findings reached by the court on various questions in dispute will have their bearing when the court ultimately decides what the parties in a suit are entitled to and it is that decision that amounts to adjudication of the rights of the parties. In other words decisions on disputed questions in the suit do not by themselves constitute decrees but it is only adjudication of the rights and a formal expression thereof that amounts to a decree.

3. When the court considers a Commissioner's report during the pendency of the suit before it for the purpose of determining whether the report should be accepted or not it does not and it should not tie its own hands in the matter of the disposal of the suit finally irrespective of the data furnished in the report. In other words the mere acceptance by court does not necessarily oblige the court to adopt the report wholly or in part at the final adjudication in the suit. No doubt, the report will be material for due consideration by the court at that time. When the court considers objections to a Commissioner's report at the preliminary stage it is only and should be only for the limited purpose of seeing whether the report should be remitted to the Commissioner for further enquiry or the report being inherently bad for any reason it is necessary that a fresh commission should be issued. Very often it happens and particularly so in partition suits that the court goes into such reports in elaborate detail at that stage and comes to the decision one way or the other on the merits so much so it becomes difficult ultimately to decide the suit by reaching a decision on the

questions independent of the earlier views expressed in the order accepting the report. Possibly the appellant in A.S. 385 of 1969 has come to this court because the court below purporting to consider objections to the commissioner's report has virtually discussed the allotments of properties. Whatever that be, the orders before us are only orders passed by the court on the objection to the commissioner's report. These orders cannot amount to decrees and these orders are not appealable under any provision of the Code of Civil Procedure.

4. We think that there is no reason to doubt this proposition, but all the same such appeals are filed to this court possibly on a misunderstanding of the scope of the decision of a learned single judge of this court in *Mayimu alias Bumbathi Bibi v. Cheriya Maliyammal Mayimu & Others* (1968 KLJ. 103). That was a case where subsequent to a preliminary decree for partition the court directed the sale of an item of property and this was taken up by way of revision to this court. It was contended that the revision would not be appropriate as appeal lies against the order since that has to be deemed to be decree. That was because, according to the respondents in that case, the direction regarding the sale of item was a final adjudication of the rights of parties in regard to the mode of division of that item and it will therefore amount to a decree. Reliance was placed on certain observations in *Pedapudi Vissanna Vs. Pedapudi Viswabrahmam and Others*. The case before the High Court of Andhra Pradesh was one where the learned judge was considering the order for sale made under the Partition Act and S. 8 of that Act specifically provided for an appeal against such an order. The learned judge incidentally also considered whether the case would have been appealable even if it did not fall within the purview of that Act. It appears that the learned judge was of the view that since the direction for the sale of the item was a direction in the nature of one to be made is the preliminary decree, it should be deemed as a preliminary decree and hence it was appealable. This decision was followed by *Krishnamoorthy Iyer J. in Mayimu alias Bambathi Bibi v. Cheriya Maliyammal Mayimu and Others* (1968 KLJ. 103). We need not pronounce our views on this question for the purpose of this case, though from the Bar very exhaustive arguments were addressed to us on the question. Whether the direction by the court to sell some of the items of properties comprised in the preliminary decree for partition would itself amount to a preliminary decree is a matter which requires examination. It is possible to contend that in directing the sale of one or other of the items of properties involved in the partition suit the court is only acting to conserve the assets which are the subject-matter of the suit and by conversion of a property into money there is no adjudication of the rights of parties with regard to such property and therefore an appeal would not necessarily lie. It is also possible to say that it is akin to a case where, by order on interlocutory applications such as for the appointment of receiver or for leasing out of property, the party may be aggrieved and that by itself may not be sufficient to characterise the order as one conclusively determining the rights of parties with regard to the matter in controversy. Of course if the case before us was one to which the decision of *Krishnamoorthy Iyer J.* was applicable we would

have further examined this position. For the present it is not necessary and we leave it at that.

5. But we find considerable force in the contention that the decision of this court is not authority for the stand taken by the appellants in this case. As we have pointed out the right of appeal must be limited to cases where the adjudications amount to decrees. The question, of course, is not whether decrees have been drawn up by a court or not. Even if decree has not been drawn up but ought to be an appeal must lie and even if a decree has been drawn up but ought not to have been no appeal will lie. In a case where it is contended that a final decree has been passed and the suit has been finally disposed of, the question that may properly be asked is, whether the reliefs sought by the parties have been considered and either granted or denied. That would be the final adjudication of rights of parties. Orders such as those before us would only be decisions on matters which are preliminary to passing a final decree in the suit and which possibly may furnish the basis for passing such a decree but are not themselves decrees.

6. We therefore hold that these appeals are not tenable and therefore they are to be dismissed. We hope that the court below will be benefited by the observations we have made in these appeals with regard to the scope of orders on petitions objecting to Commissioner's report and will bear in mind these when ultimately deciding the suit. We regret that these appeals have been pending in this court for four years. We direct the court below to deal with the matter expeditiously.

In the circumstances the parties will suffer costs.