
(2009) 04 MAD CK 0409

In the Madras High Court

Case No : C.R.P. (PD) No. 190 of 2008 and M.P. No's. 1 and 2 of 2008

Muthulakshmi and Others

APPELLANT

Vs

R. Purusothaman and Others

RESPONDENT

Date of Decision : 27-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 97
Constitution of India, 1950 — Article 227

Citation : (2009) 04 MAD CK 0409

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : S.V. Jayaraman for R.T. Shyamala, for the Appellant; G. Krishnamurthy for R1 to R6 and 8 to 10, B.K. Srinivasan, for R12 and T.S. Selvarani, for R18 to R20, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—This Civil Revision Petition is filed against the Order dated 21.11.2007 made in I.A. No. 12621 of 1997 in O.S. No. 1484 of 1979 on the file of the VI Assistant Judge, City Civil Court, Chennai.

2. The facts of the case are as follows:

Defendants 1 to 7 in O.S. No. 1484 of 1979 on the file of the VI Assistant Judge, City Civil Court, Chennai, are the revision petitioners. They are aggrieved by the order of the trial court dated 21.11.2007, made in I.A. No. 12621 of 1997.

3. I.A. No. 12621 of 1997 was filed by the third plaintiff in O.S. No. 1484 of 1979, under Order 26 Rules 13 and 14 of C.P.C. to appoint an Advocate Commissioner to divide the plaint schedule property into five shares by metes and bounds and allot 4/5th share to the petitioners or in the alternative, if the property is not capable of division, the said property may be sold and 4/5th share of the sale proceeds be allotted to the petitioners.

4. In the affidavit filed in support of I.A. No. 12621 of 1997, it was stated that

the suit was filed for partition and separate shares of 4/5th of the suit property and also for mesne profits. A preliminary decree was passed by the Court on 18.08.1982, holding that the plaintiffs are entitled to 4/5th share in the plaint schedule property and also for mesne profits. The plaintiffs 2 to 8 preferred an appeal in A.S.No.108 of 1993 before this court and the first appeal was dismissed on 15.03.1996, holding that the trial court has rightly granted a decree in favour of the plaintiffs. No second appeal was filed against the judgment in A.S.No.108 of 1983. Hence, I.A. No. 12621 of 1997 has been filed for the aforesaid relief.

5. This was resisted by the defendants 2 to 8 by filing a counter wherein it was stated that the 9th defendant Renganayaki died and the legal representatives of her were not brought on record and therefore, the suit is abated as against Renganayaki as early as on 9.6.2004. It is further stated that the defendants 2 to 8 filed a Memo stating that the 12th and 14th plaintiffs died and their legal heirs were also not brought on record. Hence, the suit is to be dismissed as abated against 12th and 14th plaintiffs herein. Hence, they prayed for the dismissal of the entire suit on the ground of abatement.

6. The trial court by order dated 21.11.2007 allowed I.A. No. 12621 of 1997 by holding that a preliminary decree was already passed on 18.10.1982 itself and the first appeal was dismissed in 1996 itself. Therefore, there is no impediment for passing a final decree on the basis of the preliminary decree. Aggrieved by the order of the trial court, appointing an Advocate Commissioner to divide the property, on the basis of the preliminary decree, the above revision has been filed under Article 227 of the Constitution of India.

7. Heard Mr. S.V. Jeyaraman, the learned Senior Counsel for the revision petitioners and the learned Counsel for the respondents. I have also gone through the entire documents available on record.

8. The learned Senior Counsel for the revision petitioners submits that in a partition suit, everyone is a necessary party and when the suit is abated against one person, then the entire suit is abated against the other persons also. Therefore, he submitted that the order of the trial court is unjustifiable in law and the same is to be set aside.

9. Per contra, the learned Counsel for the respondents relying on a judgment of the Allahabad High Court reported in Rudra Pal Singh Vs. Ram Pal Singh and Others, submitted that once a preliminary decree is passed, finally adjudicating the rights of the parties, the subsequent deaths of some of the parties do not contemplate the abatement of the entire suit. Hence, he prayed for the dismissal of the revision petition.

10. I have considered the rival submissions carefully with regard to facts and citation.

11. In Rudra Pal Singh Vs. Ram Pal Singh and Others, , the Allahabad High Court

held as under:

11. Shri N.D. Ojha on the other hand, referred to Order XXII, Rule 12 of the Code of Civil Procedure, which provides;

Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

The Allahabad High Court has made certain amendments in the Rule, and the amended Rule 12 of Order XXII, C.P.C. reads thus:

Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order or to proceedings in the original court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit.

In view of this amendment there is no question of abatement either of the execution proceeding or of the preparation of final decree in case of the death of a party. The amendment made by the Allahabad High Court certainly has got no retrospective effect, as was held by this Court in Sewa Ram and Others Vs. Giyan Singh and Others, .

12. In view of the amendment of Order XXII Rule 12, C.P.C made by the Allahabad High Court, the Full bench decision in Mahabir Singh Vs. Narain Tewari and Others , relied upon by the Counsel for the respondents, has lost its force, and under the provisions of Section 97, C.P.C. a preliminary decree, unless it is appealed against, finally adjudicate the rights and title of the parties.

13. In the Privy Council case of AIR 1940 11 (Privy Council) , where an appeal had been filed against the proceedings for the preparation of final decree, there could be a readjustment of the share as declared in the preliminary decree in view of a situation that had made it necessary to readjust the share. This can be made more clear by an example. If there was a dispute between three persons, and the preliminary decree had declared the rights of each of them to be one-third and during the proceedings for the preparation of final decree one of the three joint owners died, then in such a situation the rights and the shares of the parties would certainly have to be readjusted and the same can be done, if an appeal against the final decree was pending although no appeal against the preliminary decree had been filed. The Privy Council case cited above only contemplates a case of this nature. But in the present case no new contingency has arisen necessitating the readjustment of the shares of the parties. In this case, it has been definitely found by the Revenue Court, which was competent to do so, that the Khatas in dispute were joint Khatas in which Sheonath Singh and Devidin Singh had half share each. No appeal having been filed against the final decree.

14. The matter can be looked at from yet another aspect. Supposing the Consolidation of Holdings Act had not seen the light of the day and an appeal against the final decree was pending and no appeal against the preliminary

decree had been filed, then it was not possible for any party to get the preliminary decree set aside or modified in view of the provisions of Section 97, C.P.C. What could not have been done directly, cannot be obtained indirectly, is a well established principle. In my judgment, therefore, it was not open to the consolidation authorities to reopen the matter as it had become final by the passing of the preliminary decree.

17. In 1968 ALL LJ 693 (Smt. Lall v. Smt ranihari), it was held that it is permissible to abate the suit and the appeal partially u/s 5 of the Consolidation of Holdings Act. This case is more in Consonance with the facts of the present case than the old relied upon by Shri Agarwal. In view of the Supreme Court decision referred to above Venkata Reddi and Others Vs. Pothi Reddi, , although a case did not terminate unless a final decree was passed in it, yet there may be finality of the various stages of that case. In this view of the matter the contention of Shri Agarwal cannot be accepted.

12. In the light of the above judgment and on the basis of the facts and circumstances of the case, I am of the considered view that the trial court has correctly allowed I.A. No. 12621 of 1997.

13. It is not in dispute that the preliminary decree was passed on 18.08.1982 itself when all the parties were alive and it was not the case of the revision petitioners that there was abatement of the suit at the stage of the preliminary decree. It is also not in dispute that this preliminary decree was confirmed by this court on 15.03.1996 by dismissing the appeal. Therefore, passing away of some of the persons after passing of the preliminary decree, which has become final, will not abate the entire suit and the petitioners could very well maintain I.A. No. 12621 of 1997 to pass a final decree on the basis of the preliminary decree.

14. Hence, I do not find any illegality in the order of the trial court warranting interference under Article 227 of the Constitution of India and accordingly, the present Civil Revision petition is dismissed. No cost. Consequently, connected miscellaneous petitions are closed.