
(2014) 03 AP CK 0057

In the Andhra Pradesh High Court

Case No : Second Appeal No. 290 of 2005

Neelam Chittemma and Others

APPELLANT

Vs

Tirlangi Appa and Others

RESPONDENT

Date of Decision : 13-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18 97

Citation : (2014) 4 ALD 269 : (2014) 3 ALT 452

Hon'ble Judges : T. Sunil Chowdary, J

Bench : Single Bench

Advocate : K. Sita Ram, for the Appellant; M.V. Pratap Kumar Representing Mr. M.V.S. Suresh Kumar for Respondents 9 to 12 and Sri G. Ronald Raju for Respondents 6 and 7, for the Respondent

Final Decision : Allowed

Judgement

T. Sunil Chowdary, J.—This second appeal is preferred by the respondent Nos. 7 and 9 to 11 challenging the decree and judgment dated 03.09.2004 passed in A.S. No. 45 of 2002 on the file of the I Additional District Judge, West Godavari, Eluru, confirming the final decree and order dated 30.04.2001 passed in I.A. No. 2754 of 1994 in O.S. No. 475 of 1981 on the file of the Principal Junior Civil Judge, Eluru. The parties are hereinafter referred to as they are arrayed in the final decree proceedings, for the sake of convenience. The case of the petitioner in I.A. No. 2754 of 1994 filed for grant of final decree is as follows. He filed O.S. No. 475 of 1981 against respondent Nos. 1 to 4 for partition of the suit schedule property into two equal shares and allotment of one such share to him and for future profits. The first respondent is his father; second respondent is the purchaser of item No. 1 and respondent Nos. 3 and 4 are the purchasers of item No. 2 of the suit schedule property. The suit was dismissed on 07.07.1983. Aggrieved thereby, the petitioner preferred A.S. No. 109 of 1983 on the file of the Additional District Judge, Eluru. The appeal was allowed by decree and judgment dated 19.08.1986 and consequently the suit was decreed. Being not

satisfied with the decree and judgment in A.S. No. 109 of 1983, the second respondent preferred S.A. No. 86 of 1987 whereas one P. Appalanarasamma, who is alienee of respondent Nos. 3 and 4, preferred S.A. No. 119 of 1987. During the pendency of those two second appeals, first respondent/first defendant died and respondent Nos. 5 and 6 were brought on record as his legal representatives. Both the second appeals were dismissed by common judgment dated 18.02.1994. Thereby the preliminary decree granted in the suit filed by the petitioner for partition of Items 1 and 2 of suit schedule properties was affirmed. As a result, the petitioner is entitled to half of suit schedule properties and for future profits. The petitioner filed I.A. No. 2754 of 1994 to appoint a Commissioner for partition of suit schedule properties into two equal shares, delivery of one such share to him and for passing final decree in terms of preliminary decree.

2. The second respondent filed counter inter alia contending that he purchased item-1 of suit schedule properties under registered sale deed dated 11.09.1955 for a valuable consideration of Rs. 300/- from the first respondent and ever since, he has been in exclusive possession and enjoyment of the same by constructing a pucca house therein. The petitioner filed the suit in collusion with his father i.e., the first respondent to cause loss to the second respondent. Bona fides of second respondent in purchasing the item-1 of suit schedule property were upheld by the Court. In A.S. No. 109 of 1983, the first appellate court while granting preliminary decree categorically mentioned to allot item-1 of suit schedule properties to the first respondent by working out equities. By the time of sale of item-1 in his favour, it is vacant site and of no value, and item-2 is house property and of more valuable. In view of the preliminary decree and as item-1 is indivisible, it may be allotted to the share of deceased of first respondent. The existing structures on item-1 were constructed by the second respondent. The petitioner is not entitled to make any claim against the second respondent. Hence the petition is liable to be dismissed.

3. After death of second respondent, respondent Nos. 7 to 11 were brought on record as his legal representatives. Respondent Nos. 7 and 9 to 11 filed memo. adopting the counter filed by the second respondent.

4. The respondent No. 5 filed counter affidavit, which was adopted by respondent No. 6, inter alia contending that himself and respondent No. 6 were brought on record as legal representatives of first respondent/first defendant in the High Court. The respondent No. 5 aggrieved by the ex parte orders of the Hon"ble High Court in S.A. No. 119 of 1987 and S.A. No. 86 of 1987 taking steps to file second appeal along with petition to condone delay in preferring the same. They have strong case and if they succeed in second appeal it will be very difficult for them to recover any property from the petitioner if half share is allotted to them. The right to file additional counter is reserved by them.

5. Respondent Nos. 3 and 4 who are said to be the purchasers of item-2 of suit schedule property remained ex parte.

6. The trial court by order dated 31.12.1998 appointed Sri V.V. Kaleswaraopantulu, Advocate as Commissioner directing him to divide the schedule properties into two equal and equitable shares, with the assistance of a qualified surveyor. In pursuance of the order, the Advocate Commissioner measured the property and filed the report dated 22.11.1999 along with plan dividing the property. Basing on the material available on record, the trial Court allowed the petition dividing the suit schedule property into two equal shares by allotting item-1 to the respondent Nos. 7 to 11 with a direction to them to pay half of the market value of item-1 to the petitioner. As regards item-2, it was subdivided into Part-I and Part-II and the petitioner is allotted half share described as Part-II in item-2 of suit schedule property. The petitioner is permitted to file separate petition for awarding future profits which is the subject matter of S.A. No. 305 of 2005. Accordingly, final decree to be engrossed on deposit of required stamp papers. Aggrieved by the final decree proceedings, the respondent Nos. 7 and 9 to 11 filed A.S. No. 45 of 2002. The first appellate court dismissed the same as against which the respondent Nos. 7 and 9 to 11 preferred this second appeal.

7. After hearing Sri K. Sita Ram, learned counsel for the appellants/respondent Nos. 7 and 9 to 11, Sri M.V. Pratap Kumar, representing M.V.S. Suresh Kumar, learned counsel for respondent Nos. 9 to 12, the following substantial questions of law are framed.

1. Whether the final decree passed by the trial court as confirmed by the first appellate court is in conformity with the preliminary decree?

2. Whether a final decree can be passed beyond the scope of the preliminary decree?

Point Nos. 1 and 2:

8. The petitioner is the son of the first respondent. The second respondent purchased the item-1 of suit schedule properties under registered sale deed dated 11.09.1955 from the first respondent. The respondent Nos. 3 and 4 purchased item - 2 of suit schedule properties from the first respondent. The petitioner filed O.S. No. 475 of 1981 against the respondent Nos. 1 to 4 for partition of suit schedule properties into two equal shares and for allotment of one such share to him and for future profits. The suit was dismissed on 07.07.1983. The petitioner preferred A.S. No. 109 of 1983 and the same was allowed by decreeing the suit allotting half of the suit schedule properties in favour of the petitioner. The court further directed to allot item - 1 of suit schedule property to the first respondent as contended by the second respondent to work out equities. Feeling aggrieved by the decree and judgment in A.S. No. 109 of 1983, second respondent filed S.A. No. 86 of 1987 and P. Appalanarasamma, who is transferee of item-2 of property from respondent Nos. 3 and 4, preferred S.A. No. 119 of 1987. The two second appeals were dismissed by this court by common judgment dated 18.02.1994, confirming the preliminary

decree granted by judgment dated 19.08.1986 in A.S. No. 109 of 1983.

9. The learned counsel for the appellants submitted that the trial court committed grave error in passing final decree. To substantiate the contention, he has drawn my attention to the decision of the Supreme Court in Chitturi Subbanna Vs. Kudapa Subbanna and Others, . In para - 26, the apex Court observed as follows.

It is urged for the decree-holder respondent that the trial Court, when passing the final decree, could not have ignored what had been decreed under the preliminary decree as no appeal against the preliminary decree had been preferred and section 97, C.P.C., provided that where any party aggrieved by a preliminary decree passed after the commencement of the Code did not appeal from such decree, it would be precluded from disputing its correctness in any appeal which might be preferred from the final decree. The object of section 97 is that questions which had been urged by the parties and decided by the Court at the stage of the preliminary decree will not be open for re-agitation at the stage of the preparation of the final decree and would be taken as finally decided if no appeal had been preferred against the preliminary decree.

10. In order to appreciate the rival contentions, this Court is placing reliance on the decision in Venkata Reddi and Others Vs. Pothi Reddi, herein the Supreme Court held as follows.

A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the CPC which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.

(emphasis supplied)

11. This court also placed reliance upon the decision in Muthangi Ayyanna Vs. Muthangi Jaggarao and Others, in para-6, the Supreme Court observed as follows.

This appeal, coming up before us from the final decree, raises the question

whether the preliminary decree, confines, as the learned counsel for the appellant-defendant 4 submits, accounting to the claims made by and against individual parties mentioned in the preliminary decree. He urges that it cannot be extended to all parties, including the defendant 4, if the terms of the preliminary decree are binding. The contention is based on the well recognised proposition that a final decree cannot amend or go behind the preliminary decree on a matter determined by the preliminary decree.

(emphasis supplied)

12. As per the principle enunciated in the cases cited supra, in a suit for partition, the court determines and declares the rights of the parties while passing the preliminary decree. The shares of the parties to the suit will be worked out in the final decree proceedings.

13. The crucial question that arises for consideration is whether the trial court has passed final decree in consonance with the preliminary decree. For better appreciation of the rival contentions, it is not out of place to extract hereunder the relevant portion of the judgment in A.S. No. 109 of 1983 as extracted in page - 6 of the judgment in A.S. No. 45 of 2002.

The appeal is allowed with costs throughout and the judgment and decree passed by lower court are hereby reversed and the suit is decreed ordering partition of the plaint schedule properties into two equal shares and to put the plaintiff in possession of one such share. In the final decree proceedings, equities regarding allotment of item No. 1 to the share of 1st defendant shall be worked out as contended by the 2nd defendant. Future profits from the date of the suit shall be determined on a separate application under Order 20 Rule 12 C.P.C. A preliminary decree shall be drawn accordingly.

As per the judgment of the first appellate court, respondent Nos. 3 and 4 and their alienees are not entitled to claim equities. As observed earlier, P. Appalanarasamma i.e., alienee of respondent Nos. 3 and 4 preferred S.A. No. 119 of 1987 on the file of this court. The relevant portion in para - 19 of the judgment is extracted hereunder.

... .. The conduct of defendants 3 and 4 and their transferee, the appellant in A.S. No. 119/1987 (sic) S.A. No. 119/1987 in keeping out of the proceedings before the trial and 1st appellate courts disentitle the appellants in raising those points for the first time in this second appeal. Appellant in S.A. No. 119/1987 took the chance of a decision against him, obviously with knowledge of all the proceedings. He is not entitled to plead equities in his favour at this belated stage and by reason of his positive acquiescence.

Even as per the judgment in S.A. No. 119 of 1987, the alienee of respondent Nos. 3 and 4 is not entitled to claim equities. The preliminary decree drafted by the first appellate court in A.S. No. 109 of 1983 reads as under.

1. That the appeal be and the same is hereby allowed;

2. That the judgment and decree passed by lower court under appeal be and are hereby set aside;
3. That the plaint schedule properties be divided into two equal shares and the plaintiff be put in possession of one such share;
4. That in the final decree proceedings, equities regarding allotment of item No. 1 of the share of the 1st defendant be worked out;
5. That the future profits from the date of suit be determined on a separate application under Order 20 Rule 12 C.P.C.;
6. That the respondents do pay to the appellant a sum of Rs. 754-00 towards costs of the appeal, bearing their own costs of Rs. nil, as no memo. of costs filed; and
7. That the respondents-defendants to (sic, do) also pay to the appellant-plaintiff a sum of Rs. 311-70 towards costs of the suit in the lower court.

As per the terms of the preliminary decree, the alienee of respondent Nos. 3 and 4 is not entitled to claim equities at the time of passing of final decree. It is a settled principle of law that a preliminary decree, in a partition suit, merely determines and declares the rights of the parties in respect of suit schedule property. In the final decree proceedings, the court has to division the property by metes and bounds and allot the shares keeping in mind the rights and convenience of the parties. The function of the final decree is to apply what preliminary decree is ordered. A final decree is thus based upon and controlled by preliminary decree.

14. It is not out of place to extract hereunder the relevant portion in para - 11 of the order in I.A. No. 2754 of 1994.

Because it will deprive totally the other alienees of R. 1 of item No. 2. Though they are not entitled to the equities, they cannot be completely deprived of the property purchased by them from R. 1, at least to the extent of half share of R. 1. Because they invested huge amounts for the construction of double storeyed building.

15. A perusal of the above para clearly indicates that the trial court is conscious of the fact that alienees of first respondent i.e., respondent Nos. 3 and 4 are not entitled for any equities. But the tenor of the judgment of the trial court demonstrates its sympathy towards respondent Nos. 3 and 4 and their alienees, who are not entitled to claim equities in terms of preliminary decree passed in A.S. No. 109 of 1983 as confirmed by the High Court in S.A. No. 86 of 1987. It is not out of place to extract hereunder relevant portion in para - 13 of the order.

Commissioner Sri V.V. Kaleswara Pantulu suggested division of item No. 2 into two equal parts numbering 1 and 2. One part covered by R.C.C. building joint lane partly and some vacant land described as part-I and part-II consists of jammu house, vacant site and some vacant land etc., described in the report as

shown in the plan enclosed located in T.S. No. 122 and 167.

16. This court is unable to understand how the Advocate Commissioner has divided item-2 of suit schedule property into two equal shares i.e., Part-I and Part-II. The trial court basing on the report of the Advocate Commissioner made the following observations in para - 14 of its judgment, which read as under. "Since the subsequent purchasers are not entitled to equities, they are liable to deliver half of extent of land covered by item No. 2 described as part-II in the Commissioner plan which comes to 79.1 Sq. yards."

17. The trial court proceeded on a premise that its duty is to protect the interest of respondent Nos. 3 and 4 and their alienees by working out equities even though the preliminary decree is silent on that aspect. The result portion of the order in I.A. No. 2754 of 1994 so far as item-2 of suit schedule property is as follows.

That so far as item No. 2 of petition schedule property is concerned, the petitioner/plaintiff be and is hereby allotted half share described as part-II in the plan enclosed to the Commissioner's report besides the mesne profits allowed under a separate petition.

18. As per the terms of the final decree, the respondent Nos. 7 to 11 are entitled to item-1 of suit schedule property; and the petitioner is entitled to Part-II of item-2 apart from receiving half of the market value of item-1. Part-I of item-2 is not allotted to anybody as per the preliminary decree. A perusal of the order gives an impression that respondent Nos. 3 and 4 and their alienees have to deliver 79.1 Sq. yards of site to the petitioner and by necessary implication respondent Nos. 3 and 4 and their alienees are entitled to retain Part-I of item-2 of the suit schedule property. However this aspect is not reflecting in the final decree. There is a conflict between the order and the final decree passed in I.A. No. 2754 of 1994, which is not permissible under law.

19. The trial court passed final decree completely de hors the provisions of Order XX Rule 18 CPC. The trial court, while arriving at a conclusion that respondent Nos. 3 and 4 and their alienees are not entitled for equities, ought to have held that the petitioner is entitled for the entire extent of item-2 of suit schedule property.

20. The trial court lost sight of the settled principle of law that the scope of final decree is only to division the property and allot the shares by metes and bounds in pursuance of preliminary decree. The first appellate court mainly focused on the aspect whether the respondent Nos. 7 to 11 have to pay half of the market value of item-1 to the petitioner or not. The first appellate court has not bestowed its attention as to whether the trial court has passed final decree in terms of the preliminary decree or not. The first appellate court also proceeded as if the trial court has passed the final decree within the ambit of Order XX Rule 18 CPC.

21. In the light of the foregoing discussion, I have no hesitation to hold that the trial court has passed the final decree by traversing the terms of the preliminary decree. The courts below have lost sight of settled legal principle that the court shall not pass final decree in contravention of the terms of the preliminary decree. This court is very much conscious that it shall not lightly interfere with the concurrent findings recorded by the courts below. Suffice to say that the first appellate court is a final court so far as fact finding is concerned. The concurrent findings recorded by the courts below are in contravention of the settled principles of law; hence they are liable to be set aside. There is question of law much less substantial question of law in this appeal.

22. In the result, the second appeal is allowed, setting aside the decree and judgment dated 03.9.2004 passed in A.S. No. 45 of 2002 on the file of the I Additional District Judge, West Godavari, Eluru. Consequently the final decree and order dated 30.04.2001 passed in I.A. No. 2754 of 1994 in O.S. No. 475 of 1981 on the file of the Principal Junior Civil Judge, Eluru is also set aside. The trial court is hereby directed to pass final decree afresh strictly adhering to the terms of the preliminary decree as early as possible preferably within a period of four months from the date of receipt of a copy of this order. There shall be no order as to costs. The miscellaneous petitions if any pending in this second appeal shall stand closed.