

(1955) 10 AP CK 0035
In the Andhra Pradesh High Court
Case No : Second Appeal No. 857 of 1951

Pedapudi Vissanna

APPELLANT

Vs

Pedapudi Viswabrahmam and Others

RESPONDENT

Date of Decision : 10-10-1955

Acts Referred:

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

Citation : (1955) 10 AP CK 0035

Hon'ble Judges : Viswanatha Sastri, J

Bench : Single Bench

Advocate : B.V. Subrahmanyam, for the Appellant; C.V. Dikshiulu and K. V.E. Sarma, for the Respondent

Judgement

Viswanatha Sastri, J.—The lower appellate court has tat the appeal preferred to it by the Plaintiff was not maintainable and has not gone into the merits of the appeal. The suit was one for partition in which the Plaintiff prayed for a division of the property into 3 equal shares and allotment of one share to him, Defendants 1 and 2 being entitled to the other two shares.

There was a preliminary decree in the suit passed on 12-11-1947. The direction in the preliminary-decree was that the suit properties as per the plaint schedule should be divided into three equal shares and the Plaintiff be put in possession of one such share. The Plaintiff applied in I. A. 572 of 1949 for the appointment of a Commissioner for the division of the property into three equal shares and for the passing of a final decree.

After taking into consideration the report of the Commissioner, the trial court passed an order that the property should be sold among the different sharers and the highest bidder was to be allotted the entire property, the Ors. being directed to be content with their share of the price realised by the sale. If the property is capable of physical division and I the Plaintiff could be allotted one share either amicably or by casting of lots, he should be awarded" that relief.

It is not competent to the court to impose a forced sale upon the members of the family where the property is capable of division. The question whether the property could be conveniently divided is primarily one for the consideration of the parties and if there was an application u/s 2, Partition Act, it might be open to the Court to make an order for sale.

The order made on such an application would be appealable u/s 8, Partition Act as a decree within the meaning of Section 2, Clause. (2) Code of CPC In the present case there was no application by the parties for a sale and the court has directed a sale because in its opinion the property is not capable of convenient division and enjoyment in three shares. The direction of the trial court is in modification of the terms of the preliminary decree.

2. The question is whether the order of the Court below is a decree within the meaning of Section 2, Clause (2) of the CPC and is open to appeal. I will assume for the sake of argument that apart from the Partition Act, the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable for effecting a partition, as held in *Darbhama Subbamma Vs. Valivetti Veerayya and Others*, (A) though there is a decision of a Division Bench of the Calcutta High Court in *Nitya Gopal Samanta Vs. Pran Krishna Das and Others*, (B) that there is no "inherent power to sell in case the High Court finds that the property cannot be conveniently partitioned or that the partition thereof would affect the intrinsic value of the property.

The only point with which I am now concerned is whether the lower Appellate court was right in its decision that the order of the trial Court was not open to the appeal because it was not a decree. In my opinion, the Court below erred in its view of the law. Not only has a formal decree been drawn up in pursuance of the order of the court below but the order conclusively determines the rights of the parties with regard to the matters in controversy in the suit. No doubt the order is not a final decree in the suit and can only be viewed as a further preliminary decree passed in the partition suit.

The order has a general effect upon the entire proceedings in the suit and forever precludes the possibility of the Plaintiff getting an allotment in specie of his share of the common property. This was a right to which the Plaintiff was entitled as a co-sharer and as a member of a joint family suing for partition. This right is negated by the order of the trial court, and the order is final and conclusive so far as the trial court is concerned. As pointed out in the decision in *Kasi v. Iyamanathan Chettiar* 1947 2 Mad LJ 523 (C) there is nothing in the CPC which can be construed as a prohibition against the Court in a proper case passing more than one preliminary decree.

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.

3. I, therefore, reverse the decree of the lower appellate court and remand the case for a decision on the merits by that court. The costs will abide and follow the result. The court fee paid on the Memorandum of appeal will be refunded to the Appellant. There was no appearance on behalf of the Respondents, it being reported to the Court by the learned Counsel appearing on record that their engagement had ceased.