

(2005) 07 MAD CK 0157

In the Madras High Court

Case No : C.R.P. (NPD) No. 1134 of 2005

Selvam Antony Marie (incorrectly mentioned in the E.P.
Selvam Marie) and Others

APPELLANT

Vs

Sowaridoss and Juline Franceuve and Others

RESPONDENT

Date of Decision : 22-07-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Stamp Act, 1899 — Article 45

Citation : (2005) 4 MLJ 500 : (2006) 1 RCR(Civil) 102

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : K. Chandramouli for K.M. Naslinishree, for the Appellant; K. Yamunan, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—By consent, the main civil revision petition itself is taken up for final disposal.

2. Petitioners are aggrieved by the dismissal of their application filed u/s 47 of the CPC seeking to declare the final decree passed on 29.10.1998 by the Principal District Munsif, Karaikal as inexecutable.

3. The learned Senior Counsel appearing for the petitioners would submit that the decree as it stands cannot be executed since it only declares the shares and cannot be executed in the form in which it is drafted, and unless the decree also gives directions for specific allotment of shares and handing over of possession, there can be no final decree in the eye of law. Reliance was placed on Ramanuja Naicker and Others Vs. Seethalakshmi Ammal alias Sellathayee and Another, , learned Senior Counsel also submitted that the memorandum of compromise, based on which the final decree was passed, was obtained by fraud and therefore, there can be no final decree on the basis of such and memorandum of compromise. But, however, the learned Senior Counsel focused his submissions

only on the first objection.

4. Learned Counsel appearing for the respondents would submit that it cannot be said that the compromise decree was obtained by fraud; all the parties were served, the petitioners herein were represented by their mother, who was their power of attorney and only in the presence of the counsel as well as the parties, the memorandum of compromise was signed; the decree in terms of the memorandum of compromise is perfectly executable and nothing further needs to be done. According to the learned Counsel, the decision *Ramanuja Naicker and Others Vs. Seethalakshmi Ammal alias Sellathayee and Another*, (supra) will not apply to the facts of this case. Learned Counsel relied on *Dhurandhar Prasad Singh Vs. Jai Prakash University and Others*, where the Supreme Court held that the scope of exercise of powers of the executing Court u/s 47, C.P.C. are very narrow and objections regarding the executability of the decree can be allowed only "if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed, in ignorance of such a provision of law or a law was promulgated, making the decree in-executable after its passing". According to the learned Counsel, neither of these objections existed in the present case so as to warrant allowing the application u/s 47, C.P.C. Learned Counsel also relied on *Mohammad Aleem Vs. Maqsood Alam and Others*, where it was held that the only remedy available to a person who wishes to challenge a compromise decree on the ground of fraud is to file a suit for setting aside that decree and not raise an objection u/s 47, C.P.C. Learned Counsel further relied on *Addison Paints and Chemicals Ltd. Vs. Santram Parmanand*, where it was held that "the questions relating to obtaining of a compromise by fraud and misrepresentation do not relate to the execution of the decree and are thus outside the scope of the objection u/s 47, C.P.C."

5. The question relating to fraud was not seriously argued by the learned Senior Counsel for the petitioners and it is also seen from the affidavit filed in support of the application u/s 47, C.P.C. that the petitioners have instituted a suit before the Additional District Munsif at Karaikal to set aside the compromise decree passed in O.S. No. 666 of 1996. Therefore, the only question that has to be decided by this Court is whether the decree as it is drafted is executable or not.

6. The first respondent and one Devadoss, since deceased, filed the suit O.S. No. 666 of 1996. Respondents 3 to 6 are the legal representatives of the said Devadoss. The suit was filed against respondents 7 to 13 and the petitioners herein for a partition of their 1/3rd share in the suit property. A preliminary decree was passed on 13.4.1998. A memorandum of compromise was filed and an application in LA. No. 488 of 1998 was moved to pass a final decree in terms of the said compromise and accordingly, a final decree was passed on 29.10.1998 in terms thereof. Thereafter, the respondents/decreed holders filed E.P. No. 158 of 2001 for delivery of separate possession of the properties. In the year 2004, the petitioners herein filed the application u/s 47, C.P.C.

7. The crucial terms of the memorandum of compromise read as follows:

"Now, when parties were taking steps to have the properties divided by metes and bounds the parties by mutual agreement have divided the properties in the following manner:

(a) Plaintiffs 1 and 2 will take the following properties for their share as per Preliminary Decree.

House in Karaikal (Door No. 11, New No. 160)

Item No. 27-1/3 share

Item Nos. 11 and 12 (Items 25 and 26)

Item Nos. 1,3,4, 18

(b) 2nd plaintiff and 4th defendant will take the following properties.-

Item No. 27 (1/3 share)

Item Nos. 9, 10, 13, 14, 16, 19

Item Nos. 7, 15 (Item 7 & Items 20 to 24)

(c) Defendants 4 to 10 will take the following items.--

House in Karaikal (Door No. 144, New No. 162)

Item No. 27 (1/3 share)

Item Nos. 5, 6, 8, 17

Item No. 2

Parties pray that a Final Decree may be passed in terms mentioned above. Parties can possession as per allotment mentioned if they are not already a preliminary decree."

So, it is clear that actual division has also been made.

8. In a partition suit, the preliminary decree merely declares the rights or shares of the parties to the partition. To finally determine the rights of the parties, a further enquiry has to be made for actually dividing the properties by metes and bounds and putting the parties in separate possession of the properties so divided. On the basis of this enquiry, a final decree will be passed.

9. In Renu Devi Vs. Mahendra Singh and Others, , the Supreme Court has drawn the distinction between a preliminary decree and a final decree in a suit for partition as follows:

"The distinction between preliminary and final decree is this a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the

preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree."

The question is, therefore, whether the decree drafted in the present case is incomplete, leaving room for further inquiry.

10. The memorandum of compromise clearly indicates which are the properties to be taken by each of the parties. Except for Item No. 21, where 1/3rd share is taken by each of them, all the other Schedule mentioned properties have been specifically allotted to the respective parties. Nothing further really needs to be done except to take possession in accordance with law.

11. The issue in *Ramanuja Naicker and Others Vs. Seethalakshmi Ammal alias Sellathayee and Another*, was quite different. In that case, a preliminary decree was passed in a mortgage suit. The Division Bench of this Court accepted the case of the appellants that the decree as it stood only declares the rights of the 8th defendant, but there was no decree directing the parties to pay a specific sum of money on or before a particular date nor was there a direction in respect of the charged properties that in default of payment of the amount decreed, the properties should be sold. That is not the case here.

12. In *Dr. Kedar Nath Sinha Vs. Dwarika Nath Singh and Others*, , a Division Bench of the Patna High Court had occasion to consider a dispute relating to a final decree passed in terms of a compromise. A preliminary decree was passed granting 1/3rd share to each of the three brothers. During the final decree proceedings, the parties entered into a compromise and a final decree was passed in terms of the said compromise. The executing Court came to the conclusion that the decree was in-executable on the ground that the parties had entered into a compromise. The Division Bench set aside the order of the executing Court, holding that the Court below had erred in law in holding that the final decree is in-executable and went on to observe that by entering into a compromise, the parties are not debarred from executing the final decree and getting delivery of possession of the suit properties.

13. In *Rachakonda Venkat Rao and Others Vs. R. Satya Bai (D) by Lr. and Another*, , the parties entered into a compromise and a final decree was passed in terms of the said compromise. In that case also, the memorandum of compromise indicated the properties to be "allotted to the respective parties". of course, there was also an added clause indicating that the parties were put in possession of their respective shares. But, that will not change the legal position. The Supreme Court held that for all practical purposes, there was a complete partition of the suit properties and that is why the parties moved the compromise memo and prayed for a decree in terms thereof, and that:

"In partition suit, a Court is required to define the shares of the parties, identify the joint properties which are to be partitioned, allocate properties to parties as per their respective shares and put the parties in possession of properties

allocated to them. All this happened with agreement of the parties when the Court passed the decree on 13.7.1978. No step is missing in those proceedings. Therefore, nothing remained to be done."

14. The case in *Raghubir Sahu v. Ajodhya Sahu* AIR 1945 Pat. 482, is almost identical to the present case, as seen from the following extract:

"In the present case, the decree was passed on compromise. It was admitted that by the compromise, the properties allotted to the share of each party were clearly specified and schedules of properties allotted to each were appended to the compromise petition. Therefore, no further inquiry was at all necessary. In such circumstances, the decree did not merely declare the rights of the several parties interested in the properties but also allotted the properties according to the respective shares of each party. Therefore, it was not a preliminary decree but it was the final decree in the suit. A compromise decree in a partition suit allotting, specific parcels to the parties is a final order for effecting partition AIR 1933 562 (Oudh) . There being already a final decree, the only thing that remained to be done was to engross it on a stamped paper under Article 45, Stamp Act, 1899. The decree to be engrossed on the stamp will bear the date of the decree, 17.12.1921, and will declare the position of the parties in respect of the properties on that date."

In *Renu Devi Vs. Mahendra Singh and Others*, , the Supreme Court has in fact extracted the above paragraph, observing:

"In our opinion, the law has been correctly stated by the Division Bench of the Patna High Court. It is seen from the said judgment that reliance had been placed before the Supreme Court on AIR 1933 562 (Oudh) , which in turn relied on *Thiruvengadathamiah v. Marugiha*, ILR. 1912 (35) Mad. 26."

"The principles of law laid down in the two decisions support the view taken by the Division Bench of the Patna High Court. We find ourselves in agreement with the view of the law taken by the Oudh Chief Court and the Madras High Court."

15. In view of the above legal position, the case of the petitioners cannot be accepted. The Civil Revision Petition is, therefore, dismissed. No costs. Consequently, C.M.P. No. 8033 of 2005 is closed.