

(1999) 01 BOM CK 0001

In the Bombay High Court

Case No : Civil Revision Application No. 86 of 1997

Shri Victor de Graca Pinto and another

APPELLANT

Vs

Smt. Lourdes de Graca Pinto e Nazareth and another

RESPONDENT

Date of Decision : 22-01-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 19, 115, 151
Registration Act, 1908 — Section 17(2)
Stamp Act, 1899 — Article 45, 35

Citation : (1999) 3 ALLMR 39 : (1999) 3 BomCR 441 : (1999) 1 BOMLR 704

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : A.F. Diniz, for the Appellant; S.M. Usgaonkar, for the Respondent

Judgement

R.K. Batta, J.—After obtaining a decree, the problem of the decree-holders is execution of the Decree. All sorts of possible objections are raised in execution by the judgment-debtors, so as to defeat the decree obtained by the decree-holders so that they are not able to reap fruits thereof. The instant case under consideration is an example of this state of affairs. A deed of partition was executed between the parties on 21-12-1989, by which the property, in question, was divided into three parts. By this deed of partition, the matter was amicably settled between the parties and the terms of settlement were recorded in Decree dated 2-1-1990 in the Inventory Proceedings No. 55/88/A. Inventory proceedings, under the Portuguese Law, are initiated to determine all rights in property and partition of the estate left by the deceased. By this Decree, the property was divided into three parts, namely (A), (B) and (C) as per plan attached thereto. In terms of the same, part (A) shall belong to the applicants and part B shall belong to the respondents and others. Some of the heirs had renounced their rights to the property and others had orally communicated their agreement to the partition deed. In part B which was allotted to the respondents and others, there is a W.C. which was in possession of the applicants. As per the said Decree, this W.C. fell in part B which was to belong to the respondents and

others. The opening to this W.C. was from part A and, as such, the respondents vide application dated 27-6-95, sought closure of the door of the said W.C. Prior to this application, the applicants had filed Civil Suit No. 59/92 in the Court of the Civil Judge, Panaji seeking to restrain the present respondents from demolishing or interfering with the toilet-cum bath-room or dispossessing them from the said toilet-cum-bathroom. The stand taken by the present applicants in the said suit was that both the toilets fell in Part B which was allotted to the respondents since partition line was drawn in straight line separating Part A and Part B to divide the house equally, but it was an oral understanding between all the parties that the present applicants will continue to occupy and possess the toilet-cum-bathroom although the said bathroom falls on the border of partition of two halves. This suit was dismissed by the Civil Judge after the learned Civil Judge had come to the conclusion that there was no dispute that the present respondents are the owners of part B of the house which includes toilet and bathroom, which is in possession of the present applicants from the year 1985. The Civil Judge held that the present respondents are entitled to part B including the bathroom and the toilet and they ought to go to the Executing Court. The appeal filed by the present applicants before the District Court was dismissed and the Second Appeal filed before this Court was summarily rejected. Even inspite of clear findings of the Civil Court in the said suit, the present applicants have raised series of objections to frustrate the possession of the said bathroom which, admittedly, falls in part B, which was allotted to the respondents. The Civil Judge, vide impugned order dated 16-1-1997, overruled the objections raised by the present applicants and it was held that the respondents are entitled to close the door of the W.C. to implement the Decree dated 2-1-90 and that in case it is necessary police assistance shall be provided to them.

2. Learned Advocate Shri A.F. Diniz listed a number of objections raised by the applicants and I shall deal with them one-by-one.

3. The application, in question, was filed u/s 151 C.P.C., but the same was registered as Civil Misc. Application 47/95/Portuguese. It is urged before me by the learned Advocate for the respondents that the application for execution of a Decree in an inventory proceeding is required to be filed under the Portuguese CPC as per the ratio laid down in Zacarias Durate Dmoingos Pereira Vs. Camilo Inacil Evaristo Pereira, and that the powers of the Court under the Portuguese CPC are contained in Article 266 which are akin to section 151, C.P.C. It is, therefore, urged that the application, in question, has to be treated as filed under the Portuguese Civil Procedure Code. In Zacarias Durate Domingos Pereira v. Camilo Inacio Evaristo Pereira (supra) the learned Single Judge of this Court, had held that once the inventory proceedings culminate by a final order, any application to enforce the said order or to move an execution for obtaining the assets by the person to whom they are allotted, the proceedings for the said purpose will fall under the provisions of Portuguese CPC and not under the provisions of Order 21, C.P.C. The ratio laid down by the learned Single Judge has not been disputed before me, by the learned Advocate for the applicants

though it was urged that the decree can be executed under Order 21 C.P.C. but recourse cannot be had to section 151 C.P.C. In this connection, reliance was placed by learned Advocate for the applicants on *Nain Singh Vs. Koonwarjee and Others*, . In view of the position of law as laid down by the learned Single Judge in *Zacarias Durate Domingos Pereira v. Camilo Inacio Evaristo Pereira* (supra), it is not necessary to go into this question since the execution has to be sought under the provisions of Portuguese Civil Procedure Code. The application, in question, though styled u/s 151 C.P.C., it had been registered as Civil Misc. Appln. No. 47/ 95/Portuguese. The objections raised by learned Advocate for the applicants on the strength of Order 21 C.P.C. and section 151 C.P.C., therefore, are without any force in the circumstances of this matter.

4. The next objection raised by the learned Advocate for the applicants is that the Decree dated 2-1-90 is merely declaratory in nature and it cannot be executed. In support of this submission, reliance has been placed on *Smt. Usha Dhabekar Vs. Prakash Sahakari Griha Nirman Sanstha and Another*, . In this case, the Decree declared that the decree-holder was entitled to allotment of one plot in Layout No. 3. The Society was not left with any plot for allotment, but the Executing Court had ordered allotment of Plot No. 1 which was shown as vacant earlier and which had been sold to third party much earlier. It was held that there was no decree for possession of Plot No. 1 as directed by the Executing Court. The position is some what different in the matter under consideration. By decree dated 2-1-1990, the property was divided into 3 parts A, B and C as per the plan attached. The said parts were divided by metes and bounds and in appeal filed by the present applicants in Civil Suit No. 59/92, it was noticed that the house was divided by virtue of a plan, drawing a line in red and the disputed W.C. admittedly fell in portion B allotted to the present respondents and others. In that case, the applicants had not entered into the witness box. It was further held in the judgment dated 6-1-1994 in the said appeal by the learned Addl. District Judge that the consent decree in the Inventory Proceedings No. 55/ 88/A crystalizes the rights and shares of the parties into portions A and B and that being the position, the present applicants were not entitled to claim any right in portion B and that the present applicants did not have any title to the disputed toilet. Thus, the Decree dated 2-1-90 had not only declared the rights of the parties, but also had divided the shares by metes and bounds and it is this division by metes and bounds under the said Decree which is sought to be enforced by the application in question. Therefore, there is no merit in this objection of the applicants. It may be pointed out here that the present applicants in their reply filed in November 1995, in respect of the application, in question, had wrongly stated that the W.C. in question falls in part A and that there was no physical partition at the site by metes and bounds. Parts A and B were specifically marked on the plan by dividing the same in red line, which means that the two parts were divided by metes and bounds and an application to enforce the same would, certainly, lie.

5. The third objection which has been raised is that there is no executable decree

and the decree, in question, is only a preliminary decree. There is, in fact, no merit whatsoever in this contention . I have already pointed out that the decree in question had not only determined the rights of the parties, but it had also divided the property by metes and bounds into part A and part B. When a decree relates to any Immovable property and the partition/separation cannot be conveniently made without further inquiry, then the Court is required to pass a preliminary decree, declaring the rights of several parties interested in the property. However, the decree in question has not only declared the rights of the parties, but also divided the property by metes and bounds into parts A , B and C which is thus a final decree, which can be executed. The applicants had failed to prove their case that there was an oral understanding that though the W.C. falls in part B, but the same shall belong and shall be used by the applicants.

6. The fourth objection which has been raised is that the decree is not engrossed on stamped paper and in this respect reliance has been placed on *Shankar Balwant Lokhande (dead) by L.Rs. Vs. Chandrakant Shankar Lokhande and Another*, . It has been held in this case by the Apex Court that a final decree specifying the division by metes and bounds needs to be engrossed on stamped paper. In this connection, my attention was also drawn by learned Advocate for the respondents to a judgment of this Court in *Fernando Jorge Colaco v. State of Goa and others*, 1991 (2) Goa L.T. 11. In this case, it was held that a final order in inventory amounts to an instrument of partition which is chargeable under Article 45 of the Stamp Act because the document is required to be registered. When the proceedings were pending in this Court, the respondents has supplied stamped papers to the Civil Court for the purpose of engrossing the decree on stamped papers and these stamp papers have been taken on record by the Civil Judge. The question which now arises is whether providing of the stamped papers at this stage would validate the proceedings on this count with retrospective effect? In this respect, my attention has been drawn by learned Advocate for the applicants to the Judgment in *Thummala Suryamma Vs. The Andhra Pradesh State Electricity Board and Others*, and by learned Advocate for the respondents to a judgment in *Ummed Mal Vs. Kundanmal and Another*, . In *Thummala Suryamma v. The Andhra Pradesh State Electricity Board and others* (supra), it has been laid down that the parties must furnish non-judicial stamp paper for drawing up a decree. In fact, as already pointed out, the Division Bench of this Court had held in *Fernando Jorge Colaco v. State of Goa and others* (supra) that the final order in inventory amounts to an instrument of partition which is chargeable under Article 45 of the Stamp Act. In *Ummed Mal v. Kundanmal and another* (supra) partition decree was drawn up without proper stamp. After a review of various authorities on the subject, the learned Single Judge of the Rajasthan High Court held that the decree and proceedings taken thereunder can be validated with retrospective effect after supply of proper stamp. The learned Judge did not subscribe to the view profounded in *Pandivi Satyanandam and Others Vs. Paramkusam Nammayya and Another*, and adopted the view taken by the Full Bench of Allahabad High Court in *Ganesh Prasad Vs.*

Mt. Makhna and Another, . The reasoning given by the learned Judge in adopting the view of the Full Bench of Allahabad High Court is as under:

"However, this question directly arose in Ganesh Prasad's case (supra) and the view taken is that the supply of the stamp validates not only the decree but also the proceedings taken thereunder. The reason appears to be that in such cases, the Court does not lack inherent jurisdiction to execute the decree but the decree cannot be executed because of the bar contained in section 35 of the Stamp Act. Moreover, if the decree is validated by the supply of requisite proper stamp with retrospective effect from the date of the decree then it does not stand to reason that the subsequent proceedings are not so validated. Obviously bar of acting upon such a decree is also taken away with retrospectively. Two different yardsticks cannot be applied; one for curing the defect of a decree which is not drawn on the stamp paper with retrospective effect from the date of decree by the supply of the stamp paper and the other with regard to the proceedings taken upon such a decree. In Ganesh Prasad's case (supra), the view taken in the case of Gopimal's case (supra) was not subscribed to. I am, therefore, of the opinion that on the supply of the requisite stamp would validate not only the decree but the proceedings taken thereunder retrospectively. In this view, the order relating to the actual physical partition by the Court in the execution would not suffer any infirmity after the supply of the stamp papers."

I am in respectful agreement with the Full Bench view of the Allahabad High Court which has been adopted by the learned Single Judge. Thus, I do not find any merit in this objection of the applicants. It was also urged by the learned Advocate for the applicants that several parties were not joined in the application and some parties had not signed the decree who also have share in the property. This objection cannot be permitted on behalf of the applicants who had even filed a suit in the matter, but failed.

7. The last objection which has been raised by the applicants relates to compulsory registration of decree/order of the Court in view of section 17(2)(vi) of the Registration Act, 1908. In this respect, reliance has been placed by learned Advocate for the applicants on Bhoop Singh Vs. Ram Singh Major and others, . On the other hand, learned Advocate for the respondents has urged that such registration would apply if only new rights are created, in which case only the registration is required. According to him, the partition, by itself, does not amount to creation of new rights or transfer of rights and in this respect, reliance has been placed on Venkideswara Prabhu Ravindranatha Prabhu Vs. Surendranatha Prabhu Sudhakara Prabhu and Others, and Chanderwati and Others Vs. Lakhmi Chand, . The position of law has been laid down by the Apex Court in Bhoop Singh v. Ram Singh Major and others (supra). The Apex Court has laid down :

"The exception under Clause (vi) of section 17(2) is meant to cover that decree or order of a Court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create

new right, title or interest in praesenti in immovable property of the value of Rs. 100 or upwards. Any other view would find the mischief of avoidance of registration, which requires payment of stamp duty, embedded in the decree or order. It would, therefore, be the duty of the Court to examine, in each case whether the parties have pre-existing right to the immovable property, or whether under the order or decree of the Court one party having right, title or interest therein agreed or suffered to extinguish the same and created right, title or interest in praesenti in immovable property of the value of Rs. 100 or upwards in favour of other party for the first time, either by compromise or pretended consent. If latter be the position, the document is compulsorily registrable."

In the case before the Apex Court, the decree purported to create right or title in the plaintiff for the first time that is not being a declaration of pre-existing right. It was held that it did require registration and the decree not having been registered did not confer any right on the petitioner.

8. In the case under consideration before me, the partition as well as the decree in question do not only relate to pre-existing rights, but it does create new rights interest parties to the partition since some persons have relinquished their right in the property, as a result of which, the pre-existing rights have changed. The Delhi High Court in *Smt. Chanderwati v. Lakhmi Chand and others* (supra), upon which reliance has been placed by learned Advocate for the respondents also states that a document which merely acknowledges or makes an admission as to a prior partition, is not compulsorily registerable, but if there is an instrument effecting a partition of immovable property, it falls u/s 17(1)(b) of the Registration Act and is compulsorily registerable under that clause. The Division Bench of this Court in *Fernando Jorge Colaco v. State of Goa and others* (supra) has also come to the conclusion that a final order in inventory amounts to an instrument of partition which is chargeable under Article 45 of the Schedule (1) (a) of the Stamp Act, 1899, because that document is to be registered. In view of the same, I am of the opinion that the decree in question which was passed on the basis of the partition deed is required to be registered u/s 17(2) of the Registration Act, 1908. The Decree in question can be executed after such registration.

9. For the aforesaid reasons, I do not find any merit in this revision, except that the decree in question would become enforceable on its registration in accordance with section 17(2) of the Registration Act, 1908. Once the registration is done, this objection to execution of the decree would stand overruled and the respondents shall be entitled to possession of the suit W.C. and for that purpose, if necessary, the Executing Court shall provide necessary police help. Hence the revision stands disposed of in the aforesaid terms with no order as to costs.

10. Order accordingly.