
(1969) 08 MAD CK 0029
In the Madras High Court

Swayamprakasam alias Chidambaranathan

APPELLANT

Vs

R. Vijayarangam

RESPONDENT

Date of Decision : 01-08-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : (1970) 1 MLJ 243

Hon'ble Judges : R. Sadasivam, J

Bench : Division Bench

Judgement

R. Sadasivam, J.—Petitioner was the plaintiff in a suit for partition, O.S. No. 40 of 1941, on the file of the Subordinate Judge's Court, Tiruchirapalli, filed by his mother Anjalai Ayal as his next friend. His father Raju Padayachi was the first defendant in the suit and one Rathnam Ayal, another wife of the Raju Padayachi, was impleaded as the second defendant in the suit. The other defendants were the alienees from the first defendant. The first defendant remained ex parte in the suit. Some of the debts incurred by the first defendant were attacked in the suit and in support of the said plea, it was urged that he was leading an immoral life by keeping a concubine by name Marudambal through whom he had a son and two daughters. The alienations made by the first defendant were held to be not binding on the petitioner herein and he got a preliminary decree for his half share in the suit properties on 15th December, 1942 and the final decree proceedings are pending. One Vijayarangam the son of the said Marudambal, filed I.A. No. 404 of 1967, on the file of the lower Court, under Order 1, Rule 10, Civil Procedure Code, to implead him as the 25th defendant in the suit on the ground that he is entitled to one third share in the suit properties as the legitimate son of the petitioner's father Raju Padayachi. The learned Principal Subordinate Judge allowed the petition. Hence the plaintiff-petitioner has filed this revision petition.

2. The respondent Vijayarangam filed Exhibits A-1 and A-2 to show that in 1962 and 1963 he has joined in executing sale-deeds along with Raju Padayachi and

the petitioner herein and that in these documents to which the petitioner herein was a party, he has been described as the son, of Raju Padayachi. The petitioner herein, on the other hand, filed Exhibit B-1 to show that in 1943 he and his father Raju Padayachi alone sold some family properties. The question whether the respondent Vijayarangam is a legitimate son of Raju Padayachi has to be decided in the suit. It is true that as the respondent Vijayarangam was not a party to the suit O.S. No. 40 of 1941, on the file of the lower Court, the decree therein will not bind him and it is open to him to file a separate suit to establish his rights. But the question for consideration in this petition is whether as contended by the learned Advocate for the petitioner, the lower Court has no jurisdiction to implead the respondent Vijayarangam as a party to the partition suit after the preliminary decree had been passed in this suit as early as 15th December, 1942.

3. Sri R. Ramamurthi Iyer, appearing for the petitioner, relied on the decision in Baman Chandra Acharya and Others Vs. Balaram Acharya and Others, in support of his contention that a partition suit even if co-sharers are necessary parties, an application for their addition cannot be allowed after the preliminary decree is passed except in certain exceptional circumstances such as, impletion of transferees subsequent to the preliminary decree or death of parties whose rights were carved out in the preliminary decree. The correctness of this decision is questioned by the learned Advocate Sri N. Sivamani appearing for the respondent. The ratio of this decision is that in a preliminary decree certain rights are conclusively determined and unless the preliminary decree of a Court is assailed in appeal, the rights so determined will become final and conclusive and cannot be questioned in the final decree. The decision of the Supreme Court in Venkata Reddi and Others Vs. Pothi Reddi, was relied on in the above decision in support of the said view. It is true by virtue of Section 97, Civil Procedure Code,

Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

This new section was introduced with the object of giving a finality to the preliminary decree so far as the parties thereto were concerned. It cannot affect the powers of the Court under Order 1, Rule 10, Civil Procedure Code, to add parties. In Venkata Reddi and Others Vs. Pothi Reddi, , the Supreme Court had to construe the clause in the proviso to Section 28-A of the Provincial Insolvency Act that nothing in the section shall affect any adjudication of the properties of the insolvent by a Court, or Receiver or the Collector acting u/s 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent Court. The question for decision in that case whether the preliminary decree for partition obtained by the sons of the insolvent which was affirmed finally in second appeal by this High

Court can be regarded as a " final decision ". A suit for partition was filed by the sons of the insolvent impleading the person who claimed to have purchased their share in the joint family property which had been sold by the Official Receiver in the insolvency proceedings against their father. The Supreme Court held that the sale made by the Official Receiver during the insolvency of the appellants' father was the subject of a final decision by a competent Court inasmuch as that Court decided that the sale was of no avail to the purchaser as the Official Receiver had no power to make that sale and that nothing more was required to be established by the appellants before being entitled to the protection of the first proviso to Section 28-A of the Provincial Insolvency Act. Thus the Supreme Court had to consider only the meaning to be given to the expression " final decision " by a competent Court occurring in the first proviso to Section 28-A of the Provincial Insolvency Act in dealing with a preliminary decree in a suit for partition filed by the sons of the insolvent in so far as the parties to the proceedings were concerned.

4. Order 1, Rule 10 (2) Civil Procedure Code, gives jurisdiction to the Court to order that the name of any person who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added at any stage of the proceedings. The proceedings in a suit for partition cannot come to an end till the final decree is passed and hence an order directing a party to be added under Order 1, Rule 10, Civil Procedure Code, may be made in a suit for partition before it is actually terminated by the passing of the final decree.

5. In *Ramaswami Chettiar minor by next friend S.R.M.S.A. Annamalai Chettiar and Roya Kanniappa Mudaliar and Others Vs. P.M.A. Vellayappa Chettiar and Others*, , third parties were added on their own application after a preliminary decree in a partition suit was passed. It was held in that decision that the fact that there was no issue between the parties to the suit as originally framed on the question raised by the applicants was immaterial. In *Krishna Iyer Vs. Subramania Iyer and Another*, , it has been held that it is competent to the Court to add a person interested in the equity of redemption as a party to a suit on a mortgage even after the passing of the preliminary decree therein and to re-open the prior proceedings so far as he is concerned. It was observed in the decision that the party sought to be added had no opportunity to meet the plaintiff's case in its earlier stages and that it would not be fair to implead him as a party and make him liable to the preliminary decree already passed without giving him an opportunity of meeting it. It was held that it was open to the Court to add a party and allow the prior proceedings to be re-opened so far as he was concerned. The Court after considering all the circumstances of the case thought that the said course was desirable instead of driving the plaintiff to another suit against the party sought to be added. In *Swaminatha Iyer v. Alagiriswami Chettiar* (1955) 68 L.W. 831, it has been held that creditors who have obtained decrees can be made parties in a partition suit filed by the sons of the judgment-

debtor before the final decree is passed and after the passing of the preliminary decree. In *Syed Mohiddin (died) and Another Vs. Abdul Rahim and Others*, it has been held that a third party can be added as a defendant after a preliminary decree in a partition suit. It is clear from the facts of that case that when the Commissioner appointed in the suit to effect a division of the properties went to take the measurements of the house, objections were raised by third parties who had purchased the house very much earlier. It was held in that decision that in the interests of justice and to avoid multiplicity of suits, it was desirable to implead them as parties to the proceedings, there being no legal bar to the adoption of such procedure.

6. The learned Advocate for the respondent relied also on two un-reported decisions of this Court. In C.R.P. No. 2044 and 2105 of 1967, *Veeraswami, J.*, as he then was, allowed two sisters to get themselves impleaded in a suit for partition between their brothers with regard to the estate of their mother. But this decision is not relevant to this case as the proceedings in that case had not reached the stage of the preliminary decree. If, however, the sisters were ignorant of the partition suit filed by their brothers till the preliminary decree was passed in it, it would not affect their right to get themselves impleaded under the provisions of Order 1, Rule 10, Civil Procedure Code, and agitate their rights in the same suit instead of being driven to a separate suit. In C.R.P. No. 2150 of 1965, *Ramaprasada Rao, J.*, has held that notwithstanding the passing of a preliminary decree in a suit for partition, the Court has inherent power to pass such orders as are necessary in the interests of justice so that the equities arising in the action between the parties inter se on the one hand and between the parties and alienees, if any, on the other, can be adjusted in the final decree proceedings. The alienee from one of the parties in the partition suit was added as a party after the preliminary decree in the suit. It was held that though the alienation in his favour was prior to suit and it was not affected by the doctrine of *lis pendens*, there could be no objection to his being added as a party after the preliminary decree.

7. If the respondent Vijayarangam is the legitimate son of the petitioner's father Raju Padayachi, he is a necessary party who ought to have been added in the suit for partition. It is true that even if the lower Court had jurisdiction to implead a third party, it should exercise its discretion under Order 1, Rule 10, Civil Procedure Code, judicially. On the materials before me, it could not be said that the lower Court erred in impleading the respondent as a party to the partition suit at the stage of the final decree proceedings. It is clear from what I have already stated that the status of the respondent Vijayarangam as the legitimate son of Raju Padayachi is a matter that has to be decided in the suit.

8. I see no ground to interfere with the order of the lower Court. The civil revision petition is, therefore, dismissed, but in the circumstances of the case, I make no order as to costs.