

(2021) 10 KAR CK 0005
In the Karnataka High Court
Case No : Writ Petition No. 35432 Of 2016

T. S. Lakshminarayana Upadhyaya

APPELLANT

Vs

Geetha Devi

RESPONDENT

Date of Decision : 07-10-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151

Code Of Civil Procedure, 1908 — Order 20 Rule 18, Order 22 Rule 18, Order 39 Rule 1,
Order 39 Rule 2

Citation : (2021) 10 KAR CK 0005

Hon'ble Judges : Suraj Govindaraj, J

Bench : Single Bench

Advocate : A. Madhusudhana Rao, Prasanna.V.R

Final Decision : Allowed

Judgement

Suraj Govindaraj, J

1. The Petitioner is before this Court seeking for the following relief:

"Wherefore, it is most respectfully prayed that this Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ order or direction quashing the impugned order dated the 27.08.2014 produced at Annexure-D and the impugned orders dated 13.10.2014 on I.A. Nos.10, 11, and 13 in F.D.P. No.3/1982 passed by the learned Principal Senior Civil Judge, Mysore, produced at Annexure-M, allow this writ petition with costs and grant such other reliefs as this Hon'ble Court be pleased to grant in the circumstances of the case."

2. Final Decree Proceedings No.3/1982 had been filed to draw Final Decree in terms of the preliminary decree passed in O.S. No.73/1969.

3. In the said Final Decree Proceedings, I.A. No.10 had been filed under Section 151 read with Order XX Rule 18 of CPC by the legal heirs of the deceased 10th defendant seeking for release of the share of the 10th defendant in their favour.

4. I.A. No.11 had been under Order 39 Rule 1 and 2 of CPC by 10th defendant seeking for temporary injunction restraining the 9th defendant from receiving any amount from the share of deceased 10th Defendant till the disposal of application in I.A. No.10.

5. I.A. No.13 was filed under Section 151 directing the 9th defendant to pay a sum of Rs.3 lakhs 4 towards rentals collected by her in the schedule property.

6. The said applications were filed by the wife of the 10th defendant on her own behalf and also other legal heirs of deceased 10th defendant who expired during the pendency of the Final Decree Proceedings.

7. The 9th defendant had sought for the share of the 10th Defendant to be allotted to 9th defendant contending that a Will had been executed in her favour by the 10th defendant.

8. This was opposed by contending that 9th defendant did not have any right over the property. The legal heirs of 10th defendant contended that 9th defendant did not have any right over the property. There is no Will executed in favour of 9th defendant, even if it 5 was, the same would have to be proved in a separate proceeding. If at all 9th defendant wanted to lay a claim, same would have to be by way of separate proceedings, not in Final Decree Proceedings where right and title of 10th defendant had fructified and only legal heirs of 10th defendant could claim his share.

9. The said applications were objected to by the 9th defendant contending that there was a Will dated 11.08.2007 executed in her favour bequeathing the share of 10th defendant, as such she was entitled to the share of the 10th defendant and she was ready to prove the Will by examining the attestors of the Will and she sought permission to do so. Pending such consideration, it was contended by the 9th defendant that the other applications cannot be considered.

10. The trial Court vide its order dated 13.10.2014 dismissed IA-10 on the ground that the shares of the parties having already been determined, in the present case the dispute is as regard the succession of the share of 10th defendant under a Will, the aspect whether the Will is genuine or not cannot be decided in the Final Decree

11. Proceedings. IA No.11 and 13 were dismissed on the ground that since IA-10 is not maintainable, the question of granting an injunction and depositing of monies would not arise. It is aggrieved by the same that the Petitioner is before this Court.

12. Sri.Madhusudhan Rao, learned counsel for the Petitioner would submit that 12.1. the entire reasoning of the trial Court is not proper. He relies upon the decision of the 7 Apex Court in Ganduri Koteshwaramma and Another -vs- Chairi Yanadi And Another [(2011) 9 SCC 788], more particularly para 19 thereof which is extracted hereunder for easy reference: "19. The High Court was clearly in error in not properly appreciating the scope of Order XX Rule 18 of C.P.C. In a

suit for partition of immovable property, if such property is not assessed to the payment of revenue to the government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. In Phoolchand, this Court has stated the legal position that C.P.C. creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings."

8 12.2. Relying on the above he contends that until final decree is passed, the Court would have the power to pass any number of preliminary decrees.

12.3. The determination of the dispute between the 9th defendant and legal heirs of 10th defendant was very much essential for allocation of the share of the 10th defendant. If the said dispute was not resolved, it would not be possible for a final decree to be drawn up since it would not be clear as to whom the property falling to the share of 10th defendant has to be allotted. 12.4. He further relies upon the decision of the Apex Court in Phoolchand and Another - v- Gopal Lal [AIR 1967 SC 1470], more 9 particularly para 7 thereof which is extracted hereunder for easy reference: "7. We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. . . . So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. . . for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. . . . a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree."

10 12.5. Relying upon the said decision, he submits that when there is a dispute

between the surviving parties as to devolution of the share of the party who is dead, the same would have to be determined in the Final Decree proceedings. A second preliminary decree could also be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is a dispute between the surviving parties on that behalf, then that dispute would have to be decided in the final decree.

12.6. He relies upon the decision in *Rukmini & Others -v- Uday Kumar and Others* [AIR 2008 KAR 13] more particularly, para 19 thereof which is extracted hereunder for easy reference:

11 "19. We are of the considered opinion that the final decree proceedings are continuation of the suit. Final decree proceedings is a stage in continuation of the suit for partition. The preliminary decree declares and determines the shares of parties. Actual division of the properties, putting the parties in separate possession of their shares, adjustment of equities, impartibility of the suit property, sale of property and all other disputes have to be settled in final decree proceedings. The final decree Court is competent even to determine the interse partition among the defendants in which the plaintiffs have no share."

12. 7. Relying upon the same he submits that until and unless actual division of the property happens, Final Decree Court is competent to pass interse partition amongst the defendants in which plaintiffs have no share. On the basis of the above, he submits that even though the 9th defendant has set up a Will, the genuineness or otherwise of the Will would have to be determined by the Final Decree Court so as to resolve the dispute between 12 the 9th defendant and the legal heirs of 10th defendant so as to decide in whose favour the share of 10th defendant has to be handed over, without that final decree could not be drawn up and division of the properties can not be taken up.

12. 8. On the basis of the above, he submits that the writ petition as filed has to be allowed. Consequently, IA Nos. 10, 11 and 13 filed before the trial Court would be required to be allowed.

13. Per contra, Sri.V.R.Prasanna, learned counsel appearing for the respondent would submit that;

13. 1. In a Final Decree proceedings, inter-se dispute between the defendants cannot be agitated inasmuch as the same would go 13 beyond the decree drawn up which is not permissible;

13.2. The share of 9th and 10th defendants have already been determined. Hence, on that basis the shares will have to be allotted. There cannot be an enquiry as regards the share of the 9th and 10th defendants.

13.3. In this regard, he relies upon the decision of this Court dt. 16.02.2021 in RFA No.841/2016 which had been rendered between the parties to this proceedings itself.

13.4. An application was filed under Order XXII Rule 18 of CPC by plaintiff 1(a) claiming that plaintiff No.1 during her lifetime had executed a Will 29.11.1968 bequeathing in favour of plaintiff No.1(a). This court held 14 that the Will having been executed in the year 1968 before the filing of the suit and the said issue not having been agitated, during the course of the suit could not be agitated in the Final Decree proceedings. 13.5. This Court held that the said Will coming up for consideration for the first time, the same could not be decided enlarging the scope of Final Decree proceedings. 13.6. Relying on the above decision, Sri.Prasanna submits that when this Court in a earlier decision relating to the same matter where a Will has been set up, declined the application under Order XX Rule 18 of CPC, in the present case also the same situation would persist and therefore, the present 15 petition would also have to be dismissed confirming the order of the trial Court.

14. Heard Sri.Madhusudhana Rao, learned counsel for the petitioners and Sri.Prasanna.V.R, learned counsel for the respondent. Perused papers.

15. The short question that would arise for determination are:

15.1. Whether in Final Decree proceedings on a share being allotted to one of the parties, if such party were to expire during the pendency of the proceedings having left behind a Will, could dispute relating to the Will between the existing parties to the proceedings be determined in Final Decree proceedings?

15.2. What order?

16. ANSWER TO POINT NO.1: Whether in Final Decree proceedings on a share being allotted to one of the parties, if such party were to expire during the pendency of the proceedings having left behind a Will, could dispute relating to the Will between the existing parties to the proceedings be determined in Final Decree proceedings? 16.1. Firstly let me answer the point raised by Sri.Prasanna.V.R, learned counsel for the respondent.

16.2. In the decision rendered by this Court in RFA No.841/2016, the Will which was stated to have been executed by the plaintiff on 28.11.1968, it is not clear when the plaintiff expired. Be that as it may, this Court taking into consideration that the suit was filed in O.S. No.73/69 and that Will was executed prior to the filing of the suit had not been referred to or relied upon during the pendency of the suit came to a conclusion that the said Will cannot be agitated in the Final Decree Proceedings.

17. In the present case, the Will is sought to be executed and claimed to have been executed on 19.08.2007 after the Final Decree proceedings in FDP No.3/1982 had been filed.

16.4. This Will is stated to have been executed by the 10th defendant in favour of the 9th defendant. In pursuance thereof, the 9th defendant is claiming the entire share of the 10th defendant. This is opposed by the wife and children of 10th defendant who challenged the said Will.

16.5. Thus exfacie having regard to the context of the matter and the datelines the decision in RFA No.841/2016 was rendered as regards a Will executed pre-litigation whereas in the present case, the Will is 18 executed and become operational in the Final Decree proceedings, thus the decision in RFA No.841/2016 is not applicable. 16.6. Be that as it may, in the said decision, the parties had not brought to the notice of this Court the Judgments in Phoolchand's case, Rukmani's case, as also Ganduri Koteshwaramma's case to the notice of this Court in this proceedings. 16.7. Having regard to the decision rendered in Phoolchand's case which has been extracted hereinabove, as also Rukmini's case, it is clear that in a Final Decree proceedings before the final decree is drawn up, the Final decree Court could decide any claims interse between the parties.

19 16.8. This is a case where the dispute is between 9th defendant and legal heirs of 10th defendant as regard the share of 10th defendant. The Final decree Court would necessarily have to decide as to whom the share of 10th defendant has to be allotted, whether it is to 9th defendant or legal heirs of 10th defendant. Without such adjudication the allotment of share of 10th defendant cannot be made.

16.9. It would have been a different matter if upon the expiry of 10th defendant there is dispute interse amongst the legal heirs of 10th defendant, which need not be adjudicated in Final Decree proceedings, same could have been adjudicated in a separate proceedings amongst the legal heirs of 10th defendant.

20 16.10. In the present case, the dispute is between the 9th defendant and legal heirs of 10th defendant and as stated above, the share of 10th defendant is required to be allotted to someone without determination of that someone, the Final Decree proceedings cannot come to an end.

16.11. In order to draw up the Final decree, final decree court will have the power and competence to decide all issues and disputes between the parties so as to give effect to a final decree including determination of any claim of legal heirship, testamentary succession, etc, so long as it is required for the drawing up of the final decree.

21 16.12. Hence, I answer Point No.1 by holding that in Final Decree proceedings on a share being allotted to one of the parties, if such party were to expire during the pendency of the proceedings having left behind a Will, any dispute relating to the Will between the existing parties to the proceedings be can be determined in Final Decree proceedings by the court seized of that matter.

17. POINT NO.2: What order ?

17.1. In view of answer to Point No.1, the writ petition is allowed.

17.2. The order dated 13.10.2014 on IA-10 passed by Prl. Senior Civil Judge, Mysore, is set-aside. The orders dated 13.10.2014 on IA Nos.11 and 13 are also set-aside.

22 17.3. IA-10 is allowed. Consequently IA-11 is allowed.

17.4. The Final decree Court is directed not to disburse the share of 10th defendant until the determination of the dispute between 9th defendant and legal heirs of 10th defendant.

17.5. As regards IA-13, the trial Court to take a decision on the matter upon completion of an enquiry under Order XX Rule 18 of CPC. 17.6. Any rentals relating to the property falling to the share of 10th defendant are directed to be henceforth deposited in the trial Court pending enquiry to be completed. 17.7. The final decree Court is directed to determine the dispute between the 9th 23 defendant and legal representatives of 10th defendant in terms of Order XX Rule 18 of CPC.

17.8. The trial Court is directed to dispose of the matter as expeditiously as possible within an outer limit of nine months from the date of receipt of certified copy of this order. 17.9. No Costs.