

**SUPREME COURT OF INDIA**

S. Satnam Singh

Vs.

Surender Kaur

C.A.No. 7008 of 2008

(S.B. Sinha and Cyriac Joseph)

02.12.2008

**JUDGMENT**

**S.B. SINHA, J.**

1. Leave granted.

2. Whether a property can be added in the list of properties after a preliminary decree is passed in a partition suit is the question involved herein.

3. The parties hereto are successors of one late Surender Singh and one late Harikishan Singh. They were brothers. First respondent is the widow of late Harikishan Singh and the second respondent is his son. The property which was the subject matter of the partition suit was a house premises bearing Municipal No.2-4-1099 situated at Nimbali Adds, Hyderabad admeasuring 671 sq. yards.

4. The suit was filed by late Harikhsian Singh against the first petitioner and his son Rajinder Singh. In the written statement, the said fact was admitted. The question which arose for consideration of the court, however, was as regards the share of the parties therein. Whereas according to the petitioner, the plaintiff had only 1/3rd share in the suit property, according to the plaintiff he had 1/2nd share therein.

5. In the written statement, it was, inter alia, contended :

"There has never been any such attempt by the plaintiff for partition of the property as alleged in the plaint. In fact, the plaintiff has failed to render true and proper account of the business of M/s. Bombay Cycle Company though he was specifically called upon to do so by the defendant - 2, individually as well through his counsel. The plaintiff has also never co-operated in managing the matters immediately after the death of Late Sunder Singh, the father of the plaintiff and defendant - 1. Having knocked away some of the securities and other amounts which were in the hands of the plaintiff after death of late Sunder Singh singularly the plaintiff has chosen to file the present suit for partition claiming 50% share in the residential house, which is mentioned as suit schedule property."

6. An application for amendment of the said written statement was filed, inter alia, stating :

"It is true that Sri Sunder Singh died on 26.4.1980 intestate leaving behind his widow, the plaintiff and the defendant - 1 herein. It is also true that widow of late Sri Sunder Singh, i.e., Smt. Karam Kaur also died on 14.9.1992. However, the allegation that she died intestate is incorrect and false. The plaintiff is very well aware that Smt. Karam Kaur executed a registered will on 1.9.1981 before the Sub-registrar, Chikkadpally bequeathing her 1/3rd share in the suit schedule property as well as her 50% rights as a partner in the business of M/s. Bombay Cycle Company to the defendant No.2, herein. In the circumstances the contrary allegations made in the plaint in this respect are denied as false and fabricated. It would, thus, be apparent that by any stretch of imagination the plaintiff cannot deny 50% rights

in respect of the suit schedule property as after the death of Sunder Singh, widow of Sri Sunder Singh, Karam Kaur, plaintiff / and the defendant 1 herein had become entitled to 1/3rd share each. Smt. Karam Kaur having executed a registered will on 1.9.81, her 1/3rd share naturally goes to the defendant 2, herein. In the circumstances the plaintiff would not be entitled to anything more than 33.33% of the suit Schedule property if at all."

It was furthermore alleged:

"There has never been any such attempt by the plaintiff for partition of the property as alleged in the plaint. In fact, the plaintiff has failed to render true and proper account of the business of M/s. Bombay Cycle Company though he was specifically called upon to do so by the defendant - 2, individually as well as through his counsel. The plaintiff has also never co-operated in managing the matters immediately after the death of Late Sunder Singh, the father of the plaintiff and defendant - 1. Having knocked away some of the securities and other amounts which were in the hands of the plaintiff after death of late Sunder Singh singularly the plaintiff has chosen to file the present suit for partition claiming 50% share in the residential house, which is mentioned as suit schedule property. It would thus be apparent that there is absolutely no merits in the suit and the plaintiff would not be entitled for the share as claimed. The suit, therefore being absolutely devoid of merits deserves to be dismissed with costs."

A replication to the said written statement was also filed.

7. The learned Trial Judge framed issues which read as under:

"i. Whether plaintiff is entitled for partition? If so, to what share?

ii. To what relief? On 21.1.02, basing on the pleadings of defendant No.3, the following additional issues were settled :-

iii. Whether defendant No.3 is the legal heir of defendant No.2?

iv. Whether the Will deed claimed by defendant No.3 is true, valid and binding on the plaintiff?"

8. The suit was decreed declaring 1/3rd share in favour of the plaintiff as also the first defendant, stating :

"i. The plaintiff is entitled to partition and separate possession of 1/3rd share only in the suit schedule property.

ii. The first defendant is entitled to 1/3rd share in the suit schedule property.

iii. Defendant No.3 being the legal heir of defendant No.2, who is not heard of since more than 7 years and thereby presumed to be dead in the eye of law. Defendant No.3 is entitled to his (D2) 1/3rd share in the suit schedule property."

9. An interlocutory application was filed by the appellant thereafter purported to be in terms of Order XX Rule 18 of the Code of Civil Procedure read with Section 152 of the Code of Civil Procedure with regard to the share of the parties in the said Bombay Cycle Company. The respondents objected thereto. By reason of an order dated 14th March, 2006, the said application was allowed, directing:

"Admittedly the petitioners have raised a plea in respect of Bombay Cycle Company in their written statement but there was no specific issue framed in the regard. The learned counsel appearing for the petitioners submit that in order to shorten the litigation instead of driving the parties to a separate action, the present dispute can be decided in the present dispute itself. The petitioners in support of their contention relied on the decision of our Hon'ble High Court in Syed Ikramuddin v. Syed Mahamed Ali reported in AIR 1986 AP 267. Further there is a dispute with regard to the Bombay Cycle Co. business. Whether it is a joint family business and whether the petitioners are having any share in the property cannot be decided without making any enquiry in that direction. Therefore, I feel that the parties should be directed to adduce oral or documentary evidence in respect of their respective contentions so as to enable this Court to decide the point of controversy. It is also not out of place of mention here that the Hon'ble High Court also directed to dispose of the matter at the earliest possible time. Accordingly the parties are directed to lead oral and documentary evidence in support of their contentions. The respondent No.4 herein is not a party to the suit. No relief is passed against the respondent No.4 herein is not a party to the suit. No relief is passed against the respondent No.4 in this petition. Call on 16.3.2006."

10. A civil revision application filed thereagainst by the respondents has been allowed by reason of the impugned judgment. The High Court referred to the decision of this Court in Phoolchand v. Gopal Lal [AIR 1967 SC 1470] to conclude:

"The Supreme Court was dealing with a case where the shares had to be reallocated on account of death of party and therefore the Court said such facts can be taken into consideration and appropriate orders could be passed which could be a fresh preliminary decree. But here we have a case where it is contended by the defendants that they had mentioned in their written statement the property which they now sought to include in the preliminary decree. Whole trial went on decree was passed in 2003, and this particular property was not mentioned in the decree as joint family property and after three years an application came to be filed that it should be added in the decree which, in our view, is not permissible. Therefore, we hold that the judgment of this Court in Syed Ikramuddin v. Syed Mahamed Ali does not lay down a good law and the question is answered that additional properties cannot be added for partition in the preliminary decree after the preliminary

decree attained finality in terms of Section 97 of the Code."

11. Mr. P.S. Narasimha, learned counsel appearing on behalf of the appellant, would submit that as in this case the only dispute between the parties was with regard to the share in the suit property and, thus, it was obligatory on the part of the court to pronounce its decision on all the issues.

12. It was urged that a very well considered decision of the Andhra Pradesh High Court in Syed Ikramuddin v. Syed Mahamed Ali [AIR 1986 AP 267] has wrongly been overruled by reason of the impugned judgment.

13. Mr. G.V.R. Choudhary, learned counsel appearing on behalf of the respondent, on the other hand, would support the judgment contending that the courts even do not have any suo motu power to amend the decree as a preliminary decree once passed is final.

14. A 'decree' is defined in Section 2(2) of the Code of Civil Procedure to mean the formal expression of an adjudication which, so far as regards, the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It may either be preliminary or final. It may partly be preliminary and partly be final. The court with a view to determine whether an order passed by it is a decree or not must take into consideration the pleadings of the parties and the proceedings leading upto the passing of an order. The circumstances under which an order had been made would also be relevant.

15. For determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests :

"(i) There must be an adjudication;

(ii) Such adjudication must have been given in a suit;

(iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;

(iv) Such determination must be of a conclusive nature; and

(v) There must be a formal expression of such adjudication."

16. Before advertng to the rival contentions of the parties, it must be kept in mind the principle that ordinarily a party should not be prejudiced by an act of court. It must also furthermore be borne in mind that in a partition suit where both the parties want partition, a defendant may also be held to be a plaintiff. Ordinarily, a suit for partial partition may not be entertained. When the parties have brought on records by way of pleadings and/or other material that apart from the property mentioned by the plaintiff in his plaint, there are other properties which could be a subject matter of a partition, the court would be entitled to pass a decree even in relation thereto.

17. In certain situations, for the purpose of complete adjudication of the disputes between the parties an appellate Court may also take into consideration subsequent events after passing of the preliminary decree. In Ct. A. Ct. Nachiappa Chettiar & Ors. V. Ct. A. Ct. Subramaniam Chettiar [(1960) 2 SCR 209], it was held :

"It would thus be seen that the respondent's share in the family properties was not in dispute nor was his share in the properties in Burma seriously challenged. The only plea raised in respect of the latter claim was that the court had no jurisdiction to deal with it. This state of the pleadings in a sense truly reflected the nature of the dispute between the parties. It is common ground that the family is a trading family and there could be no doubt that the assets of the family were partible between the members of the family. It was on these pleadings that the trial judge framed fifteen issues and set down the case for hearing."

18. While dealing with the application under Section 21 of the Arbitration Act, 1940 where one of the questions was as to whether an immoveable property situated in Burma could be a subject matter of reference, in Phoolchand & Anr. v. Gopal Lal [(1967) 3 SCR 153], it was held :

"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. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. 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; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. 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."

The said principle was reiterated in *Mool Chand & Ors. v. Dy. Director, Consolidation & Ors.* [AIR 1995 SC 2493], stating :

"The definition of `decree' contained in Section 2 (2) read with the provisions contained in Order 20, Rule 18(2) as also Order 26, Rule 14 of the Code indicate that a preliminary decree has first to be passed in a partition suit and thereafter a final decree is passed for actual separation of shares in accordance with the proceedings held under Order

26. There are, thus, two stages in a suit for partition. The first stage is reached when the preliminary decree is passed under which the rights of the parties in the property in question are determined and declared. The second stage is the stage when a final decree is passed which concludes the proceedings before the Court and the suit is treated to have come to an end for all practical purposes."

19. Mr. Chaudhary, however, has placed strong reliance in *Venkata Reddy & Ors. v. Pethi Reddy* [AIR 1963 SC 992], wherein it was held :

"A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its

wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that

as to the matters thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

20. Indisputably, Section 97 of the Code of Civil Procedure provides for an appeal against preliminary decree but the said provision, in our opinion, would not be a bar to file an application for amendment of a decree.

21. The court may not have a suo motu power to amend a decree but the same would not mean that the court cannot rectify a mistake. If a property was subject matter of pleadings and the court did not frame an issue which it ought to have done, it can, at a later stage, when pointed out, may amend the decree.

22. The power of amendment, in a case of this nature, as noticed hereinbefore, would not only be dependent upon the power of the court but also the principle that a court shall always be ready and willing to rectify the mistake it has committed.

23. The issues were not correctly framed. An additional written statement was permitted to be filed. A replication thereto also was allowed. It was in that situation, the question as to whether the business transaction of Bombay Cycle Company could be a subject matter of the suit for partition or not was required to be determined on its own merits.

24. The Trial Court felt that it had committed a mistake. In such a situation, the court, in our opinion, committed no infirmity in directing rectification of its mistake.

25. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. No costs.