SUPREME COURT OF INDIA

Maddineni Koteswara Rao

Vs.

Maddineni Bhaskara Rao

C.A.No.3233 of 2009

(Tarun Chatterjee J.)

05.05.2009

JUDGEMENT

Tarun Chatterjee, J.

1. Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 26th of October, 2006 of the High Court of Andhra Pradesh at Hyderabad, wherein the High Court had dismissed the Civil Revision Case being CRP No. 986 of 2006 filed before it by the appellant.

3. The relevant facts leading to the present appeal are as follows:

> "One M.Veera Raghavaiah, the father of the appellant (since deceased) and the respondents, had three sons and 1 a daughter. M.Veera Raghavaiah, the deceased father of the appellant, was acting as a manager and karta of the joint family till 1966. Thereafter, he fell sick and became incapable of managing the joint family property and joint family debts. The appellant herein came forward and agreed to take up the responsibility. Accordingly, all the parties agreed to execute a power of attorney in favour of the appellant. But, the appellant insisted on executing a separate deed instead of a power of attorney saying that a power of attorney may not be effective and it can be terminated at any point of time. The respondents herein and the deceased father out of confidence signed on the said deed which was registered on 17th of May, 1966, without knowing its contents. However, they later came to know that the said deed was styled as a partition deed between the parties. On 21st of April, 1978, M. Bhaskara Rao, one of the sons of the deceased father and the respondent no.1 herein (hereinafter referred to as the respondent), filed a suit for partition of the plaint scheduled property claiming 1/4th share in the same and also for a declaration that the alleged deed of partition dated 17th of 2 May, 1966 was sham, void and inoperative and for other incidental reliefs in the Court of Principal Subordinate Judge, Vijayawada. The suit was decreed by the Principal Subordinate Judge, Vijayawada

and a preliminary decree dated 1st of October, 1986, was passed whereby all the parties including the deceased father of the parties were found to be entitled to 1/4th share each in respect of the plaint scheduled property. It was further declared by the trial court that the partition deed dated 17th of May, 1966 was inoperative, ineffective, void and a sham transaction."

4. When the aforesaid suit was pending, M.Veera Raghavaiah (since deceased) being the father of the parties, executed a registered Will on 21st of March, 1984 bequeathing his 1/4th share in respect of the plaint scheduled property in favour of the respondent and also a sum of Rs.10,000/- was allotted to his daughter/ respondent No.2 herein. M. Veera Raghavaiah died on 17th of January, 1985. While the suit was pending, more precisely on 25th of February, 1985, the respondent filed a photostat copy of the Will in the trial court praying that the 3 probate of the will bequeathing his 1/4th share in respect of the plaint scheduled property to the respondent and Rs. 10,000/- to his daughter be granted. When the photostat copy of the Will was filed by the respondent for grant of probate, it was made clear by all the parties that the parties on record were sufficient and there was no need of impleading any other legal representatives. An endorsement to this effect was also made by the counsel for the appellant stating that "no L.Rs. need be added". In view of such stand taken by the parties before the trial Court and no objection having been raised upto this Court, we refrain from going into the question whether probate can be granted to the Will in question in the absence of any other heirs and legal representatives of the deceased, if there be any.

5. On 4th of November, 1986, the appellant went in appeal before the High Court of Andhra Pradesh at Hyderabad against the preliminary decree declaring 1/4th share each to the parties including the share in favour of the deceased father of the appellant before the High Court which came to be registered as A.S.No. 2879 of 1986 4 which was also dismissed by a learned Judge of the High Court that had confirmed the judgment and decree of the trial court. Feeling aggrieved, the appellant also filed a Letters Patent Appeal which came to be registered as LPA No.154 of 1997 before the Division Bench of the High Court. It would be evident from the record that while the LPA was pending, the respondent on 11th of February, 1988 filed an application for drawing up the final decree in respect of the plaint scheduled property in which he applied for appointment of a Commissioner to divide the plaint scheduled property into four equal shares and to allot two shares to the respondent as his father M.Veera Raghavaiah had executed a registered Will dated 21st of March, 1984. The appellant resisted the said application on numerous grounds.

6. After the LPA was dismissed by the Division Bench of the High Court, the trial court before whom the application for drawing up the final decree was pending, allowed the same filed by the respondent and passed a final decree allotting two shares in respect of the plaint scheduled 5 property to the respondent after considering the Will executed by the deceased father of the parties. It may be kept on record that the trial court went into the question of the genuineness of the Will executed by the deceased father of the parties and after considering the evidence on record including examining the scribe and attestor of the Will found the Will to be genuine and granted probate of the Will. The trial court also recorded the findings to the effect that the Will was duly proved as required in law.

7. On 18th of February, 2006, the appellant approached the High Court by filing a Civil Revision Case being CRP No. 986 of 2006 contending that the Trial Court erred in allotting two shares to the respondent relying on the Will of the deceased father of the parties which amounted to alteration of the preliminary decree passed by the trial court. The High Court declined to accept this contention of the appellant. The High Court further observed that in a suit for partition more than one preliminary decree can be passed. The High Court also observed that a suit for partition stands disposed of, only with the passing of the final decree. It is competent for the court to examine the validity of the transfers, 6 testate or intestate successions in the final decree proceedings, of which examination had not been done before the passing of the preliminary decree, to take into consideration the changes occurring on account of death of a party or transfer made by him.

> "Therefore, the High Court and the trial court were justified in taking into account the Will of the deceased father while passing the final decree in the partition suit. The High Court placed reliance on a decision of this Court in *Phoolchand v Gopal Lal*[1]. The High Court further held that alteration of the preliminary decree would occur only if the extent of shares allotted to each parties or the items identified for partition, were altered. No such alteration had taken place in the present case.
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> A mere adjustment of the shares of the parties does not bring about any alteration in the preliminary decree. Accordingly, the High Court had refused to interfere with the order of the trial court in revision."

8. Feeling aggrieved, the appellant filed a special leave petition, which on grant of leave, was heard in the presence of the learned counsel for the parties.

9. The only question that needs to be decided in this appeal is whether the High Court as well as the trial court were justified in allotting two shares in favour of the respondent on the basis of the Will executed by the deceased father of the parties and whether the genuineness of the Will could be decided by the Court in a suit for partition or not or by a separate suit.

10. It is well settled that a suit for partition stands disposed of only with the passing of the final decree. It is equally settled that in a partition suit, the court has the jurisdiction to amend the shares suitably, even if the preliminary decree has been passed, if some member of the family to whom an allotment was made in the preliminary decree dies thereafter. The share of the deceased would devolve upon other parties to a suit or even a third party, depending upon the nature of the succession or transfer, as the case may be. The validity of such succession, whether testate or intestate, or transfer, can certainly be considered at the stage of final decree proceedings. An inference to this effect can suitably be drawn from the decision of this Court in the case of 8 *Phoolchand v Gopal Lal*[2]. In that decision, it was observed as follows:

> "There is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if the 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... 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 specifications 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 the parties to the suit on the question in dispute and we see no difficulty on 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."

11. Therefore, relying on the decision of this Court and following the principles as aforesaid, both the courts below granted two shares to the respondent in respect of which we do not find any reason to differ. The courts below were also justified to hold that the two shares granted at the final stage could be treated as two preliminary decrees which are permissible in law. However, the learned counsel for 9 the appellant pointed out that in Phoolchand's Case (supra), the death of two parties had taken place after the preliminary decree was passed. A new circumstance had emerged after the passing of the preliminary decree, that is why the court had passed a second preliminary decree modifying the shares of the other parties, accordingly, based on the Will executed by the deceased. But, in the present case their father had executed the Will and died before the passing of the preliminary decree. Therefore, no new circumstance has arisen after the passing of the preliminary decree. Accordingly, the appellant contended that the High Court as well as the trial court were not justified in taking into consideration the question regarding the genuineness of the Will of the deceased father of the parties and allot two shares to respondent in the final decree.

12. So far as the first question, as noted herein earlier, is concerned, we are of the view that such a contention of the learned counsel for the appellant was of no substance.

> "According to the learned counsel for the appellant, as 10 noted herein earlier, the genuineness of the Will of the deceased father of the parties not having been proved in a separate suit, the High Court as well as the trial Court had specifically considered this point before passing the final decree. As noted herein earlier, in Phoolchand vs. Gopal Lal (supra), this question has been squarely answered. In the said decision, the appellant also filed a suit for partition of the joint property in which a preliminary decree was passed before passing a final decree. The father and the mother of the appellant died and the brother of the appellant claimed that he was entitled to the share of the father as the same was declared by way of a Will executed by the father and the appellant claimed his right in the share of the mother as the same was sold to him by the mother. This question relates to the preliminary shares of the parties which were redistributed, however, the trial court did not prepare another formal preliminary decree on the basis of this re-distribution of shares. The appeal was taken to the High Court by the brother of the appellant against distribution which finally came to this Court and this Court held that Will executed by the father in favour of the 11 brother of the appellant was genuine and, therefore, the appellant was not entitled to take advantage of the share of the mother and the same must be distributed equally. In

view of the aforesaid decision of this Court, it is clear that in a suit for partition, a party who is claiming share in the plaint scheduled property, is entitled to plead for grant of probate of the Will executed by the deceased father of the parties and for which no separate suit needed to be filed."

13. While re-allotting the shares of the parties, the trial court had framed the issues on the genuineness of the Will of the deceased father of the appellant and decided that the Will was genuine after considering the evidence on record including examining the evidence of the scribe and attestor in respect of the Will in question. This finding of fact regarding the genuineness of the Will of the father affirmed by the High Court was also not agitated before us in this appeal. That being the position, and considering the concurrent findings of fact it was also not open for us to interfere with the same if it is found not to be perverse or arbitrary. In view of our discussions made hereinabove 12 and applying the principles laid down in the aforesaid decision of this Court, namely, Phoolchand vs. Gopal Lal (supra), we do not find any substance in the arguments of the learned counsel for the appellant.

14. A further contention was advanced by the learned counsel for the appellant that if certain entitlement of share even on the basis of the Will was available to the parties at the stage of preliminary decree, but such entitlement was given a go-by by one of the parties, the parties who have already given a go-by of such entitlement cannot have any adjudication at the final decree stage. In support of this contention, the learned counsel appearing on behalf of the appellant had drawn our attention to Section 97 of the CPC and also on a decision of this Court in the case of *Venkata Reddy & Ors. vs. Pethi Reddy*[3]. In our view, so far as the decision of this Court in Venkata Reddy's case is concerned, there is no applicability of the principles laid down in that decision in the present case. In that decision, the sale made by the Official Receiver during the insolvency of the father of the appellant was the subject 13 matter of a final decision by a competent court inasmuch as the court had decided that the sale was of no avail to the purchaser as the Official Receiver had no power to that sale. 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. As noted herein earlier, we are unable to find any applicability of this decision in the facts of this case. It is true that a Will was executed by the deceased father when the suit was pending for passing a preliminary decree in respect of the plaint scheduled property of the parties and also for declaration that the alleged partition deed executed was sham, void and inoperative in law. Until and unless the partition deed is declared in operative, it is not open to one who claimed more shares on the basis of a Will in respect of the plaint scheduled property. In our view, it was also not open to the respondent to lead any evidence to prove the Will before passing the preliminary decree, since the suit itself was for a declaration that the partition deed was void, inoperative and a sham transaction and that being the factual position, there was no point in proving the Will 14 before the said declaration was granted by the court. If ultimately, the court comes to the conclusion that there was a partition as evidenced by the partition deed dated 17th of May, 1986, the evidence in respect of the Will would totally become irrelevant. It was only under those circumstances, the proof of the Will was withheld. That being the position, this decision is distinguishable on facts and also on law. So far as Section 97 of the CPC is concerned again, we do not find that the said provision is at

all applicable to the present case. To understand the problem, it would be appropriate for us to produce Section 97 of the CPC which runs as under :- "Appeal from final decree where no appeal from preliminary decree- 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."

15. A plain reading of this provision would make it clear that a party aggrieved by a preliminary decree passed after the commencement of the CPC does not appeal from such decree, he shall be precluded from disputing its 15 correctness in any appeal which may be preferred from the final decree. This is not the position in this case. Here admittedly, a preliminary decree was passed declaring the share of the parties including the share in favour of the deceased father of the parties. That preliminary decree is final, but on the death of the father of the parties, the shares allotted to the deceased father of the parties would fall either to the parties in equal shares or if by Will or by any form of transfer, such share has been given to one of the parties. Therefore, in that situation, the respondents could not have filed any appeal against the preliminary decree because (1) at this stage, the father was very much alive and only on the death of the father, the question of getting one more share that is the share of the father would come into play and (2) the declaration made in the preliminary decree by the Court was also accepted by the parties at that stage. Therefore, Section 97 of the CPC could not be an aid to the appellant and therefore, the submission of the learned counsel for the appellant in this Court cannot be accepted and therefore it is rejected.

16. Before parting with this judgment, we may refer to a decision of this Court in the case of *Kaushalya Devi & Ors. vs. Baijnath Sayal (deceased) & Ors.*[4] on which reliance was also placed by the learned counsel for the appellant. The learned counsel for the appellant also had drawn our attention to paragraph 9 of the said decision. At this stage, it would be appropriate if we reproduce Para 9 on which strong reliance was placed by the learned counsel for the appellant. Para 9 of the said decision runs as under :- "If the preliminary decree passed in the present proceedings without complying with the provisions of Order 32 Rule 7(1) is not a nullity but is only voidable at the instance of the appellants, the question is ;can they seek to avoid it by preferring an appeal against the final decree ? It is in dealing with this point that the bar of Section 97 of the Code is urged against the appellants. Section 97 which has been added in the Code of Civil Procedure, 1908 for the first time provides that where any party aggrieved by a preliminary decree passed after the commencement of the 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."

17. We have already explained in this judgment that Section 97 of the CPC is not applicable to the facts and 17 circumstances of the present case and, therefore, we do not find any applicability of Paragraph 9 of the decision thereof in this decision of this Court in the facts and circumstances of the present case.

18. No other point was raised by the learned counsel for the parties before us. Accordingly we do not find any merit in this appeal. The appeal is thus dismissed. There will be no order as to costs.

[1]*AIR 1967 SC 1470*
[2]*AIR 1967 SC 1470*
[3]*AIR 1963 SC 992*
[4]*AIR 1961 SC 790*