

SUPREME COURT OF INDIA

Shub Karan Bubna @ Shub Karan Prasad Bub

Vs.

Sita Saran Bubna

S.L.P.(C) No.17932 of 2009

(R. V. Raveendran and B. Sudershan Reddy JJ.)

21.08.2009

ORDER

R. V. RAVEENDRAN, J.

1. The first respondent and his mother filed a suit for partition against petitioner and two others in the year 1960 in the court of the First Additional Judge, Muzaffarnagar, for partition and separate possession of their one-third share in the plaint schedule properties and for rendition of accounts. The suit was in respect of three non-agricultural plots and some movables. After contest the suit was decreed on 25.2.1964 directing a preliminary decree for partition be drawn in regard to the one-third share of the plaintiffs in the said plots and a final decree be drawn up through appointment of a Commissioner for actual division of the plots by metes and bounds.

2. Feeling aggrieved the petitioner (and others) filed an appeal before the Patna High Court which was dismissed on 29.3.1974. The first respondent filed an application on 1.5.1987 for drawing up a final decree. The petitioner filed an application on 15.4.1991 to drop the final decree proceedings as it was barred by limitation. The said application was dismissed by the trial court holding that once the rights/shares of the plaintiff had been finally determined by a preliminary decree, there is no limitation for an application for affecting the actual partition/division in accordance with the preliminary decree, as it should be considered to be an application made in a pending suit. The said order was challenged by the petitioner in a revision petition which was dismissed by the High Court order dated 15.1.2009. The petitioner has filed this special leave petition seeking leave to appeal against the said decision of the High Court.

3. The appellant contends that when a preliminary decree is passed in a partition suit, a right enures to the plaintiff to apply for a final decree for division of the suit property by metes and bounds; that

whenever an application is made to enforce a right or seeking any relief, such application is governed by the law of limitation; that an application for drawing up a final decree would be governed by the residuary Article 137 of Limitation Act, 1963 ('Act' for short) which provides a period of limitation of three years; that as such right to apply accrues on the date of the preliminary decree, any application filed beyond three years from the date of preliminary decree (that is 12.3.1964) or at all events beyond three years from the date when the High Court dismissed the defendant's appeal (that is 29.3.1974) would be barred by limitation. Reliance was placed by the petitioner on the decision of this Court in *Sital Parshad v. Kishori Lal* [AIR 1967 SC 1236], the decision of the Privy Council in *Saiyid Jowad Hussain v. Gendan Singh* [AIR 1926 PC 93] and a decision of the Patna High Court in *Thakur Pandey v. Bundi Ojha* [AIR 1981 Patna 27] in support of his contention.

The issue:

4. 'Partition' is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. 'Separation of share' is a species of 'partition'. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?

5. In a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) and termed as 'preliminary decree' under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/ combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject matter of the final decree under Rule 18(2). The question is whether the provisions of Limitation Act are inapplicable to an application for drawing up a final decree.

6. Rule 18 of Order 20 of the Code of Civil Procedure ('Code' for short) deals with decrees in suits for partition or separate possession of a share therein which is extracted below:

18. Decree in suit for partition of property or separate possession of a share therein.-- Where the Court passes a decree for the partition of property or for the separate possession of a share therein,

then, --

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required.

The terms 'preliminary decree' and 'final decree' used in the said rule are defined in Explanation to section 2(2) of the Code and reads thus : A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

Section 54 of the Code dealing with partition of estate or separation of share, relevant for purposes of Rule 18(1) reads thus: Where the decree is for the partition of an undivided estate assessed to the payment of revenue of the government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted sub-ordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Rule 13 of Order 26 of the Code dealing with Commissions to make partition of immovable property, relevant for purposes of Rule 18(2) reads thus :

Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

7. We may now turn to the provisions of the Limitation Act, 1963. Section 3 of the Act provides that subject to sections 4 to 24, every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed. The term 'period of limitation' is defined as the period of limitation prescribed for any suit, appeal or application by the Schedule to the Act (vide clause (j) of section 2 of the Act). The term prescribed period is defined as the period of limitation computed in accordance with the provisions of the said Act. The Third Division of the Schedule to the said Act prescribes the periods of limitation for Applications. The Schedule does not contain any Article prescribing the limitation for an application for drawing up of a final decree. Article 136 prescribes the limitation for execution of any decree or order of civil court as 12 years when the decree or order becomes enforceable. Article 137 provides that for any other application for which no period of limitation is provided elsewhere in that division, the period of limitation is three years which would begin to run from the time when the right to apply accrues. It is thus clear that every application which seeks to enforce a right or seeks a remedy or relief on the basis of any cause of action in a civil court, unless otherwise provided, will be subject to the law of limitation. But where an application does not invoke the jurisdiction of the court to grant any fresh relief based on a new

cause of action, but merely reminds or requests the court to do its duty by completing the remaining part of the pending suit, there is no question of any limitation. Such an application in a suit which is already pending, which contains no fresh or new prayer for relief is not one to which Limitation Act, 1963 would apply. These principles are evident from the provisions of the Code and the Limitation Act and also settled by a series of judgments of different High Court over the decades (See : for example, Lalta Prasad vs. Brahma Din [AIR 1929 Oudh 456], Ramabai Govind v. Anant Daji [AIR 1945 Bom. 338], Abdul Kareem Sab vs. Gowlivada S. Silar Saheb [AIR 1957 AP 40], A. Manjundappa v. Sonnappa Ors. [AIR 1965 Kar. 73], Sudarsan Panda Ors. v. Laxmidhar Panda Ors. [AIR 1983 Orissa 121], Laxmi v. A.Sankappa Alwa [AIR 1989 Ker. 289]. We may also draw support from the judgments of this Court in Phoolchand vs. Gopal Lal [AIR 1967 SC 1470], Ors. [2007 (2) SCC 355] and Bikoba Deora Gaikwad v. Hirabai Marutirao Ghorgare [2008 (8) SCC 198].

8. Once a court passes a preliminary decree, it is the duty of the court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves agree as to the manner of division. This duty in the normal course has to be performed by the court itself as a continuation of the preliminary decree. Sometimes either on account of the pendency of an appeal or other circumstances, the court passes the decree under Rule 18(1) or a preliminary decree under Rule 18(2) and the matter goes into storage to be revived only when an application is made by any of the parties, drawing its attention to the pending issue and the need for referring the matter either to the Collector or a Commissioner for actual division of the property. Be that as it may.

9. The following principles emerge from the above discussion regarding partition suits :

9.1) In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible). Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

9.2) In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties: (i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the

property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

9.3) As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

10. The three decisions relied on by the petitioner (referred to in para 3 above) are not relevant for deciding the issue arising in this case. They all relate to suits for mortgage and not partition. There is a fundamental difference between mortgage suits and partition suits. In a preliminary decree in a mortgage suit (whether a decree for foreclosure under Rule 2 or a decree for sale under Rule 4 of Order 34 of the Code), the amount due is determined and declared and the time within which the amount has to be paid is also fixed and the consequence of non payment within the time stipulated is also specified. A preliminary decree in a mortgage suit decides all the issues and what is left out is only the action to be taken in the event of non payment of the amount. When the amount is not paid the plaintiff gets a right to seek a final decree for foreclosure or for sale. On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds. Therefore, the concept of final decree in a partition suit is different from the concept of final decree in a mortgage suit. Consequently an application for a final decree in a mortgage suit is different from an application for final decree in partition suits. A suggestion for debate and legislative action

11. The century old civil procedure contemplates judgments, decrees, preliminary decrees and final

decrees and execution of decrees. They provide for a 'pause' between a decree and execution. A 'pause' has also developed by practice between a preliminary decree and a final decree. The 'pause' is to enable the defendant to voluntarily comply with the decree or declaration contained in the preliminary decree. The ground reality is that defendants normally do not comply with decrees without the pursuance of an execution. In very few cases, the defendants in a partition suit, voluntarily divide the property on the passing of a preliminary decree. In very few cases, defendants in money suits, pay the decretal amount as per the decrees. Consequently, it is necessary to go to the second stage that is levy of execution, or applications for final decree followed by levy of execution in almost all cases.

12. A litigant coming to court seeking relief is not interested in receiving a paper decree, when he succeeds in establishing his case. What he wants is relief. If it is a suit for money, he wants the money. If it is a suit for property, he wants the property. He naturally wonders why when he files a suit for recovery of money, he should first engage a lawyer and obtain a decree and then again engage a lawyer and execute the decree. Similarly, when he files a suit for partition, he wonders why he has to first secure a preliminary decree, then file an application and obtain a final decree and then file an execution to get the actual relief. The common-sensical query is: why not a continuous process? The litigant is perplexed as to why when a money decree is passed, the court does not fix the date for payment and if it is not paid, proceed with the execution; when a preliminary decree is passed in a partition suit, why the court does not forthwith fix a date for appointment of a Commissioner for division and make a final decree and deliver actual possession of his separated share. Why is it necessary for him to remind the court and approach the court at different stages?

13. Because of the artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings, many Trial judges tend to believe that adjudication of the right being the judicial function, they should concentrate on that part. Consequently, adequate importance is not given to the final decree proceedings and execution proceedings which are considered to be ministerial functions. The focus is on disposing of cases, rather than ensuring that the litigant gets the relief. But the focus should not only be on early disposal of cases, but also on early and easy securing of relief for which the party approaches the court. Even among lawyers, importance is given only to securing of a decree, not securing of relief. Many lawyers handle suits only till preliminary decree is made, then hand it over to their juniors to conduct the final decree proceedings and then give it to their clerks for conducting the execution proceedings. Many a time, a party exhausts his finances and energy by the time he secures the preliminary decree and has neither the capacity nor the energy to pursue the matter to get the final relief. As a consequence, we have found cases where a suit is decreed or a preliminary decree is granted within a year or two, the final decree proceeding and execution takes decades for completion. This is an area which contributes to considerable delay and consequential loss of credibility of the civil justice system. Courts and Lawyers should give as much importance to final decree proceedings and executions, as they give to the main suits.

14. In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the

emphasis is not only on disposal of suits, but also on securing relief to the litigant. We hope that the Law Commission and Parliament will bestow their attention on this issue and make appropriate recommendations/amendments so that the suit will be a continuous process from the stage of its initiation to the stage of securing actual relief. The present system involving a proceeding for declaration of the right, a separate proceeding for quantification or ascertainment of relief, and another separate proceeding for enforcement of the decree to secure the relief, is outmoded and unsuited for present requirements. If there is a practice of assigning separate numbers for final decree proceedings that should be avoided. Issuing fresh notices to the defendants at each stage should also be avoided. The Code of Civil Procedure should provide for a continuous and seamless process from the stage of filing of suit to the stage of getting relief. In money suits and other suits requiring a single decree, the process of suit should be a continuous process consisting of the first stage relating to determination of liability and then the second stage of execution and recovery, without any pause or stop or need for the plaintiff to initiate a separate proceedings for execution. In suits for partition and other suits involving declaration of the right and ascertainment/quantification of the relief, the process of the suit should be continuous, consisting of the first stage of determination and declaration of the right, second stage of ascertainment/division/quantification, and the third stage of execution to give actual relief.

Conclusion

15. In so far final decree proceedings are concerned, we see no reason for even legislative intervention. As the provisions of the Code stand at present, initiation of final decree proceedings does not depend upon an application for final decree for initiation (unless the local amendments require the same). As noticed above, the Code does not contemplate filing an application for final decree. Therefore, when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed. It is the duty and function of the court. Performance of such function does not require a reminder or nudge from the litigant. The mindset should be to expedite the process of dispute resolution.

16. In view of the foregoing, we are of the view that the application filed by the plaintiff in this case for drawing up of a final decree, was rightly held to be not subject to any period of limitation. We therefore dismiss this special leave petition as having no merit, with a request to expedite the final decree proceedings.