SUPREME COURT OF INDIA

Venu

Vs.

Ponnusamy Reddiar

C.A.No.4187 of 2008

(Arun Mishra and Amitava Roy,JJ.,)

27.04.2017

ORDER

1. Only question raised in the present appeal is with respect to the limitation for execution of preliminary decree for partition. In the instant case, the application for execution of the decree was filed after thirty years of the preliminary decree. That too in the shape for the appointment of an court Commissioner so as to carry out the preliminary decree which has been passed on 23.11.1959. The application for the execution of the decree was filed on 3.10.1989 i.e. after thirty years.

2. Learned counsel appearing on the appellant has submitted that since the application had been filed for appointment of court commissioner, it ought to be governed by provisions of Article 137 of the Limitation Act, 1963.

3. On the other hand, learned counsel appearing on behalf of the decree holder has urged that in substance an application has been filed for final decree proceedings and the cost of the final proceedings is paid then the preliminary decree is executed, thus application for execution of preliminary decree for partition could not be said to be barred by limitation.
In our opinion a preliminary decree for partition crystallizes the rights of parties for seeking partition to the extent declared, the equities remain to be worked out in final decree proceedings. Till partition is carried out and final decree is passed, there is no question of any limitation running against right to claim partition as per preliminary decree. Even when application is filed seeking appointment of Commissioner, no limitation is prescribed for this purpose, as such, it would not be barred by limitation, lis continues till preliminary decree culminates in to final decree.

4. The matter is no more res integra. The Division Bench of the High Court of Calcutta in In *Bhusan Chandra Mondal vs. Chhabimoni Dasi*[1], considered the question when a preliminary decree was passed in a suit for partition in courts, the court consider the applicability of Article 181 of the Limitation Act, 1908 (in short 'the old Act') the court has laid down thus :

”(6) Article 181 is the residuary Article relating to applications. In a mortgage suit it has been held that the application for a final decree has to be made within 3 years by reason of Article 181,Limitation Act. But those decisions are not helpful because O.34 R.4 Civil P.C.expressly requires the mortageee to make an application for a final decree, either for foreclosure or for sale. In a suit for partition and/or accounts a party need not make an application for making the decree final. After the preliminary decree is in such a suit has been passed it is the usual practice for the plaintiff to make an application for the appointment of the Commissioner but there were no legal bar in the court appointing the commissioner suo motu and asking the plaintiff to deposit the commissioner's fee in Court. If he does not deposit the fees any other party to the suit can do so and take upon himself the carriage of the proceedings if the plaintiff and none of the other parties make the deposit the fact that the court would not be able to dismiss the suit is, however, another matter. (7) We therefore do not see our way to accept the petitioner's contentions on this point also."

5. Similar is the view adopted by a Single judge of the *High Court of Kerala in Laxmi & Ors. vs. A. Sankappa Alwa & Ors*[2]. the logic given by the High Court of Kerala that the preliminary decree does not completely dispose of the suit. The suit continues till the final decree is passed. Suit is pending till the passing of the final decree. There is no necessity of filing an application to apply for the final decree proceedings by litigants, then there is an obligation on the court for drawing up a final decree. The court had held thus:

”15.I turn to consider the question of obligation of the Court and the parties after a preliminary decree is given in a partition suit. I do not propose to discuss that matter elaborately. In my view a preliminary decree conclusively determines the rights and liabilities of the parties with regard to all or some of the matters in controversy in the suit although it does not completely dispose of the suit. Further proceedings await the suit to work out and adjust the rights of the parties. The Court cannot dismiss a suit for default when once a preliminary decree is passed in a partition suit. The parties to the suit have acquired rights or incurred liabilities under the decree. They are final, unless or until the decree is varied or set aside. The law being so, if the plaintiff does not take any steps after a preliminary decree is passed, the Court should adjourn the proceedings sine die with liberty to the parties concerned to end the torpor and suspended animation of the suit by activising it by taking appropriate proceedings. In *Thomas v. Bhavani Amma*[3], Krishna Iyer, J. observed:

”It is correct law that in a suit for partition, after the passing of a preliminary decree it is the duty of the Court to pass a final decree and what is called an application for final decree is but a reminder to the Court of its duty. If so, it is the Court's duty to give notice to the parties.”

6. No rule provides for the filing of an application by the party for passing a final decree. The preliminary decree will not dispose of the suit. The suit continues. The position being so, it is more appropriate for the Court to adjourn the case sine die. It is difficult for me to say that

there is an obligation on the part of the Court to "pass the final decree after necessary enquiries" as observed by Paripoornan, J. in *(Sreedevi Amma v. Nani Amma[4]).*

7. I am of the opinion that an application for drawing up a final decree in a partition suit is in no way an application contemplated under the Limitation Act. It is a reminder to the Court that something which the Court is obliged to do has not been done and so, such an application, is not governed by any provision of the Limitation Act. When once the rights of the parties have been finally determined in a preliminary decree, an application by a party thereto or the legal representatives, for effecting the actual partition in accordance with the directions contained in the preliminary decree can never be construed to be an application within the meaning of the Limitation Act. It shall be taken to be an application in a pending suit and therefore the question of limitation does not arise. Similar is the view taken by the Single Bench of High Court of Punjab & Haryana in *Naresh Kumar & Anr. vs. Smt. Kailash Devi & Ors[5].* in which reliance has been placed upon the decision of High Court of Madras in *Ramanathan Chetty v. Alagappa Chetty[6]* in which it was held that until final decree is passed in a partition suit, limitation will not come into play because the suit continues, till final decree is passed. Reliance is also placed on a decision of High Court of Peshawar in *Faqir Chand v. Mohammad Akbar Khan[7]* in which it has been observed that there is no obligation of a litigant to apply for final decree proceedings. As such there is no question of application of the limitation. Another decision of the High Court of Orissa had been referred in *Sudarsan Panda vs. Laxmidhar Panda[8]* in which also similar view had been taken. In the instant case, the other ground which was taken by the appellant with respect to the preliminary decree being worked out by way of compromise. However, the factum of compromises has not been found to be established. Thus there is no satisfaction of the preliminary decree which had been passed in the instant case. The decision in *Varatharajulu Reddiar vs. Venkatakrishna Reddiar & Ors[9].* is pertinent in this regard, in which it has been observed that in case parties had affected partition by metes and bounds as per the preliminary decree, it would not be necessary to undertake the final decree proceedings but in the instant case, it has not been found to be established that parties have worked out their rights by mutual agreement. Thus the final decree has to be drawn in accordance with law. We appreciate the fairness with which the case has been argued by the learned counsel appearing for the appellant.

8. Thus we find no merit in this appeal which is hereby dismissed. No order as to costs.

Judgment Referred.

[1]*AIR 1948 Cal. 0363*
[2]*AIR 1989 Ker. 0289*
[3]*(1969) Ker LT 0729*
[4]*(1985) Ker LT 0940*
[5]*AIR 1999 Pun. & Har.102*
[6]*AIR 1930 Mad. 528*
[7]*AIR 1933 Pesh. 0101*
[8]*AIR 1983 Ori. 0121*
[9]*(1967) 2 Mad. LJ 0342*