

ANDHRA PRADESH HIGH COURT

Kotipalli Mahalakshamma

Vs

Kotipalli Ganeswara Rao

(P C Reddy, C.J. Srinivasachari, J.)

13.03.1959

JUDGMENT

Srinivasachari, J.

1. This appeal arises in execution proceedings. The appellant herein is the transferee-decree-holder. The relevant facts necessary for the purposes of this appeal may be stated.
2. A decree was passed by the Subordinate Judge in O. S. No. 106 of 1933 in a suit filed for partition of 1/4th share in the suit properties, for mesne profits and for accounts. The preliminary decree passed by the Subordinate Judge was taken in appeal and the High Court confirmed the decree in A. S. 111/1937.
3. An application for the appointment of a Commissioner (I. A. 269/1936) was filed to effect a division of the properties. In 1937 the properties were divided and the plaintiff given his share in the immovable properties and possession also was given.
4. After all this was over, the decree-holder assigned his decree in favour of the appellant herein a final decree was passed on 8-1-1945 embodying the result of the partition and awarding a particular amount to the plaintiff as mesne profits. An appeal was filed before the High Court which modified the decree by reducing the amount payable. This was on 14-3-1950.
5. In October 1950 the appellant herein applied to execute the final decree as modified by the High Court. The Executing court dismissed the application. It held that the decree passed by the Court was composite decree, one for partition of immovable properties and another for mesne profits and as a partition decree it had to be engrossed on non-judicial stamp. As it was not engrossed on the requisite stamp the decree was inexecutable. This order of dismissal was passed on 13-2-1952. Thereafter the assignee-decree-holder filed an application I. A. 922-1952 for drafting and engrossing the decree on stamp paper. This was ordered on 3-1-1953 and the decree was engrossed on stamp paper.

6. After this the present E. P. was filed on 27-2-1954 being E. P. No. 43/1954. Execution was opposed on the ground that the application was barred by limitation. The plea was that the previous application which was dismissed on 13-2-1952 was not one in accordance with law and inasmuch as more than three years had elapsed since the date of the High Court's decree (14-3-50) the execution application was clearly out of time. This plea was upheld and the E. P. was dismissed. Hence this appeal.

7. At the outset we must point out that the order of the learned Subordinate Judge of 13th February 1952 was erroneous when he held that the decree was inexecutable for not having been engrossed on non-judicial stamp. The Judge failed to note that there was only one decree that had been passed by the Court viz., the decree for mesne profits, as modified by the High Court. There was no final decree with regard to the partition of immovable property as immovable properties had been already divided and possession given to the decree-holder. As would be apparent from the order of the Subordinate Judge the allotment of property in the division of immovable property was not incorporated in the final decree passed on 8-1-1945 and subsequently confirmed after notification by the High Court on 14-3-1950. No objection on the ground that the decree was inexecutable was taken by the judgment-debtor when the assignee-decree-holder drew amounts deposited by the judgment-debtor. Even before the High Court no objection seems to have been taken to the final decree as passed on 8-1-1945; the objection seems to have been to the quantum of the mesne profits awarded.

8. We may also point out that it is the duty of the court when passing final decrees for partition to call upon the parties to furnish the requisite stamp paper for engrossing the decree on such stamp-paper. The decree-holder cannot be made to suffer for the omission of the court in making such direction. The lower court has referred to the case of *Satyanandam v. P. Namayya*, AIR 1938 Mad 307. There the question was whether a particular decree passed by the Court was final decree or a preliminary decree having regard to the terms of the decree. The learned Judges, Burn and Lakshman Rao JJ., construing the provisions of the decree held that it was a final order of a court for effecting a partition falling within the terms of Section 2(15) of the Stamp Act. They further held that the furnishing of the requisite stamp at a later stage could not be allowed to have a retrospective effect so as to regard the execution application filed after expiry of the period of limitation to be within time. That case has no application to the facts of the present case.

9. The position on the date when E. P. 304/50 for the recovery of the amount of mesne profits was filed was that there was only one decree capable of execution and the appellant sought to execute that decree. Such an execution application could not be regarded as being not one in accordance with law. The Privy Council in referring to the expression "made in accordance with law" observed as follows:

"The application; were made in accordance with the provisions of the Civil Procedure Code and therefore, in accordance with the law applicable thereto, they were made to the proper court, they were obviously steps in aid of execution and they were made within time."

Vide Khalil-ul-Rahaman Khan v. Collector of Etah, ILR 55 All 993; (AIR 1934 PC 14). Looked at from another point of view the position will be this. If the contention were accepted that there ought to be a composite final decree, as a matter of fact there was no such composite final decree 3S such till 3-1-1953 until jt was engrossed on non-judicial stamp paper. This view receives support from the observations of the learned Judge in AIR 1938 Mad 307 wherein the learned judges stated that a final decree for partition has no existence as a decree until it is engrossed on the proper non-judicial stamp paper; till that is done that suit is pending. If that is the position of law, then limitation could be said to commence only on 3-1-1953 and the application filed on 27-2-54 is Certainly within time. Looked at from any point of view the present application can never be held to be beyond time. As was observed by the Privy Council in the case of Maharaja Sir Rameswar Singh Bahadur v. Homeswar Singh, 40 Mad LJ 1; (AIR 1921 PC 31):

"When the Limitation Act of 1908 prescribes three years from the date of a decree or order as the period within which it must be enforced, the language read with its context refers only toan order or decree made in such a form as to render it capable in the circumstances, of being enforced."

The appeal is allowed, the order or the lower Court set aside. The present E. P. filed by the appellant on 27-2-1954 will be taken on file and disposed of on the merits. The appellant will be entitled to his costs here and in the court below.

