

ANDHRA PRADESH HIGH COURT

S. Narayana Reddy

Vs.

S. Sai Reddy

C.R.P. No. 3205 of 1989

(Radhakrishna Rao, J.)

02.02.1990

ORDER

Radhakrishna Rao, J.

1. This revision petition is directed against the order of the Subordinate Judge, Mahbubnagar, in I.A.No. 82 of 1988 in O.S.No. 42 of 1972 filed by the plaintiff for passing a final decree in terms of preliminary decree.

2. The facts in brief that led to the filing of an application by the plaintiff for passing a preliminary decree in the partition suit are as follows :

The plaintiff filed the suit for partition and the Court passed a preliminary decree on 26-12-1973 declaring that he is entitled to 1/3rd share in the plaint A, C and D schedule properties. The first defendant filed an appeal against that preliminary decree. The High Court confirmed the findings of the Trial Court on 15-10-1984 holding that the plaintiff, the 4th defendant and the first defendant are entitled to 1/3rd share each and also directed the Trial Court while passing a final decree to make appropriate provision for maintenance and marriage expenses of defendants 5 to 9 and maintenance of the third defendant out of totality of joint family properties shall be borne equally by each of the plaintiff, 4th defendant and first defendant. The 10th defendant died long back when the appeal was pending. The marriage of the 5th defendant was performed subsequently with the expenses of the plaintiff.

3. The first defendant filed a counter stating that the marriage of the 5th defendant was performed not with the expenses of the plaintiff but with his expenses and he also gifted 30 tolas of gold to the 5th defendant at the time of her marriage. He also stated that the plaint A, C and D schedule properties are held to be ancestral properties by the Court and after the insertion of Sections 29-A, 29-B and 29-C of the Hindu Succession Act of 1956, defendants 6 to 9 being unmarried daughters are also entitled for a share on par with their brothers, since the properties have not

been divided so far. He also stated that the suit A, C and D schedule properties have to be divided in 7 parts.

4. The Trial Court found that a preliminary decree was passed and an appeal was also preferred against the preliminary decree and that appeal was also dismissed confirming the preliminary decree passed by the Trial Court and in that situation the contention of the defendants that the properties have not yet been divided and so the unmarried daughters are also entitled to the share is not tenable.

5. The suit was filed for partition in 1972 and a preliminary decree was passed in 1973 declaring that the plaintiff is entitled to 1/3rd share. The lower Court came to the conclusion that when a preliminary decree was passed declaring the shares of the parties, it is not open to the unmarried daughters to claim shares in those properties by virtue of the amended provisions of the Hindu Succession Act, 1956.

6. The contention that has been raised on behalf of the daughters who are respondents 6 to 9 in the lower Court is that the Court below failed to take into consideration the amended provisions of the Hindu Succession Act correctly. The lower Court also failed to take note that it is a settled law that a suit for partition of the joint family properties should be deemed to be pending till a final decree is passed and merely because a preliminary decree was passed before the Hindu Succession (Andhra Pradesh Amendment) Act, 1956 (XIII of 1986) came into force on 5-9-1985 the rights of the unmarried daughters conferred under the said Act cannot be said to be unenforceable.

7. The learned counsel for the respondent-plaintiff contended that as the preliminary decree has already been passed, the severance has already been taken place by virtue of the passing of the decree and the rights have been declared and the only alternative that is left for the Court is to implement the preliminary decree passed by it which has been confirmed by the High Court also.

8. On September 24, 1985 the Andhra Pradesh Legislature has adopted a Bill to confer equal right to property on Hindu women. A new Chapter II-A is inserted into the Hindu Succession Act consisting of Sections 29-A, 29-B and 29-C. Section 29-A stipulates that in a joint family governed by the Mitakshara law the daughter shall by birth become a coparcener in her own right and have the same rights in the coparcenary property as she would have had if she had been a son. It makes the daughter's right to ancestral property direct and absolute. Section 29-B provides for the devolution of such interest by survivorship. Section 29-C gives preferential right to acquire property in certain cases.

9. Section 29-A which is inserted by the Act (XIII of 1986) reads as follows :

"29-A. Equal rights to daughter in coparcenary property: Notwithstanding anything contained in Section 6 of this Act-

(i) in a Joint Hindu Family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and having the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same

liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a Joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son;

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter;

Provided further that the share allottable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

(iv) Nothing in clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986."

10. Now we have to consider the meaning of the words "partition which had been effected" occurring in Clause (iv) of Section 29-A of the Hindu Succession Act. Can it be said that by means of the passing of the preliminary decree by a competent civil Court, a partition is deemed to have been effected from the date of the filing of the suit by one of the sons? The law on this point is very clear.

11. In a suit for partition of the Hindu Joint Family property, the property not being of the kind referred to in sub-rule (1) of Order 20, Rule 18, a preliminary decree may be passed as provided by sub-rule (2); and for the purpose of working out the preliminary decree and adjusting the shares, the final decree may give one coparcener a charge over the share of another as an alternative to depriving a coparcener of some property. In a suit for partition, there are normally two decrees; (1) a preliminary decree, and (2) a final decree. Any order passed between preliminary and final decree is an interlocutory order although it may finally decide the rights of the parties so far as the trial Court is concerned. Admittedly in this case no final decree is yet passed. The unmarried daughters are already on record and provision was directed to be made for their marriage expenses in the preliminary decree itself.

12. It has been held in *'Jotindra Mohan v. Bijoy Chandra'*, that a suit for partition, even after the report of the Commissioners is confirmed and decree is directed to be drawn up in accordance therewith, is a pending litigation, until the Court signs the final decree, and that a decree for partition, to be operative, must be engrossed on stamped-paper as required by the Stamp Act, and until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated; and an order directing a party to be added under Section 32, Civil Procedure Code (old) can therefore be made in such a suit before it has actually terminated.

13. Mulla on the Civil Procedure Code, 12th Edition, Vol. 2 at page 963 discussed about the position after passing of a preliminary decree and before the final decree is passed. According to the learned author, the words :

¹(1905) ILR 32 Cal 483

"During the pendency of a suit" mean 'before a final decree or order has been passed or made in the suit'. Hence, the provisions of this rule (Order 22, Rule 10) apply if the assignment, creation or devolution of interest takes place before a final decree or order is passed or made in the suitUntil the decree is passed, a transferee 'pendente lite' is entitled to apply under this rule to be joined as a party."

14. While considering the adjustment of rights arising after the preliminary decree in a partition suit, the Mysore High Court in *R. Gurubasaviah v. Rumale Karibasappa*², held as follows (at p. 7 of AIR) :

"It cannot be said that the decree of 1936 finally disposed of the suit, even in respect of the immovable properties as the shares had still to be divided by metes and bounds either through a Commissioner or otherwise. If in the meantime and subsequent to that decree there has been either an enlargement or diminution of the shares or rights of the parties by reason of succession or subsequent purchases or by assignments of interest by whatever cause, the Court, before passing its final decree can and ought to go into the matter and grant a final decree in accordance with such subsequent devolutions to avoid multiplicity of suits and give complete and appropriate relief to all the parties."

15. The Bombay High Court in *Parashuram Rajaram Tiwari v. Hirabai Rajaram Tiwari*³, has considered a case in similar situation. In that case the plaintiff filed a suit for partition. After contest a preliminary decree has been passed holding that the plaintiff was entitled for 1/8th share. The shares of the defendants were also ascertained and provision for marriage expenses of the unmarried daughters also has been made. After the passing of the preliminary decree, the 1st defendant in the suit, who is the father of the plaintiff, died. Then the plaintiff filed an application claiming that the decree be amended by providing him 1/7th share instead of 1/8th share that has been awarded in the preliminary decree. The learned Judges of the Bombay High Court considering the expression 'decree' occurring in Section 2(2), Civil Procedure Code held that until there is a final decree in a partition suit, the suit is pending and thus, the application by the plaintiff was made in a pending suit. By an application, the plaintiff claimed that by reason of his father's death, his share was augmented and the share which was 1/8th was increased to 1/7th. Ultimately the Bombay High Court held that the plaintiff in that suit was entitled for 1/7th share.

16. The Privy Council also as early as in 1940 had decision to consider whether in a partition suit in which a preliminary decree has been passed, is still a pending suit and the rights of the parties who have been added after the preliminary decree have to be adjusted in the final decree. The Privy Council in *Jadu Nath Ray v. Parmeshwar Mallik*⁴, while reversing the judgment of the Calcutta High Court held that a mortgagee who is added as a party after a preliminary decree in a partition suit is, therefore, entitled to have his claims adjusted in the final decree. Their Lordships of the Privy Council confirmed the view expressed by the learned Subordinate Judge who has passed the final decree by holding that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties who are added after the preliminary

decree have

² AIR 1955 Mys 6

⁴ ILR (1940) 1 Cal 255 (265) : (AIR 1940 PC 11 (16))

³ AIR 1957 Bom 59

to be adjusted at the time of final decree.

17. The law as summarised from the above three judgments is clear and it must be held as a settled proposition that after the passing of the preliminary decree in a partition suit before passing of the final decree if there has been either enlargement or diminution of the shares or rights of the parties have been changed by reason of the rights that have been conferred by the statute or rights of the parties by a second or by subsequent purchase or by assignments of interest by whatever cause, the Court, before passing its final decree, has to consider and decide the matter and grant a final decree in accordance with such subsequent devolutions to avoid multiplicity of suits and give complete and appropriate relief to all the parties. The mere fact that those parties have been added subsequent to the preliminary decree and their interest has been found to be affected and they were added as necessary parties, it does not mean that the Court has no right to consider their claims. On the other hand, the decision of the Privy Council cited above clearly points out that even in the case of a party who has been brought on record his right has to be adjusted at the time of the final decree.

18. The lower Court has not taken into consideration the view expressed by the Supreme Court in *Phoolchand v. Gopal Lal*⁵, In that case, the Supreme Court while considering Order 20, Rule 18 and the definition of 'preliminary decree' as defined in Section 2(2) of the Civil Procedure Code, held as follows (at p. 1473 of AIR) :

"We are of opinion that there is nothing in the Civil Procedure Code 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 the 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 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 There is no prohibition in the Civil Procedure Code 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 Civil Procedure Code does not contemplate such a possibility.

In any case if two views are possible - and obviously this is so because the High Courts have differed on the question - we would prefer the view taken by the High

⁵ AIR 1967 SC 1470

Courts have differed on the question - we would prefer the view taken by the High Courts which hold that a second preliminary decree can be passed, particularly in partition suits where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted."

19. Since the parties have invoked the jurisdiction of the Civil Court to decide their rights in a partition suit, their rights can be considered at any stage till the passing of the final decree. Till the final decree as stated above is passed in a partition suit, it is well settled that the suit is said to be pending, till the final decree is signed by the Judge after engrossing the same on the stamps. In view of the insertion of Section 29-A in the Hindu Succession Act by Act (13 of 1986) the statute conferred a right on the daughters and they become coparceners in their own right in the same manner as sons and have the same rights in the coparcenary property. In this case, admittedly the daughters are already on record and, therefore, they are entitled to claim a right and request the Court to pass a final decree by taking into account the altered situation. It must be made clear that the alteration of the shares as conferred under the Amendment Act to the daughters can only be done so long as the final decree has not been passed. In the case of registration of the partition deed, it is deemed to have been effected and it is complete partition. But in the case of a partition that has to be made by a Court, it must be deemed that it has been effected only after the passing of the final decree. The meaning of the words "a partition which had been effected" occurring in Section 29A(iv) must be construed as follows :

(i) In the case of partition through Court, the termination of the suit ultimately by passing the final decree; (ii) in the case of partition by a registered deed of partition, the partition is deemed to have been effected finally on the date of the registration of the document; (iii) in the case of an agreement or arrangement as entered into between the parties and as recognized in the custom, the date of such agreement or arrangement as per the custom pleaded and proved by the parties has to be taken into consideration.

20. As pointed out by the Supreme Court in Phoolchand's case, (supra) there is no prohibition in the Civil Procedure Code against passing a second preliminary decree particularly in partition suits where shares specified in the preliminary decree have to be adjusted so long as a final decree has not been passed in that suit. On facts in this case, a preliminary decree has been passed giving 1/3rd share to the plaintiff. The shares of the other persons also have to be ascertained and the rights of the unmarried daughters have been recognized in the preliminary decree. There is a statutory change by the introduction of Section 29A of the Hindu Succession Act which came into force on 5th September, 1985 and the preliminary decree has been passed on 26th December, 1973, but no final decree has been passed. The plaintiff himself filed an application for passing a final decree and the trial court is bound to implement the statutory rights conferred on the daughters and it ought to have allowed the petition in accordance with law.

21. It is to be noted here that a Division Bench of this Court in *Rahmat Bee v. Maqbool Banu*⁶ found that even the defendant also can file a petition, in a partition suit, for passing a final decree.

When the defendant also is entitled to file a petition for passing a final decree, I fail to understand why the unmarried daughters, who are given statutory rights

⁶(1989) 2 APLJ (HC) 220

under Section 29A of the Hindu Succession Act, cannot file an application for passing of a final decree in the light of the findings that have already been arrived at by the trial Court.

22. The order of the lower Court is set aside and the revision petition is allowed. No costs.
Petition allowed.