

Narasu and ors. Vs. Narayan Krishnaji and ors.

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Court : Karnataka

Decided On : Sep-19-1958

Reported in : AIR1959Kant233; AIR1959Mys233; ILR1958KAR718

Judge : N. Sreenivasa Rau and ;K.S. Hegde, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47, 48, 54 and 96 - Order 20, Rule 18 and 18(1) - Order 21, Rule 10; Code of Civil Procedure (CPC), 1888; Limitation Act - Schedule - Articles 181 and 182

Appeal No. : Appeal No. 142 of 1957

Appellant : Narasu and ors.

Respondent : Narayan Krishnaji and ors.

Advocate for Def. : H.B. Datar and ;G.G. Shirgurkar, Advs.

Advocate for Pet/Ap. : B.V. Krishnaswamy Rao, Adv.

Judgement :

Hegde, J.

1. The appellants are some of the respondents in Regular Dharkast No. 204 of 1947 on the file of the learned Civil Judge, Senior Division, Belgaum. The first respondent is one of the petitioners (decree-holder) in the trial Court.

2. Regular Dharkast No. 204/47 purports to be an execution petition. In that petition, the representatives of the decree-holders in O. S. No. 119 of 1890 on the file of the learned Civil Judge, Senior Division, Belgaum, applied to the Court below to send the said decree to the Collector of the District for partitioning the property under Order XX, Rule 18 (1), C. P. C. The respondents therein are said to be the representatives of the original judgment-debtors. Most of the respondents resisted the application on several grounds including the ground of limitation.

3. To understand the scope of the controversy, it is necessary to state a few more facts. The trial Court's decree in O. S. No. 119 of 1890 had been modified by the High Court of Bombay. After the High Court's decree, the decree-holders appear to have filed some applications to the trial Court to take steps to partition the property in question. Barring some minor adjustments nothing substantial appears to have been done to partition the property. The present dharkast was filed in 1947.

4. On the objections raised by the contesting respondents, the Court below at the first instance raised two issues. They are:

'(i) Whether this application in execution is tenable?

(ii) If so, is the dharkast according to law in the absence of mention of previous executions taken out with others thereon being mentioned?'

5. The Court answered both these issues in favour of the petitioners as per its order dated 27-6-1952. It repelled the contention of the contesting respondents that the petition was barred by limitation or that it was not executable as being opposed to Section 48 of the Code of Civil Procedure. It came to the conclusion that there is no limitation for sending the papers to the Collector under Order XX, Rule 18 (1), C. P. C. There was no appeal against that order.

Later on the lower Court has considered the other objections of the respondents and passed its final order on 28-2-1957. The present appeal purports to be directed against the last order though it covers also contentions on 27-6-1952.

6. The first respondent has raised a preliminary objection that the appeal is not maintainable. According to him, the order passed on 28-2-1957, is a ministerial order and consequently there can be no appeal either under Section 47 or under Section 96, C. P. C. He contends that in spite of the fact that the application purports to be an execution application, it is merely a reminder to the Court to do its duty as enjoined by law; it was wrongly described as an execution application.

It is not an application under any of the provisions of Order XXI nor does it comply with the requirements of Rule 10 of Order XXI. In support of his contentions he relied on the decision reported in *D. M. Jacinto v. J. D. B. Fernandez* AIR 1939 Bom 454. From the report of that decision it appears that a practice had developed in the Courts subordinate to the Old Bombay High Court to frame an application under Order XX, Rule 18 as if it were an execution application.

Their Lordships held that in spite of this form, the application cannot be considered in law as an execution application. The Civil Procedure Code of 1888 provided for a single decree in a suit for partition. Even under that Code, partition of the estate assessed to the payment of revenue to the Government could only be done by the Collector or any gazetted subordinate of his. In that respect there is no material difference between the provisions contained in the old Code and the present Code.

A decree passed under Rule 18(1) of Order XX, directing partition by the Collector cannot be said to be a preliminary decree. So far as the Civil Courts are concerned it is final for all purposes, though the partition of the property may remain to be effected by the Collector. Sub-rule (1) of Rule 18 does not contemplate any application to be filed by the parties for sending the papers to the Collector. It says that the Court '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.' This direction must be deemed to be a part of the decree. Any application filed before the Court which passed the decree to send the papers to the Collector could only be considered as a reminder to the Court to follow up its direction given under Sub-rule (1) of Rule 18. No period of limitation is provided for such a

reminder as the same is not one contemplated by law. In sending the papers to the Collector, the Court is not performing any judicial function; nor is it required to pass any judicial order.

Its function could at best be described as ministerial. It will be inappropriate to call such an application as an execution application. The Court which passed the decree must be deemed to have become *functus officio* after passing the decree.

7. A Full Bench of the Bombay High Court in the case reported in *Ramabai Govind v. Anant Daji* AIR 1945 Bom 338, held that

'whether the decree contemplated in Order 20 Rule 18 Sub-rule (1) is in the nature of a preliminary decree or a final decree an application made by a party to a decree under Order 20 Rule 18(1), asking that the papers should be sent to the Collector for effecting a partition as directed in it is of the nature of a mere proceeding in the suit rather than as application to execute the decree, and there is no period of limitation for making it.

The effecting of partition by the Collector, carrying out an order already passed by the Court is not execution of the decree' as contemplated by that expression in column 1 of Article 182 of Schedule 1, Limitation Act. Even if the decree be regarded as final, an application to send the decree to the Collector for effecting a partition, being only a request to the Court to do a ministerial act, is not governed by Article 182. Nor is such an application governed by Article 181, since there is no provision which requires an application to be made to the Court to send a decree, under Order 20, Rule 18 (1), to the Collector. An application, even if made in the form of a *dharkast* application, is not governed by Article 181 or any other Article of the Limitation Act.'

This decision followed the earlier decision of the Bombay High Court reported in AIR 1939 Bom 454. A Full Bench of the Madras High Court in the case reported in *Venkataraghava Rao v. Venkata Hanumantha Rao* AIR 1945 Mad 336 held that 'the Court which has passed a decree for partition to which Section 54 applies and has sent it to the Collector for the purpose of effecting the partition has no power to hear objections to the partition made by the Collector or his subordinate or to

modify the partition.'

The ratio decidendi of this decision is that the Court which passed the decree became functus officio on the passing of the decree. If the parties are aggrieved by any of the orders of the Collector their remedy lies in the Revenue Courts, and not in the Civil Courts. The same reasoning is adopted by the Oudh High Court in the case *Lalta Prasad v. Brahma Din* AIR 1929 Oudh 456. In a later decision reported in *Abdul Ali v. Mirza Viqar Ali Beg*, AIR 1949 Oudh 37, the same High Court reiterated its earlier view.

8. We are aware of the fact that in this case, the decree-holders have tried to put into effect a partition decree which had been passed over 40 years prior to the filing of the present application, Prima facie it may appear to be something strange. But the law of limitation does not spring from the common law of this country. Its effectiveness depends upon the statutory provisions. So long as there is no law prohibiting the partition of the property after a fixed period of limitation, the decree-holders cannot be deprived of their rights.

9. Our attention was invited to the fact that Section 54 C. P. C. finds a place in Part II of the Code which relates to execution. From this fact the learned Counsel for the appellants developed an argument that an action taken under Rule 18 of Order XX read with Section 54 C. P. C. is a proceeding in execution. The scheme of the Code itself is insufficient to deem a proceeding under Section 54 as execution proceedings.

Section 54 C. P. C. is a provision allied to provisions relating to execution. That section could not have been conveniently placed anywhere else. There is nothing in the language of that section to indicate that the proceedings thereunder are execution proceedings. If they are execution proceedings, there must have been corresponding provisions in Order XXI of the Civil Procedure Code. The learned counsel for the appellants has not been able to bring to our notice any decision wherein it was held that an application under Sub-rule (1) of Rule 18 of Order XX is an execution application.

On the contrary, there is a long line of decisions which have taken the view that such an application is not an execution application. We find ourselves in agreement with this view.

10. The learned Counsel for the appellant has complained that the lower Court in spite of holding that it is merely discharging a ministerial function, still has decided a number of points of dispute that arose between the parties. According to him if the trial court became functus officio after passing the decree it is so far all purposes; it will have no jurisdiction to implead fresh parties or determine any controversy that might arise between the parties.

This appears to be so at first sight. But it is unnecessary for us to pronounce on the same in this case. This contention bears further examination. Nor is it necessary for us to decide whether the Collector has jurisdiction to reconsider the question of executability of the decree or about the impleading of parties to it. If the appellants are so advised they may urge these contentions before the Collector and it is then for the Collector to decide.

Having come to the conclusion that the order of the Court below directing the transmission of the papers to the Collector, is a ministerial order, we cannot but hold that the present appeal is unsustainable. Hence it is unnecessary to consider the other contentions urged before us.

11. In the result, the appeal fails and the same is dismissed with costs.

12. NITTOOR SREENIVASA RAU J. : -- I agree. Appeal dismissed.