

**S.V. Munikrishnappa and Others Vs. S.V. Narayanappa**

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**Court :** Karnataka

**Decided On :** Mar-17-1999

**Reported in :** ILR1999KAR2461; 1999(6)KarLJ155

**Judge :** G. Patri Basavana Goud, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 41, Rule 3-A)3)

**Appeal No. :** Civil Revision Petition No. 76 of 1999

**Appellant :** S.V. Munikrishnappa and Others

**Respondent :** S.V. Narayanappa

**Advocate for Def. :** Sri S. Harish Kumar, Adv.

**Advocate for Pet/Ap. :** Sri Rahamathulla Shariff, Adv.

**Judgement :**

ORDER

1. In a suit for partition, preliminary decree has been passed. The subject-matter covers both the agricultural lands and house property. The petitioners herein have preferred an appeal as against the said preliminary decree. There is a delay in filing the said appeal. They have also, therefore, sought for condonation of delay which is yet to be heard and decided. In the meantime, they have sought for stay of further proceedings in the final decree proceedings already initiated in respect

of the said preliminary decree. The learned Appellate Judge, in the impugned order, in view of Order XLI, Rule 3-A(3) of the CPC, has held that until the aspect relating to condonation of delay is heard and decided and until the delay is condoned, the question of granting of stay does not arise.

2. In support of the conclusion reached by the learned Appellate Judge, Sri Harish Kumar, learned Counsel for the respondent, refers to a decision of this Court in Mahadevappa and Others v Mallappa and Others. A learned Single Judge of this Court has held therein that where a belated appeal is preferred against a preliminary decree, until the delay is condoned, stay of the decree appealed against cannot be granted in view of Order XLI, Rule 3-A(3) of the CPC.

3. The distinction between the execution of a decree appealed against and stay of final decree proceedings in respect of a preliminary decree that is appealed against, does not appear to have been canvassed before the learned Single Judge who decided the above matter, nor has the learned Single Judge adverted to that distinction. Now that the said distinction is pressed into service in course of arguments in this matter and now that I am finding that the said distinction makes all the difference, any further reliance upon the said decision of the learned Single Judge would be of no avail to the learned Counsel for the respondent.

4. It is no doubt true that Order XLI, Rule 3-A(3) of the CPC makes it absolutely clear that until the delay is condoned, there could be no stay of execution of decree against which the appeal is proposed to be filed. What is of significance is that the prohibition under sub-rule (3) of Rule 3-A of Order XLI of the CPC is against stay of execution of decree. Where, in a partition suit, preliminary decree is passed, on some aspects at least, there could be no question of it being called an executable decree that can be straightaway put into execution. For example, in the present matter itself, the preliminary decree relates to house property also.

It is only the entitlement to a particular share by each of the parties that is declared in the preliminary decree. There is no way it can be put into execution. Therefore, final decree proceedings have to be initiated and are in fact initiated. The process of effecting partition of the house property by metes and bounds in accordance with the declaration of shares as made in the preliminary decree, is yet to be made

in the final decree proceedings. It is only after that process is completed, and it is only after a particular portion of the house property is held in the final decree as having fallen to the share of a particular party to the proceedings, can it be called an executable decree that can be put into execution. Therefore, at least so far as the house property is concerned, the preliminary decree cannot be called a decree that can be straightaway put into execution. There still will be necessity of initiation of final decree proceedings, and a final decree proceeding therefore is initiated. There could therefore be no stay of any execution proceeding at all that Order XLI, Rule 3-A(3) speaks of, In the circumstances, when an appeal is preferred against a preliminary decree like the present one, what is asked to be stayed is not execution of a decree, but only further proceedings in pursuance of the preliminary decree appealed against, i.e., stay of further proceedings in the final decree proceedings. It is this distinction that makes all the difference, I am, therefore, of the opinion that Order XLI, Rule 3-A(3) of the CPC cannot come in the way of an Appellate Court staying further proceedings in a final decree proceeding even before the application for condonation of delay in preferring the appeal is heard and disposed of.

5. The present matter covers both the agricultural lands and house property. So far as the agricultural lands are concerned, in the final decree proceedings as on today, the Civil Court has become functus officio, it having already sent the papers to the Deputy Commissioner. Therefore, all that the Appellate Court can do now is to stay the further proceedings in the final decree proceedings insofar as it relates to house property. The Appellate Court, in passing the impugned order, has acted with material irregularity inasmuch as, it has lost sight of the distinction between the execution of a decree and a final decree proceeding.

Petition allowed. Impugned order set aside. The final decree proceedings in the Trial Court are stayed insofar as it relates to house property, until the Appellate Court hears and disposes of the application seeking condonation of delay in filing the appeal. The learned Appellate Judge is directed to hear and dispose of the application relating to condonation of delay on or before 15th of April, 1999. Since this order is being dictated in the presence of the learned Counsel appearing on both the sides, it is directed that, without the necessity of separate notice in that

regard, both the parties shall appear before the learned Appellate Judge on 5-4-1999 for further directions by the learned Appellate Judge and to enable him to hear and dispose of the application for condonation of delay on or before 15th of April, 1999. In the event the appeal stands posted to a date beyond 5-4-1999, on production of a copy of this order, the learned Appellate Judge shall have it advanced to 5-4-1999 to comply with the directions herein.

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