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Court : Karnataka

Decided On : Mar-26-2001

Reported in : ILR2004KAR655

Judge : N. Kumar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 96 and 151 - Order 7, Rule 1 - Order 22, Rule 10; ;[Transfer of Property Act, 1882](#) - Sections 52; [Limitation Act, 1963](#) - Schedule - Article 137; Partition Act, 1870

Appeal No. : Regular First Appeal No. 427/1995

Appellant : P.B. Kotturbasappa and ors.

Respondent : K.B. Veerappa, Since Dead by Lr

Advocate for Pet/Ap. : Uday Holla, Adv. for K. Giridhar and ;D.S. Jayaraj, Adv.

Judgement :

Kumar, J.

1. The appellants have preferred this regular first appeal against the order dated 18.4.1995 passed in FDP.No.3/63 on the file of the Civil Judge, Davangere, dismissing the said application for drawing up of a final decree as not maintainable

2. The first appellant P.B. Kotturbasappa and his brothers filed a suit for partition and separate possession of their respective shares in the suit schedule property. After contest, the suit came to be decreed on 16.2.1972, holding that the plaintiffs 1, 8(a) to (h) and 9 are entitled for partition and separate possession of their four annas share in the plaint schedule property and also four annas share in the profits of the joint business from the year 1929 to date of suit and the defendants are also directed to render accounts. Aggrieved by the said judgment and decree, the 11th defendant, K.B. Rudrappa preferred a regular first appeal No. 73/72, challenging the correctness of the said preliminary decree. Similarly, P.B. Kotturbasappa and others also preferred regular first appeal No. 83/72 challenging that portion of the judgment and decree which was against them. These two regular first appeals were disposed of by a common judgment and decree dated 28th September, 1975. For the purpose of this appeal, it is sufficient to note that in the aforesaid decree which is affirmed by the High Court, the first plaintiff was declared to be entitled to 0.03 Np. share in a rupee and the accounting in regard to his share to be rendered by the defendants from Diwali, 1947 onwards. It appears that except the first appellant, all the other parties have entered into compromises and the contesting respondents now claim to be the owners of 0.97 Np. share in a rupee. In other words, 0.03 Np. share of the first plaintiff is not in dispute.

3. Thereafter, P.B. Kotturbasappa and others filed an application under Section 151 CPC for partition and separate possession of the said 0.03 Np. share and for accounts. Though the provision invoked was under Section 151 CPC, the said application was numbered as FDP.3/83. The respondents contested the said application by filing detailed objections. In the aforesaid petition, apart from the original first plaintiff, four other petitioners were impleaded, that is because, it is averred in the petition that Sri P.B. Kotturbasappa sold his share to one B.M. Halasiddappa-petitioner No. 5, under a registered sale deed dated 23.3.1970 for a sum of Rs. 5, 000/-. Thereafter, the said property has been reconveyed back by the said B.M. Halasiddappa, under a registered sale deed dated 13.12.1978 in favour of the petitioners 2 to 4, who are none other than the children of Sri P.B. Kotturbasappa as an abundant caution. Therefore, all of them have joined as petitioners to the final decree proceeding. In view of the aforesaid subsequent developments, petitioners 2 to 4 prayed for drawing up of a final decree and

directing respondents to render the accounts as ordered in the decree. Respondents 1, 2, 11, 13 to 15 mainly filed objections, contending that the petition is not maintainable in law. It is their specific case that the alienation in the petition are hit by the provisions of the Karnataka Vacant Lands in Urban areas (Prohibition and Alienation) Act, 1975 and the petitioners 2 to 5 being strangers of the suit schedule property are not entitled to pursue this petition. They further contended that the petition is barred by time. The 15th respondent contended that he has been impleaded as a party in proceedings as per the order of the High Court, dated 11.12.1986 as he has acquired the interest by way of purchase of the suit schedule property, he contended that, after he became exclusive owner of the property in question he has got alienated and paid improvement charges to City Municipal Council, Davangere and he has put up 8 shop premises and has got plan approved for constructing a cinema and he is also constructing commercial complex in the portion of the suit schedule property and he has already spent about 3 lakhs of rupees and he will be spending not less than 8 lakhs of rupees and therefore the petitioners are not entitled to a share in the property which he has acquired subsequent to the decree. It is also further contended that 0.03 Np. share of the petitioners cannot be partitioned. On these grounds they wanted the petition to be dismissed. Thereafter, the Court Commissioner was appointed for submitting the scheme or proposal of partition of the property in question and to submit his report. Accordingly, A.S. Basanth, who is examined as PW.2 has been appointed as a Commissioner, who after local investigation, has submitted his report. He has submitted a report to the effect that 0.03 Np. share belonging to the petitioners could be partitioned by metes and bounds and in the report he has suggested as to how the partition is to be effected. The respondents filed their statement of objections opposing the said Commissioner's report. Therefore, the said Commissioner was examined as PW.2 in the case and the respondents had an ample opportunity to cross-examine the Commissioner to substantiate the objections that they have raised. In addition to that, PW.1 Manjunath, the petitioner No. 3 was also examined in support of the said application. On behalf of the respondents, one witness RW. 1 Shivakumar was examined. Petitioners have marked Exhibits P1 to P26, the documents, in support of their contentions. On behalf of the defendants, documents Exhibits D1 to D27 have been marked.

4. The learned Trial Judge framed the following points for consideration:

(1) Whether the petition by the petitioners 2 to 4 (mainly) in the present form, is maintainable?

(2) Whether the petitioners 2 to 4 are entitled to the final decree as prayed for?

(3) What order?

5. The learned Trial Judge, on consideration of oral and documentary evidence, has come to the conclusion that the first plaintiff P.B. Kotturbasappa who relinquished his interest under a gift deed as per Exhibit D27, has lost his right in all the movable and immovable properties of the family. Further, the Court below has held on the date Sri P.B. Kotturbasappa executed a registered sale deed in favour of B.M. Halasiddappa in the year 1970, he has no saleable interest in the property and B.M. Halasiddappa, the 5th petitioner does not acquire interest in the suit schedule property. Similarly, when the petitioners 2 to 4 claim interest under the sale deed executed by B.M. Halasiddappa in their favour in the year 1970 do not acquire any interest in the suit schedule property as the vendor himself had no right to the property. In view of these findings, the Court below held that the petitioners 2 to 4 do not get right or interest to the suit schedule property. Therefore they have no locus standi to file the petition for drawing up of a final decree in their individual capacity on the basis of Exhibit P4, the registered sale deed. In so far as coming to the right of P.B. Kotturbasappa to get the final decree, the Court below has recorded a finding that though Sri P. B. Kotturbasappa was alive on the date of petition, neither he has signed the petition nor he was examined in the proceedings. Therefore, it held that the petition filed by the petitioner No. 1 is also not maintainable. It is relevant to point out at this stage itself that during the pendency of the final decree proceedings, Sri P.B. Kotturbasappa has died and his wife and two daughters were brought on record as his legal heirs and petitioners 2 to 4 his sons were already on record in the said proceedings. The Court below also held that the petitioners 2 to 4 being strangers to the preliminary decree, they are not entitled for drawing up of a final decree. Therefore, it has recorded that the petition for drawing up of a final decree is not maintainable in law.

6. On the point whether a partition could be effected in terms of the Commissioner's report, the learned Trial Judge has recorded a finding that in view of his finding that petition itself is not maintainable, the said question would not arise and even otherwise, he held that the Commissioner's report, if considered in the light of the nature of the averments of the parties, evidence on record, regarding the improvement and developments made by one of the parties, he held that the Commissioner's report is not acceptable one. After recording the aforesaid findings, the petition filed by the petitioners for drawing up of a final decree was dismissed by the impugned judgment and decree.

The appellants being aggrieved by the aforesaid judgment and decree dated 18.4.1995, have preferred this appeal.

7. Sri Uday Holla, learned Counsel appearing for the appellants submitted before me that the finding of the Court below that the application for final decree proceedings is not maintainable, is wholly erroneous for the following reasons:

That the deceased P.B. Kotturbasappa, the first plaintiff who was the first petitioner in the final decree application had duly signed the final decree application when it was filed. It is only on the death of Kotturbasappa, the legal representatives were brought on record and for the purpose of convenience that the petitioners were called upon to file the amended petition showing the names of legal representatives, and accordingly an amended petition showing the names of all the legal representatives was filed, which did not contain the signature of P.B. Kotturbasappa. The Court below proceeded on the assumption that the deceased Sri P.B. Kotturbasappa had not signed the petition and therefore, the petition is not maintainable, which is a finding factually incorrect.

8. Secondly, he contended that under Exhibit D.27, if the deceased Sri P.B. Kotturbasappa had relinquished his interest in the suit schedule property in favour of his children, that does not take away his right to prosecute the final decree proceedings and to get a final decree passed in his favour and the finding of the Court below that late Kotturbasappa has ceased to have any interest in the suit schedule property, the petition filed by him is not maintainable, is illegal and contrary to law.

9. It was further submitted that if the 5th petitioner who acquired the title of the first petitioner under a registered sale deed has reconvened the same to the petitioners 2 to 4 subsequently, under a registered sale deed, that property continues to be with P.B. Kotturbasappa and his children and therefore the petitioners 2 to 4 are made parties to final decree proceedings they are not strangers, and therefore they could maintain this petition for drawing up of a final decree.

10. Lastly, he contended that the petitioners 2 to 4 were parties on record and in addition, first petitioner's wife and daughters were brought on record and therefore all of them would have prosecuted the application for drawing up of a final decree and the finding of the Court below that they have no locus standi is wholly unsustainable in law. On the question of limitation, he submitted that it is settled law that the final decree is a continuation of the original proceedings. Therefore, he contends that though after a preliminary decree is passed, an application for drawing up of a final decree is filed, it is only a procedure adopted for the purpose of convenience though, in law filing of such application is not contemplated nor the period of limitation is provided. In that view, the question of petition being barred by limitation does not arise.

11. Per contra, Sri N. Shankarnarayan Bhat, advocate appearing for R5 (d) contended that the present appeal is not maintainable because there is no final decree passed by the Court below and the regular first appeal could be filed only against a decree and not against an order. Therefore, according to him, the impugned order in this appeal is not a decree, but it is only an order. Therefore, this appeal is not maintainable.

12. Sri S.K. Venkata Reddy, advocate appearing for the 7th respondent contended firstly that as Sri Kotturbasappa had relinquished his interest in the suit schedule property under Exhibit D.27 immediately after filing of the suit and as he did not have any interest on the date the decree was passed, the decree which is passed in this case and which is confirmed by the High Court is void, nullity and nonest in the eye of law and therefore final decree application for drawing up of a final decree is bad. In support of his contention, he relied on a judgment reported in AIR 1995 SC 3450. Secondly, he contended that as the petitioners 2 to 4 claimed to

have acquired the interest of the suit schedule property during the pendency of the proceedings, unless they seek leave of the Court to come on record by filing an application under Order XXII Rule 10 CPC, they cannot be permitted to prosecute the matter. In the instant case, admittedly, no such application is filed, no leave is sought and no leave is granted and they have no locus standi to prosecute these proceedings. He also contended that even if such an application is to be filed, it has to be filed as per the residuary Article 137 of the Limitation Act, within three years from the date of accrual of cause of action, the petitioners have not filed such application and as such the application for final decree is barred by limitation.

12A. Sri G.S. Vishweswara, learned Senior Advocate appearing for the third respondent submitted relying on a judgment of this Court in the case of M. SUNNASAB, BY L.Rs. v. RAMEEZALI AND ORS., ILR 1996(4) KAR 3347 that though the proceedings are termed as final decree proceedings, which is in the nature of execution and which ought to have been filed within 12 years from the date of passing of preliminary decree and the same has not been done, the said final decree application is barred by limitation. Secondly, he contended that in the event the Court comes to the conclusion that application is maintainable, then the matter has to be sent back to the Trial Court to consider their objections on the Commissioner's report and directing the Trial Court to give a finding regarding the objections on the Commissioner's report.

13. In view of the aforesaid rival contentions the points that arise my consideration in this appeal are as under:-

- (1) Whether the present appeal is not maintainable under Section 96 of CPC?
- (2) Whether the preliminary decree passed by the Trial Court and affirmed by the High Court is void, abinitio, nonest and unenforceable in law?
- (3) Whether the final decree application is barred by limitation?

14. Regarding Point No. (1):- Sri Shankarnarayan Bhat advocate for R5(d) contended that no final decree has been drawn up by the Trial Court. As could be seen from the order, the application filed for final decree has been dismissed.

Therefore, it is an order, not a decree. It is settled law that an appeal is preferred only against a decree and not against an order. Therefore he contends that the present appeal filed against an order is not maintainable. I do not find any substance in this submission, because in a suit for partition, the Court below while passing the preliminary decree declares the rights of the parties to the suit schedule properties. Thereafter, in the final decree proceedings, the properties are divided by metes and bounds in terms of the declaration of rights as contended in the preliminary decree. The said final decree in a partition suit will be drawn up only on submission of necessary stamp papers and the said final decree would be engrossed on the stamp paper. It is only thereafter the said final decree becomes executable. After the Court decides the portion that the party is entitled to in terms of the preliminary decree and identifies the property by metes and bounds, the aggrieved person has to challenge the said order by - preferring a regular first appeal. If the stamp paper is not supplied, the final decree will never be drawn. If that being the case, to contend that merely because the final decree is not drawn up by the Court on stamp paper, there is no final decree in the case cannot be accepted. Therefore, an order passed in a final decree proceeding directing partition by metes and bounds would be in the nature of final decree and aggrieved person can prefer an appeal against that order. The Court has committed an error in passing the final decree and appellants are perfectly entitled to prefer regular first appeal against the said order. This view of mine finds support from a judgment of a Division Bench of this Court in the case of NARAYANAGOWDA v. CHANNAMMA, RFA 35/1970 dd 24.8.1973

"Where three I.As., were filed during final partition decree proceedings, for accounts, for inclusion of certain items in the partition, and for appointment of a commissioner and a common order was passed, held (1) the orders were in one and the same proceeding namely, preliminary partition decree and passed in the course of the final decree proceedings, and a single regular appeal was maintainable. (2) Though a cross appeal was filed against the order in one I.A., it must be taken that the cross objections were in respect of all the reliefs granted in all the three I.As."

Therefore, I do not find any substance in the said contention.

15. Regarding Point No. (2):- A plaintiff who files a suit for partition if he alienates his share of the property during the pendency of the proceedings, by such alienation would not lose his right to prosecute the suit. All alienations made during the pendency of the proceedings are hit by the doctrine of lispendence under Section 52 of the Transfer of Properties Act. During the pendency of the proceedings, the original party prosecutes the litigation, to see that the litigation ends successfully in his favour so as to make out a markable title to the alienee. Therefore, it cannot be said that the plaintiff who alienates the property loses the right to prosecute the matter in this regard. The learned Counsel pointed out to me the provisions of Order I Rule 1 CPC, which deals with, who are the persons to be joined as parties in a suit. In the instant case, on the date the suit is filed, Sri P.B. Kotturbasappa had an interest in the property and he has been rightly joined as party in the suit. Therefore, the learned Counsel was unable to point out any provision of law which declares that a plaintiff who had a right to the property on the date of filing of the suit, would lose his right to prosecute the matter in the event he loses the interest in property during the pendency of the proceedings. It was contended that as on the date of decree Sri P.B. Kotturbasappa had no title of the property, which fact had not been brought to the notice of the Court and therefore decree passed is void, nullity, is without any substance. As in the case of the death of the person, or an insolvency of the plaintiff, the suit does not get abated when the person transfers his interest, which is the subject matter of the suit. Rule 10 of Order XXII of CPC clearly recognizes the right of transferee to be impleaded as a party to the proceedings and to be heard before any order is made. If he has not applied to be impleaded in the proceedings, that does not mean that the original party has no right to prosecute the matter or he loses any right in the matter. In the case of KIRAN SINGH v. CHAMAN PASWAN, the Hon'ble Supreme Court was dealing with a decree passed by a Court which had no pecuniary or jurisdiction. In that context, it was held that objection regarding executability of decree could be raised at any stage of a proceeding. That judgment has no application to the facts and circumstances of the case. Admittedly, the Court below was the competent Civil Court, which had jurisdiction to entertain a suit for partition and pass a decree for partition. Merely, because a plaintiff had no interest on the date the decree was passed, the decree does not

become void. In the instant case, Sri P. B. Kotturbasappa had interest in the suit schedule property on the date of the suit. If he had relinquished his interest in favour of his children, still he had right to make out a markable title to them and therefore, he continued to have interest in the property to that extent and therefore, the decree passed on that day cannot be said to be void. Therefore, this is not a case where the Court had no jurisdiction to pass a decree, as such the preliminary decree which is passed by the Trial Court and affirmed by the High Court is a valid decree and executable and final decree application was perfectly maintainable to obtain the final decree on the basis of the said preliminary decree.

16. Regarding point No. (3):- (a) Coming to the question of limitation. There is absolutely no merit in the contention that residuary Article 137 is attracted and the alienees from Kotturbasappa having not made an application within three years from the date of approval of cause of action, the final decree application is not maintainable. In the first place, no application under Order XXII Rule 10 CPC is filed by petitioners 2 to 5 on the original side. In so far as the final decree is concerned, they have joined as parties and they are prosecuting this matter. As the first plaintiff who had 0.03 Np. share in a rupee in the suit schedule property after obtaining decree, has filed this final decree application, the question of attracting residuary Article 137 of the Limitation Act would not arise, merely because petitioners 2 to 5 were added as parties along with him.

(b) Regarding the final decree application being barred by time as having not filed within 12 years from the date of final decree is passed, it has no merit. Preliminary decree was passed on 16.2.1972. The said decree was the subject matter of first appeal before this Court. The decree was passed by this Court on 28.8.1975 where Sri Kotturbasappa is held to be entitled to 0.03 Np. share in one rupee and that he is entitled to accounting from Diwali, 1947 by modifying the decree of the Court below. When in the appeal the Trial Court decree was modified, it is that decree which is sought to be enforced by making an application for final decree. The final decree application was filed on 22.1.1983, well within 12 years' period. Therefore, I do not find any substance in the submission. This observation of mine should not be construed as holding that an application for final decree is to be filed within 12 years from the date of preliminary decree as held by the judgment of this

Court in ILR 1996(4) KAR 3347. In the case of M. SUNNASAB BY L.Rs. v. RAMEEZABI AND ORS. It is a settled law that no limitation is prescribed for filing an application for passing a final decree. The final decree proceeding is a continuation of the suit. Limitation does not begin to run from the date when direction is given to pass final decree. Until final decree determining the rights of the parties by metes and bounds is drawn up and engrossed in a stamped paper supplied by the parties, there is no executable decree. A preliminary decree in a partition suit is a step in the suit which continues until the final decree is passed. In fact a Division Bench of this Court in the case reported in the case of NARASU AND ORS. v. NARAYAN KRISHNAJI AND ORS., dealing with an application under Rule 18(1) of Order XX and nature of the said proceedings has held as hereunder:

"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. 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. The order of the Court directing the transmission of the papers to the collector is a ministerial order, and an appeal is unsustainable."

17. In a recent judgment, the Hon'ble Supreme Court of India in the case of SHANKAR BALWANG LOKHANDE BY L.Rs. v. CHANDRAKANT SHANKAR LOKHANDE AND ANR, dealing with the nature of the proceedings has held as under:-

"Limitation does not begin to run from the date when direction is given to pass final decree. Mere giving of direction to supply stamped paper for passing final decree does not amount to passing a final decree. Until the final decree determining the rights of the parties by metes and bounds is drawn up and engrossed on stamped paper(s) supplied by the parties, there is no executable decree. In this behalf it is necessary to note that Section 2(a) of the Bombay Stamp Act, 1958, as amended by the local Act, provides that a decree of Civil Court is required to be stamped as per Article 46 in Schedule I. Section 34 thereof lays down that "no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped". Therefore, executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20 Rule 18(2). After final decree is passed and a direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper (s), it becomes executable or becomes an instrument duly stamped. Thus, condition precedent is to draw up a final decree and then to engross it on stamped paper (s) of required value. These two acts together constitute final decree, crystallizing the rights of the parties in terms of the preliminary decree. Till then, there is no executable decree as envisaged in Order 20 Rule 18(2), attracting residuary Article 182 of the Old Limitation Act."

18. In view of the aforesaid declaration of law it is clear that no limitation is prescribed for filing an application for final decree proceedings. In the decision rendered in the case of M. SUNNASAB BY L.Rs. v. RAMEEZABI AND ORS. (supra) the aforesaid two binding judgments are not brought to the notice of the learned Single Judge who has taken a contrary view. Therefore, the correct legal portion would be this:-

"A preliminary decree in a partition suit, is a step in the suit which continues until the final decree is passed. There is no time period prescribed for filing an application for drawing up of a final decree in a partition suit. The duty of the drawing up the final decree is that of the Court and neither the Civil Procedure Code nor the Limitation Act specifically provides for any application being made for

drawing up or a final decree. An application for drawing up a final decree in a partition suit is an application in a pending suit and is not an execution application such an application could only be considered as a reminder to the Court to follow up its direction given in the preliminary decree."

Therefore the submission that the application for final decree proceedings has to be filed within 12 years of the preliminary decree has no merit.

19. Unfortunately, the learned Trial Judge is carried away by the aforesaid submissions made and his finding that P.B. Kotturbasappa ceased to have any interest in the schedule property and therefore he cannot maintain the petition is unsustainable in law. Further his finding that since P.B. Kotturbasappa has not signed the final decree application is also *ex facie* illegal because P.B. Kotturbasappa has signed and duly verified the final decree application which fact has been completely ignored by the learned Trial Judge while recording the said finding. Even if the petitioners 2 to 4 have not filed any application under Order 22 Rule 10 of the CPC, on the death of P.B. Kotturbasappa, they are entitled to be brought on record as legal heirs and as they were already on record in the final decree application, his widow and daughters have been brought on record and all of them put together are entitled to prosecute the final decree application. The finding of the Court below that Halasiddappa did not acquire any title under the Sale Deed has no significance because, whether the petitioners 2 to 4 acquire an interest in the property under the relinquishment deed or a sale deed or as LRs of P.B. Kotturbasappa or whether they have a right to the property by birth, it cannot be said that they have no right, interest or title to this 0.03 Np. share they have every right to prosecute this application for final decree proceedings. Therefore the Court below has erred in holding that the application was not maintainable. The said finding of the Court below is unsustainable and accordingly is hereby set aside and I hold that the application filed by the petitioners 1 to 4 for drawing up a final decree is perfectly maintainable and they are entitled to final decree being passed in terms of declaration of their shares in the preliminary decree granted by this Court.

20. Now coming to the question of effecting partition by metes and bounds in respect of 0.03 Np. share, a Commissioner has been appointed who has submitted a report stating that the said 0.03 Np. share is partible and in the sketch which he has produced before the Court, he has also suggested the mode of partition. The respondents objected to the said Commissioner's report by filing a detailed statement of objections on that basis, the Commissioner has been examined as P.W.2 and thoroughly cross-examined by the respondents. Unfortunately the learned Trial Judge, in view of his finding that the application itself is not maintainable did not go into the merits or demerits of the said Commissioner's report and he has not recorded any finding thereof. It is submitted on behalf of respondent No. 3 that they did not have ample opportunity to contend that the said Commissioner's report is not acceptable and further they have a right under the Partition Act to make a necessary application. They argue that they also have a right to contend that if their contention that the property is not partible is accepted, they have an opportunity of purchasing the said share by paying the consideration to be decided by the Court, and that such an opportunity is deprived to them. Therefore it is submitted that even if this Court were to hold that the application for final decree proceedings is maintainable, it is just and proper that the entire matter be remitted back to the Trial Court to consider the Commissioner's report and to hold whether this 0.03 Np. share of the petitioners could be partitioned and given to them.

21. I find substance in the said submission. The Commissioner has given a detailed report stating that the plaintiff's share could be partitioned. He has also given a sketch showing the location of the said 0.03 Np. share in the entire property. However the Court below has not considered the objections and the evidence laid in support of the said contention. In this view of the matter, before this Court can go into the said question it would be appropriate to direct the Trial Court to record a finding about the correctness or otherwise of the Commissioner's report and to forward its findings thereof so that final orders can be passed in this appeal.

22. In view of the aforesaid discussion, I pass the following order:-

a) The finding of the Court below that the application filed by the plaintiffs for drawing up of the final decree is not sustainable is hereby set aside and it is declared that the said application is maintainable.

b) Now the matter is remitted back to the Trial Court only for the purpose of finding out whether the Commissioner's report submitted suggesting the partition is acceptable or not. If any application is made by the defendants under the Partition Act, I direct the Trial Court to consider the said application after giving opportunity to the plaintiffs to file objections and if the parties so request, to permit them to adduce evidence both on the Commissioner's report as well as on the application to be filed under the Partition Act and to record a finding thereon within 4 months from today. The Office is directed to despatch the entire records forthwith. The parties shall appear before the Trial Court on 16.4.2001 to take further instructions in the matter. The parties shall maintain status quo till the aforesaid findings are recorded.

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