

Ram Kishore and ors. Vs. Kesho Ram and ors.

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Court : Allahabad

Decided On : Feb-18-1972

Reported in : AIR1972All336

Judge : Satish Chandra and ;T.S. Misra, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 20, Rule 16 - Order 21, Rule 30 - Order 41, Rule 30

Appeal No. : Civil Misc. Appln. Nos. 4805 of 1962 and 5358 of 1968 (in First Appeal No. 315 of 1961)

Appellant : Ram Kishore and ors.

Respondent : Kesho Ram and ors.

Advocate for Def. : A.M. Bhargava and ;G.P. Bhargava, Adv.

Advocate for Pet/Ap. : Jagdish Swarup, Adv.

Judgement :

Satish Chandra, J.

1. These are two applications made on behalf of the defendants-appellants for permission to adduce additional evidence. Civil Misc. Application No. 4805 of 1962 was filed on 16th October, 1962. Civil Misc. Application No. 5358 of 1968 was filed

on 4th September, 1968. These applications were filed during the pendency of a First Appeal in this Court, which is directed against a preliminary decree for accounts in a suit for partition and accounting. By an order dated 8th September, 1971, we rejected the prayer for permission to adduce two sale-deeds and a plaint as additional evidence in this Court. The defendants-appellants wished to produce two applications dated 29th November, 1954, and 17th July, 1956, as additional evidence. They have stated that these applications were not within their knowledge, and so they could not be filed in the trial Court. The appellants came to know of these applications after the institution of another suit for accounts (No. 177 of 1962) pending between the parties. The averment as to the acquisition of knowledge about these applications after the institution of suit No. 177 of 1962, has not been controverted in the counter-affidavit. There is no reason to disbelieve it. The suit out of which the present appeal arises, was decided on 25th October, 1961. It is thus clear that the appellants did not, in spite of due diligence, have knowledge of these applications at the time of the passing of the decree in this suit. The appellants are entitled to produce these documents as additional evidence.

2. The plaintiffs-respondents have in their counter-affidavits sought to adduce several documents by way of rebuttal. They are entitled to lead evidence in rebuttal. The documents annexed to the counter-affidavits will also be taken on record as evidence. The other application filed on 4th September, 1968 prays that the defendants-appellants be permitted to read in evidence the documents mentioned in it, because they are already part of the record of the suit.

3. It appears that after the passing of the preliminary decree for accounts, the trial Court appointed a Commissioner to go into the accounts. A large volume of evidence was led before the Commissioner. The Commissioner filed those documents on the record of the case along with his report. It is alleged that the trial Court has also referred to these documents in its Judgment pronouncing the final decree. Learned counsel for the appellants relied upon Order 41, Rule 30, C. P. C., which provides:--

'The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.'

Under this provision, the parties to an appeal can in their arguments refer to any part of the proceedings whether on appeal or in the trial Court, to which reference may be considered necessary. On behalf of the appellants, it was urged that it is well-settled that appeal is a continuation of the suit. It was also urged that the suit does not terminate by the passing of the preliminary decree for accounts. The proceedings for the preparation of final decree are proceedings in the same suit. The proceedings undertaken in the trial court for the preparation of the final decree will be proceedings. in the Court from whose decree the appeal is preferred' within the meaning of Rule 30 quoted above. The parties are, therefore, entitled to refer to them at the hearing of the appeal. In our opinion, there is merit in this submission.

4. In *Anmol Singh v. Hari Shankar Lal* : AIR1930 All779 , a Division Bench held that under the Civil Procedure Code now in force, a suit does not terminate by the passing of the preliminary decree, but continues till it is finally and completely disposed of by the passing of the final decree. Another Division Bench in *Ramesh Chandra v. Ghansham Das* : AIR1955 All552 observed that a decree is defined in Section 2(2), Civil Procedure Code, as 'the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit'. This may be either preliminary or final. The Bench then held:--

'A decree is preliminary when further proceedings have to be taken when the suit can completely be disposed of. It is final when such adjudication completely disposes of the suit. The final decree, therefore, merely carries into fulfilment the preliminary decree passed in the suit.' This decision establishes that the proceedings for the preparation of the final decree are proceedings in the same suit; because, the suit is not completely disposed of by the passing of the

preliminary decree but it continues and is disposed of finally with the making of the final decree-The Privy Council in *Jadunath Roy v. Parmeshwar Mullick* held that a partition suit in which a preliminary decree has been passed, is still a pending suit. Similar view has been taken by the Sind Judicial Commissioner's Court, *Ghulam Fatima v. Abdul Aziz*, AIR 1933 Sind 371 and the Madras High Court, *B. Basavayya v. B. Guravayya* : AIR1951 Mad938 .

5. The proceedings for the final decree are taken in the court which has passed the preliminary decree. So, the proceedings for the preparation of the final decree would be proceedings in the same suit and in the 'Court from whose decree the appeal is preferred'. The appellate Court can refer to them. The parties would be equally entitled to refer to such proceedings at the hearing of the appeal.

6. The term 'proceedings' occurring in Order 41, Rule 30, Civil Procedure Code, would undoubtedly include the evidence led and admitted on the record of the case. This is part of the procedure undertaken by the court in drawing up the final decree. The evidence so led being evidence on the record of the suit, could be referred to at the hearing of the appeal.

7. Of course, reference to such evidence would be confined to such pieces of evidence as may be considered necessary to the appellate Court. The appellate Court has thus a discretion to refer to any part of such evidence as it may consider necessary in the context of the facts of the case. This aspect, however, can be dealt with by this Court only at the hearing of the appeal. Whether a particular document duly proved by a party to the suit in the course of the proceedings for final decree has any evidentiary value or the question as to whether a party against whom such a document or any other evidence is sought to be relied upon was afforded an opportunity to rebut the same and to cross-examine the witness or witnesses in respect of the same or the question as to what weight should be attached to such evidence are problems which would be considered at the hearing of the appeal when the parties would refer to such evidence. We need not say anything on this aspect of the case at the present stage.

8. It was, however, urged that after the passing of the preliminary decree, the trial Court finally determines the rights and shares of the parties. That Court cannot,

after passing the preliminary decree, reopen the matter so as to reconsider the question of rights and shares. If the trial Court cannot do so, the appellate court hearing an appeal against the preliminary decree can equally not do so, because appeal is merely a continuation of the suit.

9. It is true that it is well-settled that appeal is continuation of the suit(Krishnama Chariar v. Managammal, (1903) ILR 26 Mad 91 (FB); Dinonath Ghosh v. Shama Bibbi, (1901) ILR 28 Cal 23 at p. 27; Damodar Mukherjee v. Banwari Lal Agarwalla : AIR1960 Cal469 But, it is not quite correct to say that the trial Court cannot deal with the question of rights and shares of the parties after passing of the preliminary decree, under any circumstances. We are at present concerned with a suit for partition after accounting. The incidents of a suit for partition have been considered by the Supreme Court in Phool Chand v. Gopal Lal AIR 1967 SC 1471. The Court observed that it is settled that in a partition suit, the Court has jurisdiction to amend the shares suitably, even if the preliminary decree has been passed, if some member of the family to whom an allotment was made in the preliminary decree dies thereafter. Reference was made to Parashuram v. Hirabai : AIR1957 Bom59 . The Court then considered the question whether such an amendment would entail the passing of a second preliminary decree. It held:--

'We are of opinion that there is no-thing in the Code of Civil Procedure 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 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.'

Wanchoo, J., speaking for the Court, then went on to hold:--

'So far therefore as partition suits are concerned we have no doubt that 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.'

The Court then observed that they saw no reason why, in such a case, if there is dispute, it should not be decided by the Court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed. It will be seen that even the trial Court can, after passing the preliminary decree, reconsider the matter and pass a second preliminary decree 'if an event transpires after the preliminary decree which necessitates a change in shares'. The death of a party is one such event.

10. In the present case, there was a serious dispute whether a partition had already taken place. The documents which the appellants desire to refer to at the hearing are said to shed light on this dispute. If these documents are germane to the issues which arise for consideration in the appeal, we see no reason why the parties be precluded from referring to them. For the same reason, the trial Court or the appellate Court hearing an appeal against the preliminary decree, has jurisdiction to take into consideration such evidence which has been adduced and admitted on the record in proceedings for the preparation of the final decree. If an appeal was not pending, the trial Court could have done it. Since the appeal is continuation of the suit, the appellate Court can equally take into consideration such evidence, and thereafter, decide the rights and shares of the parties.

11. We are of the opinion that both parties are entitled, and shall at the hearing be permitted to refer to the evidence on the record of the case adduced, or admitted by the Court in proceedings for the preparation of the final decree. It will be for the Court hearing the appeal to consider how far reference to these documents is necessary in the light of the facts and circumstances of the case. The miscellaneous application filed in 1968 and the prayer for consideration of the

documents mentioned in the counter-affidavits are allowed. The application No. 4805 of 1962 is partly allowed. The two applications along with the documents annexed to the counter-affidavit shall be taken on record as evidence. The parties would, however, bear their own costs.

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