

Kumari Tripti Pathak and ors. Vs. B.C. Vaidya, the then Tahsildar and Subhash Pathak S/O Late Shri Basant Rao Pathak

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Court : Madhya Pradesh

Decided On : Sep-11-2007

Reported in : 2008(1)MPHT207; 2008(1)MPLJ200

Judge : K.K. Lahoti, J.

Appellant : Kumari Tripti Pathak and ors.

Respondent : B.C. Vaidya, the then Tahsildar and Subhash Pathak S/O Late Shri Basant Rao Pathak

Disposition : Application dismissed

Judgement :

ORDER

K.K. Lahoti, J.

1. The applicants have made a complaint to the Court that the respondents have not complied with the order dated 3.3.2004 in F.A. No. 92/04 by which this Court passed following order: Let notice of M.C(P) 612/04 be sent to respondent No. 4 to 10. In the meantime, further proceedings may go on. However, final decree may not be passed till further orders.

2. It is submitted by the petitioners that the order dated 3.3.2004 was communicated to the Tehsildar, Damoh on 16.3.2004, but inspite of this, the Tehsildar passed an order on 20.5.2004, which is in gross violation of the order dated 3.3.2004 passed by this Court and the respondents deserve to be punished.

3. The facts of the case are as under:

Respondent No. 2 Subhash Pathak filed a civil suit for declaration, possession, mesne profits and for permanent injunction against the petitioner. The suit was contested by the parties and ultimately on 8th December, 2003, the judgment and decree was passed in favour of respondent Subhash Pathak. He was declared owner of 1/8th share in respect of properties left by his father Basant Rao Pathak and was found entitled to 1/8th share in the agricultural lands of village Damoh, Bansakala, and it was directed that the plaintiff shall be entitled to get the land partitioned under Section 54, C.P.C from the Collector or any gazetted officer subordinate to the Collector deputed by him in this behalf and shall be entitled to get possession accordingly. In respect of various house properties mentioned in the decree, a preliminary decree was passed in this regard and the plaintiff was found entitled for partition by appointment of a Commissioner who shall report to the Court in respect to the shares of the parties and thereafter a final decree shall be passed.

4. Against the judgment and decree dated 8th December, 2003, the petitioners filed a First Appeal before this Court which was registered as FA No. 92/2004. In the aforesaid appeal, this Court on 3.3.2004 passed the aforesaid order.

5. The respondent No. 2 after declaration of his rights in the agricultural lands filed an application before the Tehsildar on 24.12.2003 for dividing the lands under Section 178 of the M.P. Land Revenue Code. Annexure P/3 is the proceedings of the Tehsildar Damoh. In the aforesaid proceedings, a notice was issued and it appears that during the pendency of the aforesaid proceedings, the interim order was passed by this Court on 3.3.2004 and the aforesaid order was placed before the Tehsildar on 16.3.2004. The grievance of the petitioners is that inspite of the interim order passed by this Court, the respondent No. 1 passed the order dated 20th May, 2004 by which the lands were partitioned by the Tehsildar. On this

ground, it is submitted that the aforesaid act is in violation of the order passed by this Court on 3.3.2004.

6. Respondent No. 1, in the reply submitted that he joined at Damoh on 7.4.2004 and after few months, he was again transferred on 14.7.2004. He was relieved on 14.7.2004 and Shri S. R.Mehroliya ,who was posted prior to respondent No. 1 , again joined at Damoh. The stand of respondent No. 1 is that the aforesaid order dated 3.3.2004 was not produced before him till 20th May, 2004 when the order was passed, but subsequently, with the connivance of S. R. Mehroliya, this order was inserted in the file. The order sheet dated 16.3.2004 is antedated written by S.R.Mehroliya mentioning that the order passed by the High Court was produced. This fact further supported by the order dated 20th May 2004, in which he had specifically referred in para 4 that the respondents of Tehsil Court (who are petitioners herein) remained absent except Pawan Kumar Pathak. Pawan Kumar Pathak though filed reply before the Tehsildar that appeal has been preferred before the High Court, but no interim stay order was produced before the Tehsildar so order of partition was passed by him. It is submitted that there was no wilful disobedience on the part of respondent No. 1. The order was not produced or available in the file at the time when respondent No. 1 passed the order, but with the connivance of S.R.Mehroliya, the order was inserted in the file subsequently, and the order sheet was also tampered with.

7. Respondent No. 2 has filed the reply in which it is stated that before the Tehsildar, he appeared on 24.2.2004 when a week's time was granted to the other side to produce the stay order. The allegation that the non-applicant No. 2 continued to prosecute the partition application has been denied. It is submitted that non applicant himself was aggrieved with the order of the Tehsildar and has filed an appeal before the SDO, Damoh as Appeal No. 117/4/04. That mere purchase of stamp paper and its production,in compliance of the order would not make the non applicant liable for the disobedience of the order. It is also submitted that final decree is envisaged under Order 20 rule 18(2) of the C.P.C and respondent has not taken any step for passing of final decree.

8. During the course of the arguments, the applicants reiterated their contention that respondents in spite of interim order passed by this Court, staying the final decree, proceeded before the Tehsildar and the land was got partitioned. The respondent No. 1 knowing it well that the High Court passed the order staying the final decree proceedings, passed the order Annexure P/4 and committed disobedience of the order passed by this Court and respondent No. 2, who was present before the High Court in First appeal No. 92/94 had pressed his application before the Tehsildar and thereby made him liable for the disobedience of the order passed by this Court.

9. The respondent No. 1 submitted that in fact, he was not aware in respect of any interim order passed by this Court and in fact, the order passed by the High Court was not available in the file and if he would have seen the order, then there was no question of passing any order by him. Shri S.R. Mehroliya, Tehsildar was having ill will with respondent No. 1 so with the connivance of the petitioner, he subsequently took the application in the back date and inserted in the order sheet. It is apparent from the perusal of order sheet dated 16.3.2004, in which this filing of the order has been subsequently written. He has also referred para 4 of the order Annexure P/4 in which this fact was also specifically mentioned by respondent No. 1, that no interim order was produced before him by the applicants herein.

10. Respondent No. 2 submitted that in fact, the order of this Court was only in respect restraining of passing a final decree in the matter. Though the High Court directed that further proceedings may go on. He has referred Section 54 of the C.P.C. which reads thus:

Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of share of such estates.

It is submitted that Order 20 rule 18 of C.P.C provides in respect to property assessed to the payment of revenue to the Govt. that the Court shall declare the rights of the parties interested in the property, and thereafter the Civil Court shall direct 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. Only in respect of any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the right of the several parties interested in the property and issue such further directions as may be required. It is submitted by Shri A.D.Deoras, learned Senior Advocate that decree Annexure P/1 is very specific. In respect of agricultural lands, the right of properties were declared and the plaintiff respondent No. 2 was directed to get partition and possession from the revenue authorities as per share. Only a preliminary decree, as envisaged in para 2 of the decree, was passed which was in respect of the house property situated in Ward No. 4 of Damoh in which the Civil Court declared 1/8th share of the plaintiff and directed a preliminary decree in this regard to get partition of the properties by appointment of Commissioner and after receiving the report of the Commissioner, final decree shall be passed. That in view of the specific directions by the Trial Court in the decree which are enumerated in paras 1 and 2 , of the decree, there is no iota of doubt that the order of the High Court was in respect of para 2 of the decree and not in respect of para 1 of the decree. The final decree has been defined by the Apex Court in Hasham Abbas Sayyad v. Usman Abbas Sayyad AIR 2007 SC 1077 and the respondent No. 2 had not taken any steps for the preparation of final decree. The partition effected by the Tehsil under Section 178 of the Code does not fall within the purview of final decree and there is no disobedience of the order passed by this Court. It is submitted by Shri Deoras that the petitioners on knowing this fact that the proceedings of Tehsil were not stayed by the High Court filed an application before the High Court in First Appeal No. 92/04 seeking an injunction and on 27th July, 2007 the High Court granted injunction in respect of partition proceedings of Tehsil. So the subsequent events also clarify the position that in fact on 3.3.04, there was no interim order in respect of Tehsil proceedings and this contempt application is misconceived and may be

dismissed.

11. To appreciate contentions of the parties, order dated 3.3.2004 may be referred. In the aforesaid order, the High Court had very specifically directed that in the meantime, further proceedings may go on, however, final decree may not be passed till further orders. The aforesaid order is very specific and there was no absolute stay in respect of proceedings but only final decree was directed not to be passed till further orders. Meaning thereby the trial Court, who was vested with the power to pass a final decree was restrained to do so. Section 54 of the Code of Civil Procedure provides partition of an estate and separation of share, assessed to the payment of revenue to the Government and does not say that the proceeding under Section 54 shall be final decree proceedings. The aforesaid provision specifically provides procedure in respect to division of undivided estate, assessed to the payment of revenue and in that regard, the mandate is that the Revenue Courts are to give effect to the decree of the Civil Court in accordance with the rights declared of the parties.

12. Order 20 rule 18 of the C.P.C. also clarifies the position. Sub rule (1) deals with properties assessed to the payment of Revenue to the Govt. and provides that after declaration of the rights of the parties, the Revenue Officers to give effect to the declaration as per Section 54 of the C.P.C. Sub-rule (2) of Rule 18 provided that other immovable properties or movable properties would be partitioned as per the preliminary decree declaring the rights of several parties interested in the property and the Court while passing decree can issue further directions as may be required. So as per provision enumerated under Order 20 rule 18 Sub-rule (2) a final decree is to be passed after receiving a scheme from the Commissioner in this regard. The legal position may be summarized as under:

(i) in respect of an estate assessed to the payment of revenue to the Government only a declaration is required from the Civil Court. The declaration has to be given effect to by the Revenue Authorities as enumerated in Section 54 and Order 20 Rule 18(1) of C.P.C.,(ii) in respect of other properties, a preliminary decree has to be passed and as per directions issued by the Civil Court as enumerated under Sub rule (2) of Rule 18 of Order 20, the directions have to be complied with and

thereafter a final decree is to be passed. So the proceedings for final decree are envisaged only in respect of the directions as may be issued in preliminary decree. Final decree has been defined by the Apex Court in *Shankar Balwant Lokhande v. Chandrakant Shankar Lokhande* : (1992)11LLJ18SC wherein the Apex Court held thus:

3. Order 20 Rule 7 of CPC envisages that the decree 'shall bear the day on which the judgment was pronounced, and, when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree'. Section 2(2) of CPC defines 'decree' to mean '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 and may be either preliminary or final'. A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest Court; (ii) when, as regards the Court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree.

4. Order 20 Rule 18 envisages passing of a decree for partition of property or for separate possession of a share therein. Sub-rule (2) is material which provides that 'if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.'

Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the Court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The Court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by a coparcener or co-sharer, the Court should not give a decree only for the plaintiff's share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. The words 'declaring the rights of the several parties interested in the property' in Sub-rule (2) would indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing a preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject-matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper.

8. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. The final decree made in favour of the first respondent is only partial to the extent of his 1/6th right without any demarcation or division of the properties. Until the rights in the final decree proceedings are worked out qua all and till a final decree in that behalf is made, there is no formal expression of the adjudication conclusively determining the rights of the parties with regard to the properties for partition in terms of the declaration of 1/6th and 5/6th shares of the first respondent and the appellants so as to entitle the party to make an application for execution of the final decree.

In the case of H.Abbas (supra) the apex Court held thus:

19. It is true that the house property was found to be an impartible one; but a preliminary decree having been passed, the valuation thereof and final allotment of the property could have been done only in a final decree proceeding. Only when final allotments were made or a determination is made that the property should be put on auction sale, a final decree in respect thereof should have been passed. It

is appealable. Only a final decree could be put to execution.

13. In view of the aforesaid settled law, it is apparent that a decree in a given case may be both preliminary and final. In the present case, as stated hereinabove, the properties in respect of which land revenue was payable to the State Govt, the Civil Court was not required to pass any preliminary or final decree and only right or share in respect of those properties were to be declared by the Civil Court. The Civil Court in para 1 of the decree found that the plaintiffs are entitled for 1/8th share in the agricultural lands and after declaring their share issued directions as enumerated in Section 54 of the C.P.C. Meaning thereby that the Civil Court was not to do anything further in respect of agricultural lands and the entire follow up action was to be taken by the Revenue Courts in that regard, though on filing of an application.

Only in respect to house properties in respect of which directions were issued in para 2 of the decree, the Civil Court was required to pass a final decree as at the time of passing of the decree, the Civil Court was not in a position to finally determine the rights of the parties and after declaring the rights of the parties, necessary directions were issued. So the final decree was required only in respect of direction No. 2 and not in respect of direction No. 1 of the decree.

14. The High Court while passing order on 3.3.2004 had only directed that final decree may not be passed till further orders. There is no complaint that respondent No. 2 took any further action in continuation to direction No. 2 of decree passed by the Civil Court. Respondent No. 2, until of passing a final decree cannot be held liable for disobedience of the order dated 3.3.2004. It is also pertinent to mention here that the High Court in the order dated 3.3.2004 had specifically directed that further proceedings may go on, meaning thereby the respondent No. 2 was entitled to take further steps in respect of direction 2 also, but only passing of final decree was stayed by the High Court.

15. In aforesaid circumstances, as there was no order by the High Court in respect of direction No. 1 passed by the Civil Court, which relates to agricultural land and if respondents proceeded further in this regard, no fault is found, as stated hereinabove. The petitioners by their subsequent conduct themselves have made

the position clear, as they have filed another application seeking injunction in respect of partition proceedings before the Tehsildar and as stated at the Bar that on 27.7.2007 such direction has been issued by the High Court and further proceedings before the Tehsildar have been stayed.

16. In view of the aforesaid discussion, in the opinion of this Court, there is no disobedience of the order dated 3.3.2004 passed by this Court. This application is misconceived and dismissed with no order as to costs.

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