

Sudarsan Panda and ors. Vs. Laxmidhar Panda and ors.

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Court : Orissa

Decided On : Aug-16-1982

Reported in : AIR1983Ori121

Judge : B.K. Behera, J.

Acts : [Limitation Act, 1963](#); [Code of Civil Procedure \(CPC\) , 1908](#) - Order 20, Rule 18 - Order 22, Rule 4

Appeal No. : Civil Rev. No. 177 of 1982

Appellant : Sudarsan Panda and ors.

Respondent : Laxmidhar Panda and ors.

Advocate for Def. : S. Misra (No. 2), ;B. Das, ;R.C. Rath and ;K. Kar, Advs.

Advocate for Pet/Ap. : R. Ch. Mohanty and ;R.K. Mohanty, Advs.

Disposition : Revision dismissed

Judgement :

ORDER

B.K. Behera, J.

1. This revision has been directed against the order passed by the learned Subordinate Judge, Anandapur, dismissing the objections raised by the petitioners

in the final decree proceeding arising out of Title Suit No. 41 of 1952 in which a decree for partition on the basis of a petition of compromise had been passed allotting 7-annas share to the plaintiffs and 9-annas share to the defendants Nos. 1 to 5, the defendants Nos. 1 and 2 being the sons and the defendant No. 3 being the widow of late Dologobinda Panda and the defendants Nos. 4 and 5 being the sons of late Baidyanath Panda.

2. The legal representatives of the deceased defendant No. 4 Gananath Panda made an application before the learned Subordinate Judge for a final decree. The plaintiffs and the defendants Nos. 1, 2 and 5 resisted it on the grounds that (a) the application was barred by limitation, (b) the legal representatives of the defendant No. 4 had no locus standi to initiate the final decree proceeding, having not been substituted in time and (c) the final decree proceeding was not maintainable. Upon hearing the learned counsel for both the sides, the learned Subordinate Judge overruled the objections.

3. Mr. Mohanty, the learned counsel for the petitioners, has urged the same grounds raised before the learned Subordinate Judge and in support of the last objection viz., that the application for final decree proceeding without modification of the original decree is not maintainable, reliance has been placed on the principles laid down in AIR 1981 Mad 307, *S. V. Muthu v. Veeramma*, Mr. S. Misra for the opposite parties has submitted that none of the contentions raised on behalf of the petitioners can prevail.

4. As to the question of limitation raised by the petitioners for the initiation of a final decree proceeding after a decree has been passed, as rightly submitted by the learned counsel for the opposite parties and observed by the learned Subordinate Judge, the contention raised on behalf of the petitioners that the preliminary decree having been passed in the year 1954, the application for final decree in the year 1981 had become barred by time cannot be accepted. After the rights of the parties have finally been determined in a preliminary decree, an application by a party thereto or the legal representatives for effecting the actual partition by metes and bounds in pursuance of that decree cannot be construed to be an execution proceeding, but shall be taken to be an application in a pending suit and therefore,

the question of limitation does not arise. In this connection, reference may be made to the principle laid down in (1972) 1 Cut WR 140, Chetram Agar-walla v. Budhu Mallik that a final decree proceeding is a continuation of the suit and no question of limitation arises. After the suit for partition remains pending and a preliminary decree has been passed, the duty of the drawing up of the final decree proceeding is on the Court until a final decree is drawn up in accordance with law. It follows, as rightly noticed by the learned Subordinate Judge, that an application for a final decree in a suit for partition is not governed by any provision of the Limitation Act.

5. I would come to the next contention that the legal representatives of the deceased defendant No. 4, having not been substituted in time, have no locus standi to initiate a final decree proceeding. O. XXII, R. 4 of the Civil P. C. prescribes the procedure for bringing in the legal representatives. O. XXII, R. 12 with the Orissa High Court Amendment reads :

'Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order or to proceedings in the original Court taken after the passing of the preliminary decree where having regard to the nature of the suit, a final decree is required to be passed.'

The legal representatives of the deceased defendant No. 4 could not, therefore, be precluded from making the application on the ground that they had not been substituted in time as the legal representatives of the deceased defendant No. 4.

6. The learned counsel for the petitioners has laid much stress on the third objection raised before the learned Subordinate Judge and in this Court and has submitted that as laid down in AIR 1981 Mad 307 (Supra), unless the opposite parties file a separate suit to get their shares declared as no separate share had been declared in favour of the deceased defendant No. 4 in the preliminary decree, no application for final decree could lie. Dealing with this aspect, the learned Subordinate Judge held thus :

'--..... I am unable to accept this submission since it is devoid of any merit. After passing of a preliminary decree it is open to any of the parties to apply for getting

his separate share allotted in a final decree proceeding. In this case the preliminary decree clearly declares allotment of 9 annas share in favour of defendants 1 to 5 and when it is found that the present applicants to the final decree proceeding are entitled, to get 3 annas share out of it, it is open for them to get it carved out in the final decree proceeding instead of bringing a separate suit for the same. As per the preliminary decree, the Commissioner who is to be deputed by the Court, will divide the properties. The decision relied upon is of no help to the case of the petitioners as the facts of both the cases are completely different. A faint attempt has been made on behalf of the petitioners of this M. J. C. to resist the final decree proceeding on the ground that the final decree application contains certain properties with a prayer for its division which are not there in the preliminary decree and as such when the subject matters of the final decree proceeding are not in conformity with that of the preliminary decree, the prayer for drawing up a final decree should be rejected. In my opinion even if there are certain properties which are not available in the preliminary decree then also the final decree application cannot be rejected as a whole, At the time of giving direction to the commissioner for division of the properties, the Court is to pass orders directing the Commissioner to make the division only in respect of the properties available in the preliminary decree.'

7. In the Madras case, the learned Judge observed and held:--(at pp. 309, 310).

'..... If the preliminary decree already passed does not contain any declaration as to the rights of the defendants, their application for partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified, but when once the preliminary decree contains a declaration as to the defendant's share, they can, even after the passing of the preliminary decree, take steps for the actual separation of their share. Indeed, in the instant case, no such steps have been taken by the petitioners to modify the preliminary decree in any manner for having their shares declared and until such time, it is not open to the petitioners to claim that they are entitled to the amount in deposit. It is undoubtedly open to the petitioners to take such steps as they may be advised to have the preliminary decree amended in such a manner as to include a declaration of the rights as regards their share in the properties as well and only then they can seek

payment of the amount in deposit. Without doing so, on the basis of the preliminary decree as it now stands, the petitioners cannot seek to withdraw the amount in court deposit on the ground that they are entitled to the same. ,.....'

In the instant case, 9-annas share had been allotted in favour of the defendants Nos. 1 to 5. As the share of the parties had distinctly been denned, no objection can be raised on this account and even as observed in the Madras case, when once the preliminary decree contains a declaration as to the defendants' share, they can, after passing of the preliminary decree, take steps for the actual separation of their shares. The opposite parties have, therefore, the legal right to come to the Court for a final decree based on the preliminary decree passed in favour of the deceased, defendant No. 4 of whom they were the legal representatives.

8. It has been laid down by this Court in AIR 1961 Orissa 140, Jagan nath Samantra v. Sudarsan Das that a partition suit in which a preliminary decree has been passed is still a pending suit, and the rights of the parties, who are added after the preliminary decree, have to be adjusted at the time of the final decree. This makes it clear that at the stage of final decree when the rights of the parties have to be declared, opportunities should be given to the legal representatives of the deceased party to agitate their rights. In case there be any controversy as to such rights, it is at this stage open to them to present their case before the final decree is passed. In AIR 1978 Kant 76, Shivaramiah v. Mallikarjunaiah a Division Bench of the Karnataka High Court held thus:--(para 7).

'..... We hold that if after the decree is made under Order 20, Rule 18 (1) of the C. P. C. and before the Deputy Commissioner effects partition, any party who has been allotted a share dies, necessary adjustment of the shares and the resolution, of disputes arising in that behalf can be made by the Civil Court, The Civil Court can make appropriate adjustment and draw a further preliminary decree modifying the shares of the parties consequent upon the devolution of interest resulting from the death of one of the parties to the suit. It is, however, necessary to emphasise that this can only be done so long as the Deputy Commissioner has not completed the process of partition in accordance with the decree of the Civil Court. If the

shares get altered as a result of the death of any of the parties after the Deputy Commissioner completes the process of partition, it is obvious that the Civil Court which made the decree under Order 20, Rule 18 of the C. P. C. cannot be approached for the purpose of the adjustment of the shares of the parties in the very same proceeding. In such a case, the parties may have to seek relief in a separate suit.'

9. A final decree proceeding does not originate in itself, but follows a preliminary decree already passed in a suit determining the rights and interests of the parties in relation to the land. The final decree proceeding is only to enforce what has already been decided and decreed and it does not relate to a decision of the substantive rights of the parties. It cannot be said that the opposite parties have no locus standi or that they cannot legally make the application for a final decree in accordance with the shares determined in the preliminary decree. I thus find that the learned Subordinate Judge was justified in dismissing the objections raised before him by the present petitioners.

10. As now provided in Section 115 of the Civil P. C. as amended by the Amendment Act of 1976, the High Court shall not, under this section, vary or reverse any order made in a suit or proceeding except where the order, if it has been made in favour of the party applying for revision, would, have finally disposed of the suit or other proceeding or the order, if allowed to stand, would occasion failure of justice or cause irreparable injury to the party against whom it is made. It cannot reasonably be said, in the circumstances of the case, that the impugned order has occasioned a failure of justice or has caused irreparable injury to the petitioners. It is not a case where the learned Subordinate Judge has exercised his jurisdiction not vested in him by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of his jurisdiction illegally or with material irregularity. The learned Subordinate Judge has not committed any jurisdictional error. Apart from the fact that none of the contentions raised on behalf of the petitioners can prevail, it is not a fit case in which this Court should exercise its jurisdiction under Section 115 of the Civil P. C. and set aside the order.

11. In the result, the revision fails and the same is dismissed leaving the parties to bear their own costs of this revision.

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