

Anthony Ammal Vs. Antony

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Court : Kerala

Decided On : Jun-28-1983

Reported in : AIR1984Ker38

Judge : K.K. Narendran, J.

Acts : [Partition Act, 1893](#) - Sections 2; Kerala Civil Rules of Practice - Rule 234

Appeal No. : C.R.P. No. 626 of 1982G

Appellant : Anthony Ammal

Respondent : Antony

Advocate for Def. : M.P.R. Nair, Adv.

Advocate for Pet/Ap. : N. Viswanatha Iyer, Adv.

Disposition : Revision allowed

Judgement :

ORDER

K.K. Narendran, J.

1. The short point that arises for consideration in this Civil Revision is whether the Court can direct a sale of the property involved in a partition suit and distribution of the proceeds even in a case where a request is not made by a shareholder or

shareholders interested individually or collectively to the extent of one moiety or upwards and whether such a sale should be conducted in open Court. The plaintiff is the revision petitioner in this Civil Revision Petition. The challenge is against the order of the Munsif's Court, Palghat dismissing an application for a review of an order refusing to give a direction to the commissioner appointed in a final decree proceedings in a suit for partition, to stop the sale. The commissioner appointed in the, final decree proceedings reported to the Court that the decree schedule properties can only be sold and the sale proceeds distributed among the sharers and that was allowed by the Court. Accordingly, the commissioner fixed a date for selling the properties by auction among the sharers. It was then that the petitioner-plaintiff put in a petition to stay the auction sale. On the Court rejecting that petition, the petitioner filed an application for review of the order which was dismissed by the order impugned in this Civil Revision.

2. Section 2 of the [Partition Act, 1893](#) reads:

'2. Power to Court to order sale instead of division in partition suits.-- Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of shareholders therein, or of any other special circumstances, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.'

Rule 234 of the Civil Rules of Practice, Kerala, reads :

'234. Order for sale.-- (1) When it is ordered in a partition suit that any property may be sold and proceeds divided, persons other than the co-owners shall not be permitted to bid in the sale, unless it appears to the Court that it is just and expedient to order otherwise.

(2) The sale when the bid is not open to strangers shall be held in open Court on a day to which the case is adjourned for the purpose. The highest bid shall be accepted and the sale confirmed at once unless the sale is adjourned to some other date.

(3)

(4)

(5) Where the Court considers that the interests of the parties will be better served by ordering a sale, open for the bid of the general public, the Court may appoint an auctioneer and shall fix the remuneration for the purpose and may give the necessary direction relating to the place, time and manner of publication and conduct the sale and shall direct any of the parties to deposit in Court any sum required for the publication and conduct of the sale.....'

As per Section 2 of the [Partition Act, 1893](#), a sale of the properties involved in a partition suit and distribution of the sale proceeds among the sharers can be made only on the request of a shareholder individually interested or of shareholders collectively interested in one moiety or upwards of the properties involved. But, it cannot be said that the Court has no power to direct the sale of the property involved in a suit for partition and the distribution of the sale proceeds among the sharers even if the above condition insisted by Section 2 of the Partition Act is not satisfied. What the Court has to see is that there is a just partition. In all cases where the property, or properties, is incapable of partition by metes and bounds, the Court is not without powers to resort to a feasible method just and equitable in the circumstances of the case. The Partition Act does not take away this power the Court has. In this case, even though the application for final decree has been made by the 5th defendant-respondent, who has only less than a moiety, it cannot be said that the Court was in the wrong in accepting the report of the Commissioner to sell the property by auction among the sharers. But the further question is whether the sale is to be conducted in open Court or by the commissioner as directed by the Court. Rule 234 of the Civil Rules of Practice insists that in the case of a sale among the sharers only, the sale is to be conducted in open Court. The order sought to be reviewed by the petitioner before

the Court below was passed ignoring the above Rule 234 as the sale proposed by the commissioner is one to be conducted by him. Simply because the commissioner is an officer of the Court, it does not mean that a sale by him will be a sale in open Court as insisted by Rule 234 (2) of the Civil Rules of Practice. In this view of the matter, the order sought to be reviewed by the petitioner suffers from an error apparent on the face of the record and the Court below exercised its jurisdiction with material irregularity in rejecting the petitioner's application for review.

3. Before parting with the case, it is only proper that I refer to some of the decisions relied on by the counsel appearing in the case. In *Ramaprasada Rao v. Subbaramaiah*, (AIR 1958 Andh Pra 647) it has been held (at page 651):

'The provisions of the Partition Act do not, in any way, entrench upon (the undoubted power of the Court to effectuate a partition between co-owners in one or other of the methods suggested above.

Under the Act, a right is conferred upon the sharer or sharers, if certain conditions are complied with, to request the Court to sell the property and a correlative right conferred upon a small sharer to insist upon purchasing the former's share or shares at a value fixed by the Court. Except to this extent and that provided by the other provisions of the Act, the power of the Court to partition the properties equitably by any of the methods detailed above or similar other is not, in any way, affected by the provisions of the Act.'

In *Gadadhar Ghose v. Janaki Nath Ghosh*, (AIR 1969 Cal 59) it has been held (at page 63) :

'In a suit for partition if any sale is directed, it has to be a sale first, in accordance with the provisions of the Partition Act and secondly, if a sale is directed under Section 2 of the Partition Act it has to be a sale by public auction. A sale confined only to co-sharers is not warranted by the provisions of the Act.'

In *Badri Narain v. Nilratan Sarkar*, (AIR 1978 SC 845) it has been held :

'In cases, not covered by Sections 2 and 3 of the Partition Act, the power of the Court to partition property by any equitable method is not affected by the said Act. In a situation where it is found, as a fact, that the suit property is so small that it cannot be conveniently and reasonably partitioned by metes and bounds without destroying its intrinsic worth, the Court can devise such other feasible method for effecting partition as may appear to it to be just and equitable, in the circumstances of the case.' (Head Note 2).

In Janardan v. Vijaynath, (AIR 1982 Bom 274) the High Court of Bombay has held that the Court has no inherent power dehors the provisions of the Partition Act. But, in view of the decision in Badri Narain Choudhary v. Nilratan Sarkar, (AIR 1978 SC 845) referred to above, with respect, I venture to state that the view taken by the High Court of Bombay in Janardan's case (AIR 1982 Bom 274) is not correct.

4. In the result, the order impugned is set aside and the Court below is directed to proceed with the matter in accordance with what has been laid down in this order. The Civil Revision Petition is allowed as above. No costs.

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