

Rajan V.P Vs. Saseendran

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Court : Kerala

Decided On : Jun-10-2011

Reported in : 2012(3)KLT590; 2012(3)KLJ420; 2012(3)ILR(Ker)870

Judge : The Honourable Mr Justice K.T. Sankaran

Appeal No. : OP(C).No.156 of 2011(O)

Appellant : Rajan V.P

Respondent : Saseendran

Judgement :

K.T. SANKARAN J.

1. The petitioner, who is the third defendant in a suit for partition filed an application under Order IX Rule 13 of the Code of Civil Procedure to set aside the preliminary decree which was passed ex parte. There was a delay in filing the application for setting aside the ex parte decree. An application was filed to condone the delay. The trial court dismissed both the applications. The third defendant filed CMA No.141 of 2009 before the First Additional District Court, Thrissur against the order passed by the trial court. The appeal was dismissed by a one line order which reads as follows: "CMA is dismissed as infructuous".

2. The learned counsel for the petitioner submitted that the dismissal of the appeal was on the basis of the submission made by the respondent before the appellate

court that the appeal had become infructuous on the ground that a final decree was passed in the partition suit. That such a submission was made, is not disputed by the learned counsel for the respondent.

3. An aggrieved party is entitled to file an appeal against the preliminary decree for partition. Either he may not apply for stay of the final decree proceedings or the Appellate Court may refuse to stay the final decree proceedings. In either case, it is likely that a final decree would be passed. That does not mean that the appeal against the preliminary decree would become infructuous. What is to be decided in the preliminary decree is determination of the shares to which the parties are entitled to, whether the plaintiff is entitled to get a share and all other contentions which would determine the rights of parties in respect of the property sought to be partitioned. In the final decree proceedings, those questions cannot be raised and the court dealing with the final decree proceedings need only divide the properties by metes and bounds in tune with the preliminary decree. If the preliminary decree is reversed or modified in appeal, the final decree, if any, passed in the meanwhile, would become nullified to that extent. The Supreme Court in *Sital Parshad and another v. Kishori Lal* (AIR 1967 SC 1236) held as follows:

"7. There can in our opinion be no doubt that if in appeal the preliminary decree is reversed, the final decree must fall to the ground for there is no preliminary decree thereafter in support of it. It is not necessary in such a case for the defendant to go to the Court passing the final decree and ask it to set aside the final decree. Even if the defendant does not make an application to the Court for setting aside the final decree within three years because the preliminary decree has been reversed, the decree-holder cannot get the right to execute the final decree which has no preliminary decree in support of it."

4. The same principles would apply in the case of a preliminary decree passed ex parte. Pending an application to condone the delay in filing an application for setting aside the ex parte preliminary decree, if a final decree is passed, on the setting aside of the ex parte decree, the final decree would be of no effect and force. The application to set aside the ex parte preliminary decree cannot be dismissed as infructuous on the ground that a final decree was passed. Similarly,

a Civil Miscellaneous Appeal filed against the dismissal of the application for setting aside the ex parte preliminary decree cannot be dismissed on the ground that the appeal became infructuous on the passing of the final decree in the meanwhile. The judgment passed by the court below is illegal and unsustainable, which is liable to be set aside in the exercise of the jurisdiction under Article 227 of the Constitution of India.

Accordingly, the Original Petition is allowed. The judgment in CMA No.141 of 2009 is set aside. The Appellate Court shall dispose of the C.M.Appeal on the merits, as expeditiously as possible, and at any rate within a period of two months from the date of receipt of a copy of the judgment.

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