
(43) In the light of the *ratio* laid down by their Lordships of the Supreme Court in the case of *Kashmir Singh Bhullar* (supra), P.K. Vasudeva cannot be allowed to raise a new plea regarding the use of the house for commercial purposes inasmuch as no such plea was raised by him in his affidavits filed before the Rent Controller.

(44) On an examination of all the pleas taken by the tenants in their applications and the affidavits, it is found that those pleas did not give rise to any triable issue before the Rent Controller.

(45) In the result, the orders of eviction dated 13th June, 1997, passed by the Rent Controller against the petitioner-tenants do not call for any interference. The revision petitions are, therefore, dismissed. No order as to costs.

R.N.R.

Before V.S. Aggarwal, J

NARESH KUMAR & ANOTHER.—*Petitioners*

versus

KAILASH DEVI & OTHERS,—*Respondents*

C.R. No 2013 of 1998

10th November, 1998

Code of Civil Procedure, 1908—0.20 Rl. 18—Preliminary decree for partition passed—Appeal preferred against the preliminary decree passed—Thereafter application moved for passing of final decree and for appointment of Local Commissioner to suggest mode of partition—Challenge thereto on grounds that application for passing of final decree barred by limitation—Held, Court not only declare rights of parties but is duty bound to pass final decree—Drawing of final decree is continuation of the said proceedings—Limitation does not come into play.

Held that, under Order 20 Rule 18 of the Code of Civil Procedure, when a preliminary decree is passed for partition, the Court not only declare the rights of the parties but is duty bound to, after the further act is done, pass a final decree, if permissible. He is to give further direction as to if necessary. In the case of preliminary decree passed for partition, no further right necessarily in this regard accrue. It would be a continuation of the same proceedings.

(Para 10)

Further held, that in the case of preliminary decree in partition suit, drawing of the final decree is continuation of the said proceeding. It is improper, therefore, to say that the period of limitation would come into play. The trial Court rightly rejected the contention of the petitioners.

(Para 14)

A.C. Jain, Advocate for the Petitioner.

R.S. Mittal, Senior Advocate, with Sudhir Mittal, Advocate for the Respondents.

JUDGEMENT

V.S. Aggarwal, J.

(1) The present revision petition has been filed by Naresh Kumar and another, hereinafter described as the petitioners, directed against the order passed by the learned Civil Judge (Senior Division), Rohtak, dated 9th March, 1998. By virtue of the impugned order, the learned trial Court rejected the request of the petitioners that the application filed for passing the final decree is barred by time and appointed an Advocate to suggest the mode of partition and the share of the respondent decree-holders in accordance with the preliminary decree.

(2) The facts relevant are that a preliminary decree for partition was passed. Thereafter respondent decree-holders submitted an application for passing a final decree on the basis of the judgment and decree dated 18th March, 1989 with a request for the appointment of the Local Commissioner to suggest the mode of partition and share of the decree-holders. Notice of the application was issued to the petitioners who had taken up the plea that the respondent decree-holders are not entitled to get their shares because the application is barred by time. It had been contended that the preliminary decree was passed on 18th March, 1989. Against the same, an appeal was filed with the learned District Judge, Rohtak, and thereupon in this Court. This Court had dismissed the same on 8th February, 1993. During the pendency of the first and second appeal, there was no stay that had been awarded. Accordingly, as per petitioners, the application seeking passing of the final decree was barred by time. Learned trial Court,—*vide* the impugned order, as mentioned above, rejected the said contention holding that the preliminary decree was passed on 18th March, 1989 and the successor Court had the power to entertain and decide the application because the application filed for appointment of the Local Commissioner was within time. In view of the learned trial Court, earlier the application could not be filed because of the litigation that has

been pending between the parties. Aggrieved by the said order, present revision petition has been filed.

(3) As pointed out above, learned counsel for the petitioners had urged that the application filed for passing of the final decree was barred by time and in this regard the above said fact can be repeated. The preliminary decree was passed on 18th March, 1989 for partition. The appeal was dismissed by the learned District Judge. Rohtak, in the year 1991 and this Court dismissed the second appeal on 8th February, 1993. The application was filed for passing of the final decree on 30th September, 1994. Admittedly, there was no stay that had been granted during the pendency of the appeal. Thus, according to the learned counsel for the petitioners, the period of limitation start running from the time the preliminary decree was passed.

(4) Learned counsel for the petitioners in support of his argument relied upon the decision of the Allahabad High Court in the case of *Baljit Singh (deceased by L.Rs.) v. J.I. Cunningham and others* (1). In the cited case, the suit was filed for recovery of certain amount on the basis of mortgage of land. A preliminary decree was passed for sale of mortgaged property. Period was fixed therein for payment of amount found due. Subsequently, an application for preparation of final decree was filed after three years of the preliminary decree. Allahabad High Court held that the application for preparation of final decree was barred by time.

(5) The said contention of the learned counsel is totally devoid of any merit. As would be noticed hereinafter, the decision in the *Baljit Singh's case* (supra) is totally distinguishable because it pertained to a preliminary decree passed for recovery of the amount in a mortgaged matter. A clear distinction in this regard must be drawn between a preliminary decree for partition and a decree for foreclosure under Order 34 of the Code of Civil Procedure (for short "the Code")

(6) To appreciate the said controversy, reference can well be made to Order 20 Rule 18 of the Code which deals with decree in suit for partition of property or separate possession of a share therein. It reads as under :—

"18. Decree in suit for partition of property or separate possession of a share therein :—Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree

(1) A.C.R. 1984 Allahabad 209.

shall declare the rights of the several parties interested in the property, but shall direct such 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;

- (2) 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.”

(7) Similarly, Order 34 deals with suits relating to mortgages of immovable property. Order 34 Rule 3 refers to final decree in foreclosure suit. Sub-rule (1) and (2) of Rule 3 of Order 34 of the Code reads as under :—

“3. Final decree in foreclosure suit :—(1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

- (a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—
- (b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree, and also, if necessary—
- (c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him or debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.”

(8) Similarly, Order 34 Rule 4 sub-rule (3) and (4) of the Code prescribes the procedure with respect to preliminary decree in suit for

sale and power of the Court to decree sale in foreclosure suit. It reads as under :—

“(3) Power to decree sale in foreclosure suit :—In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.”

(9) Order 34 Rule 5 of the Code refers to final decree in suit for sale and Order 34 Rule 8 of the Code pertains to final decree in redemption suit. Sub-rule (1) and (2) of Order 34 Rule 8 of the Code is also being reproduced below for the sale of facility :—

“8. Final decree in redemption suit :—(1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree, or, if such decree has been passed, an order—

- (a) ordering the defendant, to deliver up the documents referred to in the preliminary decree, and, if necessary—
- (b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property, as directed in the said decree, and, also, if necessary—
- (c) ordering him to put the plaintiff in possession of the property.

-
- (2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.”

(10) It is abundantly clear from the relevant provisions of the Code that have been reproduced above that in the cases concerning Order 34 of the Code, namely, preliminary decree passed in suit relating to mortgages of immovable property, after preliminary decree opportunity is to be given to the judgment debtor for making payment. Once a preliminary decree has been passed in a suit relating to mortgages of immovable property, unless subsequent procedure is adopted and adhered to final decree cannot be passed. As already referred to above, under Order 34 Rule 4 of the Code the Court has to fix a period not exceeding six months within which the defendant is to pay the amount to the plaintiff as determined by the Court. The plaintiff can apply for drawing of the final decree if amount is not paid within time. The court has the power to extend the time. Similarly, under Order 34 Rule 5 of the Code, deposit of the decretal amount by the judgment debtor in an execution for sale of the mortgaged property is permissible unless the sale is confirmed. The relevant provisions referred to above consequently show that in the cases of suits concerning immovable property based on mortgage of the property a preliminary decree necessarily has to be followed in further application or proceedings, as the case may be, before a final decree can be passed. However, under Order 20 Rule 18 of the Code when a preliminary decree is passed for partition, the Court not only declare the rights of the parties but is duty bound to, after the further act is done, pass a final decree, if permissible. He is to give further direction as to if necessary. In the case of preliminary decree passed for partition, no further right necessarily in this regard accrue. It would be a continuation of the same proceedings.

(11) Whenever a preliminary decree for partition is passed in a suit for partition, the Court should appoint immediately a Local Commissioner, if necessary, or take other proceedings rather than to bound his hands. He is duty bound to continue the proceedings in this regard. This question has been considered in the case of *Ramanathan*

Chetty v. Alagappa Chetty and others (2). Madras High Court held that until final decree is passed in a partition suit, limitation will not come into play because the suit continues till final decree is passed. It was held as under :—

“It is clear to me that the suit continues for some purposes at least until the final decree; it would indeed be an anomaly if any decree could be reached by proceedings other than a suit. That being so, I have been shown no authority for the view that an application in a pending suit desiring the Court to proceed to judgment is governed by any rule of limitation.....”

(12) This distinction has more clearly been drawn in the decision rendered in the case of *Faqir Chand and others v. Mohammad Akbar Khan and others* (3). The Court held as under :—

“.....In the first class of the suits after the passing of the preliminary decree the Court is not bound *suo motu* to pass a final decree till an application is made to it for the purpose,— *vide* 0.34, but in the latter class of cases after the preliminary decree, the Court is bound to proceed further and to appoint a Commissioner to actually partition the property and on the report of the Commissioner, if accepted, to pass a final decree. Art. 181 may apply to the first class of suits but it does not apply to second class, because, as already pointed out, there the Court has to carry on the proceedings after the preliminary decree *suo motu*. After considering the authorities we are of the opinion that the contention of counsel for appellants is well founded, is supported by unimpeachable authorities and must prevail.....”

(13) Orissa High Court in the case of *Sudarsan Panda and others v. Laxmidhar Panda and others* (4), has dealt with the same question and concluded as under :—

“.....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 can not 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 Agarwalla v. Budhu Mallik* that a final decree

(2) A.I.R. 1930 Madras 528.

(3) A.I.R. 1933 Peshawar 101 (2).

(4) A.I.R. 1983 Orissa 121.

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.”

(14) It is abundantly clear from the aforesaid that in the case of preliminary decree in partition suit, drawing of the final decree is continuation of the said proceeding. It is improper, therefore, to say that the period of limitation would come into play. The trial Court rightly rejected the contention of the petitioners.

(15) For these reasons, the revision petition being without merit must fail and is hereby dismissed.

J.S.T.

Before Jawahar Lal Gupta and N.K. Agrawal, JJ.

M/S MEERA COMPUTERS.—Petitioner

versus

STATE OF HARYANA AND OTHERS.—Respondents

C.W.P. No. 1579 of 1998

17th February, 1999

Haryana General Sales Tax Act, 1973—S. 40—Central Sales Tax Act, 1956—S. 9(2)—Constitution of India, 1950—Art. 226—Joint Excise and Taxation Commissioner, Faridabad deciding appeal after having been informed of Government orders transferring jurisdiction of the appellate authority to the Joint Excise and Taxation Commissioner (Appeals), Rohtak-JETC (Faridabad) going ahead reducing additional demand from Rs. 9,96,850/- to Rs. 19,476/- Validity of such order—Revisional authority setting aside the order as being wholly without jurisdiction—Petition is liable to be dismissed—High Court upholding revisional order and dismissing petition.

Held that, the Revisional Authority was justified in invoking this power. Apparently, the Commissioner had transferred the jurisdiction with some objective. If despite the order of the Commissioner, an Appellate Authority had proceeded to decide a matter, it could be legally said that the action was without jurisdiction.

(Para 9)