

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION Nos.1998, 1999, 2000 & 2005 OF 2017
AND TRANSFER C.M.P. No.14 OF 2018

COMMON ORDER:

All these four Civil Revision Petitions are preferred by the revision petitioners - respondent Nos.3 and 4 - defendant Nos.3 and 4, challenging the orders passed in I.A. Nos.344, 345, 343 and 342 of 2015 in I.A. No.510 of 1994 and I.A. No.509 of 1994, which are filed for appointment of advocate commissioner to ascertain mesne profits and for passing final decree, respectively, before the learned Principal Senior Civil Judge, Gudivada, Krishna District.

2. The revision petitioners herein are respondent Nos.3 and 4 and defendant Nos.3 and 4 in the aforesaid I.As and suit, while respondent No.1 herein is the petitioner and plaintiff and respondent Nos.2, 3 and 4 herein are respondent Nos.1, 2 and 5, respectively.

3. Before advertng to the grounds agitated and contentions raised by the learned counsel for the petitioners and the counter arguments advanced by the learned counsel for contesting respondent No.1, who is the petitioner in I.A. Nos.509 and 510 of 1994 and plaintiff in O.S. No.160 of 1984, it would be appropriate to refer to the relevant facts.

i) The revision petitioners herein are purchasers of the plaint schedule property, to which respondent No.1 herein was not a party, who was admittedly minor on the date of their purchase. Respondent No.1 herein filed the suit in O.S. No.160 of 1984 through his mother as the next friend, seeking partition of the plaint schedule properties into four equal shares and for allotment of one such share to him and mesne profits even.

ii) That suit was filed against his father, who is arrayed as defendant No.2, his paternal grand-father, who is arrayed as defendant No.1, who is no more admittedly and respondent No.4 herein is added as his legal representative, by orders, dated 21.04.2001, in I.A. No.2165 of 1999 as defendant No.5 and the revision petitioners herein were subsequently impleaded as defendant Nos.3 and 4. It appears defendant No.1 died during pendency of the final decree application and application for mesne profits.

iii) The trial Court pronounced the judgment and passed the decree on 12.07.1991 to partition the plaint schedule properties into four equal shares and allot one such share to respondent No.1 herein. Thus, a preliminary decree was passed.

iv) Questioning the preliminary, the revision petitioners herein, who are defendant Nos.3 and 4, filed Appeal Suit No.12103 of 1994 on the file of this Court. This Court, by judgment, dated 15.09.2011,

dismissed it and, thus, the preliminary decree passed by the trial Court has attained finality. Thereafter, respondent No.1 herein, who is plaintiff in the aforesaid suit, filed I.A. No.510 of 1994 for appointment of advocate commissioner to ascertain mesne profits of his 1/4th share of the plaint schedule properties and also to direct the Commissioner to file his report. Like-wise, he has also filed I.A. No.509 of 1994 for passing of a final decree directing the respondents to deliver possession of his 1/4th share to him.

v) Both the aforesaid petitions were dismissed by the trial Court on 19.07.2006 for default as respondent No.1 herein, who is petitioner-plaintiff therein, was absent. In fact, by then, the appeal suit No.12103 of 1994 was pending on the file of this Court and was disposed of only on 15.09.2011. The petitioner - plaintiff in I.A. Nos.509 of 1994 and 510 of 1994 claimed that he was minor even on the date of dismissal of both the applications for default. Since the appeal suit was pending preferred by the revision petitioners and, in fact, proceedings were also transferred to Gudivada Court, delay of 3160 days occurred in filing restoration petition to restore I.A. No.509 of 1994 and, accordingly, I.A. Nos.342 of 2015 to condone the delay of 3160 days and I.A. No.343 of 2015 to set aside the order passed on 19.07.2006 in I.A. No.509 of 1994, were filed. Like-wise, I.A. No.344 of 2015 to condone the delay of 3160 days in filing the petition to restore I.A. No.510 of 1994 and I.A.No.345 of 2015 to set

aside the order passed on 19.07.2006 passed in I.A.No.510 of 1994 were filed.

4. It would be suffice to refer to the order passed by the learned trial Court in I.A. Nos.344 of 2015 in I.A. No.510 of 1994 in O.S. No.160 of 1984 filed under Section 5 of the Indian Limitation Act to condone the delay of 3160 days for deciding the controversy in these revision petitions.

i) The learned trial Court observing that the record reveals that at the time of filing the petitions in I.A. Nos.509 and 510 of 1994, the petitioner - plaintiff therein was a minor and was represented by his mother and that his mother was looking after his affairs and, he was told by his mother that the appeal suit was pending before this Court and, as such, he did not attend before the trial Court on 19.07.2006 and, therefore, they were taken into consideration and further observing that the suit is one for partition of plaint schedule properties into four equal shares, wherein the petitioner- plaintiff is entitled to one such share and if the delay is not condoned and I.A. Nos.509 and 510 of 1994 are not restored to file, he may be put to irreparable loss, and also observing that there was gross negligence in prosecuting the said two petitions, as such, in the circumstances, it was inclined to allow the petitions on payment of costs of Rs.1000/- to the Legal Services Authority, Gudivada on or before 13.02.2017, and if the

petitioner fails, the petition shall stand dismissed, and directed to list the matter on 13.02.2017.

ii) On 13.02.2017, the trial Court recorded payment of costs by the petitioner and allowed the petition. Thus, a similar order has been passed in other delay condonation petition and restored both I.A. Nos.509 and 510 of 1994. Thus, these orders are now under challenge in the present Civil Revision Petitions.

5. Heard Sri P.S.P.Suresh Kumar, learned counsel for the revision petitioners, and Sri Ganta Ramakrishna, learned counsel for respondent No.1.

6. The main ground urged by the learned counsel for the revision petitioners is, that the trial Court having recorded that there was gross negligence in prosecuting both petitions, still, allowed the petitions condoning the delay of 3160, though, no sufficient cause was shown by the petitioner therein to entitle him to the relief of condonation of delay of 3160 days. That has been the main submission made by the learned counsel in attacking the orders under challenge.

i) Responding to the submission made by the learned counsel for respondent No.1 that the trial Court has even passed a final decree on 28.03.2017 and, therefore, the present revision petitions have become infructuous, he would contend that the orders under challenge

suffer from material irregularity and, therefore, liable to be set aside and once the revision petitioners succeed, the matter relates back to the stage prior to filing of petitions in I.A. Nos.509 and 510 of 1994.

7. The learned counsel for contesting respondent No.1, *per contra*, would submit that once the final decree was passed, the only remedy open to the revision petitioners, who are purchasers, is, to question the final decree, in case they are aggrieved by the final decree and even, remedy lies before the appellate Forum against the order passing the final decree and no cause survives in these revisions.

i) He also would submit that a counter affidavit is filed in C.R.P.M.P. No.4348 of 2017 requesting to vacate the interim order, dated 13.04,.2017, by which, this Court granted interim stay of further proceedings for a period of two weeks, directing the Registry to list after two weeks and later, on 28.04.2017, this Court ordered awaiting service of notice, interim order to continue and directed the Registry to post after vacation.

8. The factum of passing final decree on 28.03.2017 itself, is not in dispute. The same can be gathered from the averments made in Transfer C.M.P. No.14 of 2018, which is taken up for disposal by way of common order, as the learned counsel for the revision petitioners wanted the present Transfer CMP also to be disposed of along with the aforesaid revisions and, thus, all the four revisions and the

aforesaid Transfer CMP are listed together for disposal by a common order.

9. In paragraph No.5 of his affidavit filed in support of Transfer C.M.P., which, of course, was sworn-in on 04.01.2018, petitioner No.2 would state that he learnt that the trial Court has passed final decree on 28.03.2017 in I.A. No.509 of 1994 in O.S. No.160 of 1984, and even mentions thus:

“...But, however, in the original preliminary decree passed by the Court below it has categorically observed that without disturbing our rights and properties, share may be given to the plaintiff and equities have be worked out while passing the final decree. But the trial Court has ignored this aspect and passed final decree by recording that we have no objection in terms of the preliminary decree. Hence, challenging the same I filed appeal the before Court of XI Additional District Judge, Gudivada vide AS GL.No.4773 of 2017. Since there was delay of 188 days in filing appeal, I also filed I.A.No.1648 of 2017 seeking condonation of delay. The same is pending before the appellate Court.”

Of course, he got mentioned in paragraph No.6 that if at all these C.R.Ps. are allowed, there is no necessity for prosecuting the Appeal Suit, filed by him and, therefore, these revisions and A.S.G.L.No.4773 of 2017 pending before the XI Additional District Judge, Gudivada needs to be clubbed and heard together for avoiding any conflict of opinions, and thereby he filed Transfer C.M.P. for the said purpose.

10. Thus, it is abundantly clear that the petitioners are aware of passing of the final decree on 28.03.2017 in I.A.No.509 of 1994,

though, they did not disclose on what date they gained knowledge as to passing of final decree by the trial Court on 28.03.2017. That particular aspect is crucial. But, for the reasons best known to the petitioners herein, they did not incline to come out as to on which date they gained knowledge as to passing of final decree.

11. Now, the question is, though, significant or otherwise touching merits whether the order passed by the trial Court condoning the delay of 3160 days in each of the petitions in making the petitions to restore I.A. Nos.509 of 1994 and 510 of 1994 suffers from any patent irregularity in view of the observations made by the trial Court that there was gross negligence in filing the petitions, but, however, condoned the delay ordering the petitions, which are under challenge now in these revisions.

12. In the present context, it would be appropriate to refer to a crucial aspect as to whether there is any time limit to file application with a request to pass final decree after passing preliminary decree declaring the shares of the parties and granting the relief for ascertainment of mesne profits. The legal position is well-settled that there is no time limit to file an application for passing final decree. In the present context, in **Laxmi & Others v. A. Sankappa Alwa & others**¹, a learned Single Judge of Hon'ble Kerala High Court held that an application for final decree is not governed by the Limitation

¹. AIR 1989 Ker 289

Act. In **Hasham Abbas Sayyad v. Usman Abbas Sayyad**², the law declared by the Hon'ble Supreme Court is, to the effect that a final decree proceeding may be initiated at any point of time, and no limitation is provided therefor, and what can be executed is a final decree and not a preliminary decree, unless and until final decree is a part of the preliminary decree.

i) It would be profitable, in the same context, to refer to the ruling in **Shub Karan Bubna @ Shub Karan v. Sita Saran Bubna & others**³. The law declared by the Hon'ble Supreme Court is, that the declaration of rights or shares is only the first stage in a suit for partition; a preliminary decree does not have the effect of disposing of the suit; the suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree; an application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of Limitation Act), and it is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion. The Hon'ble Apex court while emphasizing the duty of the Court that once a preliminary decree is passed, enunciated the

². AIR 2007 SC 1077

³. (2009) 9 SCC 689

principles that emerge from the discussion in the preceding paragraphs of paragraph No.'9' regarding partition suits and laid down the principles in paragraph Nos.9.1, 9.2 and 9.3 and, thereafter, directs that when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed, and it is the duty and function of the court, and performance of such function does not require a reminder, or nudge from the litigant, and the mind-set should be to expedite the process of dispute resolution. It would be appropriate to refer to the expression of the Hon'ble Apex Court in paragraph Nos.9 to 16 thus:

“9. The following principles emerge from the above discussion regarding partition suits:

9.1) In regard to estates assessed to payment of revenue to the government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually

lost its relevance, as revenue from agricultural lands is negligible). Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

9.2) In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the

Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

9.3) As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

10. The three decisions relied on by the petitioner (referred to in para 3 above) are not relevant for deciding the issue arising in this case. They all relate to suits for mortgage and not partition. There is a fundamental difference between mortgage suits and partition suits. In a preliminary decree in a mortgage suit (whether a decree for foreclosure under Rule 2 or a decree for sale under Rule 4 of Order 34 of the Code), the amount due is determined and declared and the time within which the amount has to be paid is also fixed and the consequence of non-payment within the time stipulated is also specified. A preliminary decree in a

mortgage suit decides all the issues and what is left out is only the action to be taken in the event of non-payment of the amount. When the amount is not paid the plaintiff gets a right to seek a final decree for foreclosure or for sale. On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds. Therefore, the concept of final decree in a partition suit is different from the concept of final decree in a mortgage suit. Consequently an application for a final decree in a mortgage suit is different from an application for final decree in partition suits. A suggestion for debate and legislative action

11. The century old civil procedure contemplates judgments, decrees, preliminary decrees and final decrees and execution of decrees. They provide for a 'pause'

between a decree and execution. A 'pause' has also developed by practice between a preliminary decree and a final decree. The 'pause' is to enable the defendant to voluntarily comply with the decree or declaration contained in the preliminary decree. The ground reality is that defendants normally do not comply with decrees without the pursuance of an execution. In very few cases, the defendants in a partition suit, voluntarily divide the property on the passing of a preliminary decree. In very few cases, defendants in money suits, pay the decretal amount as per the decrees. Consequently, it is necessary to go to the second stage that is levy of execution, or applications for final decree followed by levy of execution in almost all cases.

12. A litigant coming to court seeking relief is not interested in receiving a paper decree, when he succeeds in establishing his case. What he wants is relief. If it is a suit for money, he wants the money. If it is a suit for property, he wants the property. He naturally wonders why when he files a suit for recovery of money, he should first engage a lawyer and obtain a decree and then again engage a lawyer and execute the decree. Similarly, when he files a suit for partition, he wonders why he has to first secure a preliminary decree, then file an application and obtain a final decree and then file an execution to get the actual relief. The common-sensical query is: why not a continuous process? The litigant is perplexed as to why when a money decree is passed, the court does not fix the date for payment and if it is not paid, proceed with the execution; when a preliminary decree is passed in a partition suit, why the court does not forthwith fix a date for appointment of a Commissioner for division and make a final decree and deliver actual possession of his separated

share. Why is it necessary for him to remind the court and approach the court at different stages?

13. Because of the artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings, many Trial judges tend to believe that adjudication of the right being the judicial function, they should concentrate on that part. Consequently, adequate importance is not given to the final decree proceedings and execution proceedings which are considered to be ministerial functions. The focus is on disposing of cases, rather than ensuring that the litigant gets the relief. But the focus should not only be on early disposal of cases, but also on early and easy securement of relief for which the party approaches the court. Even among lawyers, importance is given only to securing of a decree, not securing of relief. Many lawyers handle suits only till preliminary decree is made, then hand it over to their juniors to conduct the final decree proceedings and then give it to their clerks for conducting the execution proceedings. Many a time, a party exhausts his finances and energy by the time he secures the preliminary decree and has neither the capacity nor the energy to pursue the matter to get the final relief. As a consequence, we have found cases where a suit is decreed or a preliminary decree is granted within a year or two, the final decree proceeding and execution takes decades for completion. This is an area which contributes to considerable delay and consequential loss of credibility of the civil justice system. Courts and Lawyers should give as much importance to final decree proceedings and executions, as they give to the main suits.

14. In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation

by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant. We hope that the Law Commission and Parliament will bestow their attention on this issue and make appropriate recommendations/amendments so that the suit will be a continuous process from the stage of its initiation to the stage of securing actual relief. The present system involving a proceeding for declaration of the right, a separate proceeding for quantification or ascertainment of relief, and another separate proceeding for enforcement of the decree to secure the relief, is outmoded and unsuited for present requirements. If there is a practice of assigning separate numbers for final decree proceedings that should be avoided. Issuing fresh notices to the defendants at each stage should also be avoided. The Code of Civil Procedure should provide for a continuous and seamless process from the stage of filing of suit to the stage of getting relief. In money suits and other suits requiring a single decree, the process of suit should be a continuous process consisting of the first stage relating to determination of liability and then the second stage of execution and recovery, without any pause or stop or need for the plaintiff to initiate a separate proceedings for execution. In suits for partition and other suits involving declaration of the right and ascertainment/quantification of the relief, the process of the suit should be continuous, consisting of the first stage of determination and declaration of the right, second stage of

ascertainment/division/quantification, and the third stage of execution to give actual relief.

Conclusion

15. In so far final decree proceedings are concerned, we see no reason for even legislative intervention. As the provisions of the Code stand at present, initiation of final decree proceedings does not depend upon an application for final decree for initiation (unless the local amendments require the same). As noticed above, the Code does not contemplate filing an application for final decree. Therefore, when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed. It is the duty and function of the court. Performance of such function does not require a reminder or nudge from the litigant. The mindset should be to expedite the process of dispute resolution.

16. In view of the foregoing, we are of the view that the application filed by the plaintiff in this case for drawing up of a final decree, was rightly held to be not subject to any period of limitation. We therefore dismiss this special leave petition as having no merit, with a request to expedite the final decree proceedings.”

13. Thus, in view, of the law declared by the Hon’ble Apex Court, the trial Court though, recorded that there was gross negligence on the part of the petitioner - plaintiff, who is respondent No.1 herein, still, allowing the petitions condoning the delay of 3160 days in filing restoration applications to restore I.A. Nos.509 and 510 of 1994, do

not suffer from any patent irregularity and, therefore, no interference is warranted at all.

14. Further, it is well-settled that the interest of a minor in immovable property invariably has to be safeguarded. Without permission of the Court, minor's share in undivided property cannot be alienated and that the paramount consideration is to protect the minor's interest in joint family properties. Therefore, looking from this view point, it is to be stated that the trial Court has rightly allowed the delay condonation petition and the petition to set aside the default order of dismissal in I.A. Nos.509 and 510 of 1994.

15. Turning to the question, whether the request in these revisions would become infructuous, the emphatic answer should be 'Yes', irrespective of whether the revision petitioners herein were aware of passing of final decree on 28.03.2017 or not. The remedy is, to avail of the opportunity questioning the final decree passed, in which direction, they even moved the appellate Court by preferring appeal suit i.e., A.S. G.L. No.4773 of 2017 along with an application under Section 5 of the Limitation Act to condone the delay of 188 days in preferring the appeal. Therefore, the present revisions have become infructuous in view, of the passing of final decree even prior to filing the present Civil Revision Petitions. There is no merit in these revisions and, accordingly, all these four revisions are dismissed.

16. Adverting to the request made in Transfer C.M.P. No.14 of 2018, it is needless to mention that such a request cannot be acceded to. *Ex facie*, such a request is not at all maintainable for the reason what is to be decided in the aforesaid revisions is something not touching the main issue, but only an ancillary issue. This apart, since the aforesaid revisions are dismissed, the Transfer C.M.P. is liable to be dismissed invariably. Accordingly, the Transfer C.M.P. is also dismissed.

17. All these Civil Revision Petitions as well as Transfer C.M.P. are, therefore, dismissed. In the circumstances, there is no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in these revisions and Transfer C.M.P., stand closed.

A. SHANKAR NARAYANA, J

April 02, 2018.

Mgr