IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON: 28.02.2018

ORDER PRONOUNCED ON: 27.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

Application No.8127 of 2017
in CS No.709 of 2004

B.Narasimha Rao ... Applicant

Vs

1. T.Madhava Rao & Co.
   Rep. By its Partner
   No.23, Chinna Tambi Mudali Street,
   Chennai 600 079.

2. B.Uma Maheswara Rao ...Respondents

Prayer: Application is filed under Order XIV Rule 8 of the O.S.Rules read with Order XXVI Rule 9 of the Code of Civil Procedure, praying to pass the final decree in the above suit by appointing an advocate Commissioner to take true and proper accounts of the firm T.Madhava Rao & Co., as per the preliminary decree from the second respondent with the assistance of expert.

For Applicant : Mr.A.V.Arun

For 2nd Respondent : Mr.A.Ashok

ORDER

The plaintiff in CS No.709 of 2004 has come forward with this application seeking appointment of an Advocate Commissioner to take true and proper accounts of the firm T.Madhava Rao & Co., as per the preliminary decree and to pass a final decree there on.

2. The applicant as plaintiff has filed the suit in CS No.709 of 2004 seeking dissolution of the firm T.Madhava Rao & Co., and directing the defendants to render accounts and for declaring the share of the partners. An *ex-parte* preliminary decree came to be passed in the said suit on 20.07.2007, as per the said decree, the firm T.Madhava Rao & Co., was directed to be dissolved and the defendants were directed to render true and proper accounts.

3. The plaintiff would claim that the property belonging to the firm was brought to sale by a creditor of the firm in CS No.267 of 2002 and the proceeds were deposited to the credit of the said suit. The residue of the sale proceeds after adjusting the suit claim in CS No.267 of 2002 is available subject to various attachments arising out of other money decrees passed against the firm. While so, it appears that the 2nd respondent filed an application to withdraw 30% of the sale profits being his alleged share in

the partnership without settling the accounts of the partnership. The said application in Application No.5094 of 2016 appears to have been allowed by the learned Master. It is also stated that the said order was set aside by this Court, by an order 02.01.2017 made in Appln.No.5527 of 2016 and the matter has been remitted to the learned Master to hold enquiry with regard to the entitlement of the parties, it is stated that the said application is pending. It is at this stage, the plaintiff has come forward with the present application seeking appointment of an Advocate commissioner.

4. The contesting 2nd respondent has filed a counter affidavit, wherein he would claim that he was not in the management of the firm and the firm has ceased to carry on business as on today. It was the Managing Partner Madhava Rao, who died even before filing of the suit, who was maintaining all the accounts. According to the 2nd respondent, the firm ceased to carry on business after the death of the said Madhava Rao. It is also contended that the application is barred by limitation.

5. Mr.A.V.Arun, learned counsel appearing for the applicant would submit that since the present application is in the nature of continuation of the suit, the same cannot be said to be barred by limitation. According to him, Article 137 of the Limitation Act, has no application to the case on

hand. He would also rely upon the judgment of this Court in ***Ramanathan Chetty v. Alagappa Chetty & Others*** reported in ***AIR 1930 Mad 528*** *and* ***Amirthammal and Others v. M.K.Mani Iyer,*** reported in ***(1982) 1 MLJ 326***.

6. Mr.A.Ashok, learned counsel appearing for the 2nd respondent would contend that the preliminary decree had been passed as early as on 20.07.2007 and this application which has been filed nearly 10 years after the preliminary decree is barred by limitation. According to him, Article 137 of the Limitation Act would apply as in the case of mortgage source.

7. I have considered the rival submissions. It is the contention of Mr.A.V.Arun, learned counsel appearing for the applicant that the suit being one for dissolution of partnership and accounts does not terminate with the preliminary decree. The suit is deemed to be pending till such time the accounts are taken and the shares of the partners are determined in accordance with law. Therefore, according to him, this application is in the nature of further proceedings in the suit itself, hence it is not an application for execution of a decree or an application for other relief to which Article 137 of the Limitation Act could be said to apply. He would invite my attention to the observations of **Hon'ble Mr.Justice Curgenven**, in ***Ramanathan Chetty v. Alagappa Chetty & Others*** reported in ***AIR 1930***

Mad 528, wherein after referring to the various decisions of this Court, the learned Judge has concluded as follows:

"17. 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. So far as the examples shown to me go, applications which are so governed will be founded not to be of this character. In Kalyani Pillai v. Thiruvenkadaswami Ayyangar, 1924 I.L.R. 47 M 618: 47 MLJ 154, the application was to bring on record the legal representative of a respondent to a Priyy Council appeal. Mangamma Nayakuralu v. Ramadasappa Nayanimvary (1924) 48 MLJ 563 related to execution. Swaminath Pillay v. Rajagopala Mudaliar (1920) 40 MLJ 206 was an unusual case where a trustee who had brought a suit died and application was made to transpose a co-trustee defendant as plaintiff. It is difficult to say whether in the interval between death and transposition the suit could be held to be pending. The case in Hindustan Bank v. Mehraj Din (1920) I.L.R. 1 Lah. 187, related to the Companies Act. Indeed, the only case in point, Srinivasa Mudaly v. Ramaswamy Mudaly (1915) M.W.N. 725 to which I have already referred, appears to me very good authority against the application of the Limitation Act."

8. In ***Amirthammal and Others v. M.K.Mani Iyer,*** reported in ***(1982)***

1 MLJ 326, this court while dealing with the suit for specific performance had after considering the decisions as to the effect of the preliminary decree and the proceedings, which are in the nature of the further proceedings in the suit itself had observed as follows:

> *"Once the decree is treated to be a preliminary decree, then on the analogy of partnership suits and suits for accounts, Articles 126 and 137 of the Limitation Act will not apply. In* ***K.S.Doraiswami Nadar and others v. Vinayaka Ratnaswami Nadar and others****, (****AIR 1969 (1) MLJ 392****) a Division Bench of this Court had held that an application for passing final decree in a partition suit is not in execution and as such number of applications for passing a final decree in parts are permissible and neither Article 136 nor Article 137 of the Limitation Act would apply to applications for passing final decrees, and that the position is so well established that it is hardly necessary to refer to any authority."*

9. Of course, the learned counsel for the respondent would seek to make a distinction between the suit for partition and the suit for rendition of accounts. I do not think such a distinction is possible. Of course, suits on mortgage stand on different footing in view of introduction of Order 34 of Code of Civil Procedure, 1908, and this Court as well as the Hon'ble Supreme Court had held that the Article 137 would apply to the application to pass a final decree in a mortgage suit. The Full Bench of this Court in

Babburu Basavayya and Others v. Babburu Guravayya and another reported in ***AIR (38) 1951 M 938***, had held that an application for determination of mesne profits in a partition suit is a proceeding in that suit itself and *de hors* the fact as to whether the preliminary decree directs such enquiry or not and enquiry into profits subsequent to the date of the suit can be made by the Court and such determination has to be the part of the final decree. The Hon'ble Full Bench had summarized its conclusions as follows:

> "*We may now summarise our conclusions. A partition suit in which a preliminary decree has been passed is still a pending suit & the rights of the parties have to be adjusted as on the date of the final decree: Jadunath v. Parameswar, I.L.R. (1940) 1 Cal. 255. In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property the property to be divided. The preliminary decree determines the moieties of the respective parties & thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered & decided before an equitable final partition can be effected. Among them are the realisation of common outstandings, the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of owelty, the provision of maintenance to parties entitled thereto, the allotment of lands on which improvements have been effected*

to the sharer who has improved them, the allotment of alienated lands to the share of the alienor & other similar matters. Even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either suo motu or on the application of the parties. Order 20, Rule 18, Civ. P. C. does not prohibit the Court from issuing such directions after the stage of a preliminary decree. It is open to the Court in order to prevent multiplicity of litigation & to do complete justice & effect an equal division of all the common assets & properties among the parties, to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit & to award the others their proper share of, such profits under its final decree. This enquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree, & in either case the result of the enquiry has to be incorporated in the final decree."

10. In view of the above categorical pronouncements of this Court, the irresistible conclusion is that a suit in which a preliminary decree for accounts is passed by the Court is deemed to be pending till accounts are taken and the rights of the parties are determined thereafter. Hence, the objection of the learned counsel for the 2nd respondent, that this application is barred by limitation cannot be sustained. The other objections set out in the counter are factual in nature and they will have to be decided only after

an attempt is made to look into the accounts of the firm. Hence the objection relating to limitation is over ruled and Mr.R.SunilKumar, Advocate (Phone No.98411 91112) 155 Linghi Chetty Street, Chennai 1, is appointed as a Commissioner to look into the accounts of the firm T.Madhava Rao & Co., and submit a report.

11. The Commissioner is permitted to take the assistance of qualified Chartered Accountant if necessary. The Commissioner shall make an attempt to complete the process and file a report by 02.04.2018. The applicant is directed to pay a sum of Rs.25,000/- as initial remuneration to the Commissioner. The said payment shall made on or before 05.03.2018.

27.02.2018

jv

R.SUBRAMANIAN,J.

jv

Pre Delivery Order

Application No.8127 of 2017
in CS No.709 of 2004

27.02.2018