

(2002) 10 KL CK 0059**High Court Of Kerala****Case No:** C.R.P. No. 2262 of 2001

Swaminathan

APPELLANT

Vs

Anantharama Subramanian

RESPONDENT

Date of Decision: Oct. 7, 2002**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 18, Order 20 Rule 18(2), Order 23 Rule 3, 97

Citation: AIR 2003 Ker 30 : (2002) 3 ILR (Ker) 400**Hon'ble Judges:** J.M. James, J**Bench:** Single Bench**Advocate:** K.S. Hariharaputhran, P.J. Joseph, M.D. Sasikumar and George Mathew, for the Appellant;**Final Decision:** Allowed**Judgement**

@JUDGMENTTAG-ORDER

J. M. James, J.

The plaintiff in O.S. No. 446/2000 on the file of the First Additional Sub Court, Thiruvananthapuram, is the revision petitioner. The suit was filed for partition. The plaintiff claimed 5/12 shares over the Plaintiff "A" and "C" schedule properties and 1/4 share in Plaintiff "B" schedule property. During the pendency of the suit, the parties settled the matter among themselves out of Court and therefore filed I.A. No. 1297/2001, compromise petition, signed by all the parties to the suit and their respective advocates, praying that a final compromise decree may be passed accepting the compromise petition. The parties are prepared to pay requisite stamp duty for the preparation of compromise decree. The parties have also agreed to suffer their costs. Plans filed along with the compromise were agreed to form part of the decree. But the learned Munsif, as per the impugned order dated 29.6.2001, dismissed the petition. The revision is aimed against the said dismissal.

2. Notice has been ordered to the respondents 1 to 3. Though respondents 1 and 3 had received the notice, they did not enter appearance. The second respondent could not be served as she left the place. After hearing the learned counsel for the revision petitioner and also considering the compromise petition filed by the parties, I do not find it necessary to hear the second respondent as she is one of the parties who signed the compromise petition expressing her desire to compromise the suit along with the other defendants and the plaintiff.

3. The order of the Court below is,

"Heard further. The petition is for passing a compromise final decree. Suit is for partition. No preliminary decree is passed in the suit. I am not inclined to allow this petition and hence the same is dismissed."

4. The argument of the learned counsel for the revision petitioner is that under Order XX, Rule 18(2) of Civil Procedure Code, there is no need of passing a preliminary decree and that the Court can accept the compromise petition filed under Order XXIII Rule 3 of Civil Procedure Code.

5. For clarity, I reproduce below Order XX Rule 18(2).

"R. 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) xxx xxx xxx

(2) If and in so far as such decree relates to any other immovable property or to moveable 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."

(emphasis mine)

(With the Kerala Amendment to the Civil Procedure Code, the whole of Clause (1) and some portion in the beginning of the Clause (2) are omitted and it has got only one clause under Rule 18.)

6. Order XXIII Rule 3 is also reproduced below:

"3. Compromise of suit:- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a

decree in accordance there with so far as it relates to the parties to [he suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:"

(emphasis mine)

7. As stated above, Rule 18 of Order XX directs the Court to pass a preliminary decree declaring the rights of the several parties interested in the property, which is the subject matter of a suit, only when the partition cannot conveniently be made without further inquiry. A preliminary decree determines the rights of the parties with regard to or some of the matters in controversy between the parties in a partition suit, all though it does not completely dispose of the suit. The disposal comes only when a final decree is passed. If a preliminary decree is never challenged by preferring an appeal, such a preliminary decree has got an effect in respect of the matters concluded by it. Those matters are not open to challenge in an appeal against a final decree as contemplated u/s 97 of the Civil Procedure Code. Therefore, the passing of the preliminary decree is necessary and it becomes conclusive only when the Court cannot conveniently separate the shares of the parties to a suit and give a decree. In the case at hand, as could be seen from records, the parties to the suit had filed a compromise petition along with plans, giving all the details of the shares to be allotted to the parties and the other transactions, completed among themselves. Together with the plans separating and allotting the respective shares of the parties, all the three defendants as well as the plaintiff have signed the compromise petition and the same were vouched by their Advocates. In such circumstances, it is not at all necessary for the learned Sub Judge, to hold any enquiry regarding the separation of the joint shares held by the parties to the suit as they themselves have partitioned and produced the required plans and the details of the type of decree to be passed. Thus, the partition of the property could conveniently be made with the help of the terms and conditions contained in the compromise petition as well as the plans filed by the parties. Therefore, in such situation, according to me, there is no need to pass a preliminary decree as such.

8. In Tara Pada Ray Vs. Shyama Pada Ray and Others, a Division Bench of Calcutta High Court considered the rights of the parties, two brothers, to the suit where a compromise petition, after the passing of a preliminary decree before the trial court was filed and also the right of one of the brothers in later on filing a petition with a prayer to pass a final decree in terms of the preliminary decree. At paragraph 34 of the judgment, the Division Bench observed that,

"(34). It is unquestionable that the right of a party to claim partition primarily depends on a fact to be proved that there are divisible joint properties held by the parties. If there be no such property the Court cannot be called upon to pass a decree for partition. This principle may be invoked not only when a suit is filed by a party for effecting partition and before a preliminary decree is passed, but it is

equally applicable at every stage of the partition suit. If all the parties to a partition suit amicably effect a partition whatever may be the form of procedure adopted leaving nothing as joint family property, is there anything further for the Court to do?"

9. In *Gulam Basool v. Jawahar Beegum* 1989 (2) KLT 85 Justice Padmanabhan, dealt with the effect of a preliminary decree and its finality in the proceedings and in so doing, the Judge observed that:

"6. Certain types of suits, such as mortgage suits, partition suits and suits for accounting are to be decided at stages. Though such suits could be regarded as fully and finally decided only after a final decision is made, the decision arrived at the earlier stage also has a finality attached to it. The circumstance that further proceedings are required to be taken for procuring the relief to which a party is held entitled by a decision is no test for not regarding that decision as final. When in a partition suit the preliminary decree fixes shares and liability for accounting it is final so far as those matters are concerned".

10. The effect of filing of a compromise petition, after the disposal of an appeal by the High Court of Madras, on a suit for partition and passing of the preliminary decree, came up for consideration of that Court, in *R. Subramania Iyer and Ors., Petitioners v. Thangammal*, Respondent AIR 1965 Mad 305 and it was held that,

"6. The court is competent to take into account the matters set out in the compromise, if the compromise is found to be genuine and binding on the parties and the Court is entitled to embody it in a set of fresh directions for the purpose of passing a final decree, and the directions so issued should be construed as not an amendment to the preliminary decree already passed, but rather as a fresh preliminary decree, which it is open to the Court, dealing with a partition suit to pass at any time till the stage of passing the final decree is over."

11. From the above discussions and authorities, it can be seen that, when the parties to a suit have filed a compromise petition with the plan partitioning their respective shares by metes and bounds, unless it is found to be not genuine, no further enquiry is needed in passing a decree. In such circumstances, there is no need to pass a preliminary decree and then wait for the parties to apply for passing a final decree, thus, making the stages of procedure complete in a typical arid stereotyped manner. When the parties to the suit decided and filed a compromise petition in a partition suit, the Court cannot ask the parties to wait till a preliminary decree is passed. In the case at hand, as stated above, a compromise petition, was filed praying to pass a decree in terms of the compromise petition, finally deciding the rights of the parties to the suit. Therefore, I hold that, there is absolutely no need for the parties to adduce any type of evidence, and the Court can pass a decree giving finality to the suit, in terms of the compromise petition, along with the plans filed by the parties.

12. It is true that only when the final decree is drawn up and has been engrossed on the requisite stamp paper with the Presiding Officer's sign in the decree so engrossed, the suit for partition is terminated. When a decree is drawn up in terms of the compromise and there being no challenge to the same by any of the, parties to the suit, within the time prescribed by the law for challenging it, then the said decree can be engrossed on such stamp paper as contemplated in the Indian Stamp Act; If any of the parties applied for" engrossing the said decree, the Court is bound to give the decree engrossed on the requisite stamp paper, thus, making the procedure-final. It is not at all necessary for the learned Sub Judge to wait to pass the preliminary and final decree to terminate the proceedings and make the same final.

13. Therefore, I hold that the learned Sub Judge, went wrong in dismissing the compromise petition, which had been numbered as an interlocutory application. Hence, I am inclined to set aside the same and give an opportunity to the parties to appear before the Court below and obtain a decree in terms of the compromise petition with the plans appended to it.

14. In the result, the revision is allowed. The impugned order dated 29.6.2001 of the First Additional Sub Court, Thiruvananthapuram is set aside. O.S. No. 446/2000 is restored to file of that Court. The case is remitted to the court below to dispose of the same, in view of the discussions held above.

15. The parties shall appear before the Court below on 5.11.2002. The lower court shall dispose of the matter within three months from the date of appearance of the parties before that Court.

16. In the circumstances, I direct the parties to bear their respective costs.

The Civil Revision Petition is disposed of as indicated above.