

(2010) 07 MAD CK 0358

Madras High Court (Madurai Bench)

Case No: C.R.P. (PD) M.D. No. 2068 of 2009 and M.P. (MD) No. 1 of 2009

Senthilnathan

APPELLANT

Vs

S. Karuppiah and

Others <BR>S.

Karuppiah Vs

RESPONDENT

Senthilnathan and

Others

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Date of Decision: July 23, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 153
- Limitation Act, 1963 - Section 5
- Stamp Act, 1899 - Article 45

Citation: (2010) 5 LW 320

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Final Decision: Dismissed

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### Judgement

@JUDGMENTTAG-ORDER

R.S. Ramanathan, J.

Heard both sides

2. The first Defendant in O.S. No. 144 of 1989, on the file of the Sub Court, Sivagangai, is the revision Petitioner herein.

3. O.S. No. 144 of 1989 was filed by the 1st Respondent herein against the revision Petitioner and 5 others, for partition of the properties mentioned in the suit. During trial, an endorsement was made by the Plaintiff's counsel on 08.03.1991 exonerating the Defendants 3 to 6 from the array of parties and a memo of compromise was filed on the same day by the Plaintiff and the Defendants 1 and 2

and it was prayed that decree may be passed in terms of the compromise. It is seen from terms of compromise that certain properties were allotted to the Plaintiff, the 1st Respondent herein and certain properties were allotted to the first Defendant, the revision Petitioner herein and the suit was not pressed in respect of schedule C D & F and the Plaintiff and Defendants 1 and 2 shall enjoy jointly amount mentioned in the "E" schedule. The Defendants 2 to 6 are the sisters of the Plaintiff and the first Defendant and on the basis of the memo of compromise an order was passed by the court on 08.03.1999 as follows:

This compromise petition has been presented by the Plaintiff and the Defendants 1 & 2. Other Defendants are exonerated by the Plaintiff vide endorsement made on the plaint by the counsel for Plaintiff. Plaintiff and D1 & D2 present in the open Court with their counsel. The compromise petition was read over and explained to the parties present and they admit the correctness of the same. Hence, this compromise petition is recorded.

4. Thereafter, the case was adjourned to 21.08.1991 and without verifying that, a compromise memo was filed on 03.08.1991 and it was recorded by the court, the suit was dismissed for non-prosecution on 21.08.1991. Thereafter, I.A. No. 290 of 2008 was filed by the Respondents stating that after filing of the compromise memo, the case was adjourned to 14.03.1991 for submitting the non-judicial stamp paper for engrossing the decree on the stamp paper and on 21.08.1991, the case was adjourned for the same purpose and on that date, as the Petitioner/Plaintiff was not present, the suit was dismissed for default and after recording the compromise, the Court should not have dismissed the suit for default and he was under the impression that decree has been passed on the basis of the compromise memo he did not appear on 21.08.1991 and he was not aware that he has to furnish non-judicial paper for the decree to be engrossed on the stamp paper and he was under the impression the suit was settled amicably by the filing of compromise memo and as the revision Petitioner/ 1st Defendant is disputing the claim and right of the Respondent over the property, it becomes necessary for filing the petition.

5. The revision Petitioner resisted the application stating that the application filed by the Petitioner under Sections 151, 152, 153 Code of CPC is not maintainable and there is no clerical or arithmetic error or error apparent on the face of the record in the decree passed in O.S. No. 144 of 1989 while dismissing the suit for non-prosecution and the application filed after a lapse of 16 years is also not maintainable and once the suit is dismissed for default, it has to be restored within a period of 30 days and if sufficient reason is stated that can be considered in an application filed u/s 5 of the Limitation Act and without stating any acceptable reason and without filing application to condone the delay, the application filed for restoration of suit is not maintainable. It is further stated that the revision Petitioner has also perfected title-by adverse possession and the claim of the Respondents is also barred by limitation.

6. The lower Appellate Court relying upon the judgment of the Honourable Supreme Court reported in [Jayalakshmi Coelho Vs. Oswald Joseph Coelho](#), held that there is no time limit for receiving non-judicial stamp papers for preparing final decree and therefore, allowed the petition and aggrieved by the same, this civil revision is filed by the Petitioner.

7. Mr. T.V. Sivakumar, the learned Counsel appearing for the revision Petitioner submitted that the application under Sections 151, 152 & 153 is not maintainable and Section 151 deals with the inherent power of the Court and Sections 152 & 153 deals with the power of the court to amended the decree and judgment. In Section 152 clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be correct by the Court and Section 153, the Court may at any time and on such terms as to costs or otherwise as it may think fit amend any defect or error in any proceeding in a suit and the learned Counsel appearing for the Respondents cannot bring the application under Sections 151 to 153 and therefore, the application is not maintainable.

8. He further submitted that even though, the Court has recorded the compromise on 08.03.1991, no preliminary decree or final decree was passed and a reading of the compromise memo would also disclose that the parties prayed for passing of preliminary decree and without an application for passing of final decree, the present application is not maintainable. As a matter of fact, no preliminary decree was passed by the Court while recording the compromise. According to the learned Counsel appearing for the Petitioner, as per the judgment and decree passed in O.S. No. 144 of 1989, dated 21.08.1991, the suit was dismissed for default and therefore, without filing an application to restore the suit along with the application to condone the delay, the present application is maintainable.

9. On the other hand, Mr. G. Sitheswaran, the learned Counsel appearing for the Respondents submitted that as per Order 23 Rule 3, when a memo of compromise was filed by the parties and when the same was acted upon by the court, it is the duty of the Court to pass a proper decree and after recording the compromise on 08.03.1991, the case was adjourned to 14.03.1991 for payment of court fee and time was extended to 12.04.1991, 16.06.1991 and 23.05.1991 and finally on 21.08.1991, the court fee was not filed and the Plaintiff was called absent set ex-parte and the suit was dismissed for default and the court should not have dismissed the case for default for nonpayment of court fee and there is no time limit for submitting the non-judicial papers and hence, the order of the lower court has been rightly set aside by the lower appellate court.

10. The learned Counsel appearing for the Respondents further relied the judgment of the Honourable Supreme Court in 2009 (8) MLJ 921 : 2010 (3) L.W. 107, in the case of Shub Karon Bubna @ Shub Koran Prasad Bubna v. Sita Saran Bubna and Ors., wherein the Honourable Supreme Court has held that after passing of the

preliminary decree in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed and therefore, the learned Counsel contended that dismissal of the suit for not furnishing of non judicial papers is not proper. The learned Counsel further relied upon the judgment reported in [Renu Devi Vs. Mahendra Singh and Others](#), and contended that it is not necessary to pass a preliminary decree when the rights of the parties are finally determined and no further inquiry re-mains to be held for the purpose of completing the proceedings in partition and there is nothing in law which prevents the court from passing a final decree in the very first instance.

11. He further relied upon the judgment reported in [Jayalakshmi Coelho Vs. Oswald Joseph Coelho](#), and contended that u/s 152 Code of Civil Procedure, it is made clear that something which the court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the court to rectify such mistake and therefore, contended that the petition u/s 152 is maintainable in law.

12. The learned Counsel further relied upon the judgment of the Honourable Supreme Court 2004(1) MLJ 61(S.C) : 2004 (1) L.W. 618 [State of Punjab v. Darshan Singh [Renu Devi Vs. Mahendra Singh and Others](#), and 2009 (8) MLJ 921 (SC) Shub Karon Bubna @ Shub Karon Prasad Bubana v. Sita Saran Bubna and Ors. in support of his contention. The learned Counsel appearing for the Petitioner relied upon the judgment reported in [Sneh Gupta Vs. Devi Sarup and Others](#), . to hold that even assuming that compromise was recorded when the suit was dismissed for default, it has to be restored by filing necessary application within the period of limitation and hence, the application filed by the Respondents for payment of stamp duty should not have been entertained by the lower Court.

13. I have given my anxious consideration to the submissions made by both the counsels.

14. In this case, it is admitted that the parties arrived at a compromise and a memo of compromise was also drawn up and that was filed before the lower Court and in that memo of compromise, the parties have been allotted specific properties. The lower Court has also received the memo of compromise on 08.03.1991 and passed an order recording the same. As per Order 23 Rule 3, 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, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith. Therefore, once a compromise memo has been filed and accepted by the parties, the duty of the court is to record the compromise and pass a decree in accordance therewith. In this case, as stated supra, the lower Court, by order, dated 08.03.1991 recorded the compromise.

15. Further, it is seen from the "B" Diary endorsement, dated 08.03.1991 the Court has passed an order, which is as follows: "Compromise petition filed by the Plaintiff and D1 and D2 in the open court in the presence of their counsel. Other Defendants are exonerated by the Plaintiff side endorsement made on the plaint by the counsel for Plaintiff. The compromise petition was read over and explain to the parties they admit the correctness of the same. Hence, the compromise petition has been recorded, for payment of court fees for passing the final decree 14.03.1991.

16. The Court has also stated that compromise petition has been recorded and for payment of court fee and for passing the final decree adjourned to 14.03.1991. Thereafter, the case was adjourned to various dates and on 21.08.1991, the suit was dismissed for default for non-payment of court fees. Therefore, we will have to see whether the act of the lower Court in dismissing the suit for default on 21.0.1991 for non-payment of court fee is in order.

17. As stated supra, under Order 23 Rule 3, when any comprise memo is recorded, the duty is cast upon the court to pass the decree. In this case, it is seen from the order passed on 08.03.1991 that after recording the compromise, the lower court adjourned the case for payment of court fee for passing the final decree. It is seen from the memo of compromise, properties were allotted to the Petitioner and the Respondent. Therefore, there is no need to pass a preliminary decree in such situation and the court ought to have passed the final decree on the basis of the compromise memo.

18. It is seen from the Order 20 Rule 18(2) where the court passes a decree for the partition of property or for the separate possession of a share therein, then 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. Therefore, under this provision, if the partition or separation can be conveniently made without further inquiry, the Court can pass a decree for partition, which is final decree and only in cases where the partition or separation cannot be conveniently made without further inquiry, the Court has to pass a preliminary decree declaring the rights of the parties.

19. In this case, admittedly there is no need for partitioning the property as the properties have already partitioned by the parties and a memo compromise was filed to that effect. Therefore, there is no necessity for the Court to conduct further inquiry and for that purpose, passing the preliminary decree declaring their rights. In other words, only in cases, where properties are to be divided by conducting further inquiry and rights of the parties alone can be determined in the first instance, the Court has to pass a preliminary decree determining the rights of the parties leaving the parties to apply for final decree for dividing the property according to their share. Therefore, it is not in all cases of partition suit, the Court

should pass a preliminary decree and thereafter, final decree and when the allotment of properties were already agreed upon by the parties, there is no need to pass a preliminary decree and the Court can straightaway pass the final decree. This position has been stated in the judgment of the Honourable Supreme court held in the judgment reported in [Renu Devi Vs. Mahendra Singh and Others](#), that under Order 20 Rule 18, it is not necessary to pass a preliminary decree, the court may pass preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purpose of completing the proceedings in partition then there is nothing in law which prevents the court from passing a final decree in the very first instance.

Therefore, in the present case, though the Court has adjourned the case to 14.03.1991 for passing of final decree, the case was adjourned only for the purpose of furnishing stamp paper for effecting final decree and the court having recorded the memo of compromise, has passed the final decree. In the above reported case, a preliminary decree was passed on 13.02.1978 and final decree was passed on 24.05.1979 and in that context, the court held that the court and parties acted under the misapprehension that the decree, dated 13.02.1978 was a preliminary decree and therefore, a final decree was needed to be drawn up. The final decree, dated 24.05.1979 is nothing, but a reproduction of the schedules contained in the preliminary decree, dated 13.02.1978. The only difference is that the decree, dated 24.05.1979 is engrossed on the stamp papers, but not the decree, dated 13.02.1978. The decree, dated 13.02.1978 being a decree for effecting partition by metes and bounds ought to have been engrossed on requisite stamp papers. Therefore, applying the same analogy, the order passed on 08.03.1991 amounts to final decree, but the Court under the mistake impression, after recording the compromise, though that the court has to pass the final decree and adjourned the case adjourned and under that misapprehension of law, the Court has adjourned the case to various dates and finally, dismissed the suit for non-payment of stamp papers and default of the Plaintiff.

20. In this connection, the judgment of the Honourable Supreme Court reported in 2009 (8) MLJ 921(SC) in the case of Shub Karon Bubna @ Shub Koran Prasa Bubna v. Sita Saran Bubna and Ors., will clear the issue involved in this case. The Honourable Supreme Court has held that Code of CPC does not contemplate filing an application for final decree and 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. The mindest should be to expedite the process of dispute resolution."

Therefore, once a preliminary decree is passed, the proceedings should be continued and there is no question of limitation for filing the final decree application.

21. Further, our Honourable High Court in the judgment reported in [Murugan Vs. Chidambaram Pillai and others](#), held that in a suit for partition, there is no limitation for filing a final decree application and any number of final decree applications could be filed until the suit is finally disposed of.

22. The Honourable Supreme in the judgment reported in [Shankar Balwant Lokhande \(dead\) by L.Rs. Vs. Chandrakant Shankar Lokhande and Another](#), held that condition precedent is to draw up a final decree and then to engross it on stamped paper(s) of required value. These two acts together constitute final decree, crystallizing the rights of the parties in terms of the preliminary decree.

23. Further, in AIR 2002 Karn 439 in the case of A.P. Madonna (deceased) by L.Rs. v. A.P. Kushalappa and Ors., it has been held that the final decree in a partition suit comes into existence for the purpose of O.20 R. 18(2) only when it is engrossed on stamp papers of sufficient value and the period of limitation prescribed within which it could be executed begins to run only from that point time.

24. Further [Raghubir Sahu Vs. Ajodhya Sahu and Others](#), , it has been held that when in a partition, suit the properties allotted to the share of each party are clearly specified and schedules of properties allotted to each are appended to the compromise petition, no further enquiry is at all necessary. In such circumstances, the compromise decree does not merely declare the rights of the several parties interested in the properties but also allots the properties according to the respective shares of each party. Therefore, it is not a preliminary decree but it is the final decree in the suit. The only thing that remains to be done is to engross it on a stamped paper under Article 45 Stamp Act the engrossment of a partition decree on stamp of requisite value. Therefore, mere delay in engrossment of the decree on stamped paper of the requisite value will not in any way affect the interests of the parties in respect of the properties though changes may have taken place in regard to the properties since the decree has been made.

25. This has been reiterated in [Swaminathan Vs. Anantharama Subramanian](#), .

26. Therefore, it is seen from the above judgments that once the parties have partitioned the properties among themselves and when the compromise is recorded only remaining things to be done by the court is to pass a final decree and only act to be done is to engross the decree on the requisite stamp paper and for that, no limitation is prescribed under the Act.

27. Further, the Court should not have dismissed the suit for default on 21.08.1991 on the ground that no stamp papers were furnished by the Plaintiff and the court should have adjourned the case for furnishing the stamp papers. As a matter of fact, it is seen from the typed set filed by the Respondent that on 04.10.1991, a memo was filed on behalf of the first Respondent, the Petitioner herein offering to pay the court fee on their part for passing a final decree, so far as the Petitioner share is concerned. Therefore, in this case, the court has to do the ministerial job of

receiving stamp paper and engrossed the decree on the stamp paper and when the Plaintiff did not furnish the stamp papers for en-grossing the final decree on it, the court ought not to have dismissed the suit for default. Further, as held by the Honourable Supreme Court in various cases, there is no limitation for furnishing stamp papers and in this case, the Plaintiff has given explanation for not filing the stamp papers immediately and that has been accepted by the court and final decree was passed on the receipt of stamp papers. As a matter of fact, the court has committed a mistake in dismissing the suit for default after recording the compromise, which amounts to passing the final decree and as held by the Honourable Supreme Court in the judgment reported in [Jayalakshmi Coelho Vs. Oswald Joseph Coelho](#), that the act of court prejudice no man and no parties should suffer due to mistake of the court and whatever is intended by the court while passing the order or decree must be properly reflected therein, otherwise it would only be destructive to the principle of advancing the cause of justice.

28. Therefore, the lower court has corrected allowed the Respondent to pay the necessary stamp paper for drawing of the final decree and hence, I do not find any infirmity to interfere with the order of the lower court.

29. In the result, the order of the lower court is confirmed and accordingly, this civil revision petition is dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.