

CASE NO.:
Appeal (civil) 4174 of 2008

PETITIONER:
BIKOBA DEORA GAIKWAD & ORS

RESPONDENT:
HIRABAI MARUTIRAO GHORGARE & ORS.

DATE OF JUDGMENT: 27/05/2008

BENCH:
S.B. Sinha & Lokeshwar Singh Panta

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No. 6692 of 2007)
REPORTABLE

S.B. Sinha, J.

1. Leave granted.
2. Whether an application for initiating a final decree proceedings in terms of Section 54 of the Code of Civil Procedure, 1908 (for short, \023the Code\024) would be governed by any provision contained in the Schedule appended to the Limitation Act, 1963 is the question involved in this appeal which arises out of a judgment and order dated 12.2.2007 passed by the High Court of Judicature at Bombay in Writ Petition No. 7382 of 2005.
3. A suit for partition was filed by the respondents herein claiming 1/3rd share in the joint family property. The said suit was registered as Regular Civil Suit No. 145 of 1969. A decree was passed therein on or about 27.6.1975, the relevant portion whereof reads as under:
\023It is hereby declared that Plaintiff, Defendant No. 1 and 2 each have 1/3 share in the suit property described in the schedule 7 to the plaint. Plaintiff do recover separate possession of the land excluding the lands which are in the possession of Defendant No. 7 and of the house property. The partition of the land shall be effected by the Collector in the execution proceedings, under Section 54 C.P.C. Partition of the house property shall effect by the Commissioner to be appointed in the execution proceedings. The suit against Defendant No. 7 is dismissed with costs. Other parties should bear their own costs.\024

Indisputably, the learned trial judge did not send the decree to the District Collector for partition in terms of Section 54 of the Code of Civil Procedure. An appeal preferred thereagainst by the appellants was dismissed for default on or about 7.9.1978.

4. An application for sending the said decree to the Collector was filed before the Civil Judge Junior Division, Indapur on or about 19.12.2002, which was marked as Regular Darkhast No. 34 of 2002. Appellants 2 and 3 filed applications for dismissal thereof, inter alia, on the premise that the same was barred by limitation.

The said objections filed by the appellants were rejected. A writ petition preferred thereagainst was also rejected by the Bombay High Court. Another application was filed in March 2005 by the appellants herein in terms of Section 54 of the Code whereto also an objection was filed. The said objection has also been dismissed. A writ petition filed thereagainst has been dismissed by the High Court by reason of the impugned judgment.

5. Mr. R. Sundaravardan, learned Senior Counsel appearing on behalf of the appellants submits:

(i) The decree dated 27.6.1975 is not a preliminary decree but in effect and substance is really a final decree and/or both and in that view of the matter the application for partition must be held to be in the nature of an execution petition.

(ii) In any event, the said petition having been filed after a period of 17 years was barred under Articles 136 and 137 of the Limitation Act, 1963

6. Mr. Vinay Navare, learned counsel appearing on behalf of the respondents, on the other hand, would support the impugned judgment.

7. By the judgment and order dated 27.6.1975 passed by the Civil Judge, Junior Division, Indapur on the basis whereof the decree was prepared, 1/3rd share of the plaintiff as well as Defendant Nos. 1 and 2 were declared. In terms of the said decree, the plaintiff was granted liberty to recover separate possession of the land excluding the lands which were in the possession of Defendant No. 7 and of the suit property. It was directed that the partition of the land shall be effected by the Collector in the execution proceedings in terms of Section 54 of the Code. However, as regards partition of the house property, the same was to be effected by a Commissioner to be appointed in the execution proceedings. A bare perusal of the said judgment clearly shows that the decree passed therein was a preliminary decree and not a final decree.

8. In terms of that said decree, thus, in respect of agricultural land and as also the house property, the plaintiff respondent was entitled to file applications in terms of under Section 54 of the Code as also Order XXI thereof, respectively.

The terms "execution proceedings" appear to have been inadvertently used in the operative portion of the judgment. The same, in our opinion, must be ignored. The decree dated 27.6.1975 does not show that a final decree has been passed.

9. "Decree" as defined in Section 2(2) of the Code reads as under: "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

A decree therefore may denote final adjudication between the parties and against which an appeal lies, but only when a suit is completely disposed of, thereby a final decree would come into being.

There cannot be any doubt whatsoever that a decree may be partly preliminary and partly final. It has not been contended that the parties have partitioned the joint properties by metes and bounds and they are in separate possession of the lands allotted to them.

Section 54 of the Code in effect and substance confers a duty upon the Court. The said provision must be read in the context of the Order XXVI Rule 13 of the Code and/or Section 51, Order XXI Rule 11 thereof. It is not in dispute that in the State of Maharashtra the practice to get the properties partitioned by a District Collector still continues.

10. Section 54 only provides for a ministerial functions of a court. It cannot be termed to be an execution proceeding.

11. It is now well settled that for the purposes of construing the nature of the decree one has to look to the terms thereof rather than speculate upon the Court's intentions. {See Ramanathan Chetty v. Alagappa Chetty & ors. [I.L.R 53 Madras 378]}

12. A bare perusal of Section 54 read with Order XX Rule 18 of the Code leaves no manner of doubt that the application filed before the Court to send decree and papers to Collector to carry out partition was not and could not have been an application in execution.

If it was not an application for execution, the question of the application of the provisions of the Limitation Act would not apply.

Reliance has been placed by Mr. Sundaravardan on Venkata Reddy & ors. v. Pethi Reddy [AIR 1963 SC 992]. Therein this Court was concerned with the meaning of the words 'final decision' vis-à-vis 'preliminary decree for partition' and in that factual backdrop, it was opined:

It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended unless what the learned judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Ss. 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a Court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be modified and amended. Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.

13. The distinction between 'a final decree' and 'finality of a decree' is obvious enough to merit a detailed discussion. A decree whether preliminary or final is binding on the parties but the same does not mean that all decrees would be final decrees.

Section 2(2) of the Code clearly shows as to the nature of the decrees that the court may pass.

14. It is in the aforementioned context, the applicability of the provisions of Articles 136 and 137 of the Limitation Act may be noticed, which read as under:

Description of application	Period of Limitation	Time from which period begins to run
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136.

For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.

Twelve
years

[When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place:

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

PART II--OTHER APPLICATIONS

137.

Any other application for which no period of limitation is provided elsewhere in this division.

Three years

When the right to apply accrues.

Article 136 would apply when an application for execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court is to be filed. An application for taking steps towards passing a final decree is not an execution application. The said provision, therefore, cannot have any application in respect thereof.

Article 137 is a residuary provision which applies when no period of limitation is provided elsewhere in the Division. An application asking the court to perform its duty in terms of Section 54 of the Code can be filed at any point of time in a case where a right to apply accrues in a decree holder. Therefore, no period of limitation is to be prescribed as there is none.

This aspect of the matter has been considered in *Shankar Balwant Lokhande (Dead) by LRs. v. Chandrakant Shankar Lokhande & Anr.* (1995) 3 SCC 413 wherein it has been held:

\0238. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. The final decree made in favour of the first respondent is only partial to the extent of his 1/6th right without any demarcation or division of the properties. Until the rights in the final decree proceedings are worked out qua all and till a final decree in that behalf is made, there is no formal expression of the adjudication conclusively

determining the rights of the parties with regard to the properties for partition in terms of the declaration of 1/6th and 5/6th shares of the first respondent and the appellants so as to entitle the party to make an application for execution of the final decree.

10. As found earlier, no executable final decree has been drawn working out the rights of the parties dividing the properties in terms of the shares declared in the preliminary decree. The preliminary decree had only declared the shares of the parties and properties were liable to be partitioned in accordance with those shares by a Commissioner to be appointed in this behalf. Admittedly, no Commissioner was appointed and no final decree had been passed relating to all.\024

Recently, albeit on a different factual backdrop, this Court in Hasham Abbas Sayyad v. Usman Abbas Sayyad and ors. (2007) 2 SCC 355 opined:

\0239. A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, 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.\024

For the reasons aforementioned, Articles 136 and 137 of the Limitation Act, 1963 will have no application. Even otherwise, the contention of the appellants is wholly unsustainable. Such a contention had been raised even in the earlier objections. They were rejected. The appeals preferred thereagainst have also been dismissed. In that view of the matter, the appellants could not have agitated the same issue by filing another objection.

15. For the reasons aforementioned, there is no merit in this appeal, which is dismissed accordingly with costs. Counsel\022s fee assessed at Rs.25,000/-.