

Ramchandra Jeetmal and ors. Vs. Jeetmal Ganpat Porwal and anr.

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Court : Madhya Pradesh

Decided On : Oct-13-1961

Reported in : AIR1962MP380; 1962MPLJ323

Judge : V.R. Newaskar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 40, Rule 1

Appeal No. : Misc. Civil Appeal No. 194 of 1960

Appellant : Ramchandra Jeetmal and ors.

Respondent : Jeetmal Ganpat Porwal and anr.

Advocate for Def. : Chitale, Adv.

Advocate for Pet/Ap. : J.D. Patel, Adv.

Disposition : Appeal allowed

Judgement :

V.R. Newaskar, J.

1. This appeal is directed against an order refusing to appoint a receiver.
2. The facts necessary for the consideration of the question raised in this appeal are as follows:
 3. Petitioner Ramchandra along with his two minor sons Daulal and Kailash filed the present suit against Jeetmal and Ramniwas the father and the third son of Ramchandra for partition of joint family property. A preliminary decree for partition of certain items of property was passed by the trial Court on 24-1-1959 and a Commissioner was appointed to take accounts and the property in possession of the defendants. Against the preliminary decree thus passed the defendants went up in appeal and the plaintiffs filed cross-objections. The appeal as well as the cross-objections are still pending. On being moved by the defendants for a stay of further proceeding in the suit subsequent to the preliminary decree the High Court directed withholding of the passing of the final decree in the case until the disposal of the appeal. It was further specifically mentioned in the order of the High Court that the proceedings before the Commissioner shall continue. This order was passed on 8-7-1960 and was communicated to the Court below on the 9th.
4. An application was made for appointment of a receiver. This was resisted by the

defendants on two grounds. Firstly, it was contended that it was not just and convenient to appoint a receiver in the present case and secondly that at any rate the power to appoint a receiver is no longer in the trial Court inasmuch as an appeal has been preferred against the preliminary decree passed in the case.

5. On the first ground of contention the trial Court held that there were sufficient grounds shown on behalf of the plaintiffs for the appointment of a receiver. It was held that the plaintiffs had been kept out of enjoyment of the joint family property and the profits thereof during the pendency of the suit and even after the passing of the preliminary decree. The decision of the appeal, it was further held, will take a long time and till then the plaintiff will not be able to get their due share in the joint family property in view of the order, for stay of the passing of the final decree, passed by the High Court. It was therefore thought by the trial Court just and convenient to appoint a receiver. Reliance was placed by the trial Court for this view of the matter upon the decision reported in AIR 1929 Lah 497, *Basant Ram v. Dasondhi Mal*, AIR 1947 Nag 26, *Dadoo Balaji v. Kanhaiyalal Dhanaram* and AIR 1942 Sind 60, *Sahijram Rupchand v. Alu Tundu*. Thus on this part of the case the trial Court was with the plaintiffs.

6. But on the second ground of contention it found against them. It held that in view of the fact that the preliminary decree had been appealed against the order for appointment of the receiver can be made only by the appellate court. For this view the trial court relied upon the commentary by Chitale under Order 40, Rule 1, C. P. C. Note No. 12. In this view of the matter the trial Court rejected the application for appointment of the receiver.

7. In his appeal it is contended by Mr. Patel for the appellant that the trial Court failed to exercise jurisdiction vested in it by law. The suit or at any rate the proceedings subsequent to the passing of the preliminary decree were pending in the trial Court although an appeal had been preferred against the preliminary decree and it had therefore sufficient jurisdiction to act in exercise of its powers under Order 40, Rule 1, C. P. C. to appoint a receiver. Reliance in this connection was placed by the learned counsel upon the decision reported in AIR 1937 Mad 163, *Chidambaram v. Pethaperumal* and AIR 1940 PC 11, *Jadhunath v. Parameswar*.

8. In my opinion the contention put forward by Mr. Patel in the present case ought to be accepted. It is no doubt implicit in the provision of Order 40, Rule 1, C. P. C. that in order to enable the Court to appoint a receiver with reference to a property either before or after the decree the Court must before the passing of the decree be seized of the suit itself and after the passing of the decree it must be seized of the execution proceeding. Where therefore the Court becomes functus officio after the passing of the decree and there is an appeal preferred against that decree it is the appellate Court which ought to be moved for the purpose. But there may be cases such as the present one where in spite of the fact that there is a preliminary decree against which an appeal has been taken to the higher Court the Court is actually seized of the further part of the trial subsequent to the preliminary decree. In such a case the trial Court, in my opinion, cannot be said to have lost its power for appointing a receiver. It is no doubt true that where there are more Courts than one which can be moved for taking action under Order 40, Rule 1, C. P. C. and both the Courts are moved then in order to avoid conflict of jurisdiction the lower court should stay its hands, but where the only court moved is the trial Court then in that case it cannot be said that any question regarding conflict of jurisdiction will arise.

9. The question with which we are here concerned appears to have been considered by Cornish, J., of the Madras High Court in AIR 1937 Mad 163. It was observed by the learned Judge :

'I think that a Court's power to appoint a receiver is limited to the case where the proceedings are still pending before it. Either the suit must be pending and it will be pending after a preliminary decree, but before final decree, or the proceedings in execution of a final decree must be pending. In either event the Court in which the suit or proceedings are pending will have seisin of the suit or of the property subject to execution; and this will be the basis of the Court's power to appoint a receiver of it. A decree may be partly preliminary and partly final. It was so in the present suit. But this is no reason why the principle which I have just stated should not apply.'

Reference in this decision was made by the learned Judge to the observations of the Full Bench of the Madras High Court in ILR 32 Mad 416, Chenna Reddi v. Pedda Obi Reddi, which are as under:

'Now after an appeal has been filed, the appellate Court is seized of the case and should no doubt be applied to rather than the Court of first instance unless the law expressly enjoins the contrary, as was held in ILR 18 Mad 214, Pichuvayyanganar v. Seshayyanganar; but it is a very different thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of first instance of power to dispose of an application which has been properly made to it in the exercise of its Jurisdiction.'

10. It is clear from the decision of the Privy Council in AIR 1940 PC 11, that a partition suit in which a preliminary decree has been passed is still a pending suit, and the pendency referred to is in the Court which initially tried the suit.

11. In view of these decisions, with which I respectfully agree, it is clear that the trial Court had sufficient jurisdiction to deal with the application for appointment of a receiver. Since it has already come to a finding that this is a fit case in which a receiver should have been appointed I would hold that the appointment of a receiver in the present case ought to have been made. There was, under the circumstances, erroneous refusal on the part of the lower court to exercise jurisdiction vested in it by law.

12. The appeal is, therefore, allowed. The trial Court shall proceed to appoint a receiver as early as possible.

13. The appellants are entitled to their costs of this appeal from the opposite party. Counsel's fee shall be taxed at Rs. 50/-.