

## **Shankar Balwant Lokhande (Dead) By L.Rs vs Chandrakant Shankar Lokhande & Anr on 20 March, 1995**

**Equivalent citations: 1995 AIR 1211, 1995 SCC (3) 413, AIR 1995 SUPREME COURT 1211, 1995 (3) SCC 412, 1995 AIR SCW 1971, 2006 CRI LJ 425, 2006 (5) AIR BOM R 925, (1995) 2 LANDLR 472, 1995 ALL CJ 1 414, (1995) 1 APLJ 77(1), (1995) 1 MAD LW 568, 1995 (3) SCC 413, 1995 SCFBRC 233, (1995) 2 SCR 776 (SC), 1996 BOMCJ 1 146, (1995) 3 CIVLJ 698, (1995) 2 CURCC 41, 1995 HRR 540, (1995) 3 JT 186 (SC), (1995) 4 BOM CR 16, (1995) 3 SCR 109 (SC), (2006) 2 ALLCRIR 1875, (2006) 55 ALLCRIC 337**

**Author: K. Ramaswamy**

**Bench: K. Ramaswamy, B.L Hansaria**

PETITIONER:

SHANKAR BALWANT LOKHANDE (DEAD) BY L.RS.

Vs.

RESPONDENT:

CHANDRAKANT SHANKAR LOKHANDE & ANR.

DATE OF JUDGMENT 20/03/1995

BENCH:

RAMASWAMY, K.

BENCH:

RAMASWAMY, K.

HANSARIA B.L. (J)

CITATION:

1995 AIR 1211

1995 SCC (3) 413

JT 1995 (3) 186

1995 SCALE (2) 318

ACT:

HEADNOTE:

JUDGMENT:

K. RAMASWAMY, J.:

1. These appeals by special leave arise from the judgment of the High Court of Bombay dated April 7, 1977 by which LPA 15/77 was dismissed in limine. The facts lie in a short compass for deciding the question of law arising in these appeals. On August 2, 1955, a preliminary decree in Spl.Civil Suit No.296/49 was passed declaring that Chandrakant-first respondent was entitled to 1/6th share and the appellants were entitled to 5/6th share in the suit properties. An order was made on April 19, 1958 directing preparation of a final decree. On December 19, 1960, first respondent supplied non-judicial stamps to engross and sign the final decree to the extent of his 1/6th share. On January 11, 1961, a final decree, in that behalf, was engrossed on the stamped paper and signed by the trial court. Since the appellants had not supplied the non-

judicial stamps, no final decree was made qua them. On the other hand, Darkhast No.41/63 was filed by them for execution of the preliminary decree which was subsequently dismissed as withdrawn. Darkhast No. 70 was filed in 1965 which was dismissed on March 13, 1968 as the application was barred by limitation. In First Appeal No.605/68, the High Court held that "in view of the fact that no final decree was passed on non-judicial stamps, there was no decree in existence for its execution". Therefore, on August 12, 1975, the appeal was dismissed. On August 14, 1975, the appellants filed Misc.Application No.538/ 75 before the trial court to accept the nonjudicial stamps and to pass a final decree. The said application was contested by the respondent pleading bar of limitation. The trial court overruled the objection and allowed the application on 3.2.76 holding that the application was not barred by limitation. In First Appeal No.229/76, Learned Single Judge of the High Court held that the limitation began to run from the date when the direction was given to pass final decree. Since the application was filed after the expiry of period of limitation counted from that date, the Court held on March 7, 1977 that it was barred by limitation. As stated earlier, on further appeal, the division bench dismissed the appeal in limine.

2. The crucial question for consideration is as to when the limitation begins to run for filing an application to pass final decree on stamped papers. There is no direct decision of this court on this point. Therefore, after hearing counsel at length, we reserved the judgment in the appeal and independently made detailed examination. There is divergence of opinion in the High Courts on this question.

3. Order 20 Rule 7 of CPC envisages that the decree "shall bear the day on which the judgment was pronounced, and, when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree". Section 2(2) of CPC defines "decree" to mean "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". A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such

determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word "decree" is used in, s.2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfillment the pre-liminary decree.

4. Order 20 Rule 18 envisages passing of a decree for partition of property or for separate possession of a share therein. Sub-r. (2) is material which provides that "if and in so far as such decree relates to any other immovable property or to movable 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 ours) Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by a coparcenar or cosharer, the court should not give a decree only for the plaintiffs share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. The words "declaring the rights of the several parties interested in the property" in sub-rule(2) would indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject-matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper.

5. The preliminary decree, in these appeals declared that the properties belong to the joint family of the plaintiffs and defendant No. 1 set out in Schedules 'A' and 'B'. The details of the properties have been enumerated and they are liable to partition as per the right of the parties mentioned in the preliminary decree. In other words, Chandrakant has 1/6th share and the appellants have 5/6th share. The former is directed to pay certain sum towards marriage expenses of his sisters with a charge on the property allotted to his share. He is also entitled to mesne profits from the date of the institution of the suit in respect of certain properties specified in para 7 of the preliminary decree. A Commissioner was directed to be appointed to partition the properties mentioned in paragraph 8 of the decree. Para 9 declares certain charges in respect of specified properties. It would, thus, be seen that except declaration of the rights of the parties and the charge on the shares, there is no final decree. The partition is to be effected by the Commissioner to be appointed and as per directions from the court in that behalf. A preliminary decree in respect of 1/6th share of the first respondent was engrossed on the stamped papers submitted by him. The question is whether the decree then became final and the rights of the parties stood crystallised, as envisaged under s.2(2) of CPC and, if so, when the limitation would begin to run for execution thereof?

6. It is seen that the single Judge of the High Court held that the limitation began to run from the date when the direction was given by the civil court to pass the final decree and since the application was not made by the appellants within three years from that date, the application for execution stood barred. The single Judge concluded thus "I, therefore, hold that limitation for executing a final decree in a suit for partition starts on the date on which the final decree is passed, that is, on the date on which the judgment directing the final decree to be drawn is given and not from any subsequent date on which the party supplies the non-

judicial stamp for engrossing the final decree and when the Court engrosses the final decree on the stamp and signs it. "

7. Question is whether the aforesaid view is correct? Since the decree is one which is prior to the Limitation Act, 1963, we are to look to the provisions contained in the Limitation Act, 1908, (for short, 'the old Act'), for deciding the controversy. Article 182 of the First Schedule to the old Act envisages that "for the execution of a decree or order of any civil court not provided for by Article 183 or by Section 48 of CPC, the period of limitation of three years begins to run from the date the final order was passed on an application made in accordance with law to the proper court for execution, or to take some step in aid of execution of the decree or order. Explanation 1 provides that "where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in note 5 of the article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all." Therefore, it would be clear that where decree or order has been passed jointly against more persons than one, the application shall take effect against them all, even if it is made by one or more. It is seen that the preliminary decree is a declaration of the rights of the parties with a charge on the properties to be allotted and a Commissioner is required to be appointed for partition of certain specified properties. Therefore, as envisaged in sub-r. (2) of Rule 18 of Order 20, it was only a preliminary decree declaring the rights of the parties with power to the court to give further directions in that behalf. It is settled law that more than one final decree can be passed. With the passing of the final decree in respect of the share of the first respondent, the rights of the parties in respect of other properties have not been crystallised and no final decree dividing the properties by metes and bounds was passed nor any application was made to divide the properties in terms of the shares of the parties declared in the preliminary decree.

8. 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.

9. In *Rameshwar Singh-Decree holder v. Homeswar Singh- Judgment-debtor*, AIR 1921 Privy Council 31, the facts, in nutshell, were: There was a joint liability for the payment of some amount under a grant. A decree in that behalf was passed and the property was sought to be proceeded against the estate for execution. The contention was that since a decree was made earlier which was executable but no application was made within limitation, the decree became unexecutable, being barred by limitation. That was accepted by the High Court. On appeal, the Judicial Committee held that "in order to make the provisions of the Limitation Act apply, the decree sought to be enforced must have been in such a form as to render it capable in the circumstances of being enforced". The decree being limited in its scope, it was held that limitation did not begin to run from the date of decree as drawn. The contention of Smt. Jaishree Wad, learned counsel for the respondent, is that the Privy Council upheld the principle of making an application within three years from the date when the right to apply accrues, as provided in Article 181 of the old Limitation Act, the ratio of the aforesaid case applies to the facts in this case since the application had not been made within three years or within 12 years and so, it was hopelessly barred by limitation. She placed reliance on the judgment of this Court in *Yeshwant v. Walchand*, AIR 1951 SC 17 also, and on judgments in *Maksudan Prasad v. Smt. Lakshmi Devi*, AIR 1983 Patna 105, *Pandivi Satyanandam v P. Nammayya* AIR 1938 Madras 307, and *Basamma v. Shivamma*, AIR 1963 Mysore 323.

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.

11. In *Yashwant's case* (supra), the facts were that preliminary decree for accounting was passed in a suit for rendition of account of partnership. There was deficit court fee payable. It was contended that until the payment of deficit court fee was made, right had not been accrued to draw the final decree and that therefore, limitation begins to run only from the date of paying the deficit court fee. This court negated the contention and held that the preliminary decree was not a conditional decree and its enforceability was not dependent upon the future act namely pay-

ment of the deficit court fee; and payment thereof at a later date would not provide fresh limitation to run from that date.

12. As to *Maksudan's case* (supra), we state that it had not been correctly decided. Limitation does not begin to run from the date when direction is given to pass final decree. Mere giving of direction to supply stamped paper for passing final decree does not amount to passing a final decree. Until the final decree determining the rights of the parties by metes and bound is drawn up and engrossed on stamped paper(s) supplied by the parties, there is no executable decree. In this behalf, it is necessary to note that s.2(a) of the Bombay Stamp Act, 1958, as amended by the local Act, provides that a decree of civil court is required to be stamped as per Article 46 in Schedule-1. Section 34 thereof lays down that "no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument

is duly stamped". Therefore, executing court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20 Rule 18(2). After final decree is passed and a direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper(s), it becomes executable or becomes an instrument duly stamped. Thus, 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. Till then, there is no executable decree as envisaged in Order 20 Rule 18(2), attracting residuary Article 182 of the old Limitation Act. Contrary views of the High Courts, are not good law. A Division Bench of the Andhra Pradesh High Court in Smt. Kotipalli Mahalakshamma v. K. Ganeswara Rao, AIR 1960 AP 54, correctly decided the question of law which held that the limitation begins to run only after a final decree is engrossed on stamped papers.

13. Accordingly, the appeals are allowed. The judgments and orders of the High Court are set aside and that of the trial court stands confirmed. The trial court is directed first to pass the final decree and then to engross the same on the stamped papers already supplied by the appellants; if further stamped papers be needed, reasonable time would be given to supply the same. The final decree would then be drawn thereon. The court would, thereafter, proceed with the execution of the final decree in accordance with law.

14. In the circumstances, the parties are directed to bear their own costs throughout.