

Karnataka High Court

Smt. Rukmani W/O Late Ethiraj, Sri ... vs V. Uday Kumar S/O Late B. ...on 31 August, 2007

Equivalent citations: ILR 2008 KAR 13, 2008 (3) KarLJ 129

Author: H N Das

Bench: C Ullal, H N Das

JUDGMENT H.N. Naghmohan Das, J.

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1. In this appeal the appellants have called in question the order dated 1.4.2006 in FDP No. 10007/1994 passed by the Addl. City Civil Judge, Mayohall, Bangalore City.

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2. The subject matter of the litigation is property bearing No. 155/B situated in the compound of premises No. 1 Wheeler Road, Civil Station, Bangalore measuring in all 5600 Sq.ft. (for short 'the schedule property'). The appellants and respondents are relatives except respondent No. 23. The family tree is as under:

G . V . B a l a k r i s h n a (d e c e a s e d) |
_____| | Pillama
@ Jayamma (deceased) Nagamma (deceased) | Second wife (Deft. NO. 1) | |
_____|
| | | | Venkateshalu Pillamma Muniratnam Naidu Devaraj Yatiraj Jayaram
Narayan Murthy (Deceased (Deceased (Deceased DEFT.2 Deft.5 Deft.4 Deft.3 by LRs)
by LRs) by LRs) (Deceased (Deceased by LRs) by LRs) (-----Plaintiffs -----)

3. The appellants in this appeal are the children of defendant No. 5 and respondents are the plaintiffs and other defendants before the Trial Court and respondent No. 23 is the auction purchaser. In this judgment the parties are referred to their status before the Trial Court.

4. Plaintiffs filed O.S.No. 245/1980 later numbered as O.S. No. 8471/1980 against the defendants for partition and separate possession of their 3/8th share in the schedule property. The Trial Court decreed O.S.No. 8471/80 vide judgment dated 31.7.1993 declaring that the plaintiffs together are entitled for 3/7th share in the entire schedule property. The defendants being aggrieved by the Judgment and Decree of the Trial Court filed RFA No. 381/1993 on the file of this Court. This Court vide Judgment dated 4.7.1995 partly allowed the appeal holding that G.V. Balakrishna and his second wife Nagamma are the co-owners having one half share in the schedule property. It is further held that the plaintiffs are entitled for 3/7th share in one half of the property of G.V. Balakrishna and not the entire property. The operative portion reads as under:

Having regard to the aforesaid position the appeal partially succeeds. The decree passed by the learned trial Judge is modified to the extent that while the apportionment of 3/7 share to the plaintiffs is upheld, it is in respect of one-half of the property of deceased Balakrishna and not the

entire property. Subject to this modification, the rest of the decree stands confirmed. The appeal accordingly stands disposed of. In the circumstances of the case, there shall be no order as to cost.

5. Subsequent to the preliminary decree in O.S.No. 8471/80, the plaintiffs filed FDP No. 10007/94 to draw the final decree proceedings and the same was pending on the file of City Civil Court (CH 20). The further proceedings in this FDP No. 10007/94 were stayed during the pendency of RFA No. 381/93. Subsequent to disposal of RFA 381/93, defendant No. 2 filed FDP No. 60/97 Page 2119 to draw the final decree proceedings and to put him in separate possession of his share in the schedule property. As per notification bearing No. 41/2005 dated 14.6.2005 FDP No. 10007/94 and FDP No. 60/1997 were transferred to City Civil Court, Court Hall No. 20.

6. In FDP No. 60/97 a Court Commissioner was appointed on 30.11.2000. The Court Commissioner submitted a report on 30.08.2001 stating that it is not feasible to divide the schedule property in terms of the modified decree in RFA 381/93. Some of the defendants filed objections to the Commissioner report opposing the same and also opposed for sale of schedule property. The legal representatives of defendant No. 5 filed their claim statement and opposed the sale of schedule property.

7. When the matter stood at that stage the plaintiffs filed an application under Section 2 of the Partition Act on 1.4.2006 for sale of schedule property in a public auction and to distribute the sale proceeds on prorata basis. On that day all the defendants except the legal representatives of defendant No. 5 submitted that they have no objection for allowing the plaintiffs application. On 1.4.2006 the legal representatives of defendant No. 5 and their advocate were not present before the Trial Court. The Trial Court allowed the application of plaintiffs and appointed a court commissioner to sell the schedule property in public auction and to divide the sale proceeds. Accordingly, the court commissioner held the public auction on 31.5.2006. In this public auction, the respondent No. 23 became the highest bidder and his bid was accepted at Rs. 1,69,10,000/-. The auction purchaser has deposited the entire bid amount before the Trial Court. The legal representatives of defendant No. 5 being aggrieved by the impugned order dated 1.4.2006 are before this Court in this appeal.

8. Sri Padmaraj, learned Counsel for the legal representatives of defendant No. 5 contend that petition in FDP No. 10007/94 and PDP No. 60/97 are bald, vague and not in conformity with the requirement under Order 7 Rule 1 CPC. The application under Section 2 of the Partition Act was filed on 01.04.2006 and on the same day the trial court passed the impugned order allowing the application without providing an opportunity to the legal representatives of defendant No. 5 and as such the same is opposed to the principles of natural justice. The impugned order is not a speaking order and that there is no finding that the schedule property cannot reasonably or conveniently be divided and further that the sale of the schedule property is beneficial for all the share holders. He further contend that the provisions of Partition Act 1893 are not applicable to the facts of this case. It was his further contention that the Trial Court without considering the claim of the legal representatives of defendant No. 5 committed an error in proceeding to pass the impugned order and that the Trial Court without following the procedure under Order 21 CPC proceeded to pass the impugned order for sale of schedule property, that no enquiry was held and the impugned order

passed by the Trial Court is wholly without jurisdiction. He had also placed reliance on the following decisions.

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- i) AIR 2002 SC 2066 M.L. Subbaraya Setty v. M.L. Nagappa Setty
- ii) Sahara India v. M.C. Aggarwal HUF
- iii) AIR 2007 SC 1077 Hasham Abbas Sayyad v. Usman Abbas Sayyad
- iv) Badri Naraian Prasad Choudhary v. Nil Ratan Sarkar,
- v) Faquira v. Smt. Raj Rani

9. Sri K.T. Anand, learned Counsel for some of the defendants supports the impugned order passed by the Trial Court. The final decree proceedings are not execution proceedings and that the same is continuation of the original suit. Therefore a petition to draw the final decree proceedings need not be in the form of a plaint as required under Order 7 Rule 1 CPC. In the final decree proceedings there is no suppression of facts before the Trial Court. The preliminary decree passed by the Trial Court and also modified decree passed by High Court are produced before the trial Court. There is no need for the legal representatives of deceased Nagamma to institute a fresh suit for partition of the very same subject matter among interse and the trial Court is competent to pass another preliminary decree interse among the children of late Nagamma. According to him under the impugned order, no prejudice is caused to the legal representatives of defendant No. 5 and as such providing an opportunity to them before passing the impugned order did not arise. He had also argued that the legal representatives of defendant No. 5 were only entitled for 1100 sq.ft. area out of total area of 5600 sq.ft. Except the legal representatives of defendant No. 5, all other parties to the suit have agreed for sale of schedule property and as such the same is more than a moiety, which is in compliance of Section 2 of the Partition Act. The legal representatives of defendant No. 5 are squatting on the schedule property and earning monthly rents and were opposing the sale of schedule property. On the other hand the legal representatives of defendant No. 5 have not offered to buy the shares of others and their interest was only to drag on the proceedings at the cost of other sharers. In support of his arguments he had placed reliance on the following decisions:

- i) Venkata Reddy v. Pethi Reddy.

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- ii) AIR 1944 Calcutta 421 Nil Govinda Misra v. Rukmini Deby
- iii) Murugan v. Chidambaram Pillai
- iv) 1959 My.L.J. 103 Narasu Bin Ningappa v. Narayana Krishnaji

v) 1960 My.L.J. 847 M. Kinhabha Alva v. K.T. Alva.

vi) Saheb Khan v. Mohd.Yusufuddin.

vii) AIR 1958 AP 647 R. Ramaprasada Rao v. Subbaramaiah.

viii) R. Ramamurthi Aiyar v. Rajeswararao.

10. Sri G. Papi Reddy, learned Counsel for some of the defendants contend that the dispute is pending between the parties from 1980. The Commissioner appointed by the court submitted a report stating that the schedule property cannot reasonably or conveniently be divided as per the modified decree passed by this Court. Out of seven parties to the suit, six of them have no objection for sale of the schedule property and to distribute the sale proceedings among the shareholders. The legal representatives of defendant No. 5 are unnecessarily dragging on the proceedings. They are not interested in buying the shares of others and they are also not interested in selling the schedule property and wanted to continue in possession of the schedule property by depriving the fruits of the decree to the other share holders in the schedule property. Reliance is placed on the following decision.

. T.S. Swaminatha Odayar v. Official Receiver

11. Sri H.L. Dayanand Kumar, the learned Counsel for respondent No. 23, the auction purchaser had contended that on the date of auction, the legal representatives of defendant No. 5 were present and they did not raise any objections for sale of the schedule property. The auction purchaser honestly believing that there was no dispute among the parties Page 2122 to the suit, participated in the bid and offered the highest bid price of Rs. 1,69,10,000/- and accordingly the Trial Court had accepted the bid price offered by the auction purchaser and further more he had deposited the entire bid money before the Trial Court. Now it is more than one year since and his money is now held up in deposit for no fault of him. Sri Kumar had also argued that in the event of this Court were to come to the conclusion that the sale is bad in law, the auction purchaser may be suitably compensated in monetary terms as per the law laid down by the Supreme Court in AIR 2007 SC 1077.

12. We heard arguments on both the side, perused the entire appeal papers and lower Court records. On the basis of arguments on both the side, and according to us the following questions arise for our consideration;

i) Whether a petition for final decree proceedings shall contain all the requirements as specified under Order 7 Rule 1 CPC?

ii) Whether the Trial Court has no jurisdiction to pass the impugned order and that the same is contrary to the modified decree in RFA No. 381/1993 passed by this Court?

iii) Whether the provisions of Partition Act 1893 are not applicable?

- iv) Whether the impugned order passed by the Trial Court is opposed to principles of natural justice?
- v) Whether the impugned order is not a speaking order and that the Trial Court has no jurisdiction to pass the order?
- vi) Whether the sale of schedule property is contrary to the procedure laid down under Order 21 of CPC?

ON POINT No. I

13. Order 6 Rule 1 to 18 of CPC specifies about pleadings, material facts and particulars to be stated, forms of pleadings, signing of pleadings, verification of pleadings, striking of pleadings, amendment of pleadings etc. Rule 1 of Order 6 defines pleadings to mean plaint or written statement. Whereas Rule 3 specifies forms of pleadings as stated in Appendix A. Further more as we see Appendix A specifies as many as 49 forms of plaints for various kinds of reliefs and 15 forms of written statement for different types of defence. Order 7 specifies particulars to be contained in a plaint and on the other hand Order 8 of CPC specifies the particulars to be stated in a written statement. As we further see nowhere in the CPC the form for final decree proceedings is specified. A petition to draw final decree proceedings is not a plaint or written statement as defined under Rule 1 of Order 6 CPC. In our considered view when it is not a plaint it is not necessary that it shall contain the particulars as specified under Order 7 Rule 1 of CPC.

14. As we see Order 20 Rule 18 specifies that where the Court passes a decree for partition of property or for the separate possession of shares of the parties then the Court may pass a preliminary decree declaring the rights of the parties interested in the property and hence the Court can further direct partition or separation to be made by metes and bounds in Page 2123 terms of such declaration as per the provisions of Section 54 or under Order 26 Rule 13 of CPC. Let apart the final decree proceedings being continuation of the suit for partition, the partition suit in law is deemed to be pending until a final decree is passed by the Court. A party to the preliminary decree is therefore entitled to file petition/application under Order 20 Rule 18 CPC to draw the final decree in what is commonly known as Final Decree Proceedings. A petition/application to draw final decree is not a plaint and need not contain the material facts as specified under Order 7 Rule 1 of CPC. Further Order 20 Rule 18 CPC do not specify as to what are the particulars to be mentioned in a petition/application to draw the final decree. Therefore in our considered view a petition/application accompanied by preliminary decree passed in the suit is sufficient to draw a final decree.

15. In the instant case since F.D.P. No. 10007/1994 was filed immediately after the passing of preliminary decree in O.S. No. 8471/1980 and before the modified decree came to be passed in R.F.A. No. 381/1993. F.D.P. No. 60/1997 was filed subsequent to the passing of modified decree in R.F.A. No. 381/1993. Both F.D.P. No. 10007/1994 and F.D.P. No. 60/1997 were consequently clubbed. In these final decree proceedings the preliminary decree in O.S. No. 8471/1980 and the modified decree in R.F.A. No. 381/1993 were available. During the pendency of these two final

decree proceedings the legal representatives of defendant No. 5 filed an application under Section 151 CPC to reject the petition for final decree proceedings in F.D.P. No. 10007/1994 as not maintainable on the ground that the modified decree in R.F.A. No. 381/1993 was not incorporated in the final decree petition. The trial Court by its order dated 21.10.2006 rejected application filed by the legal representatives of defendant No. 5 on the ground that the preliminary decree in OS 8471/1980 came to be merged with the modified decree in RFA 381/1993 and as such the final decree will have to be drawn in terms of modified decree. The legal representatives of defendant No. 5 being aggrieved by the order of trial Court filed W.P No. 16370/2006 and the same came to be rejected vide order dated 08.12.2006 and the order of trial Court was confirmed and the same had become final. Therefore now it is not open for legal representatives of defendant No. 5 to contend that the petition/application for final decree proceedings in F.D.P. No. 10007/1994 lacks material particulars and is liable to be rejected as not maintainable. We therefore hold point No. 1 in the negative and as against the legal representatives of defendant No. 5.

ON POINT No. II

16. Learned Counsel for the legal representatives of defendant No. 5 contend that in the modified decree in RFA No. 381/93 it is specified that the plaintiffs are entitled for 3/7th share in respect of one half of the schedule property and not the entire property. Therefore, the Trial Court has no jurisdiction to sell the entire schedule property. The impugned order of the Trial Court ordering the sale of entire schedule property is contrary to the Page 2124 modified decree in RFA 381/93. We decline to accept this contention of Learned Counsel for the legal representatives of defendant No. 5. It is necessary at this stage to observe the law laid down by the Apex court on the question of discretion of the Trial Court in final decree proceedings. The Supreme Court in the case of Phoolchand v. Gopal Lal held as under:

7. We are of the opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Code of Civil Procedure against passing a second

preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. In any case if two views are possible - and obviously this is so because the High Courts have differed on the question - we would prefer the view taken by the High Courts which hold that a second preliminary decree can be passed, particularly in partition suits where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, it should not be decided by the Court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. Whether there can be more than one final Page 2125 decree does not arise in the present appeal and on that we express no opinion. We therefore hold that in the circumstances of this case it was open to the court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the Trial Court in the present case and thereafter the preliminary decree already passed was amended, the decision amounted to a decree and was liable to appeal. We therefore agree with the view taken by the High Court that in such circumstances a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree. We should however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant.

17. This Court in *M. Kinhanna Alva and Ors. v. K.T. Alva and Ors.* 1960 Mys.L.J. 847 held that where a preliminary decree in a partition suit allotted shares to the plaintiffs together and the remaining shares to the defendants, and did not provide for partition inter se amongst the plaintiffs, the court has jurisdiction to direct a partition inter se amongst the plaintiffs. It is a matter for the discretion of the court. It is not a matter of the right for the party to ask for such allocation irrespective of the frame of the suit or the terms of the preliminary decree.

18. In this context we deem it appropriate and beneficial to refer to a Division bench decision of Calcutta high court in *Insane Nil Govinda Misra v. Smt. Rukmini Deby* reported in AIR (31) 1944 Calcutta 421 it is held that, it is an established principle that a co-sharer, be he or she a plaintiff or defendant in a suit for partition, is entitled to claim a separate allotment at any stage before the final decree. It is further held that there is no reasons to drive the parties to a separate suit for partitioning the properties of the second class by metes and bounds when that can be done in the suit without greater expense or trouble. It is on the principle of shortening the litigation by the avoidance of multiplicity of suits, it is directed the partition by metes and bounds amongst the defendants of the rest of properties mentioned in the plaint in which the plaintiff has no share.

(Underlining is ours)

19. We are of the considered opinion that the final decree proceedings are continuation of the suit. Final decree proceedings is a stage in continuation of the suit for partition. The preliminary decree

declares and determines the shares of parties. Actual division of the properties, putting the parties in separate possession of their shares, adjustment of equities, impartibility of the suit property, sale of property and all other disputes have to be settled Page 2126 in final decree proceedings. The final decree Court is competent even to determine the interse partition among the defendants in which the plaintiffs have no share.

20. In the instant case, the modified decree in RFA 381/1993, it is declared by this Court that plaintiffs are entitled to for 3/7th share in one-half of the schedule property as such, the plaintiffs have no share in the remaining one half of the schedule property. In the remaining half of the schedule property the defendants are entitled for a share. In the modified decree in RFA 381/1993 the quantum of shares among the defendants in the remaining one half of the schedule property is not determined. But the final decree court is having the discretion to determine the shares of each of the defendants in the remaining one half of the schedule property and also their share in other half of the schedule property. It is not necessary to drive the defendants to file a separate suit for partition of their respective shares in the schedule property. The plaintiffs have filed FDP No. 10007/94 to draw the final decree proceedings in terms of the modified decree in RFA 381/1993. Defendant No. 2 filed FDP No. 60/1997 for partition of his share in the entire schedule property. There is no impediment for the court in the final decree proceedings to determine the shares of each of the defendants in the entire schedule property. The Court Commissioner submitted a report stating that the schedule property is not partitionable. The plaintiffs and all the defendants except three legal representatives of deceased defendant No. 5 have no objection for sale of the schedule property and to divide the sale proceeds in terms of the modified decree. One of the legal representatives of deceased defendant No. 5 has no objection for the sale of schedule property and to distribute the sale proceeds in terms of decree. In the facts and circumstances of this case, we are of the considered view that the impugned order passed by the final decree court is in accordance with law and the same is just and proper and hence not called for to be interfered with in the instant appeal. Accordingly we hold point No. II in negative.

ON POINT NO. III

21. Learned Counsel for legal representatives of defendant No. 5 had contended that provisions of Partition Act 1893 is not applicable to the facts of this case. Alternatively he contended that the impugned order is contrary to Section 2 of the Partition Act. We have given thought to said contentions. Having done that we find no substance and merit in the said contention of the learned Counsel for legal representatives of defendant No. 5. Hence, we hereby reject the same.

22. A preliminary decree as we see declares the rights and the liabilities of the parties and after passing of preliminary decree for partition, declaring the rights of several parties interested in the property, the final decree proceedings will start by filing a petition/application under Order 20 Rule 18 CPC by any of the parties to the preliminary decree; Then the final decree Court shall proceed to divide and separate the shares as specified either under Section 54 or under Order 26 Rule 13 and 14 CPC. In the event of court Commissioner under Order 26 Rule 13 CPC submits a report stating that Page 2127 the schedule property is not partitionable, then in that event there was no provision empowering the court to sell the schedule property against the wishes of the parties to the suit. The

court has no power to sell the property even if the circumstances necessitate. Thus there is a gap and void in law. This gap and void in law came to be filled by enacting Section 2 and 3 of the Partition Act. The statement of objects and reasons of Partition Act, 1893 which reads as under: ". That section, however, only authorises the court to divide the property, and in some exceptional cases where an equal division is not practicable to award a money compensation for the purpose of equalising the value of the shares. But as the law now stands, the court must give a share to each of the parties and cannot direct a sale and division of the proceeds in any case whatever. Instances, however, occasionally occur where there are inseparable practical difficulties in the way of making an equal division, and in such cases the Court is either powerless to give effect to its decree or is driven to all kinds of shifts and expedients in order to do so. Such difficulties are by no means of very rare occurrence although in many cases where the parties are properly advised they generally agree to some mutual arrangement, and thus relieve the court from embarrassment.

It is proposed in the present Bill to supply this defect in the law by giving the court, under proper safeguards, a discretionary authority to direct a sale where a partition cannot reasonably be made and a sale would, in the opinion of the court, be more beneficial for the parties. But, having regard to the strong attachment of the people in this country to their landed possession, it is proposed to make the consent of parties interested at least to the extent of moiety in the property a condition precedent to the exercise by the court of this new power. In order at the same time to prevent any oppressive exercise of this privilege, it is proposed to give such of the shareholders as do not desire a sale the right to buy the others out at a valuation to be determined by the court....

23. Therefore we are of the considered opinion that wherever tile property cannot be divided and separated as specified under Section 54 or Order 26 Rule 13 CPC, the provision of Partition Act, 1893 will step in to resolve the controversy between the parties and to the benefit of shareholders to enjoy the fruits of decree. There may be cases not covered under Section 2 and 3 of the Partition Act, then the court has the discretionary power to adopt equitable method of owelty. In the instant case, the Court Commissioner submitted a report stating that the schedule property is not partitionable. Except three legal representatives out of four legal representatives of deceased defendant No. 5, all other parties to the suit are agreeable for sale of the schedule property and to distribute the sale proceeds among them as per their entitlement. Under the circumstances, the provisions of Partition Act, 1893 are applicable to the facts of the case.

24. Learned Counsel for legal representatives of defendant No. 5 contend that the impugned order is contrary to the mandatory requirement of Page 2128 Section 2 of the Partition Act. He contend that the share of plaintiffs is less than a moiety in the modified decree, therefore, the application filed by them under Section 2 of the Partition Act is not maintainable. Section 2 and 3 of the Partition Act reads as under:

2. Power to court to order sale instead of division in partition suits. - Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property

and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

"3. Procedure when sharer undertakes to buy. - (1) If, in any case in which the court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in Sub-section (1), the court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

The Supreme Court in *R. Ramamurthi Aiyar v. Rajeswararao*, while interpreting the scope of Sections 2 and 3 of the Partition Act specified the various stages in the proceedings under Sections 2 and 3 of the Partition Act as under:

(i) In a suit for partition if, it appears to the court that for the reasons stated in Section 2 a division of the property cannot reasonably and conveniently be made and that a sale of property would be more beneficial it can direct sale. This can be done, however, only on the request of the shareholders interested individually, or collectively to the extent of one moiety or upwards.

(ii) When a request is made under Section 2 to the court to direct a sale any other shareholder can apply under Section 3 for leave to buy at a valuation the share of the other party asking for a sale.

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(iii) The court has to order valuation of the share of the party asking for sale.

(iv) After the valuation has been made the court has to offer to sell the share of the party asking for sale to the shareholder applying for leave to buy under Section 3.

(v) If two or more shareholders severally apply for leave to buy the court is bound to order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the court.

(vi) If no shareholder is willing to buy such share or shares at the price so ascertained the application under Section 3 shall be dismissed, the applicant being liable to pay all the costs.

25. Keeping in view the law declared by the Supreme Court in Ramamurthi Aiyar's case it is necessary to examine the fact situation in the case on hand. On 1.4.2006 the plaintiffs filed an application under Section 2 of the Partition Act for sale of the schedule property. Except the three legal representatives of defendant No. 5 and their advocate, all other parties were present before the Trial Court and submitted that they have no objection to allow the application filed by the plaintiffs. Individually the share of the plaintiffs is not a moiety as specified under Section 2 of the Partition Act. Moiety means more than 50% of the share in the schedule property. Since the plaintiffs and all other defendants except three legal representatives of defendant No. 5 agreed for sale of schedule property, the same amounts to collectively a moiety or upwards as specified under Section 2 of the Partition Act. Therefore, there is no substance and merit in the contention of the Learned Counsel for the appellants that the application filed by the plaintiffs is contrary to mandatory requirement of moiety under Section 2 of the Partition Act.

26. The material on record discloses that the Commissioner in his report stated that the schedule property is not partitionable. Except three legal representatives of defendant No. 5, all other parties to the final decree proceedings have agreed for sale of the schedule property and to divide the sale proceeds. Further there is no offer by the legal representatives of defendant No. 5 to buy the shares of plaintiffs and other defendants. Under the circumstances, the Trial Court found that division of schedule property cannot reasonably and conveniently be made, proceeded to pass the impugned order directing the sale of schedule property. Thus the impugned order passed by the final decree court is in strict compliance of the mandatory requirement under Section 2 of the Partition Act.

ON POINT NO. IV

27. Learned Counsel for the legal representatives of defendant No. 5 contend that on 1.4.2006, plaintiffs filed application under Section 2 of the Partition Act for sale of entire schedule property and the same came to be allowed on the same day without providing an opportunity to the legal representatives of defendant No. 5 and as such the same is opposed to principles of natural justice. Identical situation came up for consideration Page 2130 before the Supreme Court in Saheb Khan v. Mohd. Yusufuddin and Ors. and it is held as under:

In any event the respondent No. 1 has been unable to establish that he had suffered substantial injury by reason of any irregularity or fraud. The lack of notice under the Partition Act, 1893 to the respondent No. 1 WAS immaterial as it was not the appellant's case that he would have purchased the property. No such intention has ever been expressed. The respondent No. 1's only grievance is that the property could have fetched a higher value. Apart from the alleged affidavit of the said, Sidhique, no other material has been produced by him in support of such submission. On the other hand in fixing the upset price, the Advocate Commissioner had taken into account the certificate of market value in respect of the property issued by the Sub-Registrar Golkunda dated 13TH May, 2005 at Rs. 10 lakhs. The respondent No. 1 has never complained that the upset price had been wrongly fixed. The appellant's offer was above the market value. Additionally, the respondent No. 1 WAS given several opportunities to produce the purchaser, who was allegedly willing to pay a higher price. The purchaser was never produced. As against this, the appellant has duly deposited the entire amount of Rs. 12 lakhs in Court. The District Judge, was in the circumstances correct in rejecting the so

called offer of the said Sidhique.

28. In the instant case, it was obligatory on the part of three legal representatives of defendant No. 5 and their advocate to be present before the Trial Court on the date of hearing on 1.4.2006. On 1.4.2006 except the three legal representatives of defendant No. 5 all other parties to the proceedings were present and submitted that they have no objection for allowing the application filed by the plaintiffs and to order for sale of schedule property. Even before us all other parties except three legal representatives of defendant No. 5 supports the impugned order and consents for sale of schedule property and for distribution of sale proceeds. Neither before the Trial Court nor before us the three legal representatives of defendant No. 5 offered to buy the shares of other parties to the decree. The legal representatives of defendant No. 5 have not complained any irregularity or fraud regarding sale or that the schedule property could have fetched a higher value. The litigation is pending between the parties from the year 1980. Now we are in 2007. More than 27 years have lapsed. Under the circumstances, the three legal representatives of defendant No. 5 have failed to establish any injury suffered by them on account of the impugned order. In the absence of any injury to the legal representatives of defendant No. 5 we decline to accept the contention that there is violation of principles of natural justice.

Page 2131 POINT NO. V

29. Learned Counsel for the legal representatives of defendant No. 5 contend that the impugned order is not a speaking order. It is further contended that the trial Court has not given a finding that the schedule property was not capable of division by metes and bounds and that the sale of schedule property and distribution of the sale proceeds would be more beneficial for all the shareholders. Identical question came up for consideration before the Supreme Court in the case of R. Ramamurthi v. Rajeswara Rao and it is held:

the language of Section 2 of the Partition Act does not appear to make it obligatory on the Court to give a positive finding that the property is incapable of division by metes and bounds. It should only 'appear' that it is not so capable of division.

In the instant case, the Court Commissioner submitted a report stating that it is not possible to divide the schedule property by metes and bounds in terms of preliminary decree. Except the three legal representatives of defendant No. 5 all other shareholders agreed to sell the schedule property and divide the sale proceeds. The legal representatives of defendant No. 5 have not offered to buy the shares of other shareholders. The dispute is pending for the last 27 years. In the circumstances though there is no positive finding in the impugned order relating to impartibility of schedule property the same cannot be a ground to set aside the impugned order. It is sufficient, in the facts and circumstances of the case, a mere appearance to the Court that, it is not possible to divide the schedule property reasonably and conveniently and sale of schedule property and to distribute the sale proceeds is beneficial to the shareholders. Hence, we hold this point in negative.

POINT NO. VI

30. Learned Counsel for the legal representatives of defendant No. 5 contend that without deciding the claim of these defendants under Order 21 CPC, the trial Court committed an error in passing the impugned order. He further contends that the sale of schedule property is not in accordance with the procedure laid down under Order 21 CPC. This contention of the learned Counsel for legal representatives of defendant No. 5 is unacceptable to us. A Division Bench of this Court in Narasu Bin Ningappa Moture of Kini v. Narayana Krishnaji Karguppikar 1959 Mys.LJ 103 held as under:

Our attention was invited to the fact that Section 54 CPC finds a place in Part II of the Code which relates to execution. From this fact the learned Counsel for the appellants developed an argument that an action taken under Rule 18 of Order XX read with Section 54 CPC is a proceeding in execution. The scheme of the Code, itself is insufficient to deem a proceeding under Section 54 as execution proceedings. Page 2132 Section 54 CPC is a provision allied to provisions relating to execution. That section could not have been conveniently placed anywhere else. There is nothing in the language of that section to indicate that the proceedings thereunder are execution proceedings. If they are execution proceedings, there must have been corresponding provisions in Order XXI of the Civil Procedure Code. The learned Counsel for the appellants has not been able to bring to our notice any decision wherein it was held that an application under Sub-rule (1) of Rule 18 of Order XX is an execution application. On the contrary, there is a long line of decisions which have taken the view that such an application is not an execution application. We find ourselves in agreement with this view.

Therefore the final decree proceedings are not execution proceedings under Order 21 CPC. The question of adjudicating the claim of legal representatives of defendant No. 5 and following procedure under Order 21 CPC will not arise. The plaintiffs in the affidavit filed in support of the application under Section 2 of the Partition Act stated that the prevailing market rate of the schedule property as Rs. 3,000/- per square feet. The Court Commissioner sold the schedule property for more than Rs. 3,000/- per sq ft. It is not the case of the legal representatives of defendant No. 5 that the schedule property could have fetched a higher value. Now the auction purchaser deposited the entire bid amount of Rs. 1,60,10,000/-. The legal representatives of defendant No. 5 are residing in a portion of schedule property and deriving rents from other portions. The intention of legal representatives of defendant No. 5 is to drag on the proceedings. In the facts and circumstances of this case, we hold point No. VI in negative.

For the reasons stated above, we dismiss the appeal with no order as to costs.