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November 30.

VENKATA REDDI AND OTHERS

v.

POTHI REDDI

(S.J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR and J. R. MUDHOLKAR, JJ.)

Preliminary Decree—Partition suit—Father's insolvency—Suit challenging Official Receiver's sale of sons' share—New law declaring such right but made subject to previous final decision of court—Preliminary decree, if a "final decision"—Provincial Insolvency (Amendment) Act, 1948 (25 of 1948), s.2—Provincial Insolvency Act, 1920 (5 of 1920), s. 28A.

The appellants' father was adjudicated an insolvent and the Official Receiver put up for sale the property belonging to the undivided family including the two-thirds share of the appellants. On February 1, 1943, the appellants instituted a suit for the partition of the joint family property impleading therein the respondent, the purchaser of the property, and claimed that on their father's adjudication only his share vested in the Official Receiver and that the latter had no right to sell their two-thirds share. The trial court accepted this contention and passed a preliminary decree for partition in favour of the appellants. The decree was confirmed by the High Court of Madras on November 18, 1946. On an application made by the appellants, a final decree was passed *ex-parte* on August 17, 1946, but it was set aside at the instance of the respondent. In the meantime s. 28A of the Provincial Insolvency Act, 1920, came into force in 1948, under which the disposing power of the father over the interest of his undivided sons also vested in the Official Receiver. By the first proviso to the section it was provided "that nothing in this section shall affect any..transfer of the property of the insolvent by.....a Receiver....made before the commencement of the Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent court". The District Munsif held that the Amending Act did not affect the preliminary decree and restored the *ex-parte* final decree. The question was whether the preliminary decree for partition which was affirmed finally in second appeal by the High Court was a final decision within s. 28A of the Act.

Held, that 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 embodying the final decision of the Court passing that decree within the meaning of the first proviso to s. 28A of the Provincial Insolvency Act, 1920.

A final decision means 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 of Civil Procedure, 1908.

In re A Debtor, [1929] 2 Ch.146, considered.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 199 of 1960.

Appeal by special leave from the judgment and decree dated December 1, 1955, of the Madras High Court in second Appeal No. 736 of 1953.

R. Ganapathy Iyer, R. Thiagarajan and *G. Gopalakrishnan*, for the appellants.

V. S. Prashar, A. S. Chaturvedi and *K. R. Chaudhari*, for the respondent.

1962. November 30. The Judgment of the Court was delivered by

Mudholkar, J.

MUDHOLKAR, J. – Only one question arises for consideration in this appeal by special leave and that is the meaning to be given to the expression 'final decision' occurring in the first proviso to s. 28 A of the Provincial Insolvency Act, 1920 (Act No. 5 of 1920), introduced by Act No. 25 of 1948.

For appreciating the argument advanced before us a few facts have to be stated. Venkata Reddy, the father of the appellants, was adjudicated an insolvent by the Sub-Court, Salem in I. P. No. 73 of 1935. At that time only the appellants 1 and 2 were born while the third appellant was born later. The father's one-third share was put up for auction by the Official Receiver and was purchased by one

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Karuppan Pillai for Rs. 80/-. The Official Receiver then put up for auction the two-thirds share belonging to appellants 1 and 2 on July 27, 1936, which was purchased by the same person for Rs. 341/-. He sold the entire property to the respondent Pethi Reddy on May 25, 1939, for Rs. 300/-.

The appellants instituted a suit on February 1, 1943, for the partition of the joint family property to which suit they made Pethi Reddy a party and claimed thereunder two-thirds share in the property puchased by him. In that suit it was contended on behalf of the respondent that on their father's insolvency the share of the appellants in the joint family property also vested in the Official Receiver and that he had the power to sell it. The contention was negatived by the trial court which passed a preliminary decree for partition in favour of the appellants. The decree was affirmed in appeal by the District Judge and eventually by the High Court in second appeal, except with a slight variation regarding the amount of mesne profits. The decision of the High Court is dated November 18, 1946. On January 18, 1946 the appellants made an application for a final decree which was granted *ex parte* on August 17, 1946. At the instance of the present respondent this decree was set aside. By that time the new provision, that is, s. 28 A of the Provincial Insolvency Act, had come into force. On the basis of this provision it was contended by the respondent that the appellants were not entitled to the allotment of their two-thirds share in the property purchased by him inasmuch as that share had also vested in the Official Receiver. The District Munsif held that Act 25 of 1948 which introduced s. 28 A did not affect the preliminary decree for partition since it had been passed on August 20, 1943. He, therefore, restored the *ex parte* final decree which had been set aside on December 17, 1950. The appeal preferred by the respondent against the decision of the District

Munsif was dismissed by the Principal Subordinate Judge, Salem, whereupon he preferred a second appeal before the High Court. The High Court allowed the appeal and dismissed the application of the appellant for passing the final decree.

Section 28A of the Provincial Insolvency Act runs as follows:

> "The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge :
>
> Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or Receiver or the Collector acting under s. 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent Court :
>
> Provided further that the property of the insolvent shall not be deemed by reason of anything contained in this section to comprise his capacity referred to in this section in respect of any such sale, mortgage or other transfer of property made in the State of Madras after the 28th day of July, 1942, and before the commencement of the Provincial Insolvency (Amendment) Act, 1948."

The objects and reasons set out in the bill which sought to introduce this provision were to bring the provisions of the Provincial Insolvency Act

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in line with those of the Presidency Towns Insolvency Act in so far as the vesting of the joint family property in the Official Receiver upon the father's insolvency was concerned. While under the Presidency Towns Insolvency Act, in a case of this kind, the disposing power of the father over the interest of his undivided sons also vests in the Official Receiver and not merely the father's own interest in the joint family property, there was divergence of opinion amongst the High Courts in India as to whether under the Provincial Insolvency Act the father's disposing power over his undivided sons' interest also vests in the Official Receiver. A Full Bench of the Madras High Court held in *Ramasastrulu* v. *Balakrishna Rao* (1) that it does not. It was in the light of this decision that in the appellants suit for partition, a preliminary decree was passed with respect to their two-thirds interest in the Joint family property which had been sold by the Official Receiver. In the course of the decision of the Full Bench a suggestion was made that the legislature should step in and bring the provisions of the Provincial Insolvency Act in the relevant respect in line with those of the Presidency Towns Insolvency Act.

The new provision makes it clear that the law is and has always been that upon the father's insolvency his disposing power over the interest of his undivided sons in the joint family property vests in the Official Receiver and that consequently the latter has a right to sell that interest. The provision is thus declaratory of the law and was intended to apply to all cases except those covered by the two provisos. We are concerned here only with the first proviso. This proviso excepts from the operation of the Act a transaction such as a sale by an Official Receiver which has been the subject of a final decision by a competent Court. The short question, therefore, is whether the preliminary decree for partition passed in this case which was affirmed finally in second

(1) I.L.R. [1943] Mad. 83.

appeal by the High Court of Madras can be regarded as a final decision. The competence of the court is not in question here. What is, however, contended is that in a partition suit the only decision which can be said to be a final decision is the final decree passed in the case and that since final decree proceedings were still going on when the Amending Act came into force the first proviso was not available to the appellants. It is contended on behalf of the appellants that since the rights of the parties are adjudicated upon by the court before a preliminary decree is passed that decree must, in so far as rights adjudicated upon are concerned, be deemed to be a final decision. The word 'decision' even in its popular sense means a concluded opinion (see Stroud's Judicial Dictionary—3rd ed. Vol. I, p. 743). Where, therefore, the decision is embodied in the Judgment which is followed by a decree finality must naturally attach itself to it in the sense that it is no longer open to question by either party except in an appeal, review or revision petition as provided for by law. The High Court has, however, observed :

> "The mere declaration of the rights of the plaintiff by the preliminary decree, would, in our opinion not amount to a final decision for it is well known that even if a preliminary decree is passed either in a mortgage suit or in a partition suit, there are certain contingencies in which such a preliminary decree can be modified or amended and therefore would not become final."

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

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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 comtemplate 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 judicate* 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.

The High Court, however, thinks that a decision cannot be regarded as final if further proceedings are required to be taken for procuring the relief to which a party is held entitled by that decision. In support of its view the High Court has referred to the following observations in *in re A Debtor* (1) :

> "It is clear, therefore, that further proceedings will be necessary to get the money out of court and I think it is also clear that the order of October 24, in its own terms, did not finally determine the right of the petitioner, or any one else, in respect of the sum to be paid. In my opinion, therefore, the order is not a 'final order'."

In that case the Divorce Court made an order that "the co-respondent do within seven days from the service of this order pay into Court the sum of £67 1s. 9d. being the amount of the petitioner's costs, as taxed and certified by one of the registrars of this Division." The order was made in that form because at that time the ultimate fate of the petition was undecided. No doubt, the decree nisi had been passed but it had yet to be made absolute and the right of the petitioner to receive the costs might never have been brought to fruition. The money had therefore to be paid into the court. A little latter a further order was made by the President of the Divorce Court in these terms :

> "Upon hearing the solicitors for the petitioner I do order that the order herein dated the 11th day of July 1928 be varied and that (the debtor) the co-respondent do within seven days from the service of this order pay to Messrs H. L. Lumley & Co., of 35 Picadilly W. 1, the solicitors of the petitioner, the sum of £ 67 1s. 9d. being the amount of the petitioner's taxed costs as taxed and certified by one of the

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registrars of this Division, the said solicitors undertaking to lodge in Court any sums recovered under this order."

Pursuant to this order the solicitors gave an undertaking required by the Court to the registrar on October 26. On November 5, the decree nisi was made absolute. On January 2, 1929, a bankruptcy notice was issued by the solicitors against the debtor for payment to them of the amount of £67 1s. 9d. The co-respondent did not comply with the bankruptcy notice and accordingly on January 27, the solicitors presented a bankruptcy petition against him. Over-ruling the objection by the co-respondent, that is, the debtor that the bankruptcy notice was bad on, amongst other things, the ground that the second order made by the President of the Divorce Division was not a final order within sub-s. 1 (g) of s. 1 of the Bankruptcy Act, 1914, the registrar made a receiving order. In appeal it was contended that the receiving order was wrong because the solicitors were not the creditors of the debtor and also because the order for payment of the costs to them was not a final order. While upholding the latter contention Lord Hanworth, M. R., said what has been quoted above and relied upon by the High Court. Upon the particular facts of the case the order was clearly not a final order and in making the observations quoted above the Master of Rolls did not formulate a test for determining what could be regarded as a final order in every kind of case. The observations of the Master of Rolls must be read in the context of the facts of the case decided by him. Read that way those observations do not help the respondents.

Apart from this, the short answer to the reason given by the High Court is that even a money decree passed in a suit would cease to be a final decision because if the judgment-debtor against whom the

decree is passed does not pay the amount voluntarily execution proceedings will have to be taken for recovering the amount from him. It would thus lead to an absurdity if the test adopted by the High Court is accepted. In support of the High Court's view a few decisions were cited at the bar but as they are of no assistance we have not thought it fit to refer to them. We may, however, refer to a decision of this court upon which reliance was placed by the respondents. That is the decision in *Vakalapudi Sri Ranga Rao and others* v. *Mutyala Ammanna* (1) in which it was held that a particular order was not a final decision within the meaning of the first proviso to s. 28-A. There, in a suit for partition and another suit for possession of the suit property and arrears of rent, it was contended that upon the father's insolvency the Official Receiver was incompetent to sell the son's interest in the joint family property. The contention was negatived by the trial court but upheld in appeals by the Subordinate Judge who remanded the suits to the trial court with certain directions. Appeals preferred against his decision were dismissed by the High Court. Before the decision of the suits after remand, the Amending Act, XXV of 1948 came into force and it was contended before the trial court that in view of the new provision the sale by the Official Receiver must be held to be good even so far as the sons' interest was concerned. This contention was negatived by the trial court on the ground that the decision of the High Court on the point was a 'final order' within the meaning of the proviso. The District Judge, before whom appeals were preferred, however, negatived the contention and held that there was no final order with regard to the sale by the Official Receiver. The High Court reversed the decision of the District Judge but this Court held that the orders of remand made by the Subordinate Judge and upheld by the High Court were interlocutory orders as also were the orders of

(1) C.A. No. 634 of 1957, decided on March 29, 1961.

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the High Court in the appeals preferred before it and as such could be challenged in the appeal preferred before this Court against the decision of the High Court in the appeal against the final decree in the suit. In the case before us the preliminary decree was never challenged at all by preferring any appeal and therefore, the matters concluded by it are not open to challenge in an appeal against the final decree. Further, a preliminary decree cannot be equated with an interlocutory order within the meaning of s. 105, Code of Civil Procedure. It will thus be seen that the decision relied upon has no application to the facts of this case.

Our conclusion, therefore, is that in this case the sale made by the Official Receiver during the insolvency of the appellants' father was the subject of a final decision by a competent court inasmuch as that court decided that the sale was of no avail to the purchaser at the Official Receiver had no power to effect that sale. Nothing more was required to be established by the appellants before being entitled to the protection of the first proviso to s.28A. Since they have established what was required to be established by them, they are entitled to a final decree and the High Court was in error in dismissing their application in that behalf. In the result we allow the appeal, set aside the judgment and decree of the High Court and restore that of the trial court as affirmed in appeal by the learned Subordinate Judge. Costs in this court and in the High Court will be borne by the present respondent. The remaining costs will be borne as ordered by the first appellate court.

Appeal allowed.