APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Pinhey.

1908
August 24,
25.

KRISHNAMACHARIAR (PLAINTIFF), APPELLANT,

v.

KUPPAMMAL AND OTHERS (DEFENDANTS 5, 8, 9 AND 10), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 396—Appointment of Commissioner, discretionary—Decree finality of—Conduct of parties.

It is not obligatory on the Court, in every case in which a decree is made for the partition of immoveables not paying revenue to Government, to appoint a Commissioner under section 396 of the Code of Civil Procedure; and such a decree is not, in all cases, to be considered pending till action is taken under section 396.

Where such a decree, not followed by action under section 396, is treated by the Court and the parties as a final decree in execution proceedings, it is not open to a party subsequently to contend that the decree had not become final.

THE father of the appellant brought a suit for partition, Original Suit No. 6 of 1886, in the District Court of Chingleput, and the decree in the suit directed that the plaint properties should be divided, and the plaintiff should be given a moiety of the properties. The fourth defendant, a widow, entitled to maintenance, appealed to the High Court, and the decree of the High Court, dated 7th March 1889, modified the decree of the lower Court by directing that the fourth defendant should reside in the house in Madras till her death, which took place in 5th October 1906. The original plaintiff died some time after decree and his son the present Appellant was brought on the record.

An application for execution was made in 1901, but no further action was taken till 1906, after the death of the fourth defendant, when an application for execution under section 235, Civil Procedure Code, was put in, praying for the delivery of one-half share of the house in which the fourth defendant resided on the ground that the decree in respect of the house could be executed only after the death of the fourth defendant. On objection being taken that execution was barred by limitation the plaintiff put in

* Civil Miscellaneous Appeal No. 157 of 1907 presented against the order of V. Venugopal Chetti, Esq., District Judge of Chingelput, in Execution Petition No. 38 of 1906 (Original Suit No. 6 of 1886).

a fresh application. The nature of the latter application, and the further facts necessary for this report will appear in the order of the lower Court passed on these applications.

"ORDER.—The decree of the Court of first instance was passed in 1887. There was an appeal to the High Court from it, only by the fourth defendant, who claimed maintenance from the plaintiff's share, and the High Court's decree was to the effect that the plaintiff was entitled to the half of the suit house subject to the right of the fourth defendant (appellant) to reside therein.

"The original petition put in in this matter has been superseded by a later one. Originally, it was contended that, the plaintiff could not execute until the fourth defendant's death which took place only recently. This ground is practically given up now. The High Court decree does not lay any restriction as to the time of execution. The plaintiff could have easily taken delivery of his half of the house allowing the fourth defendant to live in it. In the latter petition it is argued that the decree in 1889 was only a preliminary decree, and that what is prayed for now is the appointment of a Commissioner under section 396, Civil Procedure Code.

"I cannot accede to this contention. As I understand the decree of 1887, it is a final one, and the suit was finally terminated in 1889 when the High Court passed the decree to which the respondents were not parties.

"22 Calcutta, page 525, does not apply to the facts of the present case; nor do 20 Allahabad, 311 and 29 Madras, page 46.

"The present application is clearly barred and is therefore dismissed with costs."

The plaintiff appealed to the High Court.

The main grounds of appeal were :—

(1) That the lower Court ought not to have treated the petition as being one for execution and even, if it were one for execution, it should be treated as being within time within the meaning of article 179 of the Limitation Act.

(2) That the decree in question was not a final decree, but only a preliminary decree. It was not capable of execution unless and until a Commissioner was appointed, the property divided and a final decree passed.

(3) That the District Judge ought to have held that the petitioner could apply for possession of the house in execution of

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the decree only after the death of Mangammal, which occurred on 5th October 1906.

T. R. Ramachandra Ayyar for appellant.

L. A. Govindargava Ayyar and *A. Ramachandra Ayyar* for respondents.

JUDGMENT.—In this case there was a decree for partition of certain properties including a house in Madras, which, on appeal to the High Court, was, in 1889, modified by declaring the right of a widow to reside in this house. In 1901 on an application for execution Shephard, J, returned the application to the District Judge of Chingleput, but no further action was taken in that Court until 1906, when the present application was made.

The first question we have to consider is the nature of the decree. That the decree-holder treated it is as final and executable is beyond doubt. He obtained possession of part of the property under it, and it is equally clear to us that the District Court of Chingleput intended the decree to be a final decree.

In 1901 no doubt, Shephard, J., expressed an opinion that a Commissioner ought to be appointed, but that view apparently did not commend itself to the Appellant's guardian, and no action was taken upon the suggestion. It is not until 1906 that the suggestion is made that the decree is still pending, and, *that*, after an application for execution had just been made. We are not prepared to hold that in every case in which a decree is made for the partition of immoveables not paying revenue to Government it is necessary to appoint a Commissioner under section 396 of the Civil Procedure Code. That section clearly contemplates a discretion in the Court, and here, it is clear that, neither the Court nor the decree-holder thought that it was necessary to postpone the making of the decree until the house had been actually divided into halves. We do not think the decision in *Appadu* v. *Venkata Ranga Rao*(1), which was quoted to us is intended to lay down a rule that, in all cases, a partition decree is to be considered pending until action is taken under section 396 of the Civil Procedure Code, but if it is so intended, we must, with great respect, decline to accept it as correct.

We are of opinion that the decree in this case is a final decree.

(1) 18 M. L. J., 23.

We cannot accept the contention, which the District Judge says was practically given up, that this appellant was unable to obtain possession of the house by reason of the widow's residence therein. He could have obtained possession under section 264 of the Civil Procedure Code It is contended in this Court, but was not in the Court below, that the bar of Limitation is saved by the fact that the Appellant attained majority only in 1906. We are unable to entertain that contention now; it depends on a question of fact which should have been established in the Court below if the Appellant desired to rely on it.

The appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

EMPEROR

1908 October 29.

v.

MAHESWARA KONDAYA AND ANOTHER.*

Criminal Procedure Code,—Act V of 1898, s. 253—Order of discharge not a 'judgment'—Competency of Magistrate after discharge to take fresh proceedings.

It is competent to a Magistrate who has discharged an accused under section 253 of the Code of Criminal Procedure to take fresh proceedings and issue process against the person discharged in respect of the same offence without such order being set aside by a higher Court:

Per PINHEY, J.—An order of discharge is not a 'judgment.' A 'judgment' is an order in a trial terminating in either the conviction or acquittal of the accused.

The principle of *autrefois aqcuit* can have no application where an accused is discharged under section 253, as there can be no trial when the accused is discharged.

THE facts are fully stated in the letter of reference which is as follows:—

A complaint under section 406, Indian Penal Code, was presented to the Second-class Sub-Magistrate of Palkonda against two persons. The Sub-Magistrate, after taking all the evidence

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* Case Referred No 90 of 1908 (Criminal Revision Case No. 404 of 1908) for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. L. Hannay, Esq., Acting Sessions Judge of Vizagapatam, in his letter, dated 12th August 1908.