

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN
&
THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

Wednesday, the 20th day of December 2023 / 29th Agrahayana, 1945

IA.NO.1/2023 IN RFA NO. 108 OF 2003

OS 8/1996 OF I ADDITIONAL SUB COURT, THIRUVANANTHAPURAM

PETITIONERS/APELLANTS:

1. MEENAKSHI, [REDACTED]
2. P.VIJAYAN @ DAVID, [REDACTED]
3. VASANTHA, [REDACTED]
4. RAGINI, [REDACTED]

RESPONDENTS/RESPONDENTS:

1. P.SOMAN NADAR, [REDACTED]
2. CHRISTUDAS, [REDACTED]
3. VISWAMMA, [REDACTED]
4. VIJAYAN, [REDACTED]
5. RAJAN, [REDACTED]
6. MINI, [REDACTED]

Application praying that in the circumstances stated in the affidavit filed therewith the High Court be pleased to issue appropriate directions to the office of this Honourable Court to issue appropriate direction calling upon the petitioner to produce non-judicial stamp paper of value Rs.1400/-, or such other amount which this Honourable Court fixes, engross the decree in the above appeal on such stamp paper, issue copy of the same to me and on engrossing the decree on the Stamp paper, forward a copy of the same to the Sub Registry office Chalai, for due registration, the fee for which, the petitioners shall remit, if required.

This Application coming on for orders upon perusing the application

and the affidavit filed in support thereof, and upon hearing the arguments of M/S.SREELEKHA PUTHALATH, PANICKER V.P.K., Advocates for the petitioners and of SRI.K.M.FIROZ, Advocate for R2, R4 to R6/ R3, R5 to R7 in appeal, SMT.M.SHAJNA, Advocate for R2/R3 in appeal, the court passed the following:



“C.R.”

ANIL K. NARENDRAN & P.G. AJITHKUMAR, JJ.

**I.A.No.1 of 2023
in
R.F.A.No.108 of 2003**

Dated this the 20th day of December, 2023

ORDER

Anil K. Narendran, J.

The appellants are the applicants. They seek a direction to Registry to engross the final decree passed by this Court in the appeal on non-judicial stamp paper of requisite value by getting the same produced by the parties.

2. R.F.A.No.108 of 2003 was disposed of along with R.F.A.No.234 of 2006, vide judgment dated 02.11.2016. A final decree was accordingly passed, which was based on the memorandum of settlement executed between parties in the mediation held on 16.09.2016. The decree is yet to be drafted and engrossed on the stamp paper. Hence, the appellants in R.F.A.No.108 of 2003 have filed this application.

3. Heard the learned counsel for the applicants/ appellants and the learned counsel for the respondents.

4. Earlier appellants in R.F.A.No.108 of 2003 filed I.A.No.1 of 2020 seeking the same relief and that was allowed as per the order dated 02.09.2022. The final decree directs to

divide the property in question into two; plot No.1 is allotted to Sri.Christudas, who is defendant No.3 and plot No.2 is allotted to the plaintiffs in O.S.No.8 of 1996. The plaintiffs are the appellants in R.F.A.No.108 of 2003 and the 3rd defendant is the 3rd respondent in R.F.A.No.108 of 2003.

5. In **Brenda Barbara Francis v. Adrian Miranda 'Halcyon' Pakkattuvara, Kunnukuzhi [2023 (3) KHC 93]**

a Division Bench of this Court held that the power to engross a final decree on non-judicial stamp paper is with the trial court after culmination of the proceedings in the appeal, and attainment of finality of the decree. It was further held that once the final decree is engrossed on stamp paper, the original shall be given to the person concerned on his application and the copy be kept with the case records.

6. The learned counsel for the 3rd respondent would submit that the said propositions of law are against the relevant provisions in the Civil Rules of Practice, 1971 (Kerala), the Kerala Stamp Act, 1958 and the Registration Act, 1908. It is submitted that the provisions of the Stamp Act and the Registration Act were not considered in that decision. It is urged that the said dictum is against the express provisions of

Rules 237 and 238 of the Civil Rules of Practice. Accordingly, the learned counsel would submit that the said decision did not lay down any binding precedent and shall not stand in the way of directing Registry to engross the decree in these appeals on non-judicial stamp paper to be furnished by the respective parties.

7. In **Brenda Barbara Francis [2023 (3) KHC 93]** the Division Bench took the view that on a decree being passed, as the case may be, by the first appellate court or the second appellate court, the decree of the trial court merges with the appellate decree and it is the trial court, which is to execute such a decree. The very same principle is applicable to a decree of partition of immovable property, when it requires documentation as mandated by the provisions of the Registration Act. Once the right of parties is finally adjudicated, that would constitute a decree as defined under Section 2(2) of the Code of Civil Procedure, 1908 (for brevity 'the Code'). Thereafter, the matter shall go back to the trial court where only the requirement of engrossing the decree on stamp paper shall be carried out. The Division Bench explained that the expression 'by the court' made mention of

in Rule 237 of the Civil Rules of Practice stands for the trial court.

8. The insistence of Rule 237(1) of the Civil Rules of Practice is that the decree in a partition suit, which is engrossed on non-judicial stamp paper, shall be retained by the court and copies of the same shall be furnished to the parties. The Division Bench in **Brenda Barbara Francis [2023 (3) KHC 93]** held that the final decree, which has been engrossed on stamp paper would be the document of right, title or interest of the parties to it and therefore, the original shall be given to "such person on his application".

9. Rule 187 of the Civil Rules of Practice insists that a final decree in a partition suit shall be prepared on stamp papers. Sub-rule (3) of Rule 187 says that the stamp duty leviable shall be according to the Stamp Act in force at the time of passing of the final decree. This rule is in consonance to Sections 17 of the Kerala Stamp Act, which reads;

"17. Instruments executed in the State of Kerala:-All instruments chargeable with duty and executed by any person in the State of Kerala shall be stamped before or at the time of execution."

(Underline supplied)

Section 2(j) of the Stamp Act defines 'instrument' as follows:-

"(j) 'Instrument' includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded but does not include a bill of exchange, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt."

Section 2(k) defines an "instrument of partition", which states;

"(k) "Instrument of Partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any Revenue Authority or any Civil Court and an award by an arbitrator directing a partition."

It is thus clear that a final decree passed by a civil court amounts to an instrument of partition requiring stamp duty leviable under the Stamp Act in force at the time of passing of the final decree. The term 'executed' with reference to an instrument is explained by Section 2(f) of the Stamp Act as signing of the document.

10. Whether a final decree of partition requires registration is to be decided with reference to the provisions of the Registration Act. Section 17(1)(b) insists on mandatory registration of all testamentary instruments which purport or

operate to create, declare, assign, limit or extinguish title or interest of the value of Rs.100/- or upwards, to or in an immovable property. However, sub-section (2)(vi) of Section 17 excludes a decree of a court from the purview of Section 17(1)(b). Therefore, a decree of partition of an immovable property of the value of hundred rupees and upward is not compulsorily registrable. However, sub-section (5) of Section 89 of the Registration Act insists on the court which passes such a final decree of partition to send a copy to the registering officer within the local limits of whose jurisdiction the whole or any part of the immovable property is situate, and such officer shall file the copy in Book No.1. Rule 185 and 237(2) of the Civil Rules of Practice also insist on and contain the procedure for sending a copy of the final decree to the registering officer.

11. The question crops up for consideration is, can, in the light of the aforesaid provisions, the obligation of engrossing a decree of partition on stamp paper be relegated by the appellate court to the trial court.

12. Section 33 of the Code envisages that every judgment shall follow a decree. Order XX, Rule 7 of the Code states that the decree shall bear the date 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.

13. Rule 35 of Order XLI, deals with decree by appellate courts. Sub-rule (4) says that the decree shall be signed by the Judge or Judges who passed it. Rules 36 and 37 of Order XLI provides for the procedure as to the furnishing of copies of the appellate decree, which reads;

“36. Copies of judgment and decree to be furnished to parties.- Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court at their expense.

37. Certified copy of decree to be sent to Court whose decree appealed from.- A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.”

The aforesaid provision undoubtedly would show that a decree of the Appellate Court shall be signed by the judge/judges, who passed it and the original of the Appellate Court decree shall be kept in the Appellate Court and a copy forwarded to the court which passed the decree.

14. In **Shankar Balwant Lokhande (dead) by L.Rs. v. Chandrakant Shankar Lokhande and another [(1995) 3 SCC 413]** the Apex Court held that until the final decree determining the rights of the parties by metes and bounds is drawn up and engrossed on stamped paper(s) supplied by the parties, there is no executable decree. The question considered in that decision was, when would the period of limitation for executing a final decree begin? However, the observations of the Apex Court in paragraph No.12 would help to answer the question in controversy, which read thus;-

"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." (Underline supplied)

15. In the context of the law laid down by the Apex Court in **Shankar Balwant Lokhande [(1995) 3 SCC 413]** Rules 237 and 238 of the Civil Rules of Practice (Kerala) shall

be understood. The said Rules read thus;

“Rule 237: (1) Decree to be engrossed on stamp paper.- The decree in a partition suit shall be prepared on non-judicial stamp paper of the requisite value and shall be retained by the Court and shall form part of the record, and copies of the same shall be furnished to the parties as in the case of other decrees.

(2) Copy to be sent to Sub-Registrar.- A copy of the final decree in a partition suit shall be sent to the Sub-Registrar within whose jurisdiction the immovable property is situate and in cases where the properties fall within the jurisdiction of more than one registration sub-district, the Court shall send a copy to each Sub-Registrar.

Rule 238: Procedure where stamp paper is not furnished.-

(1) If the parties fail to produce the amount required for the stamp papers as directed, the records of the cases shall be consigned to the record room without drawing up the final decree and to such cases the rules regarding destruction of records shall not apply.

(2) If any party subsequently desires to have the decree prepared, he shall move therefor by petition producing at the same time the amount required for the stamp papers.

(3) The amount required for the stamp papers so produced, will be treated as costs in the final decree.

(4) Any application for copy of a final decree, in a case in which the records have been consigned to the record room without preparing the final decree under sub-rule (1), shall be returned to the applicant stating that the final decree has not been prepared.” (Underline supplied)

16. When Rule 237(1) is clear that a decree in a partition suit shall be prepared on non-judicial stamp paper of requisite value and Rule 238 is to the effect that if the parties fail to produce the amount required for the stamp paper, the records of the case shall be consigned to the record room without drawing up the final decree, there cannot be any doubt that the decree can be drawn up only on the stamp paper. The Apex Court in **Shankar Balwant Lokhande [(1995) 3 SCC 413]** made it clear that drawing up a final decree and engrossing it on stamp paper of required value together constitute the final decree having the effect of a duly stamped instrument. In that view of the matter, it cannot be said that engrossing a decree on stamp paper is an act independent of drawing up the decree. Once such a decree is drawn up, the court which passed the decree is obliged to send a copy of the same to the office of the Registrar concerned in compliance with the provisions of Section 89(5) of the Registration Act.

17. As stated, the provisions of Rule 237 of the Civil Rules of Practice leave no room for any doubt. The language of the rule allows only one interpretation that the decree

prepared on non-judicial stamp paper of the requisite value shall be retained in the court and shall form part of the records of the case. Copies of the decree alone shall be furnished to the parties.

18. The law is well settled that rules, when validly framed, become part of the statute. See: **Authorised Officer State Bank of India v. C. Natarajan [2023 SCC OnLine SC 510]** and **National Insurance Co. Ltd. v. Swaran Singh [(2004) (3) SCC 297]**

19. Therefore, the aforesaid rules in the Civil Rules of Practice are part of the statute. While interpreting such statutory provisions it is the duty of the court to construe them according to the language used. The courts are bound to apply the law as it is made. The function of the court is to interpret the law and not to amend or modify or alter it. See: **State of Kerala v. Mathal Varghese [(1986) 4 SCC 746]**. The court cannot add or subtract words while interpreting the provisions of a Statute. See **Rohitash Kumar v. Om Prakash Sharma [(2013) 11 SCC 451]**.

20. In **Glen Leven Estate (P) Ltd. v. State of Kerala [2022 (6) KLT 439]**, a Division Bench of this Court,

following the decision of the Apex Court in **National Insurance Company Ltd. v. Pranay Sethi [(2017) 16 SCC 680]** held that "a later coordinate bench holding differently from the earlier one cannot be taken as a binding precedent. A Bench of coordinate strength is expected to follow the view taken by an earlier Bench.

21. It was held by the Constitution Bench of the Apex Court in **Pranay Sethi [(2017) 16 SCC 680]** that a decision will be *per incuriam* when any provision in a statute, rule or regulation was not brought to the notice of the Court and also if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a coequal or larger Bench.

22. The view in **London Tramway Co. v London County Council [(1898) AC 375]** is generally accepted as an authority for the position that a decision rendered in ignorance of a statute acquires no authority as a precedent. More comprehensive statement of law on this subject is what was held in **Bristol Aeroplane Company case [(1944) 1 KB 718]**, where it was held that;

"The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*, for

example, where a statute or Rule having statutory effect which would have effected the decision was not brought to the attention of the earlier Court".

Therefore, a decision given in ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the Court concerned, shall, on that account, be demonstrably wrong and carry no binding force. The said principle has been accepted, approved and adopted by the Apex Court by interpreting Article 141 of the Constitution of India. See: **Bengal Immunity Company Ltd. v. State of Bihar [1955 (2) SCR 603]**; **State of Uttar Pradesh v. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139]**; **State of Bihar v. Kalika Kuer @ Kalika Singh [(2003) 5 SCC 448]** and **Madhya Pradesh Rural Road Development Authority v. L.G.Chaudhary Engineers and Contractors [(2018) 10 SCC 826]**.

23. From the above, it emerges that the view taken in **Brenda Barbara Francis [2023 (3) KHC 93]** that the Appellate Court shall after drawing up a final decree, send the records to the trial court to engross the decree on the stamp paper is against the provisions contained in Rules 237 and 238 of the Civil Rules of Practice and the imperative of

Sections 2(k), 2(l) and 17 of the Kerala Stamp Act and also Section 89(5) of the Registration Act. Such a view was taken without noticing the provisions of Order XLI Rules 35 of the Code also. Had those provisions been brought to the notice of the Division Bench, such a view would not have been taken. Also, the view that drawing up of an appellate decree for partition and engrossing it on stamp paper are different processes; one to be done by the Appellate Court and the other by the trial court is against the intent of Rules 237 and 238 of the Civil Rules of Practice and the law laid down by the Apex Court in **Shankar [(1995) 3 SCC 413]**.

24. The dictum laid down in **Brenda Barbara Francis [2023 (3) KHC 93]** that the original of the final decree shall be given to such person on his making an application is in direct conflict with the provision of Rule 237 of the Civil Rules Practice. In a suit for partition, each party is considered to be the plaintiff. Each person entitled to a share becomes the owner of the share allotted to him. If the aforesaid view is followed, to whom among such owners shall the original final decree be given, would be an imbroglio. Such a view is against the specific provisions in Order XLI, Rules 36 and 37

of the Code as well as Rule 237(1) of the Civil Rules of Practice.

25. Therefore, both the said principles of law laid down in **Brenda Barbara Francis [2023 (3) KHC 93]** are *per incuriam* and we are unable to follow. Accordingly, we allow this petition holding as follows:

- i) What was held in **Brenda Barbara Francis [2023 (3) KHC 93]** that (i) when a first appellate or a second appellate court disposes an appeal and passes a final decree, the obligation to engross the decree on stamp paper of requisite value is with the trial court, and (ii) the final decree which has been engrossed on the stamp paper shall be given in original to such person on his application after retaining a copy in the court are incorrect propositions of law;
- ii) When the first appellate court or the second appellate court passes a final decree for partition of immovable property by confirming, modifying or reversing the trial court decree, such first appellate court or second appellate court, as the case may be, shall draw up and engross the final decree on the stamp paper of requisite value. The original final decree that is engrossed on the stamp paper shall be retained in such appellate court and forms part of the records;
- iii) The appellate court, as the case may be, the second appellate court shall send a copy of the final decree to the

office of the Registrar/s concerned; and

- iv) Copy of the final decree shall alone be given to the parties in terms of Rule 237(1) of the Civil Rules of Practice.

Registry is directed to call upon the parties herein to furnish the value of the non-Judicial stamp paper and engross the decree on the stamp paper. Registry shall also take necessary further steps in accordance with law.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE



dkr