Janardhanan Vs Rugmini and Others

Regular First Appeal No. 443 of 2008

Court: High Court Of Kerala

Date of Decision: June 2, 2010

Acts Referred:
Hindu Succession Act, 1956 â€" Section 23, 6, 6(5)

Citation: (2010) 2 ILR (Ker) 933 : (2010) 2 KLJ 425

Hon'ble Judges: Thottathil B. Radhakrishnan, J; S.S. Satheesachandran, J

Bench: Division Bench

Advocate: P. Ramachandran, for the Appellant; Chitambaresh T.C. Suresh Menon, Jibu P. Thomas, P.S. Appu and C.A. Anoop, for the Respondent

Final Decision: Dismissed

Judgement

Thottathil B Radhakrishnan, J.
Defendant appeals against a preliminary decree for partition.

2. Chami, a Hindu male who ran a teashop, died intestate following a motor accident on 19.05.2000. First plaintiff is his widow. Plaintiffs 2 and 3

are their daughters and the defendant their son. in 2004, the mother and daughters sued for partition claiming one-fourth right each in the suit

properties, which according to them is the estate left behind by late chami. Defendant contested and claimed that the first item in plaint A Schedule,

a dwelling house, is not liable to be partitioned in view of Section 23 of the Hindu Succession Act, 1956, for short, ""the Act"". He also pleaded that

some of the movables in the tea shop were his acquisitions and that there are certain items of monies left out of from the claim for partition.

3. The court below held that Chami''s widow had shown that no amount other than that included in the Schedule to the plaint was available for

partition and that the defendant having taken over the tea shop of chami immediately following his unexpected demise following the motor accident,

has not shown that any of the movables in the tea shop belonged exclusively to him, contrary to the available presumption that all movables therein

belonged to chami who owned the shop till his death, on the defendant''s plea regarding the dwelling house, the court below held that though the

suit was instituted before the coming into force of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), hereinafter, the ""Amending Act"",

the female heirs are no more barred from seeking partition of the dwelling house in view of the repeal of Section 23 of the Act by the Amending

Act.

4. The findings regarding the monies and the movables in the tea shop being unassailable on the basis of the evidence on record and in law,

including the precedent relied on by the court below, the learned Counsel for the appellant, quite rightly, confined himself to attacking the impugned

preliminary decree and judgment in so far as it relates to the dwelling house. He argued that the Amending Act that came into force in 2005 is

prospective and therefore, the suit instituted in 2004 is barred. He further argued that succession having opened with the death of Chami on

19.05.2000, the rights of parties had crystallized before the repeal of Section 23 of the Act and that therefore, the female heirs of Chami had no

right to partition without the consent of the defendant, the male heir.

5. Prior to its omission as per the Amending Act, Section 23 of the Act read as:

23. Special provision respecting dwell ing-houses.-Where a Hindu intestate has left surviving him or her both male and female heirs specified in

Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding

anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to

divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has

been deserted by or has separated from her husband or is a widow.

6. A survey of the decisions of the different high courts may tend to show that there is divergence of opinion as to whether Section 23 would

operate as a bar to a female heir claiming partition in the event of there being only one male heir. The fact being that there is only one male heir for

Chami, such an issue would have been relevant in the case in hand. But, we do not propose to go into that for two reasons. Firstly, no such plea is

raised by the female heirs opposing the insulation from partition, claimed by the defendant, the sole male heir. Secondly, the fundamental question

arising for decision in this appeal is as to the effect of the repeal of Section 23 of the Act as per the Amending Act, on a pending suit, we therefore

proceed with this appeal on that basis.

7. What was the effect of Section 23 of the Act before its repeal as per the Amending Act? That provision was not a rule of succession. The very

use of the word ""heir"" in that section in relation to females is sufficient intrinsic material to conclude that Section 23 proceeded recognising and

conceding the right of the female heir/heirs to non-testamentary succession, to the extent available under the laws as they then existed. Section 23

did not have any impact on the right to succession. It did not postpone the point of time when succession would open. The commencement of the

incidence of the female''s lawful entitlement to her extent of interest in the title to the estate, if any, available for intestate succession was in no

manner impaired by the operation of Section 23. That statutory provision is only to the effect that the female heir''s right to claim partition of the

dwelling house would arise only on the male heirs choosing to divide.

8. Restrictions imposed on a right must be construed strictly. In the context of the restrictive right as contained in Section 23 of the Act, it must be

held that such restriction was to be put in operation only at the time of partition of the property by metes and bounds. That event does hot occur by

the grant of a preliminary decree which would be dependent on the right of a co-sharer in the joint property. Section 23 is merely a disabling

provision. The right could be enforced if a cause of action there-for arose subsequently. Aright of the son to keep away the right of the daughters

of the last male owner to seek for partition of a dwelling house is only a right of the male owner to keep the same in abeyance till the division takes

place. Such a right is not one of enduring nature. It cannot be said to be an accrued right or a vested right. A preliminary decree could be passed

declaring the entitlement of each co-sharer in terms of the provisions of the Act, as to the rules of succession, what is barred is only actual partition

by metes and bounds. See G. Sekar Vs. Geetha and Others, para. 27, 40 & 48. As a necessary corollary, the institution of a suit is also not

barred by Section 23.

9. Section 6 of the Act provides, among other things, that on and after the commencement of the Amending Act, in a Joint Hindu family governed

by the Mitakshara law, the daughter of a coparcener shall have the same rights in the coparcenary property as she would have had if she had been

a son. Sub-section 5 of Section 6 provides that nothing contained in Section 6 shall apply to a partition, which has been effected before the 20th

day of December. 2004. The Explanation immediately following that provision enjoins that for the purpose of Section 6, ""partition"" means any

partition made by execution of a deed of partition duly registered under the Registration Art. 1908 06 of 1908) or partition effected by a decree of

a court. In G. Sekar (supra), the Apex Court laid down that neither the Act nor the Amending Act seeks to reopen vesting of right where

succession had already taken place and although the operation of the Amending Act is not retrospective in character and nature, its application is

prospective. Therefore, Section 6 of the Act, enjoining equality among the daughter and son of a coparcener under the Mitakshara law, provides

the operation of that provision with effect from 20th day of December, 2004, in all cases where partition has not been effected either by execution

and registration of a deed of partition or partition having been effected by a decree of a court. In the case in hand, no partition deed was executed

and registered by the heirs of Chami before 20th December 2004. There is also no partition effected by a decree of a court. The impugned, is only

a preliminary decree. It only declares the entitlement of each co-sharer in terms of the rules of succession which apply to the parties. The making of

the partition by metes and bounds in terms of the declaration is yet to come. Even the impugned preliminary decree was passed only after the

coming into force of the Amending Act omitting Section 23 from the Act. Hence, Section 6 of the Act, as amended, applies to the case in hand, in

favour of the plaintiffs.

10. No other issue of law, fact or appreciation of evidence arises for decision.

11. For the aforesaid reasons, we do not find any ground to entertain this appeal.

In the result, the appeal is dismissed, in limine.