

(2010) 01 MAD CK 0156

Madras High Court

Case No: O.S.A. No. 29 of 2010 and MP No. 1 of 2010

G. Sekar

APPELLANT

Vs

L. Geetha and Others

RESPONDENT

Date of Decision: Jan. 28, 2010

Acts Referred:

- Constitution of India, 1950 - Article 136
- Hindu Succession (Amendment) Act, 2005 - Section 23, 3, 6, 8

Citation: (2010) 1 LW 802

Hon'ble Judges: T. Raja, J; M. Chockalingam, J

Bench: Division Bench

Advocate: V. Raghavachari, for Kumarpal R. Chopra, for the Appellant; P.B. Ramanujam, for the Respondent

Final Decision: Allowed

Judgement

M. Chockalingam, J.

This intracourt appeal challenges an order of the learned Single Judge of this Court made in Application No. 4063 of 2007 filed for passing of final decree in C.S. No. 153 of 1996.

2. The Court heard the learned Counsel for the Appellant and also for the Respondents.

3. From the submissions made and looking into the materials available, the following would emerge as admitted facts:

(a) The Plaintiffs namely the Respondents 1 and 2 herein, filed C.S. No. 153 of 1996 for partition and separate possession. The first Defendant apart from defending the suit, filed an O.P. seeking probate on the strength of a Will alleged to have been executed by their father. On objection, the said OP was converted into TOS No. 4 of 1998. Both the suits were tried jointly. The learned Single Judge made a judgment

whereby a preliminary decree for partition was granted in C.S. No. 153/96, while TOS 4/98 was dismissed. Aggrieved, the first Defendant preferred OSA Nos. 196 and 197 of 2001 before the Court. Both the appeals on enquiry were dismissed by a judgment dated 29.1.2007. The SL Ps were filed by the first Defendant before the Apex Court. The Plaintiffs who had no notice of those proceedings, filed an application for passing of final decree in order to have their 1/5th share each as declared in the preliminary decree. Those SL Ps were dismissed by the Apex Court affirming the preliminary decree.

(b) While the matter stood thus, the Plaintiffs filed an application for appointment of Advocate Commissioner to inspect the suit property for the purpose of division by metes and bounds. On enquiry, the learned Single Judge agreeing with the case of the Plaintiffs, allowed the same. Hence this appeal at the instance of the first Defendant.

4. Advancing arguments on behalf of the Appellant, the learned Counsel would submit that it is pertinent to note that the suit at the instance of the Plaintiffs as against a residential unit is not at all maintainable on the date of presentation of the plaint; that the Will relied upon by the Appellant before the Apex Court was found to be short of evidence; that the Apex Court had only rejected the claim based on the Will, but had not approved the suit for partition instituted by the Plaintiffs; that the Division Bench has observed in OSA Nos. 196 and 197 of 2001 that Section. 23 of the Hindu Succession Act is retrospective in nature and upheld the decree in CS No. 153/96 only on that account; that the Apex Court has held that the judgment of the High Court in that regard is erroneous; that the Apex Court has also held that the amended Hindu Succession Act 2005 is only prospective in nature, and under the circumstances, the order of the learned Single Judge has got to be set aside.

5. Countering the above, the learned Counsel for the Respondents 1 and 2 put forth his submissions inter alia that the preliminary decree which was originally granted by the trial Court, was affirmed by the Bench and also by the Apex Court, and thus the preliminary decree has become final; that consequent upon the preliminary decree, the final decree application was also filed, and the instant application was filed for appointment of an Advocate Commissioner; that filing of the final decree application was the only course open to the Plaintiffs to get the relief of partition; that a perusal of the judgment of the Apex Court would clearly indicate that the preliminary decree originally granted was not disturbed; that the observation made by the Apex Court in its judgment that the Plaintiffs may file a suit for partition will not in any way affect or prevent the right of the Plaintiffs in getting a final decree; that the parties have litigated for a period more than a decade; and that if the Plaintiffs are directed to file another suit, the decree originally passed and affirmed by the Bench and by the Apex Court would only become a paper decree.

6. Pointing to the judgment of the Apex Court, the learned Counsel would further add that the Apex Court in appraisalment of the entire facts and circumstances, has

declined to exercise its jurisdiction under Article 136 of the Constitution; that apart from that, it is a case where the property is a residential one in a part of which the Plaintiffs are also residing; that the amendment giving benefit to the female and treating her as a coparcener, was made in the year 2005; that the application for final decree was filed only in 2007; that under the circumstances, the Plaintiffs can have the benefit of the same; that accordingly, they have filed the application for final decree and hence the order of the learned Single Judge was to be affirmed.

7. The Court paid its anxious consideration on the submissions made.

8. It is not in controversy that the Plaintiffs, the Respondents 1 and 2, originally filed a suit for partition, and a preliminary decree came to be passed declaring that each was entitled to 1/5th share in the property in question namely a residential house. It is also an admitted position that the Plaintiffs and also the Defendants are residing in different portions of the same house. As could be seen, the first Defendant has challenged the preliminary decree made in the suit before the Bench of this Court and also before the Apex Court by way of filing SL Ps. But, in those proceedings, the preliminary decree originally made was not disturbed. The contention put forth by the learned Counsel for the Respondents 1 and 2 in that regard was perfectly correct. But, it should not be forgotten that the preliminary decree is one where the rights of the parties are adjudicated, and it is the final decree where the rights are worked out. In the instant case, what is not disturbed is the preliminary decree. It is also true that the preliminary decree made by the Court of original jurisdiction was affirmed by the Division Bench and also by the Apex Court. But, the question which is to be answered is that on the strength of that preliminary decree whether a final decree could be sought for or made.

9. At this juncture, the following paragraph of the judgment of the Apex Court in Civil Appeal No. 2535 of 2009 dated 15.4.2009, would be more apt and appropriate.

20. We may in the aforementioned backdrop notice the relevant portion of the Statement of Objects and Reasons of the 2005 Act, which reads as under:

3. It is proposed to remove the discrimination as contained in Section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the same section so as to remove the disability on female heirs contained in that section.

21. It is therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided in terms of Section 23 of the Act.

22. Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that Section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property is concerned has been sought to be removed, we fail to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of Section 8 of the Act read with the Schedule appended thereto. 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, as grant of a preliminary decree would be dependant on the right of a co-sharer in the joint property. Concededly a preliminary decree could be passed declaring each co-sharer to be entitled to 1/5th share therein in terms of the provisions contained in Section 8 of the Act. 1/5th share in each co-sharer upon death of the predecessor-in-interest of the parties is absolute. They cannot be divested of the said right as the restriction in enjoyment of right by seeking partition by metes and bounds is removed by reason of Section 3 of the 2005 Act. We may notice Sub-section (5) of the 2005 Act, which reads as under:

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation- for the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court.

Thus, where a partition has not been taken place, the said provision shall apply.

10. From the above it would be quite clear that the restrictions imposed have to be given strict construction and in the context of the restrictive right as contained in Section. 23 of the Act, it has to be held that such restriction was to be put in operation only at the time of partition of the property by metes and bounds as grant of a preliminary decree would be dependant on the right of a cosharer in the joint property. In view of the factual matrix of the case, there could not be any impediment for passing a preliminary decree declaring that each Plaintiff was entitled to 1/5th share in terms of the provisions contained in Section. 8 of the Act. They could not be divested of the right as the restriction in enjoyment of right by seeking partition by metes and bounds is removed by reason of Section. 3 of 2005 Act. The Apex Court has pointed out in its judgment that the High Court might have committed a mistake in opining that the operation of Section. 3 of 2005 Act was retrospective in character and it should have been held that although it was not retrospective in nature, its application was prospective. The Apex Court in order to make it clear has pointed out as follows:

As indicated hereinbefore, the institution of a suit is not barred. What is barred is actual partition by metes and bounds.

11. All the above would make it abundantly clear that the operation and application of Section. 3 of 2005 Act was only prospective, and the institution of the suit was not barred. But what was barred was the actual partition by metes and bounds, and Section. 23 of the Hindu Succession Act as it stood was to be applied on the date of institution of the suit. Hence the Plaintiffs if advised, could file a fresh suit for partition on the strength of the rights already declared in the course of the preliminary decree made in CS No. 153/96. In view of the above, no application for appointment of Advocate Commissioner for dividing the property by metes and bounds would arise. Hence the order of the learned Single Judge has got to be set aside.

12. In the result, this original side appeal is allowed setting aside the order of the learned Single Judge and leaving the parties to bear their own costs. Consequently, connected MP is closed.