

(2009) 04 MAD CK 0530
Madras High Court (Madurai Bench)
Case No: A.S. No. 963 of 1997

K. Balasubramanian

APPELLANT

Vs

K. Srinivasan

RESPONDENT

Date of Decision: April 29, 2009

Citation: (2009) 4 CTC 371

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: S. Ramesh for Mr. V. Raghavachari, for the Appellant; P.S. Seetharaman, for the Respondent

Final Decision: Allowed

Judgement

R.S. Ramanathan, J.

The plaintiff in O.S. No. 203 of 1989, on the file of the II Additional Sub Court, Trichirappalli, is the appellant herein. This is a partition Suit filed by the plaintiff for partition of his 1/2th share in the properties and for proper accounts of the rents.

2. It is the case of the plaintiff that he and the defendant were doing business in culture diamonds as partners and out of the income earning from the business, the suit property was purchased in the joint names of the plaintiff and the defendant under a sale deed dated 17.11.1974. The partnership was dissolved on 11.08.1986 and the accounts were settled between the partners. After the dissolution, it was mutually agreed between the parties that the plaintiff has to enjoy the western portion and eastern portion shall be enjoyed by the defendant. The stair case is constructed in such a way with a passage in the middle. The parties are collecting rent from the tenants in respect of the portions allotted to them for convenient enjoyment. There is one room in the first floor and that room is in the management of the defendant and it was let out to one "Super Finance" on a monthly rent of Rs. 500/- and the defendant is collecting the rent. The plaintiff is entitled to half share in the rent collected by the defendant. The other room in the first floor was used by their father and after his death, it was broke-open by the defendant and he has the

lock and key for that room. As the defendant failed to partition the suit property and give 1/2th share of the plaintiff, despite notice issued by the plaintiff, this Suit is filed by the plaintiff for partition.

3. The defendant admitted that the suit property jointly belongs to them and the plaintiff and he is entitled to half share. But he alleged that both of them owned several other properties in common and those properties were not included in the Plaint and hence, the Suit is bad for partial partition. He also denied the convenient enjoyment of the western portion by the plaintiff and eastern portion by him and also the receipt of Rs. 500/- from the tenant in respect of one room in the first floor. He also admits that he and the plaintiff are collecting rents from their respective portions.

4. On the basis of the above pleadings, the learned Trial Judge framed the following issues:

1. Whether the Suit is bad for partial partition?

2. Whether the plaintiff is entitled to the share as prayed for?

3. Whether the room in occupation of the Super Finance in the first floor belongs to both parties? Whether the defendant is receiving the rents for the same?

4. Whether the plaintiff is entitled for partition and amount as prayed for?

5. To what relief, if any, is the plaintiff is entitled to?

5. On the side of the plaintiff, he examined himself as P.W.1 and marked two documents and on the side of the defendant he examined himself as D.W.1 and marked two documents.

6. The documents marked on both sides are notices and reply notices issued by the parties.

7. The learned Sub-Judge tried Issue Nos. 2 to 4 and held that as admitted by the parties, the plaintiff is in possession and enjoyment of the western portion and the remaining portion is in enjoyment of the defendant. It is further held by the learned Sub-Judge that the defendant has admitted that he is collecting the rents from the tenant "Super Finance" in respect of one room in the first floor and therefore held that in that room the defendant and the plaintiff are having equal shares.

8. It is further observed by the learned Trial Judge that in this case a stair case with a width of 4 feet is situate on the eastern portion. Therefore, the defendant is having 4 feet less in his enjoyment and further held that to compensate the lesser extent of 4 feet, the defendant shall be permitted to use and enjoy the disputed room, the room occupied by the "Super Finance" in its entirety and entitled to collect rents including the advance by himself. In respect of second floor, the learned Sub-Judge held that both parties are having 1/2th share in the same and shall enjoy other

amenities namely, water tank, bath room and latrine room and other vacant space jointly and finally held that the western half belongs to the plaintiff and the eastern half belongs to the defendant and the room No. 53/20 in the first floor in the occupation of the tenant "Super Finance" belongs to the defendant as he is having less than 4 feet width in his portion due to the presence of staircase and therefore, the plaintiff is not entitled to any share in the room in the first floor and held that the plaintiff is entitled to half share excluding the room in the first floor and the defendant is entitled to room in which occupation of "Super Finance" in the first floor and he is entitled to receive the rent and answering these issues accordingly.

9. While answering Issue No. 1 the Trial Court also held that the Suit is not bad for partial partition and after answering all these issues the Trial Court instead of passing a preliminary decree for partition, passed a final decree straightway declaring that the plaintiff is entitled to the western half share and the defendant is entitled to eastern half share and also the room in the first floor and the second floor shall be enjoyed commonly and jointly by the parties, by an order dated 14.11.1996. Aggrieved by the same, the present Appeal is filed.

10. The point for consideration in this Appeal is whether the passing of the final decree without passing a preliminary decree is justified?

11. It is contended by the learned counsel appearing for the appellant that when the appellant/plaintiff filed a Suit for partition by metes and bounds and when the property is a building, it is the duty of the Court to find out whether the property can be divided into two, so that one property can be exclusively allotted to one party and if it is not possible, parties may be allowed to resort to the provisions of Partition Act. But in any event, preliminary decree has to be passed declaring half share in the suit property to the plaintiff and thereafter, it has to be found out in the final decree proceedings, by appointing Commissioner whether the suit property can be divided equally and if it is not capable of division, then the provisions of Partition Act can be invoked and thereafter, final decree can be passed.

12. In short, the contention of the appellant/plaintiff is without passing a preliminary decree, passing of final decree is unsustainable and therefore, the decree has to be set aside.

13. It is true that in a Partition Suit, the Court has to pass a preliminary decree declaring the shares of the parties and thereafter, final decree has to be passed. But this is not an universal rule and in cases where there is no dispute regarding the shares and parties agreed to take specific portions, the Court can straightaway pass final decree on the basis of the agreement between the parties.

14. In this case, it is admitted that the western half is in the enjoyment of the plaintiff and eastern half in the enjoyment of the defendant and they are collecting rents from the tenant in their respective portions. Therefore, the learned Sub-Judge might have thought, a final decree can be passed straightway when parties have

agreed over the enjoyment. In this case, the dispute does not rest with that. The plaintiff is claiming half share in the income from the room in the first floor, which is let out to Super Finance and the rents are collected by the defendants. Further, the defendant is complaining that the staircase is in the eastern portion and therefore, he is deprived of 4 feet width in his property and further the second floor is kept in common. The plaintiff has come to Court with a specific plea that it is not possible for him to enjoy the property in common with the defendant and therefore, he filed the Suit for partition.

15. The share of the plaintiff is not disputed and it is also held that except the suit property there is no other property belonging to both parties. Therefore, in such circumstances, when the suit property is one and when it is not known whether it can be divided into two, so that one half can be exclusively allotted to one person, the Trial Court should not have proceeded to pass a final decree on the basis of common enjoyment of some portions by parties and at the same time, leaving the second floor in common to be enjoyed by both parties. When a Suit for partition is filed, while passing a final decree the Court must be able to allot specific portions to each parties and unless consented by parties the Court should not have left some portions of the property to be enjoyed in common by the parties. In this Appeal, the Lower Court not only kept the second floor in common to be enjoyed by parties, but also allowed the room in the first floor exclusively to the respondent/defendant. In a Suit for partition, after the passing of final decree the parties must be given specific item or portion of the properties and unless consented, the Court should not keep some portions in common.

16. Further the approach of the Lower Court in allotting the room in the front floor to the exclusion of the defendant is also not correct. The approach of the Lower Court in passing such a final decree without passing a preliminary decree is against the procedure adopted in partition Suit and it has to be deprecated. The Lower Court ought to have passed a preliminary decree declaring the share and proceeded with the final decree by appointing a Commissioner and on the basis of the Commissioner's report either divided the property into two halves or allow the parties to invoke the provisions of Partition Act, Therefore, in my opinion, the passing of final decree straightaway by the Lower Court without passing of preliminary decree is illegal and is liable to be set aside.

16-A. I therefore, hold that a preliminary decree has to be passed in this case, declaring that both parties are entitled to half share each in the property and it is open to them to apply for final decree thereafter.

In the result, the Appeal is allowed, the decree and judgment of the Lower Court is set aside and a preliminary decree is passed declaring that the plaintiff is entitled to half share in the suit property, for which the matter is remitted back to the Lower Court for taking further steps by the parties concerned for passing final decree. There is no order as to costs.