

(2009) 08 MAD CK 0146

In the Madras High Court

Case No : Original Side Appeal No"s. 17, 18 and 19 of 2009 and M.P. No. 1 of 2009 in OSA No"s. 17 to 19 of 2009

Dr. V. Sathish

APPELLANT

Vs

Mrs. Radha V. Bhat (deceased) Shalini, Dr. (Mrs.) Sheila rep.
by her Power Agent Dr. V.N. Sujeer, Dr. (Mrs.) Sudha and Dr.
(Mrs.) Shobha

RESPONDENT

Date of Decision : 17-08-2009

Acts Referred:

Madras City Municipal Corporation Act, 1919 — Section 236

Citation : (2009) 08 MAD CK 0146

Hon'ble Judges : R. Subbiah, J;M. Chockalingam, J

Bench : Division Bench

Advocate : S. Parthasarathy, for the Appellant; Party-in-Person, Power of Attorney for R2 in OSA 17 to 19 of 2009 and R1 in OSA 202 and 203 of 2009, S. Devanathan, for R3 in OSA 17 to 19 of 2009 and R2 in OSA 202 and 203 of 2009, P.K. Mohanvel, for R4 in OSA 17 to 19 of 2009 and R3 in OSA 202 and 203 of 2009, M.V. Venkateshan, for R1 in OSA 17 to 19 of 2009 and R4 in OSA 202 and 203 of 2009, D. Veerasekaran, for CMDA, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—Appeal Nos. 17, 18 and 19 of 2009 challenge a common order of the learned Single Judge dated 12.12.2008 made

in Application Nos. 669, 670 and 671 of 1991 respectively, while Appeal Nos. 202 and 203 of 2009 challenge a common order dated

20.04.2009 made in Application Nos. 29 and 30 of 2009 in C.S. No. 783 of 1985, a suit for partition.

2. The plaintiff in the said suit for partition filed Application No. 669 of 1991 to pass a final decree with reference to the schedule mentioned

property being Item No. 2 of the Schedule "A" to the plaint, by dividing the same

by metes and bounds and allotting the specific portions to the petitioner and respondents, while Application No. 670 of 1991 to pass a final decree in respect of Item No. 3 of Schedule "A" and Application No. 671 of 1991 for appointment of an Advocate Commissioner to prepare a plan and divide the schedule mentioned property by metes and bounds and allot 1/6th share to each of the parties.

3. All the applications came to be filed under the following facts and circumstances:

The plaintiff and the defendants in C.S. No. 783 of 1985, a suit for partition, are the children of Dr.Bhat, who acquired several movable and immovable properties. He executed a last Will and Testament on 30.09.1981 and the same was also registered. On his death on 26.10.1985, the Will came into force. C.S. No. 783 of 1985, the suit for partition in respect of the properties mentioned in the last Will, was filed by the plaintiff, one of his daughters. In the said suit, the wife of Dr.Bhat was shown as 1st defendant while defendants 2 and 3 were the sons and defendants 4 to 6 were the daughters. The 2nd defendant, who remained absent, was set ex parte and he was also not given any share in the Will. The written statement was filed by the 3rd defendant, the appellant herein, denying the rights of the plaintiff and also defendants 1, 4 to 6. The plaintiff and defendants 1 and 4 to 6 filed O.P. No. 393 of 1987, in which the 3rd defendant was shown as sole respondent. The said O.P. was converted into T.O.S. No. 42 of 1987. Written statement of the appellant was filed and on enquiry, the Will of Dr.Bhat was proved and Letters of Administration was granted in favour of all the beneficiaries. A consent preliminary decree came to be passed in A. No. 3817 of 1989 on 05.09.1989 in the said suit for partition, declaring that the plaintiff and defendants 1 and 3 to 6 were entitled to get 1/6th share in the properties described as item Nos. 2 and 3 in Schedule "A" of the plaint. While the matter stood thus, the above said three applications were filed, seeking the reliefs mentioned therein.

4. By an order dated 13.02.1991, one Ms. S. Poorani was appointed as Advocate Commissioner to divide and allot item Nos. 2 and 3 in Schedule "A" of the plaint in equal share to the parties. The Advocate Commissioner was also permitted to have the assistance of a competent Engineer for the said purpose. The Advocate Commissioner visited item No. 2 in

"A" Schedule with the assistance of one qualified Engineer and on inspection, made 5 interim reports. The Advocate Commissioner in the course of the reports made three suggestions for division of item 2 of

"A" Schedule property, namely,

firstly, to sell the property in toto and to divide the sale proceeds by the parties;

secondly, for demolition of the entire superstructure and the vacant site could be divided among the parties as per the preliminary decree, allotting

1/6th share to each; and

thirdly, the old building at the center and the south west corner building could be demolished and the northern side 3 storeyed building could be retained.

5. After hearing the submissions made by the learned Counsel on either side, the learned single Judge found that the second suggestion found in the

last report of the Advocate commissioner was acceptable since it was beneficial to the parties and in so far as the third item of "A" schedule

property is concerned, there was no dispute for partition of the same, according to their respective share. It was also brought to the notice of the

Court that in respect of the share of the mother, the 1st defendant, the rival claims were made by the parties on the strength of two Wills and thus,

it was the subject matter of litigation and hence, the learned single Judge ordered that 1/6th share of the deceased 1st defendant should be kept

apart till the litigation with respect thereto comes to an end and thus, the learned single Judge made an order that the superstructure of the property

in item 2 of "A" Schedule property should be demolished by entrusting the same to a contractor, after getting approval from the concerned

authorities; that the sale proceeds should be divided in equal shares by the plaintiff and defendants 1 and 3 to 6 and in so far as the site of item 2 of

"A" Schedule property is concerned, it should be divided into 6 plots of equal extent confirming to the Development Control Rules of Chennai

Metropolitan Development Authority and such plots shall be allotted to each of the plaintiff and defendants 1 and 3 to 6 after drawing lots. For the

said purpose, Mr. M. Soundarapandian, former District and Sessions Judge was appointed as Advocate Commissioner, with whom all the above

works were entrusted, namely, the demolition of superstructure by entrusting the same to the Contractor and converting the same into vacant land

and also dividing the site into 6 equal plots and also dividing the shares found in item 3 of 'A' Schedule property into 6 equal shares and if

fractional shares were found, they were to be sold in stock market and the sale proceeds shall be divided equally among the parties. Aggrieved

over the above common order, Appeal Nos. 17, 18 and 19 have been preferred by the 3rd defendant.

6. Pending final decree proceedings, Application Nos. 29 and 30 of 2009 were filed by defendants 4 to 6, seeking a direction to the joint

receiver/3rd defendant to expel all the third parties inducted by him in the suit properties, pending injunction. On enquiry, both applications were

ordered and the 3rd respondent was directed to evict the persons so inducted on or before 27.04.2009. Aggrieved over the said order, the 3rd

defendant has brought forth Appeals No. 202 and 203 of 2009. Thus, all the appeals have arisen before this Court.

7. Heard the learned Counsel for the appellant and also the respondents.

8. At the outset, learned Counsel for the appellant, namely, the 3rd defendant, would submit that all the persons, who were inducted into the

property, pending proceedings, have been vacated and thus, the statement could be recorded and Appeal Nos. 202 and 203 of 2009 could be

disposed of.

9. Learned Counsel for the respondents contended that though it is stated by the appellant's side that all the persons so inducted, pending

proceedings, were vacated, some of them continued to occupy and hence, it becomes necessary to issue a direction to the 3rd defendant to evict

them within a stipulated time.

10. From the materials available, in particular, the impugned order, it is quite clear that the 3rd defendant was not the only receiver appointed by

the Court, but only a joint receiver. The Court has also appointed an Advocate commissioner. The 3rd defendant has neither sought permission of

the Court nor it was an act jointly done by both the receivers on permission of the Court and, under such circumstances, the act of the 3rd

defendant in inducting the third parties into the property, pending proceedings, is thoroughly illegal and the persons so inducted have to be termed

as "trespassers" illegally got into the property and hence, the Advocate Commissioner appointed by the Court is empowered to evict them, by

taking necessary steps and thus, the common order made by the learned single Judge in Application Nos. 29 and 30 of 2009 is sustained and

further direction is issued to the Advocate Commissioner as stated above.

11. Advancing the arguments on behalf of the appellant in Appeal Nos. 17, 18 and 19 of 2009, the learned Counsel would submit that the order of

the learned single Judge in passing the final decree and appointing the advocate commissioner was erroneous; that the Court should have deferred

the passing of the order of demolition of item 2 of "A" Schedule property till the disposal of O.P. Nos. 291 and 558 of 2008, which are filed by

the plaintiff and the appellant respectively for probate of the Wills; that the appellant has filed objections to the report of the Advocate

Commissioner report, but they were not considered by the learned single Judge; that as early as 27.03.1991, the mother of the appellant had

executed a Will bequeathing her 1/6th share to the appellant by registered document and accordingly, the appellant is entitled to 2/6th share; that

the Advocate Commissioner had stated in the 4th interim report that the appellant had agreed for demolition; but, in fact, the appellant had agreed

for demolition only in respect of the dilapidated building and not to the extent of 2/6th share, where the appellant and other respondents were

running their Clinics on the northern side; that the value of the northern side building is about Rs. one crore; that the total extent of the northern side

building is only 5610 sq.ft. and not 3 grounds i.e. 7200 sq.ft., as stated by the Commissioner in the fourth interim report; that the construction of

the northern side of the property was regularised by the competent authority and the same was assessed for tax and the appellant is regularly

paying taxes to the concerned authorities since 1985 to till date; that Mrs. V. Radha Bhat, who is the mother of the parties, during the first visit of

the Advocate commissioner on 08.03.1991 had furnished written Memo to the Commissioner and expressed her intention to give 1/6th share to

the appellant and therefore, he is entitled to 2/6th share and the Will dated 27.03.1991 executed by the mother of the appellant expressing her

husband's desire to run a clinic in the suit property and the appellant, being a competent Surgeon, would be able to run a nursing home and the

northern side building should not be demolished.

12. Added further the learned Counsel that it is pertinent to point out that

regarding the allotment of 1/6th share of the 1st defendant was pending before the Court in O.P. No. 558 of 2008 and 291 of 2008 and thus, the learned Judge should not have directed the demolition of the entire superstructure and thereby change the topography of the property before the Will was decided; that the appellant had already expressed his intention to run a charitable hospital in the property in the name of his father for the noble cause, for which he requires 2/6th share; that thus, the order of the learned single Judge for demolition of the entire superstructure was arbitrary; that the appellant had no objection in selling the shares stated in item 3 of "A" Schedule; that the learned single Judge was not correct in coming to the conclusion that the appellant is dragging on the issue; that it was also not correct in coming to the conclusion that 1/6th share of the mother could be decided later and the same could be allotted separately; that even without demolishing the existing structure, the suit property could be divided as it would be beneficial not only to the appellant but also to the other parties; that no demolition notice was issued by the Chennai Metropolitan Development Authority for the demolition of the existing building; that by payment of taxes and charges, the said building could be regularised and hence, it need not be demolished; that the building was constructed during 1980; that necessary charges were also paid and hence, the same cannot be treated as an unauthorised construction; thus, the learned single Judge was not correct in accepting the Commissioner's report and rejecting the objections of the appellant; that even in the year 1987, the appellant and the other defendants filed the written statement, wherein they had categorically stated that the present superstructure of the northern side need not be demolished and only the central Old building could be demolished and allotted to the parties and that the learned single Judge has not assigned any reason for ordering demolition of the northern side building when the balance portion is enough for partition among the four co-sharers.

13. Learned Counsel would further add that the building situate on the northern side, which would cover 2/6th of the shares, could be retained and he has no objection for the removal of the remaining superstructure of that building and the other superstructure of the other buildings. Thus, the demolition of the entire superstructure was detrimental to the interest of all the

parties and hence, the order has got to be set aside.

14. Learned Counsel for the respondents made their honest attempt of sustaining the orders under challenge.

15. The Court made a thorough scrutiny of all the materials available and considered the submissions putforth on either side. The present final

decree and the appointment of Advocate Commissioner for allotment of shares came to be made in C.S. No. 783 of 1995, a suit for partition. It is

not in controversy that the plaintiff, the eldest daughter, filed the suit against her mother, brothers and sisters on the strength of the Will executed by

her father Dr.Bhat. In T.O.S. No. 42 of 1987, the execution of the Will of Dr.Bhat was proved and Letters of Administration was also granted. A

preliminary decree came to be passed on 05.09.1989 by consent of all the parties, whereby it was declared that the plaintiff and defendants 1 and

3 to 6 are entitled to get 1/6th share in each of the properties described in items No. 2 and 3 of Schedule "A" of the plaint in the said partition suit.

The defendants and the plaintiff have made their rival claims on the strength of two Wills. By virtue of which, they were entitled to 1/6th share of

the 1st defendant, who died pending suit.

16. It is also true that two Original petitions are pending as yet. The contention that since both the original petitions are pending and till the disposal

of those petitions, the passing of the final decree has got to be deferred, cannot be countenanced for the simple reason that in the suit for partition,

the mother of the plaintiff was shown as the 1st defendant and it was also not in dispute that she was also entitled to 1/6th share in item Nos. 2 and

3 of Schedule "A" of the suit properties. Under such circumstances, the learned single Judge was perfectly correct in keeping the 1/6th share of the

1st defendant till the disposal of the said original petitions and on the ground of pendency of those original petitions, the other 5 sharers, who were

each entitled to 1/6th share, could not be restrained to get their shares or to get the fruits of the decree. Hence, the contention putforth by the

learned Counsel for the appellant in this regard has got to be rejected.

17. Admittedly, the property situate in Door No. 34, G.N. Chetty Road, T. Nagar, Madras, shown as item 2 in "A" Schedule, is a house site with

an extent of 9 grounds and 522 sq.ft. and there are three superstructures. The property is not abutting the said G.N. Chetty Road. It is also

admitted that the building situate at the centre portion is a very old and in a dilapidated condition and hence, all the parties would agree that it could

be demolished and in the northern side, 3 storeyed building is situated.

18. As could be seen from the available materials, Dr.Bhat submitted a plan for approval only for the construction of residential quarters and the

plan was approved. The construction of north side building was made by Dr.Bhat without any plan at all. When a notice was served upon him u/s

236 of the Madras City Municipal Corporation Act, he had submitted a plan for necessary approval. While the plan was approved, it was found

that the part of the construction was in violation of the Development Control Rules. The sanction was granted subject to the additional portion

should be used for residential purposes only and no change in the usage of the building. It was also made clear that the portions, which were

constructed in contravention of the Rules, must be demolished within six months from the date of the sanction. The Corporation also reserves its

right to withdraw the sanction if there was any violation or misrepresentation. Dr.Bhat was also prosecuted in S.T.C. No. 911 of 1992 and was

imposed fine for the unauthorised construction.

19. It is pertinent to point out that the Corporation of Madras issued a notice to the legal heirs of Dr.Bhat, who are the parties to the proceedings,

and ordered the demolition of the unauthorised deviated portions of the northern side of the building and thus, it will be quite clear that the entire

construction occupying about 3 grounds was contrary to the plan sanctioned and also in violation of the permit issued by the Corporation of

Madras. Under such circumstances, the property situate on the northern side, which the appellant wants to retain, was nothing but illegal

construction and in violation of the principles of law. Despite the notice from 1986 to till date, the parties to the proceedings have not taken any

steps for removal of the illegal construction. The contention put forward by the learned Counsel for the appellant that Dr.Bhat was imposed fine

and hence, there was no necessity for removal of the unauthorised construction, cannot be countenanced in law and thus, it will be quite clear that

the building, which, according to the appellant, could be retained without demolition for the purpose of running a clinic either by himself or by the

other parties, cannot be countenanced.

20. The next contention put forward by the learned Counsel for the appellant that a part of the construction, covering 4000 and odd sq.ft. could be retained towards his share, where Dr.Bhat was running his clinic. This contention cannot also be accepted. Pending proceedings in these appeals, the learned Counsel for the appellant, after getting permission of the Court, addressed a letter to the CMDA for a clarification with regard to the partition of the Schedule property in the suit in the manner shown in the sketch filed by the Advocate Commissioner, as to whether there will be any obstacle for grant of sub-division of the plots after the Court passes a final decree in the partition suit. In the letter dated 21.04.2009, it was replied by the Department stating that the sub-division approval cannot be accorded due to residuary plot violation.

21. A perusal of the plan made by the Commissioner would make it clear that on demolition, leaving a passage in the middle, each of the parties will be getting a site measuring 3064 sq.ft and all the six sharers can have ingress and egress to the plots by having 16" width passage leading from the G.N. Chetty Road. If a part of the property on the northern side covering an area of 4000 sq.ft. is retained, then the passage of 16" width cannot be given. At this juncture, the learned Counsel for the respondents brought to the notice of this Court that if not a passage with such a width, the parties, who were the respective owners of the plots, cannot enjoy their property either conveniently or to improve or develop the property and thus, it will be detrimental to their enjoyment.

22. It is the well settled principal of law that while making division of the property, the Court must keep in mind the interest of all the parties and the convenient enjoyment of all the properties, by all the sharers, without any kind of hindrance from the other sharers and their successors-in-interest.

Under such circumstances, the contention put forward by the learned Counsel for the appellant that the property could be divided into equal shares, leaving the building situate on the north intact or leaving a part of the said construction, cannot be accepted since more than 2/3rd of the construction of the property situate on the northern side was unauthorised and in thorough deviation of the sanctioned plan.

23. It is pertinent to point out that the third defendant/appellant, who is running a clinic in the northern side property, has been using the same all

along the period more than two decades. It is true, the husband of the plaintiff and some of the defendants too have their clinics. But it remains to

be stated that major part of the building on the northern side is under the use and occupation of the 3rd defendant/appellant all along the period. It

would go against the very spirit of the decree for partition granted in favour of all the parties.

24. Taking into consideration the nature of the property, in particular, the unauthorised construction of major part of the building and the convenient

enjoyment of the parties concerned, the Court is of the considered opinion that the entire superstructure of the property has got to be removed and

the vacant site has got to be allotted to the plaintiff and defendants 3 to 6, as found in the preliminary decree, while keeping 1/6th share of the 1st

defendant till the disposal of the above mentioned original petitions. In the said circumstances, this Court is of the view that the contentions put

forward by the learned Counsel for the appellant do not carry merit and hence, they are liable to be rejected and, accordingly, rejected. The

learned Commissioner appointed by the learned single Judge can proceed with the execution of the warrant.

Accordingly, all the original side appeals are dismissed and the impugned orders passed by the learned single Judge are confirmed. There will be

no order as to costs. Consequently, connected M.Ps. are closed.