

(2007) 01 MAD CK 0277

In the Madras High Court

Case No : CRP (PD) No. 1287 of 2006 and MP. No. 1 of 2006

Kamala, Rajalakshmi and Shanmugam

APPELLANT

Vs

Ramachandran and Nandakumar

RESPONDENT

Date of Decision : 10-01-2007

Acts Referred:

Citation : (2007) 1 MLJ 863

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : M.V. Krishnan, for the Appellant; P. Valliappan, for the Respondent

Final Decision : Dismissed

Judgement

S. Ashok Kumar, J.—As against the order passed in I.A. No. 6 of 2005 filed by the defendants 1 and 2 directing the Advocate Commissioner to divide the suit property as per the decree of the High Court dated 4.7.2002 made in A.S.No:1300 of 1998, the plaintiffs have preferred this revision.

2. The brief facts of the case is as follows:

(a) One Balakrishnapillai had three sons namely 1) Ramachandran, 2) Nandakumar and 3) Sambandam. They jointly purchased the property situate in R.S. No. 385/2, Easaniya Thope Street, Sirkazhi Town on 6.10.1973 under a registered sale deed, and each of them being entitled to 1/3rd share.

(b). Subsequently Sambandam died on 25.8.1983 leaving behind his mother Mangayarkarasi, wife Kamala, daughter Rajalakshmi and son Dr. B. Shanmugham and according to the plaintiffs he had executed a Will on 7.4.1983 settling 1/3rd share of the suit properties to the son, the third plaintiff in the suit. But according to the defendants the said Sambandam died intestate on 25.8.1983 leaving behind them and each of them entitled to 1/4th share in his 1/3rd share.

(c) While that being so, the plaintiffs filed the suit in O.S. No. 38 of 1985 before the Principal Subordinate Judge, Myladuthurai for partition claiming 1/3rd share

over the suit property. The trial court by order dated 19.8.1987 passed a preliminary decree granting 7/24th share to the plaintiffs. As against which the defendants preferred Appeal in A.S.No:1300 of 1988, before this Court. By order dated 4.7.2002, this Court modified the preliminary decree passed by the trial court and granted 1/4th share to the plaintiffs instead of 7/24th share. The defendants were granted 2/3rd share. The remaining 1/12th share was allotted to the mother of the defendants viz., Mangayarkarasi.

(d) According to the defendants, the said Mangayarkarasi had earlier executed a registered Will dated 12.2.1986, bequeathing all her properties in favour of the second respondent and she died on 27.3.2002. After her death the second defendant became entitled to 5/12th share over the suit property. The first defendant is entitled to 4/12th share. The plaintiffs are entitled to the remaining 3/12th or 1/4th share. Therefore the defendants filed I.A.NO;6 of 206 for passing of final decree in respect of their $4/12 + 5/12 = 3/4$ th share. In that application, by order dated 4.8.2005 an Advocate Commissioner was appointed for dividing the suit property by metes and bounds. The Advocate Commissioner also in pursuance of the warrant issued to him inspected the suit property, made the division and submitted his report on 20.6.2006. It is as against the said order passed in the Interlocutory Application, this revision has been preferred.

3. Learned Counsel for the revision petitioner contended that had the defendants brought to the notice of the court about the death of the mother Mangayarkarasi as on 27.3.2002, this Court would not have held that the defendants are entitled to 1/12th share by giving a share to the mother. The defendants had suppressed this fact only to claim a larger share to which they are not entitled to. The defendants attempt to divide the property on decree of the High Court and on the basis of the alleged Will executed by Mangayarkarasi which fact has been suppressed by them during trial of the suit or before the High Court is unsustainable. According to the learned Counsel since the Sampandam died leaving a Will the question of Mangayarkarasi's share may not arise at all and therefore the Advocate Commissioner had no jurisdiction to divide the properties giving 3/4th share to the defendants.

4. On the other hand the learned Counsel for the respondents/defendants contended that the death of Mangayarkarasi does not constitute an abatement as has been repeatedly held by the Hon"ble Supreme Court as well as this Hon"ble Court that in a partition suit, even if one party dies and his or her legal representatives are not brought on record, the suit or the appeal as the case may be will not abate if the other legal representatives are already on record and which would constitute sufficient representation. In the present case all the legal representatives of the deceased third defendant Mangayarkarasi were already on record and therefore the question of abatement would not arise. Further, Mangayarkarasi had executed a registered Will dated 12.2.1986 bequeathing all her properties in favour of the second defendant. As such the defendants are entitled to seek for passing of final decree of their 3/4th share.

5. In *Daya Ram and Others Vs. Shyam Sundari*, the Hon"ble Supreme Court held that "where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, the impleaded legal representatives sufficiently represent the state of the deceased and a decision obtained with them on record wil bind not merely those impleaded but the entire estate including those not brought on record."

6. In *Collector of 24 Parganas and Others Vs. Lalith Mohan Mullick and Others*, the Hon"ble Supreme Court in a Review Petition to the Civil Appeal filed on the ground that the Society for whom the land was acquired was not in existence and the land was not required for public purpose which ground was raised for the first time in the review petition, their Lordships have held that such a plea cannot be considered apart from the fact that it would involve investigation of new facts. In that context it has been held that when an appeal decided on merits by the court, and some of the respondents dying during pendency of the said appeal, their estates however sufficiently represented by some of the other legal representatives, the plea that the appeal had abated and the judgment on merits need to be set aside is untenable.

7. In another decision the Apex Court in *Newanness alias Mewajannessa Vs. Shaikh Mohamad and others*, again reiterated that in an appeal where one of the defendant dies and the other defendant who was representing all heirs of the deceased widow is already on record, it was held that the appeal would not abate due to failure of substitution of heirs of the deceased.

8. The decision rendered in *Smt. Bhonri and Others Vs. Shambhu Nath and Others*, is also to the said effect. Therefore, it is clear that the well settled position of law is that if the estate of the deceased is represented by any one of the legal representatives, then the appeal would not abate due to the failure for not bringing all the legal representatives of the deceased. Under these circumstances, I am of the view that the order of the learned Principal Subordinate Judge, Myiladuthurai is not liable to be interfered with.

9. In the result, this CRP is dismissed. Consequently, connected Miscellaneous Petition is also dismissed. No costs.