

(2003) 10 MAD CK 0038

In the Madras High Court

Case No : C.R.P. (P.D.) No. 1422 of 2003

Krishnabai, Saraswathy, N. Meena, S. Kamala, S. Jamuna, S.
Vatchala and S. Rajesh

APPELLANT

Vs

K.A. Krishnamurthy, Jagadambal Ammal, Mallaiya @ Mohan
and Basava

RESPONDENT

Date of Decision : 16-10-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 2004 Mad 108 : (2004) 1 MLJ 91

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : K. Govindarajan, for P. Valliappan, for the Appellant; P. Mani, for R2 and R3, for the Respondent

Final Decision : Allowed

Judgement

Prabha Sridevan, J.—The petitioners are the defendants 4 & 6 to 11 in the suit for partition filed by the 1st respondent herein namely O.S.

No. 203/98 before the Additional Subordinate Judge, Thiruvannamalai. The suit was dismissed. Against that, an appeal was filed before this Court

in A.S. No. 256/81. That was also dismissed. Against that, L.P.A. No. 129/2002 and S.A. No. 796/83 were filed and they were disposed of by

the Division Bench of this Court granting a decree for partiion of 8/21 share for items 12 and 13 and 1/7th share in items 1 to 11.

2. The properties in respect of which the dispute arose belongs to one Appadurai who had two wives. The plaintiff and defendants 4, 5 and 6

were children through the first wife. The second wife was the first defendant and defendants 2 and 3 were her son and daughter respectively. The

defendants 7 to 11 were the tenants. The defendants 1 and 2 claimed that they

were beneficiaries under the Will executed by the late Appadurai.

The Division Bench rejected the Will. The plaintiff who is the first respondent herein claimed that the properties were joint family property and

therefore he was entitled to a larger share. This was also rejected by the Division Bench holding that the properties were self acquired properties.

This finding has become final. Therefore, as the legal heirs of Appadurai, we have the plaintiff and the defendants 1 to 6 above, totally seven

persons . The Division Bench declared the share of the plaintiff as being 1/7th share.

3. It is relevant to note that though the written was filed by the defendant 1 & 2 separately and 4th defendant separately, the 6th defendant

remained exparte. The defendants 4 and 5 admitted the claim of the plaintiff and also claimed that they had share in the property. This civil revision

petition arises out of the application filed by the 4th defendant, who is the first petitioner, and on behalf of the other petitioners. He had filed this

application for amendment of the preliminary decree declaring their rights in the suit property along the lines mentioned in the affidavit which

referred to the judgement in the L.P.A. This was resisted by the respondent herein on the ground that the parties who had remained exparte and

who had not challenged the dismissal of the suit were not entitled to take advantage of the preliminary decree granted by the Division Bench and

that their remedy if any, is to file a fresh suit.

4. The submissions made by the respondent found favour with the Court below who also dismissed the application holding that the only remedy

open to the petitioners was to file a separate suit.

5. Learned counsel for the petitioners submitted that until a final decree is passed, the partition suit cannot be said to have attained finality. If the

defendants did not contest the suit, it is only because they have accepted the share claimed by the plaintiff and were willing to have their shares in

accordance with the same. Learned counsel submitted it would not be in the interest of justice to drive the petitioners to a separate suit, in fact it

has been held in several decisions that the only remedy for such defence is to seek a modification of the preliminary decree that has already been

passed and the decisions are S.V. Muthu Vs. Veerammal, and S. Narayana Reddy and others Vs. S. Sai Reddy, .

6. Learned counsel for the respondents on the other hand would submit that not having contested the suit the defendant cannot now seek to include

himself into the decree and get the relief to which he or she is not entitled to. According to the learned counsel, the Court below has rightly

dismissed the application and it warranted no interference. Reliance was placed on the judgment of the Division Bench of Calcutta High Court

reported in Sarbeswar Panda and Others Vs. Bibhabasu Panda, .

7. In AIR 1966 All 601 Bittan Devi & Others v. Rudra Sen Bajpai & Others, the Court explained the words ""declaring the right of the several

parties interested in the property"" found in Order 20 Rule 18(2) and it was held as follows.

The courts of law generally lay down in the preliminary decree the plaintiffs' share or rights in the property; but where the defendants desire that

their share or interest be also such a declaration also. If the defendants' rights have not been declared in the preliminary decree in appeal or can

apply for review. But once the preliminary decree, apply for and have their share partitioned on payment of court fee etc. As may be necessary

under the law.

8. In 1972 M.L.J. 12 Nanja Naicken v. Rangammal, this Court held that there can be more than one preliminary decree and the persons entitled

to share in the subject matter of the suit must have their rights adjudicated before passing of the final decree.

9. In that case, the sharers who were impleaded, by plaintiff as parties to the partition suit in which a preliminary decree had already been passed,

were held to be entitled to a declaration of their shares by either rectifying or amending the preliminary decree and that this has to be done before

the passing of the final decree.

10. In S. Narayana Reddy and others Vs. S. Sai Reddy, , the Court had considered the rights of parties which got either enlarged or diminished by

reason of post-preliminary decree legislation. In that case preliminary decree was passed. Thereafter the Andhra Pradesh amendment to the Hindu

Succession Act came into force. The Andhra Pradesh High court hold that till the final decree is passed in a partition suit, the suit is said to be

pending and therefore the daughters could seek amendment of the preliminary decree taking advantage of the new law.

11. In S.V. Muthu Vs. Veerammal, , this Court held as follows:

If the defendants' rights have not been declared in the preliminary decree, the aggrieved party can challenge the decree in appeal or can apply for

review. But once the preliminary decree contains a declaration as to the defendants' share, they can, even after passing of the preliminary decree,

apply for and have their share partitioned on payment of court-fee etc., as may be necessary under the law. Indeed, the Privy Council has pointed

out in Lachmi Narain Marwary v. Balmukund Marwary AIR 1924 PC 198 that after decree it is open to any party to a suit to whose interest it is

that further proceedings be taken to initiate the supplementary proceedings, but in the ordinary case, it is the plaintiff who moves. If the preliminary

decree already passed does not contain any declaration as to the rights of the defendants, their application for partition or separation of their share

shall not be maintained till they have the preliminary decree suitably modified, but when once the preliminary decree contains a declaration as to the

defendant's share, they can, even after the passing of the preliminary decree, take steps for the actual separation of their share.

....

It is undoubtedly open to the petitioners to take such steps as they may be advised to have the preliminary decree amended in such a manner as to

include a declaration of their rights as regards their share in the properties as well and only then they can seek payment of the amount in deposit.

Without doing so, on the basis of the preliminary decree as it now stands, the petitioners cannot seek to withdraw the amount in court deposit on

the ground that they are entitled to the same.

12. In fact even in the judgement relied on by the learned counsel for the respondent there is support for the petitioners' case. There too, the

Division Bench held that since the rights and share of the defendants have not been declared in the preliminary decree, the Commissioner is not

competent to partition and make separate allotment of their shares unless the said preliminary decree is modified declaring the rights and shares of

the petitioners either on appeal or on review of the said preliminary decree. Reliance was placed on the Allahabad Judgement which has also been

referred.

13. In these circumstances, it is apparent and in fact there is no doubt that the

only remedy available to the petitioners, was to have their shares declared by modification of the preliminary decree. Though the Division Bench had not in so many words declared their rights; the very fact that the plaintiff/first respondent was declared to be entitled to 1/7th share is a clear indication that the equal rights of the other six sharers had been kept in mind by the learned Judge of the Division Bench. To drive the petitioners to a separate suit would be a grave miscarriage of justice. Had this application been ordered in favour of the petitioners it would have disposed of the matter finally. Therefore, I have no hesitation in interfering with the impugned order. The impugned order is set aside and the civil revision petition is allowed. No costs.