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**(1986) 08 MAD CK 0039**  
**In the Madras High Court**

P. Jyothi (alias) Arundathi

APPELLANT

Vs

Sarojini

RESPONDENT

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**Date of Decision :** 27-08-1986

**Acts Referred:**

**Citation :** (1987) 100 LW 91 : (1987) 1 MLJ 260

**Hon'ble Judges :** S. Ratnavel Pandian, J

**Bench :** Division Bench

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## Judgement

S. Ratnavel Pandian, J.—These two appeals O.S.A. 9 and 10 of 1978 are filed by the unsuccessful applicant in Appln. Nos. 2997 of 1974 and 2667 of 1975 in O.P. 252 of 1973 on the file of the Original side of this Court, challenging the common orders dismissing both the applications filed seeking permission to sell the petition mentioned property.

2. The brief facts giving rise to the filing of these appeals are as follows : The appellant and the respondent are sisters, being the daughters of one Dhanalakshmi Ammal who executed a registered will dated 15-12-1967 by which the testatrix bequeathed the property in question. viz, premises No. 75, Perumal Mudali St, Madras 1, in favour of her two daughters during their life time without powers of alienation and thereafter in favour of the children of both her daughters with absolute right. The testatrix died on 29-2-1972. As there was no love lost between the sisters, the appellant herein filed O.P. 252 of 1973 and obtained Letters of Administration on 2-5-1974 in respect of the property, viz, her mother's estate, in terms of the will. Subsequently, the respondent filed Applns. Nos. 2438 and 2439 of 1974 for revocation of the Letters of Administration issued in favour of the appellant on 2-5-1974 or in the alternative to issue joint Letters of Administration in the names of both the appellant and the respondent. When these applications Nos. 2438 and 2439 of 1974 were pending, the appellant herein filed Appln. No. 2997 of 1974 seeking permission to seel the property in dispute after inviting offers for the sale both privately and by necessary advertisements, and to invest the net sale proceeds in high interest-

yielding securities, on the ground that the respondent had not co-operated with the appellant in administering and managing the estate but on the other hand, the respondent was stultifying the administration of the estate under the evil advice of her husband and as such it was not possible either for the appellant or for the respondent to own, possess and enjoy the property for their manifest advantage and benefit or for the ultimate benefit of their respective children and that as the building was structurally incapable of division by metes and bounds, there was no other alternative except to sell the property. This application was resisted by the respondent in her counter stating that the will does not confer any power of alienation and the terms and conditions of the will left by the testatrix prohibited such alienation during the lifetime of both the appellant and the respondent and that the allegations made in the affidavit of the appellant were incorrect. The appellant filed a reply affidavit reiterating her averments in her affidavit and adding that since the continued joint ownership and possession of the property was found to be impracticable, it was just and necessary that the application be allowed. When this application, viz., Appln. No. 2997 of 1974 was pending, Mohan, J., by a common order dated 7-11-1974, disposed of Appln Nos. 2438 snf 2439 of 1974, by modifying the order dated 2-5-1974 and directing the Letters of Administration to be issued in the joint names of both the appellant and-the respondent.

3. It is seen from the documents filed, that in Appln. No. 2997 of 1974 this Court appointed a Receiver to collect the rents from the tenants of the property and file statements of accounts periodically at intervals of six months and further directed the Receiver inter alia to find out whether it was possible to divide the property and submit a report. The Receiver filed his report dated 26-2-1975 opining that the suit property cannot be divided by metes and bounds.

3. While so, the respondent filed on 14-6-1975, Appln. No. 1285 of 1975, seeking a direction to the AdvocateReceiver to construct a proposed partition wall, bath rooms, etc., as indicated in the Plan attached to the application, install an electric motor and water pipe connections, out of the estate funds, enabling the respondent to enjoy the portions allotted to her. A counter was filed by the appellant opposing this application and the respondent also filed a reply.

4. While Applns. Nos. 2997 of 1974 and 1287 of 1975 were pending, the appellant filed Appln. No. 2667 of 1975, for a direction to sell the property through a Commissioner and to invest the net sale proceeds in approved Government securities for the benefit of the parties and their respective children, on the ground that neither of the parties was getting even a single pie from the receiver and the receiver himself had reported that the property is incapable of division by metes and bounds and hence there was no other alternative but to sell the property.

5. This application was opposed by the respondent stating among other things, that the intention of the testatrix, as revealed from the recitals in the will, was that the parties herein are not entitled to alienate or otherwise deal with the

property by way of gift, sale, mortgage, etc.,. and the parties are entitled only to share the rental income from the property after meeting the expenses for repairs of the house, payment of tax and other public dues and that only the children of the appellant and the respondent should take the property absolutely after the life-time of the life estate-holders. In the counter, it is further stated that no suit has been instituted for partition and hence the appellant is not entitled to seek any relief from this Court in testamentary proceedings.

6. At this stage, in Appn. No. 1287 of 1975, Mohan, J., by his order dated 2-12-1975, appointed one Mr. V. Ganesan, Civil Engineer, as Commissioner directing him to submit a report as to whether the property is capable of division into two convenient halves and whether for such a division any structural alterations are required and if so what they are, and whether it would not be possible to allocate to the respective occupants the portions in their occupation in the first floor, and if they are to be allocated, whether any structural alteration and adjustments require to be made. The Commissioner Mr. V. Ganesan submitted his report dated 11-8-1976 expressing his opinion that "it is not possible to make the building into two convenient halves". The respondent, who was the applicant in Appn. No. 1287 of 1975 filed her objections to the Commissioner's report, to which the appellant herein filed a counter. N.S. Ramaswami, J., who heard this application, taking into consideration the fact that there is no objection to that part of the Commissioner's report that the property is not capable of division, by his order dated 7-10-1976 recorded the Commissioner's report and directed that the parties who were in occupation of the respective portions in the first floor should continue in occupation without effecting any structural alteration. It is seen from the said order that the learned Judge has observed:

But the parties state that no structural alterations are necessary and the status quo may be maintained.

It was only thereafter, these applications, viz., Appn. Nos. 2997 of 1974 and Appn. Nos. 2667 of 1975, were heard by V.Ramaswami, J., who on 6-10-1977 passed the following impugned order:

These are applications for permission to sell the property. The applicants are the administrators appointed by this Court in O.P. No. 252 of 1973. Under the will executed by the deceased the administrators were entitled to only a life estate. The ground on which permission to sell is sought for is that though it was the intention of the testator that these administrators must be permitted to live in the house in view of the certain facts including the dilapidated condition of the property there was no possibility for the administrators to live in the house. It is also stated that the property could be sold and the amount could be invested in some securities which will yield better income so that the income from the property may be enjoyed by the life estate holders during their life time and the property itself may be left to the vested remainder. I am unable to agree with the Learned Counsel. Once it is conceded that the applicants are only life estate

holders, they will have to enjoy the property as it is and they cannot seek permission of this Court to sell the property and make the sale valid. Under these circumstances, this application is dismissed.

Hence these two appeals.

7. Before advertng to the arguments advanced by the respective counsel, we feel that it would be appropriate to refer to the subsequent development that has taken place in the matter. The appellant herein, after filing these two appeals, filed Appn. No. 2270 of 1981 seeking sanction for the sale of the property in question and to direct the sale proceeds to be divided into two halves and to invest the same separately in interest yielding securities or investments directing the payment of interest therefrom to the appellant and the respondent for their respective lives and thereafter their respective children to take the capital or alternatively direct investment of the capital in purchasing the immovable property in the name of the minors. One of the grounds mentioned in the affidavit filed in support of this application was that the building is in a dilapidated condition. To this application, also, the respondent filed her counter and thereafter the applicant (appellant) filed her reply. One Mr. P.S. Raghavendra Rao, a consulting Engineer, at the instance of the applicant (appellant) has also filed a report with an accompanying affidavit, stating that he, at the instance of the applicant (appellant) inspected the premises and prepared the report. Shanmukham, J., by his order dated 13-12-1982, has dismissed Appln. No. 2270 of 1984. Then the applicant on being aggrieved at the dismissal of Application No. 2270 of 1984, preferred O.S.A. 30 of 1985 which came up for hearing before a Bench consisting of V. Ramaswami and one of us (Singaravelu, J.) The Bench passed the following order:

One of us, on an earlier occasion has dismissed an application for grant of permission to sell the property. It is stated that the order is now under appeal. When that order is under appeal, there was no need for filing another application for the same relief. This is one of the grounds on which the learned Judge has dismissed the second application. We do not see any reason to entertain the second application. The appeal fails and it is accordingly dismissed.

8. At the time of the hearing of this appeal, two affidavits were filed in both the appeals, one sworn to by one P. Prasanna Anjaneya Gupta, the eldest son of the appellant and the other by one P.J.M. Gupta and his wife Jyoti alias Arundathi (appellant herein), commonly stating in both the affidavits that the premises is in an old and dilapidated condition and the sons of the appellant, viz., Prasanna Anjaya Gupta aged about 19 and Ramadootha Gupta a minor aged about 17, are not having sufficient space for living and studying and that health of the appellant is deteriorating due to ill ventilation and for want of space in the property. In the affidavit filed by the appellant and her husband, it is specifically averred that they have agreed to surrender the life interest of the "first of us" (sic; it should be the "second of us", viz., the appellant), that both her sons are interested in acquiring another property by selling their half share in the

premises, that their eldest son, who is a major, is willing to sell his 1/4 share and that he has filed a common affidavit to that effect. Further, they have stated that both the appellant and her husband being the natural guardians of minor Ramadootha Gupta have no interest adverse to that of the minor and that it is possible to acquire another immovable property to provide convenient accommodation for their living with the sale proceeds of half share in the property and that the proposal of the appellant to sell half share is a manifest and beneficial interest of their minor son. Finally it is stated that both the sons consent to sell 1/4 share in the property absolutely belonging to each of them.

9. Mr. G. Subramaniam, appearing on behalf of the appellant in both the appeals, contends that the appellant, as an administrator, though not in capacity of a life estate holder, is justified in approaching this Court for permission for the sale of the property now vested in her u/s 307(2)(ii)(a) of the Indian Succession Act (hereinafter referred to as the Act) since the appellant as administrator of the estate of the deceased testatrix is her legal representative for all purposes and the estate of the deceased vests in her as such as contemplated in Section 2(ii) of the Act. According to him, the order of the learned Judge in dismissing the applications seeking permission for selling the property is not correct and the learned Judge has also failed to see that pragmatism and practicalities require sale of the property to perpetuate the cherished desires of the testatrix to benefit her children and thereafter her grand children since the property is in a dilapidated condition and is incapable of division. According to him, the respondent, who is in Chittoor in an affluent position, is purposely opposing this application with the ulterior motive of giving trouble and hindrance and embarrassment to the appellant.

10. Mr. R. Mohan, Learned Counsel appearing on behalf of the respondent, would contend that if the prayer of the appellant to sell the property is granted, it would be tantamount to asking this Court to re-write the will against the desire and intention of the testatrix who has specifically stated that the appellant and the respondent have to enjoy the property only for their lifetime without powers of alienation like gift, sale, mortgage, etc., and that they shall utilise only the balance of income from the said property after meeting the expenses for repairs, payment of taxes, quit rent, etc., and after effecting the necessary repairs to the said house by dividing the same into two halves, and that after their life time the property should be taken with absolute powers of alienation by the respective children of the appellant and the respondent. Then Mr. Mohan would draw the attention of this Court to paragraph 5 of the will wherein it is stated - "My main intention is that this arrangement should be strictly and scrupulously followed after my lifetime."

and submit that when the testatrix herself wanted to preserve the property for the benefit of the grandchildren, the appellant cannot stultify the said arrangement by asking this Court to grant permission to her to sell the property. Then, he would state that even if there is inconvenience for the enjoyment of the

property or absurdity in the device, it is no ground for varying the construction where the terms and conditions are clear and unambiguous. According to him, all the repairs are carried out from time to time at the instance of the appellant and a sum of Rs. 30,000 has been expended therefor, and the building was reconstructed in the year 1950 and it is in a good condition. Since both the respondent and the appellant have got only a right of legacy as life-estate holders, the petitioners cannot seek a deviation from the will which prayer cannot normally be granted especially when certain restrictions on the power of alienation, etc, are mentioned. According to him, there is no necessity for the sale of the property since there is no encumbrance over the property or any attachment over the property for any debt, etc. Above all, the appellant, who claims a right over the property by virtue of a will, will not be justified in asking the court to make a deviation in the will in which the testatrix has expressed her intention to preserve the property for her grandchildren. Finally, he would forcibly submit that the order of Shanmukham, J., passed in Appln. No. 2270 of 1981 has become final on account of the dismissal of the appeal in O.S.A. 30 of 1975 by a Bench of this Court, against which no further appeal has been preferred before the Supreme Court and that the same would operate as res judicata u/s 11 C.P.C.

11. Both the Counsel would cite a number of decisions in support of their respective submissions. Mr. G. Subramaniam, Learned Counsel for the appellant, in support of his submission with regard to the power of an executor or administrator to dispose of the property, as contemplated in Section 307 of the Act, has cited several decisions. First, he placed reliance on the decision of the Calcutta High Court in *Adeline Maude Ellanor Catchick Nee Robertson and Another Vs. Sunderlal Daga and Others*, wherein it has been observed at page 565 thus:

An executor represents the estate and has, in ordinary course of management, power to effect necessary repairs and effect improvements which are reasonable and proper. For such purposes, he can charge the estate.

Then, the Learned Counsel cited *Sundramani Devi v. Repai Devi* AIR 1956 Ori 16., wherein, having regard to the facts of that case, it has been observed that-

The sale of the dilapidated house is, in my opinion, an act of prudent manager especially when she is not in a position to repair and must have a house to reside.

The Learned Counsel then cited *Jaisri Sahu Vs. Rajdewan Dubey and Others*, wherein the Supreme Court has observed as follows:

When a widow succeeds as heir to her husband, the ownership in the properties, both legal and beneficial, vests in her. She fully represents the estate, the interest on which reversioners therein have only spes successions. The widow is entitled to the full beneficial enjoyment of the estate and is not accountable to any one. It is true that she cannot alienate the properties unless it be for necessity or for benefit to the estate, but this restriction on her powers is not one imposed for the benefit of the reversioners but is an incident of the estate as

known to Hindu Law. It is for this reason that it has been held that when Crown takes the property by escheat, it takes it free from any alienation made by the widow of the last male holder, which is not valid under the Hindu Law, vide- Jaisri Sahu Vs. Rajdewan Dubey and Others, : where, however, there is necessity for a transfer, the restriction imposed by Hindu law on her power to alienate ceases to operate, and the widow as owner has got the fullest discretion to decide what form the alienation should assume:

Lastly, he drew the attention of this Court to the decision of the Supreme Court which has held that the sale of a property which the family finds itself difficult to manage and which results in loss, for advantageous price for the purpose of investing the sale proceeds in a profitable manner, would certainly be regarded as beneficial to the family. On the basis of the principles laid down in the above decisions, the Learned Counsel would submit that the appellant, being one of the administrators of the estate, is quite justified and entitled to seek the permission of the Court to sell the property so that any inconvenience or difficulty in the management of the property may be averted, but on the other hand, the sale proceeds could be invested in securities for the benefit of the ultimate reversioners, and the contention of the respondent that the appellant, being the life estate holder, should not be allowed to seek such a permission, is erroneous. According to him the administrator stands on a different footing and position from that of a life estate holder.

12. Meeting the argument of Mr. Mohan that the intention of the testatrix should be given effect to in terms of the will, Mr. Subramaniam would state that the ultimate intention of the testatrix was only to preserve the property. Further, the life estate is given to the two daughters separately, but not by way of a joint-lifetime and hence, if any one of the daughters dies, her children will get absolutely half share of the portion of the property enjoyed by her and in that case they can sell or alienate the property as they like.

13. Then, coming to the question of res judicata, raised by Mr. Mohan, Mr. G. Subramaniam would draw the attention of this Court to the decision of the Supreme Court in Balmukand Vs. Kamla Wati and Others, wherein it has been held as follows:

It is needless to point out that interlocutory orders are of various kinds, some like orders of stay, injunction or receiver or designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court shall take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in thought. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation, the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same

basis after the same has once been disposed of, the Court would be justified in rejecting the same as an abuse of the process of court....

Then, Mr. Subramaniam cited yet another decision of the Supreme Court in Smt. Sukhrani (Dead) by L.R.S. and Others Vs. Hari Shanker and Others, , in which it has been pointed out thus-

It is also true that a decision given at an earlier stage of a suit will bind the parties at later stages of the same suit. But, it is equally well-settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher court is not precluded from considering the matter at a later stage of the same litigation.

Relying on these two decisions, it is stated on behalf of the appellant that the order of Shanmukham, J., passed in Appn. No. 2270 of 1981, cannot be said to operate as *res judicata*, though the appeal preferred against the said order has been dismissed in limine in O.S.A. No. 30 of 1985. According to him, the decision in The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others, , cited by Mr. Mohan, may not be of any assistance to the facts of the present case. Finally he would state that the order of N.S. Ramaswami, J., that-

The parties, who are in occupation of the respective portions in the first floor, should continue in occupation and without effecting any structural alteration.

need not stand against the appellant, because the circumstances have altogether changed. So far as the argument about *res judicata* is concerned, we may also add that the Bench which dismissed in limine O.S.A. 30 of 1985, has itself observed-

It is stated that the order is now under appeal. When that order is under appeal, there was no need to file another application for the same relief.

thereby meaning that when these appeals O.S.A. Nos. 9 and 10 of 1978 are pending, there was no necessity or need to decide the same issue in O.S.A. No. 30 of 1985. In other words, the said appeal has been dismissed on the basis that whatever order that would be passed in O.S.A. No. 9 and 10 of 1978, would be binding on the parties. Therefore, we can examine the present appeals, leaving apart the question of *res judicata*. Regarding the, submission made by Mr. Subramaniam, that Section 307(2)(ii), is very wide in its application and there is no fetter for the Court to grant the permission to an administrator to sell the property, we would like to refer to some of the decisions of the various High Courts.

14. In *Sarvcooparin Pathshala Samiti v. District Judge, Allahabad* ILR (1931)All 422, it has been held that the object of Clause 2 of Section 307 of the Act, is to enable the Court of testamentary jurisdiction to see that the transfer applied for is necessary in the interests of administration of the estate. In *O.S. Aboo v. E.B. Moolla* 49 I.C. 302 11 Burma L.T. 155, it has been pointed out that the Indian

Succession Act does not contemplate that the family of a deceased whose estate vested in an administrator should be deprived of the right of retaining for themselves the immovable property which, according to law to which they are subject, devolve on them and if permission is granted, the administrator might sell the house and turn the family out of property which may have been in the possession of their successors for centuries; that permission should be granted only when the money and the proceeds of the immovable property left by the deceased are insufficient to pay the debts or other necessary outgoings and that it is not the intention of the administrator to act as a Commissioner of partition and to bring about partition by selling the properties in order to divide the proceeds. In yet another, decision viz, *Haji Fu v. Tin Tin* AIR 1924 Rang. 237 2 Rang. 117, it has been observed that it is not desirable to grant permission to an administrator to sell properties not in his possession, to which their parties claimed an absolute title, unless it is proved that the other properties are not available for sale and the sale should be necessary and in the interests of the estate as a whole. In *re the estate of Indrani* AIR 1931 A11. 212. it has been held that the property should be delivered to the legatees as per the provisions in the will, and in *In the matter of Nandolal Mullic* 23 Calcutta 908, it has been ruled that an executor's power of disposition is controlled by the testator. See also *Mt. Manki Kaur Vs. Hansraj Singh and Others*, , *G.F.F. Foulkes and Others Vs. A.S. Suppan Chettiar and Another*, and *Adeline Maude Ellanor Catchick Nee Robertson and Another Vs. Sunderlal Daga and Others*, .

15. When we approach the facts of the present case in the light of the above principles of law, it can be found that it is not the case of the appellant that there is any outstanding debt left by the testatrix or that the proceeds of the immovable property left by the testatrix are insufficient to pay the debts or any other necessary outgoings. The main contention of the appellant is that the property is incapable of division and that it is in a very dilapidated condition necessitating the sale of the, property. In the affidavit filed in support of these two applications, Appn. 2997 of 1984 and Appn. 2667 of 1975, the appellant has not disclosed any justifiable necessity for the sale of property. As per the will, the property should be delivered to the legatees, viz., the children of the life estate holder. The direction in the will of the testatrix will have to be taken into account in disposing of these applications. When it is not shown that the sale is necessary in the best interests of the administration of the estate, the reliefs sought for in these two applications have to be negated, on the basis of the principles laid down in *R.S. Aboo v. E.E. Moolla* (1919) 49 I.C. 302 and *Hajipu v. Tin Tin* AIR 1924 Rang. 237, It is needless to say that the order to be made u/s 257 of the Act is one of discretion to be made by the court having regard to the facts and circumstances of each land every case. In fact, *Shanmukham, J.*, before whom a similar contention that the building is in a very dilapidated condition has been raised, has rejected the said contention. The relevant portion of the order reads thus:

"The fact the building is in a very dilapidated condition is challenged by the

respondent. On the other hand, the respondent relies upon the report filed by the receiver and stated that the premises only requires certain minor repairs. One would lay emphasis on the importance of the locality in which the property is situate and submitted that it is therefore difficult to get a property in the said locality. It is further contended that the intention of the testator was to preserve the property for the benefit of the children of both the petitioner and the respondent and any sale would be opposed to such intention so explicitly expressed in the will". Mr. Mohan has stated that all repairs have been carried out already and the building is not in a dilapidated condition.

16. Agreeing with Shanmukham, J., we hold that this contention of Mr. Subramaniam that the building is in a dilapidated condition cannot be accepted at all. Further as we have already pointed out, there is no justifiable necessity shown by the appellant warranting the sale of the property and such a contention by the appellant even in his capacity as an administrator cannot be countenanced.

17. The present stand taken during the hearing of the appeals on the strength of the affidavit filed by P. Prasanna Anjaneya Gupta and the common affidavit filed by the appellant and her husband, viz., that the appellant's sons, who are the ultimate legatees, have consented to sell their half share in the property as the Court might deem fit to direct, also is not tenable since such a course, in our view, would definitely defeat the intention of the testatrix who had unequivocally expressed her desire that the property should be delivered to the children of both her daughters after the lifetime of the said daughters. This intention of the testatrix is reflected in Clause 5 of the will in which it is stated:

My main intention is such that this arrangement should be strictly and scrupulously followed after my lifetime.

18. In view of all the above discussions, we are of the view that the common order passed in Application 2994 of 1974 and Application 2667 of 1975 dismissing the said applications, is not liable to be interfered with.

19. In the result, both the appeals are dismissed. But, in the circumstances of the case, there will be no order as to costs.