
(1988) 01 MAD CK 0057
In the Madras High Court

P. Poonammal and Others

APPELLANT

Vs

Mrs. Kanakavalli Srinivasan and Another

RESPONDENT

Date of Decision : 21-01-1988

Acts Referred:

Citation : (1988) 2 LW 447 : (1988) 2 MLJ 18

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—The controversy in this second appeal relates to the allotment of a half share in premises No. 56, Cathedral Road, Madras comprising 3 grounds and 1538 sq.ft. of land and a building thereon with a plinth area of 3876 sq.ft.

2. One Rajaram Pillai filed the suit, out of which these proceedings arise, for partition and separate possession of one half share and for recovery of a sum of Rs. 500 for his share of collections of rent and for an account of the income from the property against his son V. Ramamoorthy alias R.M. Kumar. A few months after the filing of the suit, the plaintiff sold his undivided half share in the property to one Puram Prakasa Rao under a registered sale deed dated 16.9.64 for a sum of Rs. 20,000. A preliminary decree was passed on 31.3.1966 granting one half share to the plaintiff and a sum of Rs. 500 for his share in rental collections. The defendant filed an appeal A.S. No. 399 of 1966 in this Court and during the pendency of the appeal, the plaintiff died on 10.11.1972. The purchaser of his undivided half share viz., Puram Prakasa Rao was brought on record as the legal representative of the deceased plaintiff on 22.3.1973. On the same day, the appellant withdrew the appeal as a result to which the preliminary decree passed by the trial Court stood confirmed. Puram Prakasa Rao filed applications in March, 1973 for passing of final decree, appointment of receiver and for ascertainment of mesne profits. The defendant, Ramamoorthy alias R.M. Kumar, died on 10.8.1973 and his legal representatives, who are the appellants in this second appeal, came on record. Puram Prakasa Rao also died and his legal representatives were brought on record as plaintiffs 3 to 6. They assigned their

rights under the decree in favour of the respondents herein by registered deed of assignment dated 27.9.1978. On the strength of the assignment deed, the respondents filed I.A. No. 22753 of 1978 for recognising them as assignee-decree-holders and the application was allowed on 13.11.1979.

3. The respondents filed I.A. No. 2452 of 1979 for appointment of a Commissioner to effect a division of the property by metes and bounds and for directing the commissioner to hold an enquiry into mesne profits regarding their half share. It is stated by learned Counsel for the respondents that at the insistence of the office of the City Civil Court, a separate application was filed for dividing the property into two equal and allotting one half to the petitioners and the other half to the respondents therein. That application was numbered as I.A. No.-2499 of 198a Obviously, the earlier application I.A. No. 2452 of 1979 was confined to the relief of ascertainment of mesne profits.

4. A Commissioner was appointed for the purpose of effecting a division and with the permission of the Court, he engaged the services of a qualified engineer for taking measurements and drawing a plan to the scale. The Commissioner recorded the evidence of the tenants in the suit property and submitted a report. He had also filed the report of the Engineer with the memo of valuation attached thereto. According to the said reports, the value of the land was Rs. 4,53,122 and the value of the superstructure was Rs. 1,15,008. The Commissioner divided the property into two portions, one abutting the road and another situated in the rear with a passage from the road. The passage leading to the rear is on the east of the building having a width of 12 feet in the southern end and 10 feet 9 inches in the northern end thereof. In effect, the commissioner has demarcated the entire building as one portion and the vacant land situated on the rear side of the building with the passage leading thereto as another portion. As regards the two portions, the report of the Commissioner reads thus:

taking into consideration the characteristic features of the building and the passage leading to the rear, I feel that the front part marked with red line can conveniently be separated from the rear portion of the suit property. The passage (approach road) leading to the rear portion has to be annexed to the rear portion for proper and convenient enjoyment. The two parts are more or less equal in size. So far the land is concerned. Superstructure value has to be added to the front portion of the land. The parties to the suit have not given any other valuation of the property.

Learned Counsel for the appellants suggested to the commissioner that the two portions must be treated as equal in value and that the front portion should be allotted to the appellants in view of the fact that they were residing in the suit premises and that the tenants were inducted by them, while it was suggested by learned Counsel for the respondents that his clients needed only the front portion and that the value of the two portions could not be taken as equal since the front portion abutting the main road was more valuable. The Commissioner suggested two alternative courses in his report as follows:

(a) The two parts may be treated as two lots and each lot be auctioned between the parties themselves, and

(b) The entire property is to be sold in public auction in one lot and the sale proceeds to be divided between the parties.

5. After the receipt of the report of the Commissioner, the trial Court heard arguments and passed a final decree allotting the front portion to the appellants herein and the rear portion to the respondents and declaring that the respondents will be entitled to exclusive right to use the passage on the eastern side of the front portion, giving a limited right to the appellants to use the passage for the purpose of plastering and white washing their eastern wall. The trial Court left open the question of mesne profits to be determined by separate proceedings. In the judgment, a finding was given by the trial Court that there was no prayer in the application for enquiry into the mesne profits and that the respondents herein would have to proceed separately by a suit for recovery of mesne profits from the appellants.

6. Aggrieved by the decree passed by the trial Court, the respondents herein preferred an appeal which was heard by the V Assistant Judge, City Civil Court, Madras. The appellate Judge found that the respondents herein had already filed I.A. No. 2452 of 1979 for ascertainment of mesne profits and that the Court was bound to enquire into mesne profits on that application. The appellate Court gave a direction to the trial Court to dispose of I.A. No. 2452 of 1979 and pass a final decree on or before 15.4.1986. As regards allotment, the learned appellate Judge took the view that the tenants on the rear side of the house had taken leases of the land and would, therefore, be entitled to the benefits of the Tamil Nadu City Tenant's Protection Act, which would have the consequence of depriving the respondents herein of the portion allotted to them in these proceedings and compelling them to accept monetary compensation therefor. It was also the view of the lower appellate Court that the tenants in the rear portion were inducted by the original defendant in the suit during the pendency of the litigation, with a view to place hurdles in the way of the plaintiff's getting possession of his half share in the property and that such induction was not in good faith. The appellate Court also held that the property could not be treated as dwelling house of the appellants as they had let out most of the portions to tenants retaining only a small portion for their residence. In that view, the lower appellate Court reversed the conclusion of the trial Court and allotted the front portion to the respondents herein and the rear portion to the appellants.

7. It is the said allotment which is challenged by the appellants herein. Learned Counsel for the appellants argued faintly that there was no application bearing Number 2452 of 1979 pending on the file of the trial Court for ascertainment of mesne profits and that the lower appellate Court was wrong in directing the trial Court to dispose of the same. Learned Counsel for the respondents strongly refuted this contention and brought to my notice that the lower appellate Court sent for the papers in I.A. No. 2452 of 1979 and satisfied itself with the

pendency of the same before giving the said direction to the trial Court and the counsel on both sides were present in Court when the papers in I.A. No. 2452 of 1979 were perused by the learned appellate Judge. I do not think that there is any force in the contention of learned Counsel for the appellant in this regard. If I.A. No. 2452 of 1979 is pending in the trial Court, it will have to dispose of the same as directed by the lower appellate Court after holding an enquiry into mesne profits. Inasmuch as the lower appellate Court has given a specific direction to the trial Court to dispose of I.A. No. 2452 of 1979 after due enquiry, the said direction has to be obeyed by the Trial Court.

8. There is no substance in the contention of learned Counsel for the appellants that the application for ascertainment of mesne profits is barred by limitation, or that it is not maintainable as there is no provision therefore in the preliminary decree. It is really a misnomer to call it mesne profits. The decree-holders seek to have an account of the income from the property under Order 20, Rule 18, CPC and it is not an application under Order 20, Rule 12, Code of Civil Procedure. The law is well settled and it is too late in the day to question the right of a co-sharer in a partition suit to apply for ascertainment of the income pertaining to his share after the passing of a preliminary decree for partition. It is not necessary to refer to any authority other than that of a Full Bench of this Court in *In Re: Bandi Butchaiah*, . The following propositions laid down by the Full Bench are apposite:

A partition suit in which a preliminary decree has been passed is still a pending suit and the right of the parties have to be adjusted as on the date of the final decree; *Jada Nath Ray v. Paravieswar Mallik* ILR (1940) 1 Cal. 255 (P.C.) In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property the property to be divided. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected. Among them are the realisation of common outstandings the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of owelty, the provisions of maintenance to parties entitled thereto, the allotment of lands on which improvements have been effected to the sharer who has improved them, the allotment of alienated lands to the share of the aliener and other similar matters. Even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either SUO MOTU or on the application of the parties. Order 20, Rule 18, Civil Procedure Code, does not prohibit the Court from issuing such directions after the stage of a preliminary decree. It is open to the Court in order to prevent multiplicity of litigation and to do complete justice and effect an equal division of all the common assets and properties among the parties, to direct an enquiry into the

profits received or realised by one or some of them during the pendency of the suit and to award the others their proper share of such profits under its final decree. This enquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree, and in either case the result of the enquiry has to be incorporated in the final decree.

9. There is no question of limitation as the proceedings have been pending and the income has to be ascertained with reference to a period of commencing from the date of suit.

10. The other question that remains to be considered is whether the allotment of the front portion to the respondents is just and equitable. Two aspects of the matter have to be adverted to. The first is whether the two portions are equal in value. No doubt, both the Courts have proceeded on the footing that the two portions are equal in value. While the trial Court observes that the rear portion is a larger portion, it does not go into the question whether the value thereof is equal to that of the front portion. The trial Court proceeds to allot the front portion to the appellants on the ground that the house belonged to them as their family house and that the respondents have come on record as second purchasers of the share of the grand-father of the appellants. On the other hand, the lower appellate Court has stated that there was no dispute that the two portions were almost equal in value. The material on record, however, indicates to the contrary. It is also seen from the memorandum of grounds of appeal before the lower appellate Court that the respondents herein had raised several grounds to the effect that the value of the front portion is certainly much more the value of the rear portion and that the trial Court erred in treating them as equal in value. The memo of valuation attached to the Engineer's report fixes the value of the superstructure at Rs. 1,15,008. The value of the land, according to the present market rate, prevailing in Cathedral Road, is stated to be Rs. 1,25,000 per ground in the memo of valuation. It is seen that the total area of the building is 3876 sq.ft. The total area of the land in the rear portion added to the area occupied by the passage comes to 4862 sq.ft. The area occupied by the passage is about 1000 sq.ft. Thus, the area of the land in the rear is almost equal to the area occupied by the building. Calculating the value of the land alone, the front portion is worth about Rs. 2,01,875. The other portion including the passage is worth Rs. 2,53,750. This is on the footing that the value of the land in the rear is the same as the value of the land in the front abutting the main road. It is common knowledge that the value of the land interior, with a passage leading thereto, will not be the same as the value of the land in the front which abuts the main road. Further, the land occupied by the passage cannot have any independent market value. It has got to remain as a passage for ever without which there can be no access to the rear portion. If these matters are taken into account, it has to be concluded that the value of the land in the front portion comprising 3876 sq.ft. is more or less equal to the value of the land in the other portion comprising 4872 sq.ft. It will be wrong to treat the land in the rear with the passage added thereto as more valuable than the front portion. If

the land value of both the portions is equal, then the value of the building which occupies the front portion has to be taken into account for effecting a fair and equitable division. The engineer has valued the building at Rs. 1,15,008 and there is no evidence to the contrary. If the front portion along with the building is allotted to one party, that party will be having a share which exceeds the value of the other share by Rs. 1,15,008. Unless the party to whom the front portion is allotted with the building pays an owelty of one half of the value of the building, the partition cannot be said to be equitable or equal. Unfortunately, this aspect of the matter has been completely lost sight of by the Courts below even though the commissioner has expressly referred to it in his report as seen from the passage extracted by me earlier. Rounding off the value of the building to Rs. 1,00,000a I hold that the party who takes the building and the land beneath shall pay a sum of Rs. 50,000 by way of owelty to the other party.

11. There can be no dispute that the only convenient mode of division is that suggested by the Commissioner. The property cannot be divided by drawing a line north to south and having two portions, one of the east and the other on the west. The total width of the property on the road said is only about 50 feet 3 inches. If that is divided by two, the width of each portion will be only 25 feet 1-1/2- inches which will be very narrow. It will also lead to cutting the building into two halves which will be impracticable. The only method by which the entire property can be divided is to have the entire building as one portion and the remaining land as another portion. Fortunately, there is a passage of sufficient width on the eastern side of the building leading to the land situated on the rear. The conclusion of the lower appellate Court that it is the most convenient method of division is, therefore, upheld.

12. The only other aspect to be considered is whether the front portion or the rear portion is to be allotted to the respondents who are the assignee decree-holders, it is the general rule of law that partition should be made with due regard to the possession of the parties. If it is possible to effect a just partition without disturbing the present possession of the parties, the Court would always lean in favour of it. Even in cases where it is not possible to divide the properties without disturbing the possession of the parties, the Court would see that interference with possession should be as little as is unavoidable in the circumstances. In fact, Courts are chary in interfering with possession of co-sharers, unless other considerations and equities out-weigh. The Court is under a legal obligation to effectuate a partition on an equitable basis.

13. In the present case, it is not in dispute that the appellants are residing in a portion of the building. Normally, it has to be conceded that the appellants, being members of the family of the original owner, and the house being their dwelling house, the portion in which the house is situated has to be allotted to them. The respondents are only purchasers PENDENTE LITE. Further, they are only alienees of an alienee and not direct purchasers from the co-parcener. Undoubtedly, they have a right to enforce the decree for partition and get possession of a separate

half share. When the equities have to be considered, the scales tilt in favour of the appellants who are the descendants of the other coparcener and who are actually residing in the building.

14. The lower Appellate Court has taken the view that the appellants' predecessor, viz., the original defendant in the suit, inducted the tenants during the pendency of the proceeding without any good faith for the purpose of obstructing the realisation of the fruits of a decree to be obtained by the plaintiff in the suit. If the original parties to the suit, who were father and son, had been alive and the Court was called upon to allot their respective shares, such considerations would have been relevant. Now that both the original parties are dead and on the one side the legal heirs have come on record and on the other side, the successors-in-title by virtue of purchasers have come on record, the only question before Court is whether it is equitable to dispossess the legal heirs and drive them out to seek a residential accommodation elsewhere. Apart from the sentimental value, attached by the appellants to the ancestral family house, the practical difficulties and hardship to which the appellants would be put if the front portion is not allotted to them will have to be taken into account. It may be that the original defendant had committed a sin in inducting tenants in the vacant land. That should not, however, visit on the appellants who cannot be blamed therefor.

15. It should not be forgotten that the respondents came on the scene only in 1978 by taking an assignment of the decree and they should have expected several hurdles in the way of their getting possession of the share which might be allotted to them in the final decree proceedings. It is the claim of the tenants before the commissioner that they had been occupying the property for over a decade.

16. The lower appellate Court has also stated that if the land in the rear is allotted to the respondents, they will have to part with the same as the tenants would be entitled to the benefit of the City Tenants' Protection Act. This reasoning of the lower appellate Court is based on several erroneous assumptions. It cannot be said that the tenants will not be affected by the doctrine of LIS PENDENS and that they will be entitled to claim the benefits of the City Tenants' Protection Act as against the decree-holders. Nor can it be taken for granted that the claim of the tenants that they have erected the superstructures and that they have been in possession for over a decade is true. It is not a matter to be decided in these proceedings. The finding of the lower appellate Court that the tenants on the rear portion are entitled to the benefits of the City Tenants' Protection Act is set aside.

17. It may be that the respondents will have to institute proceedings against the tenants for recovery of possession and thus indulge in further litigation. But, that will be the case even if the front portion is allotted to the respondents. Admittedly, there are number of tenants occupying the portions of the building and one of them claims to be entitled to the benefits of City Tenants' Protection

Act, as according to him, he had taken the land on lease. Having taken an assignment of a decree in a suit, the respondents ought to have expected further litigation and could not have dreamt of taking peaceful possession without any difficulty whatever.

18. The conclusion of the learned appellate Judge that the house is not a dwelling house of the respondents is clearly erroneous. It has been laid down in a catena of cases under the Partition Act that a dwelling house will not cease to be so, just because portions thereof have been let out to tenants. It is not necessary to refer to the various decisions cited by learned Counsel for the appellants. Suffice it to mention the latest among them, being that of Division Bench of the Calcutta High Court in Santosh Kr. Mitra Vs. Kalipada Das and Others, . As pointed out already, it is not in dispute that the appellants are residing in a portion of the building.

19. The uniform policy of the legislation in this country is to prevent a stranger from disturbing the enjoyment of a family house by the members thereof. Section 44 of the Transfer of Property Act, Section 4 of the Partition Act and Section 23 of the Hindu Succession Act are all based on that principle. The law of the country has been zealous in recognising and upholding the valuable sentiments of members of a family in retaining their family house and continuing their residence therein. If the fight is between two members of the family, the Court will have to consider as to how best the house could be divided into two portions so that one could be allotted to each. When the fight is between a stranger on the one hand and a member of the family on the other, there will be no difficulty in allotting the house in entirety to the member of the family when the land could be allotted to the stranger, particularly when that member of the family is residing in the house.

20. I hold that the allotment made by the lower appellate Court is not just or equitable. The judgment and decree of the lower appellate Court are set aside. The land in the rear portion (nor of the building) and the passage leading thereto on the east of the building are allotted to the share of the respondents. The appellants shall pay a sum of Rs. 50,000 (Rupees fifty thousand only) by way of owelty to the respondents. The respondents are the exclusive owners of the passage situated on the east of the building. The appellants will have a limited right of using the passage for the purpose of effecting repairs to or white-washing the eastern wall of their building, but they should give prior intimation in writing to the respondents before exercising their right. As the proceedings in I.A. No. 2452 of 1979 were stayed during the pendency of the second appeal, I direct the trial Court to dispose of the said application and pass a final decree on or before 30.4.1988. The second appeal is allowed as indicated above and there will be no order as to costs.