
(1968) 01 MAD CK 0048
In the Madras High Court

Sri Booman alias Parakalam Pillai

APPELLANT

Vs

Kuppammal Achi and Others

RESPONDENT

Date of Decision : 04-01-1968

Acts Referred:

Citation : (1968) 2 MLJ 36

Hon'ble Judges : Ismail, J

Bench : Division Bench

Judgement

Ismail, J.—Respondents 1 and 2 herein filed O.S. No. 309 of 1959 on the file of the Court of the District Munsif of Nagapattinam for partition and separate possession of their 3/4 share in the suit property which itself is one half of a dwelling house. The third respondent to the present appeal was the first defendant in the suit and one Amirthalingam Pillai was the second defendant. After the death of the said Amirthalingam Pillai, during the pendency of the suit, his widow and children were brought on record as defendants 3 to 6. In that suit a preliminary decree for partition was passed on 14th December, 1960. On 9th March 1961 one Booman alias Parakalam Pillai purchased the share of defendants 3 to 6 in the suit property. On 13th June, 1962, on an application made by him the said Booman alias Parakalam Pillai was added as the seventh defendant to the suit. The said order was challenged on appeal and the appeal was dismissed on 11th March 1963. A civil revision petition filed to this Court failed on 26th July, 1963. On 31st October, 1963, respondents 1 and 2 herein, namely, the plaintiffs in the suit filed an application u/s 4 (1) of the Partition Act, 1893. This application was dismissed on 29th November, 1963. Thereafter on the application of the seventh defendant a final decree was passed on 31st December, 1963. Against the said final decree A.S. No. 9 of 1965 was preferred to the Subordinate Judge of Nagapattinam who, by his judgment and order date 1st March, 1965, allowed the appeal and remitted the final decree proceedings back to the trial Court and directed the trial Court to proceed u/s 4 (1) of the Partition Act and value the share of the seventh defendant in the suit property and sell it to the plaintiffs As I pointed out already, the suit property itself was

one half of the house and the plaintiffs are entitled to 3/4 thereof, namely, 3/8th of the entire house, the seventh defendant being entitled to 1/4 share of the suit property. It is admitted that the second defendant to the suit was the owner of the other half of the house and the seventh defendant had purchased that half also with the result the seventh defendant is entitled to 5/8th of the entire house. It is against the order of remand of the learned Subordinate Judge dated 1st March, 1965, that the present appeal has been filed.

2. Mr. Rathnam, the learned Counsel for the appellant contended (i) that the application filed by the plaintiffs u/s 4 (1) of the Partition Act having been dismissed on 29th November, 1963, and they not having preferred any appeal against the same, the learned Subordinate Judge was in error in remanding the proceedings back to the trial Court with a direction to apply the provisions of Section 4 (1) of the Act; and (ii) that to the present case Section 4 (1) has no application, because (a) the purchase by the seventh defendant was subsequent to the preliminary decree dated 14th December 1960, and therefore on that date there was no undivided family owning a dwelling house, and (b) Section 4 (1) will apply only when that transferee filed a suit for partition and that when that transferee figures only as a defendant in the suit for partition filed by other persons, Section 4 (1) has no application.

3. For the purpose of understanding the first contention of the learned Counsel, it is necessary to set forth one other fact. In the appeal filed before the learned Subordinate Judge the plaintiffs had taken a ground challenging the correctness of the order dated 29th November, 1963, of the learned District Munsif dismissing the application filed u/s 4 (1) of the Act. They also filed a fresh application u/s 4 (1) of the Act before the learned Subordinate Judge himself, the learned Subordinate Judge did not rest his conclusion solely on the basis of the fresh application u/s 4 (1) of the Act filed before him, but also on the basis of his conclusion that the earlier dismissal of the application u/s 4 (1) previously filed by the plaintiffs was erroneous. It is against this background that the first contention of the learned Counsel for the appellants has to be considered. The learned Subordinate Judge, relying upon the decision of the Calcutta High Court in *Bhuban Mohan Guha and Another Vs. Brojendra Chandra Ghose and Others*, took the view that an appeal did not lie against the order dated 29th November, 1963, of the learned District Munsif dismissing the application of the plaintiffs made u/s 4 (1) of the Act and therefore it was open to the plaintiffs to challenge the correctness of that order of dismissal in the appeal against the final decree proceeding. Consequently the point that has to be considered is whether an appeal lies against the order dismissing the application made u/s 4 (1) of the Partition Act. The section of that Act which provides for an appeal is Section 8 and it is in the following terms:

Any order for sale made by the Court under Sections 2, 3 or 4 shall be deemed to be a decree within the meaning of Section 2 of the Code of Civil Procedure.

The language of the section is express and categorical that an appeal is provided

only against an order for sale made by the Court and not any order made by the Court under Sections 2, 3 or 4. When there is no order for sale made by the Court, clearly, by its very terms Section 8 is not attracted and consequently no appeal will lie against an order dismissing the application made u/s 4 (1) of the Act. The decision of the Calcutta High Court already referred to support this conclusion. If it had been the intention of the Legislature to provide for an appeal against any order made under Sections 2,3 or 4 the language of the section would have been different. The section does not provide for an appeal against any order made by the Court under Sections 2, 3 or 4 of the Act but only against any order for sale made under those provisions. Consequently the sine quo non for invoking the provisions of Section 8 is an order for sale and, when there is no order for sale, Section 8 cannot have any application. This conclusion of mine is supported by a judgment of the Allahabad High Court in Wali Mohammad v. Shamshul Haq (1967) A.L.J. 379. On the other hand, Mr. Rathnam, the learned Counsel for the appellant, relied upon the decision of the Nagpur High Court in AIR 1937 4 (Nagpur) The only relevant observation in that case is as follows:

The reason why it is said the appeal is not maintainable is that the order in question is not one to which Order 43, CPC applies. The answer, I think, is to be found in Section 8, Partition Act.

And Section 8 is quoted. It is clear from the judgment in that case that no argument was advanced to the Court that from the language of Section 8 an appeal would lie only if an application u/s 4 CO was allowed and a sale was ordered and no such appeal would lie if the application u/s 4 (1) of the Act was simply dismissed. On the other hand, the argument that was put forward before the Court in that case was that under Order 43, Civil Procedure Code, no appeal lay against the said order. Repelling that contention the Court pointed out that on 8 of the Partition Act itself provided for the appeal. In view of this position I am unable to accept that the decision of the Nagpur High Court lays down any proposition such as that an order dismissing an application u/s 4 CO of the Partition Act is appealable u/s 8 of the Act. Once I come to the conclusion that an order dismissing an application u/s 4 CO of the Act cannot be deemed to be a decree u/s 8 of the Partition Act, the conclusion is irresistible that no appeal lay against such an order and the correctness of that order can be canvassed in proceedings against the final decree. Section 105 of the Civil Procedure Code, supports this conclusion of mine. Therefore, I overrule the first contention of the learned Counsel. overrule the first

4. In my view the second contention also is without substance. The expression "undivided family" in Section 4 is not used in any technical sense as denoting only a joint Hindu family. The term includes every family whether Hindu or not. All that is required for the purpose of invoking the section is that the family must remain undivided with reference to the property which is the subject-matter of the suit. In Ramaswami Pillai Vs. Subramania Pillai by power-of-attorney Agent Karuppanna Pillai and Another, .

... undivided family" in the section has been held by a series of decision, to mean simply a family which has not divided the dwelling house by metes and bounds. A Hindu joint family divided in status will still be an undivided family qua dwelling house, if there has been no division of the dwelling house by metes and bounds for the purposes of the Act.

The learned Judge in the same judgment has also pointed out:

As I look at it, even though the stranger-transferee might not have himself instituted the suit for partition, if in a suit for partition, wherein he is made a party defendant, he asserts and applies for his share and seeks relief from Court in recognition of his rights, it could properly be stated that he sues for partition.

In this case, as I pointed out already, though the seventh defendant purchased the share of defendants 3 to 6 on 9th March, 1961, i.e., subsequent to the preliminary decree for partition, he applied to be impleaded as a defendant to the suit and he was so unpleaded by order dated 13th June, 1962, and that order became final. Taking into account the fact that in a partition action every party is at the same time a plaintiff as well as a defendant, it cannot be contended that for the purpose of application of Section 4 CO, the transferee himself must have figured as a plaintiff instituting the suit. Therefore, in my view, the second contention of the learned Counsel for the appellant also fails.

5. One other suggestion that was made was that it has not been found in this case that it was impossible for the convenience of the parties to effect a partition. As has been pointed out by this Court in *Sennammal Vs. K. Natarajan and Others*, the right of person to invoke the benefit of Section 4 CO of the Act cannot be defeated merely because the share purchased by the stranger-transferee can be easily severed and enjoyed as a separate share without disturbing the enjoyment of the remaining share by the other coparceners.

6. Then there remains one consideration that has to be taken note of. As pointed out already, the second defendant was the owner of the other half of the house and the seventh defendant had purchased that half also, but that half is not the subject-matter of the suit. As far as the suit is concerned, the subject-matter was only one half of the house excluding the half of the house originally belonging to the second defendant and subsequently sold to the seventh defendant. Consequently, the question that arises for consideration is whether Section 4 (1) can be applied to one half of the house which is the subject-matter of the present suit. In *Masitullah v. Umrao* AIR 129 All. 414, the second plaintiff, who had already purchased a share belonging to a member of the undivided family, filed a suit for partition and in that suit for partition the defendants did not invoke the benefit conferred by Section 4 (1) of the Act. Consequently a partition was effected. Subsequently plaintiffs 1 and 2 purchased the shares of two other members of the family and then filed a suit for partition. In that suit for partition the defendants filed an application u/s 4 (1) of the Act. One of the points that came to be considered by the Court was that whether in View of the

earlier partition decree, the integrity of the dwelling house. Was destroyed and consequently Section 4 CO could not be applied in respect of the other portion. Such a contention was rejected by the Allahabad High Court and it was observed:

The argument is plausible but has no substance. The effect of the partition of 1922 was to cut off a portion of the house but to leave the rest of the house as a separate and independent entity. The rest of the house was a compact whole held by a number of co-sharers who were members of an undivided family having a community of interest. The portion left undivided must be regarded as a separate unit.

The principle underlying this decision of the Allahabad High Court has been followed by the Calcutta High Court in Boto Krishna Ghose Vs. Akhoy Kumar Ghose and Others, , and by the Patna High Court in Sheodhar Prasad Singh and Others Vs. Kishun Prasad Singh and Others, . As far as the present case is concerned, no objection seems to have been taken before the Courts below on behalf of the appellants contending that the suit portion of the house was not a separate unit so as to come within the scope of the expression " dwelling house " in Section 4 (1) of the Act. On the other hand, in paragraph 2 of the plaint it is stated as follows:

The and defendant who is entitled to the rest of the entire house (specific part of the house) under the aforesaid partition....

Consequently all the parties have proceeded on the basis that the subject-matter of the suit itself constituted a separate unit coming within the scope of the expression " dwelling house " used in Section 4 (1) of the Act.

7. In view of these considerations I am of the opinion that the order of the learned "Subordinate Judge dated 1st March, 1965 is correct and does not call for any interference. Hence this appeal is dismissed with costs.