

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 144/2007**

% **12th December, 2018**

VEENA RANI Appellant

Through: Mr. Kamlesh Mahajan,
Advocate with Mr. Prince
Kumar, Advocate (M.
No.9313083343).

versus

OM DUTT SHARMA AND ORS. Respondents

Through: Mr. K.K. Sharma, Advocate
and Mr. S. Khan, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the trial court dated 23.02.2007 by which the trial court has decided the preliminary issue in a suit filed for partition by a female legal heir, being the appellant/plaintiff and by relying upon Section 23 of the Hindu Succession Act, 1956 and holding that since when the suit was filed on 02.08.2004, a female heir

could not seek partition of the family dwelling house, accordingly, the suit was dismissed although during the pendency of the suit and before the impugned judgment was passed on 23.02.2007, there was an amendment to the Hindu Succession Act by the 2005 Act resulting in Section 23 being repealed from the Hindu Succession Act.

2. The Ld. Counsel for the appellant/plaintiff has rightly placed reliance upon the judgment of the Hon'ble Supreme Court in the case of *G. Sekar v. Geetha, (2009) 6 SCC 99* and this judgment holds that there is no issue of prospectivity and retrospectivity when Section 23 of the Hindu Succession Act is removed from the statute book because by the repeal, all that has happened is that the bar to seek partition has gone. In para 22 of this judgment, the Hon'ble Supreme Court has observed that once the disability is removed from the statute book, then the filing of a suit is no longer barred. In para 18 of the said judgment, the Hon'ble Supreme Court has further observed that Section 23 only restricted the right, which was an existing right, but limited to certain extent that a female could not seek partition of the dwelling house by metes and bounds but after Section 23 has been repealed, a fresh suit can be filed and the existing suit, which was filed

prior to the repeal of Section 23 of the 2005 Act, can continue. In para 25, the Hon'ble Supreme Court has clarified that there does not arise an issue of applicability of Section 6 of the General Clauses Act, 1897 because there is no issue of any vested right being taken away. Further, a clarification is given by the Hon'ble Supreme Court in para 26 of its judgment stating that Section 23 was merely a disabling provision and it cannot be said that the male members have an accrued or vested right to permanently deny partition by metes and bounds, once the disability is taken away by the amendment to the statute. Finally, in para 28 of the judgment, the Hon'ble Supreme Court has observed that a right in terms of Section 23 of the Hindu Succession Act to obtain a decree for partition is one whereby the right to seek partition is kept in abeyance, but once the rights become enforceable, the restrictions must be held to be removed. It is noted that in the facts of the case before the Hon'ble Supreme Court in the case of ***G. Sekar (supra)***, the suit was filed in the year 1996 and during pendency of the litigation, an amendment came to the Hindu Succession Act and by this 2005 amendment, Section 23 of the Hindu Succession Act was repealed.

3. The aforesaid judgment of the Supreme Court was followed by this Court in the case of *Shashi Bahadur and Ors. v. Malka Bahadur*, 248 (2018) DLT 277 wherein this Court has upheld the judgment of the trial court by which the trial court has referred to the judgment in *G. Sekar's (supra)* case and held that Section 23 only contains a disability and not a vested right.

4. In view of the aforesaid discussion, impugned judgment of the trial court dated 23.02.2007 is set aside and it is held that the suit is maintainable and the suit will now be decided by the trial court in accordance with law. Parties to appear before the District & Sessions Judge, Central, Tis Hazari Courts, Delhi and the District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law.

DECEMBER 12, 2018
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VALMIKI J. MEHTA, J