

**Saravanakumar Vs. N.Jayachandran**

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**SooperKanoon Citation :** [sooperkanoon.com/1168534](http://sooperkanoon.com/1168534)

**Court :** Chennai

**Decided On :** Mar-04-2014

**Judge :** V.Dhanapalan

**Appellant :** Saravanakumar

**Respondent :** N.Jayachandran

**Judgement :**

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated : 04.03.2014  
CORAM: THE HON'BLE Mr.JUSTICE M.DURAI SWAMY S.A.Nos.440 & 441 of 2009 and M.P.Nos.2 to 4 in S.A.NO.440 of 2009 S.A.No.440 of 2009: 1.Saravanakumar 2.Thiagaraj 3.Mallika ..Appellants versus 1.N.Jayachandran 2.N.Maheswaran 3.N.Dhandapani 4.R.Krishnasamy 5.V.Anwar 6.Arumugam 7.R.Kanniappan ..Respondents Second Appeals have been filed under Section 100 of the Civil Procedure Code against the judgment and decrees in A.S.No.118 of 2006 and Cross Objections and A.S.No.127 of 2006 dated 28.11.2008 on the file of the Principal District Court, Coimbatore, partly reversing the judgment and decree in O.S.Nos.571 of 1996 on the file of the II Additional Subordinate Court, Coimbatore, dated 16.02.2006.

S.A.No.441 of 2009: 1.

Mallika 2.S.Saravanakumar 3.S.Thiagaraj ..Appellants versus 1.N.Maheswaran 2.N.Dhandapani ..Respondents For Appellants : Mr.P.Valliappan (in both S.As)

For Respondents : Mr.T.Madhusudhana Reddy (R1 to R3 & R7 in S.A.No.440 of 2009 & R1 & R2 in S.A.No.441 of 2009) R4 to R6 ex parte Notice dispensed with vide order dated 04.03.2014 (memo) C O M M O N

## **JUDGMENT**

S.A.No.440 of 2009 arises against the judgment and decree passed in A.S.No.118 of 2006 and Cross Objections in A.S.No.118 of 2006 on the file of the Principal District Court, Coimbatore, modifying the judgment and decree in O.S.No.571 of 1996 on the file of the II Additinoal Sub Court, Coimbatore.

The plaintiffs are the appellants and the respondents were the defendants in the suit.

2.S.A.No.441 of 2009 arises against the judgment and decree passed in A.S.No.127 of 2006 on the file of the Principal District Court, Coimbatore, modifying the judgment and decree in O.S.No.571 of 1996 on the file of the II Additional Sub Court, Coimbatore.

The plaintiffs are the appellants and the respondents were the defendants in the suit.

3.The plaintiffs filed the suit in O.S.No.571 of 1996 for partition.

4.The trial Court passed a preliminary decree in favour of the plaintiffs.

Aggrieved over the preliminary decree passed by the trial Court, the defendants 2 & 3 preferred an appeal in A.S.No.127 of 2006 and the fifth defendant preferred an appeal in A.S.No.118 of 2006 and the ninth defendant filed a Cross Objection in A.S.No.118 of 2006.

The lower Appellate Court disposed of both the appeals and the Cross Objection by a common judgment.

Therefore, the above Second Appeals are also disposed of by this common judgment.

5.The learned counsel for the appellants filed a memo stating that the respondents 4 to 6 in S.A.No.440 of 2006 remained ex parte before the lower Appellate Court and therefore, notice may be dispensed with on them.

The memo filed by the appellants is taken on record.

Notice to the respondents 4 to 6 is dispensed with.

6.The brief case of the parties necessary for the disposal of both the appeals are as follows: (i)According to the plaintiffs, the suit properties are the ancestral joint family properties of the plaintiffs and the fiRs.defendant and the same were allotted to the share of the fiRs.defendant under registered Partition Deeds dated 04.12.1982 and 29.11.1982 that took place between the fiRs.defendant, his father and brother.

Item 1 of the suit property is the agricultural land and Item 2 is the house property.

The fiRs.defendant had sold a portion of the property described in Item 1 in favour of the defendants 2 to 5.

The sale proceeds were not utilised by the fiRs.defendant for any legal necessity.

The fiRs.defendant has spent all the sale proceeds for his wayward life.

The sale proceeds executed in favour of the defendants 2 to 5 are tainted with immoral purposes and not binding upon the plaintiffs and they are entitled to ignore the same.

The defendants 2 to 5 are not bona fide purchasers for value since they were aware of the plaintiffs' right in the suit properties.

The plaintiffs are entitled to two-third share in the suit properties.

During the pendency of the suit, the fiRs.defendant had died on 11.01.2002 and his wife Mallika was added as the third plaintiff and his mother Ramathal was added as the ninth defendant.

During the life time of the fiRs.defendant, he sold a portion of the suit property to the ninth defendant.

In these circumstances, the plaintiffs filed the suit for partition.

(ii)According to the defendants 2 & 3, the second defendant purchased house sites bearing Nos.12 & 13 comprised in Item 1 of the suit properties from the fiRs.defendant on 30.06.1993.

On the same day, the third defendant purchased house sites bearing Nos.10 & 11 in Item 1 of the suit properties from the fiRs.defendant.

According to the defendants, they are bona fide purchasers for valuable consideration and the Sale Deeds dated 30.06.1993 are valid in law.

Further, the defendants 2 & 3 have stated that the fiRs.defendant sold the property to them for legal necessity.

(iii)According to the fifth defendant, he purchased an extent of 5 cents and 262 sq.ft.

in S.F.No.81 in Goundampalayam on 17.05.1996 from the fiRs.defendant.

Since the fiRs.defendant's family was indebted very heavily, the fiRs.defendant sold the property to the fifth defendant.

According to the fifth defendant, the purchase made on 17.05.1996 is bona fide and was legally valid.

7.Before the trial Court, on the side of the plaintiffs, three witnesses were examined and three documents, Exs.A1 to A3 were marked and on the side of the defendants, three witnesses were examined and three documents, Exs.B1 to B3 were marked.

8.The trial Court, after taking consideration the oral and documentary evidences of both sides, passed a preliminary decree for partition.

Aggrieved over the same, the defendants 2 and 3 preferred an appeal in A.S.No.127 of 2006, the fifth defendant preferred an appeal in A.S.No.118 of 2006 and the ninth defendant filed Cross Objection in A.S.No.118 of 2006.

The lower Appellate Court, while modifying the judgment and decree of the trial Court held that the purchases made by the defendants 2, 3, 5 and 9 are valid and also allotted the properties, purchased by them under their respective Sale Deeds, to them.

Aggrieved over the judgment and decree of the lower Appellate Court, the plaintiffs have filed the above Second Appeals.

9.Heard Mr.P.Valliappan, the learned counsel for the appellants in both the Second Appeals and Mr.T.Madhusudhana Reddy, the learned counsel for the respondents 1 to 3 & 7 in S.A.No.440 of 2009 and respondents in S.A.No.441 of 2009.

10.At the time of admission of the above Second Appeals, the following substantial questions of law arose for consideration: (i)When the suit for partition is concerned only with determination of shares of the respective parties and a preliminary decree is passed thereon, whether the lower Appellate Court is correct in law in rendering a finding that the respondents 1 to 3 and 9 in S.A.No.440 of 2009 and the respondents in S.A.No.441 of 2009 would be entitled to the respective portions purchased by them, which will have the effect of stultifying the final decree proceedings even before they are commenced?.

(ii)When the actual process of division of metes and bounds takes place only during the final decree proceedings, whether the lower Appellate Court is correct in law in defeating the final decree proceedings that may be initiated?.

11.The only contention raised by the learned counsel for the appellants was that the lower Appellate Court ought not to have allotted the properties to the defendants 2, 3, 5 & 9 by metes and bounds at the preliminary decree stage.

The learned counsel submitted that the respective properties can be allotted by metes and bounds only at the time of passing of final decree.

12. In support of his contention, the learned counsel relied upon the following judgments: (i) AIR 2009 Supreme Court 2735 [Ramdas versus Sitabai and Ors.], wherein the Hon'ble Supreme Court held that a purchaser cannot have a better title than what the vendor had and an undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds and through mutual settlement or by a decree of the Court.

(ii) 1995-1-L.W.568 [Shankar Balwant Lokhande (Dead) by L.Rs. versus Chandrakant Shankar Lokhande & Anr.]. In this judgment, the Hon'ble Apex Court held that the preliminary decree is a declaration of the rights of the parties with a charge on the properties to be allotted and a Commissioner is required to be appointed for partition of certain specified properties.

Under Order 20 Rule 18 (2), it was only a preliminary decree declaring the rights of the parties with power to the Court to give further directions in that behalf.

It is settled law that more than one final decree can be passed.

With the passing of the final decree in respect of the share of the fiRs. respondent, the rights of the parties in respect of other properties have not been crystallised and no final decree dividing the properties by metes and bounds was passed nor any application was made to divide the properties in terms of the shares of the parties declared in the preliminary decree.

(iii) AIR 1953 Supreme Court 487 (2) [Sidheshwar Mukherjee versus Bhubneshwar Prasad Narain Singh and others], wherein the Hon'ble Supreme Court held as follows: ". The suits out of which these appeals arise were instituted by the plaintiff in the partition suit against the fiRs. party defendants for recovery of his 4 annas share of the Income or profits of the properties specified in the schedules to the plaints and which were included.

admittedly in his purchase, on the allegation that the defendants fiRs. party appropriated the entire profits to themselves and refused to give the plaintiff his legitimate share.

The High Court has held that this claim of the plaintiff must fail.

All that he purchased at the execution sale was the undivided interest of the coparceners in the joint property.

He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase.

He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour.

In our opinion, this is the right view to take and Mr. Daphtary, who appeared in support of the appeals, could not satisfy us that in law his client was entitled to joint possession on and from the date of purchase."

(iv) 2001-1-L.W.157 [N. Palaniswamy and others versus 1. N. Govindaraj and 2 others]. wherein this Court held that in a suit for partition it is obligatory for the trial Court to relegate to an enquiry into the claim for past and future mesne profits to the second stage in the same proceedings and this Court held that deciding the quantum of past and future mesne profits at the preliminary stage is an error.

13. Countering the submissions made by the learned counsel for the appellants, the learned counsel for the respondents submitted that since the alienees had purchased properties with specific boundaries, the lower Appellate Court rightly allotted those properties to the alienees, who purchased the property from the fiRs. defendant.

Therefore, the learned counsel submitted that the lower Appellate Court was right in modifying the judgment and decree of the trial Court by allotting the properties purchased by them.

14. In support of his contentions, the learned counsel for the respondents relied upon the following judgments: (i) (1941) 1 MLJ 15 [Katuri Dharmarao versus Manepalli Bapanayya and others]. wherein a Division Bench of this Court held that where a joint family consisted of a father and his two sons at the time of the alienation in question and one of the sons sued for partition of the family properties

in which he prayed for setting aside the alienation but at the actual time of the filing of the suit three more sons had been born to the father, the alienee was entitled to the share of the vendor as at the date of the alienation.

(ii)(2007) 10 Supreme Court Cases 571 [Subhodkumar and others versus Bhagwant Namdeorao Mehetre and others]. In this judgment, the Hon'ble Supreme Court held that a Kartha has power to alienate the joint family property for value either for necessity or for benefit of the estate.

He can alienate with the consent of the coparceners. When he alienates for legal necessity, he alienates an interest, which is larger than his undivided interest.

When the Kartha, however, conveys by way of imprudent transaction, the alienation is voidable to the extent of the undivided share of the non-consenting coparcener.

15. On a careful consideration of the materials available on record and the submissions made by both the learned counsels, it could be seen that the issue involved in these Second Appeals are only with regard to the allotment of a specific share to the defendants at the preliminary decree stage.

It is settled position that a preliminary decree is a declaration of the rights of the parties with a charge on the properties to be allotted and the decree cannot be made effective, without a final decree.

Under Order 20 Rule 18 (2) of the Code of Civil Procedure, it was only a preliminary decree declaring the rights of the parties with power to the Court to give further directions in that behalf.

It is always obligatory on the part of the Court below to relegate to the second stage in the same proceedings to conduct an enquiry into the allotment of shares to the co-sharers at the final decree stage.

But, in this case, the lower Appellate Court had done it even at the preliminary decree stage itself.

The lower Appellate Court has rightly found that the purchases made by the defendants 2, 3, 5 & 9 are valid.

The learned counsel appearing on behalf of the appellants had not advanced any arguments that the alienees/defendants are not entitled to a share in the property.

Even though the defendants had purchased the properties with metes and bounds from the fiRs.defendant, when it is found that the suit properties remain undivided, the defendants cannot be allotted specific properties at the preliminary decree stage.

No doubt they are entitled to the same extent of properties purchased under the Sale Deeds, since the property sold by the fiRs.defendant to the defendants 2, 3, 5 & 9 was much less than his share of the property.

The specific properties with metes and bounds can be allotted to the alienees/defendants only in the final decree proceedings.

The judgments relied upon by the learned counsel for the appellants, squarely, applies to the facts and circumstances of the present case.

The facts and circumstances of the cases relied upon by the learned counsel for the respondents differs from the case on hand.

Therefore, they are not applicable to the present case.

16.Following the principles laid down in the judgments relied upon by the learned counsel for the appellants, I am of the considered view that the lower Appellate Court committed an error in allotting the specific properties to the defendants 2, 3,5 & 9 at the preliminary decree stage.

Therefore, the finding rendered by the lower Appellate Court, allotting specific properties to the defendants 2, 3, 5 & 9 is liable to be set aside.

Accordingly, the same is set aside.

17. Since the lower Appellate Court found that the purchases made by the defendants 2, 3, 5 & 9 are valid and that they are bona fide purchasers for value, the prayer of the defendants that the said properties may be allotted to them, can be decided in the final decree proceedings.

As far as the principles of equity to be followed, the trial Court shall take up the issue while making actual allotment in the final decree proceedings.

19. In these circumstances, the substantial questions of law are decided in favour of the appellants.

The judgment and decrees of the lower Appellate Court are modified to the extent stated above.

The judgment and decree of the trial Court are restored.

The Second Appeals are partly allowed.

No costs.

Consequently, the connected miscellaneous petitions are closed.

Index : Yes 04.03.2014 Internet : Yes va To 1. The Principal District Court, Coimbatore.

2. The II Additional Sub Court, Coimbatore. M. DURAISWAMY, J.

va S.A.Nos.440 & 441 of 2009 and M.P.Nos.2 to 4 in S.A.NO.440 of 2009  
04.03.2014

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