

**Gomathi and Another Vs. Malathi and Others**

**Gomathi and Another Vs. Malathi and Others**

**SooperKanoon Citation :** [sooperkanoon.com/1188095](http://sooperkanoon.com/1188095)

**Court :** Chennai

**Decided On :** Sep-27-2016

**Judge :** K. Ravichandrabaabu

**Appeal No. :** Second Appeal No. 609 of 2014 & M.P.No. 1 of 2014

**Appellant :** Gomathi and Another

**Respondent :** Malathi and Others

**Judgement :**

(Prayer: Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 25.02.2014 made in A.S.No.4 of 2013 on the file of the I Additional District Judge, Tindivanam, reversing the judgment and decree dated 31.08.2012 made in O.S.No.114 of 2009 on the file of Additional Subordinate Judge, Tindivanam.)

1. The appellants are the plaintiffs. They filed a suit for partition; for cancellation of the sale deed executed by the defendants 1, 3 and 4 in favour of the 5th defendant and for permanent injunction.

2. The case of the plaintiffs is as follows:

The plaintiffs are the daughters and the defendants 3 and 4 are the sons of the defendants 1 and 2. Both the plaintiffs and defendants 1 to 4 were enjoying undivided joint family properties. The suit property is one of the joint family

property and therefore, the plaintiffs and defendants 1, 3 and 4 are entitled to equal shares. However, the defendants 1, 3 and 4 have sold the suit property to 5th defendant on 08.09.2000. The purchaser of the suit property namely, 5th defendant laid plots in the suit property and sold it to other defendants by virtue of sale deeds which are void abinitio. Therefore, the present suit is filed claiming partition of 2/5th shares and also to set aside the sale deed in respect of their shares as void abinitio.

3. The defendants 1 to 4 and 6 to 18 remained exparte. The 5th defendant contested the suit by filing written statement as follows:

The first defendant is having number of joint family properties and is still in possession of the same. Rest of the joint family properties have not been partitioned among the plaintiffs and defendants 1 to 4. All those properties should have been included in the present suit for partition. If all those properties are included, the plaintiffs can be allotted shares in some other property and the defendants 1, 3 and 4 can be allotted the suit property and by way of equity, it can be once again allotted to the 5th defendant. The 1st defendant also sold some of the joint family properties by way of sale deeds from 2002 to 2008 and those properties have not been included in the suit. Only to extract some amount from the 5th defendant, the present suit is filed with the collusion of defendants 1 to 4. The defendants 6 to 8 have purchased the plots and constructed their house.

4. Before the trial Court, the plaintiffs examined themselves as P.W.1 and P.W.2 respectively and marked Exs.A1 to A21 in support of their claim. On the side of the defendants, the third party was examined as D.W.1 and Exs.B1 to B5 were marked.

5. The trial Court, decreed the suit as prayed for. The 5th defendant preferred an appeal before the First Appellate Court. On considering the respective case of the parties, the appellate Court allowed the appeal, thereby, dismissed the suit.

6. Thus, the plaintiffs have filed the present Second Appeal, challenging the reversing finding of the Appellate Court. This Court, while admitting the Second Appeal raised the following substantial questions of law.

i) Is the lower appellate Court justified in non-suiting the appellants on the sole plea of partial partition overlooking that on the date of suit, there was no joint family and the appellants as co-owners are entitled to maintain the suit for partition of their share?

ii) Is the plea of partial partition is entitled to be raised by an alienee from a coparcener of joint family?

7. Mr.A.K.Kumarasamy, learned counsel appearing for the appellants submitted as follows:

The 5th defendant admitted that the suit property is the joint family property. The only objection is that the other joint family properties were not included in the suit and therefore, the suit is bad for partial partition. Such objection is not maintainable since a suit for partition is also maintainable as held in 1998(2) LW 414(Balakrishna Udayar and 3 others v. Chellammal and 9 others) and 2009(9) SCC 52(R.Mahalakshmi v. A.V.Anantharaman). The plaintiffs are seeking partition of the present suit property only as a co-sharer and coparcener and therefore, the partial partition principle would not apply. The 5th defendant being an alienee cannot resist the suit on the ground of partial partition. Such objection can be raised at the best only by a coparcener and not by the alienee. On the date of impugned sale, the plaintiffs became the coparcener in view of the Tamil Nadu Act 1 of 1990 and consequently, as per Section 29A of the Hindu Succession Act, the daughters (plaintiffs) are also having equal right. After the commencement of Hindu Succession (Amendment) Act, 2005, Section 29-A of the Act was introduced by Tamil Nadu Act 1 of 1990 which came into force on 25.03.1989. Since the Hindu Succession (Amendment) Act is not given retrospective effect, the right to property vested in an unmarried daughter as on the date of 25.03.1989 cannot be taken away. In this connection, the decisions of this Court reported in 2010(5) CTC 51 (Parameswari @ Gnanasakthi v. Raja Ratinam), 2015(8) MLJ 115 (Prakash v. Bhulavati) and 2014(2) CTC 113 (K.M.Thangavel v. K.T.Udayakumar) are relied on.

8. Per contra, Mr.N.Suresh, learned counsel appearing for the 1st respondent/ 5th defendant submitted as follows:

The suit itself is not maintainable claiming partition by the daughters of the 1st defendant in respect of the property which was already sold on 08.09.2000. The suit is also bad on the principles of partial partition. The property being ancestral property of the 1st defendant and he being the Kartha of the family, his power to alienate cannot be questioned and challenged by the plaintiffs. The plaintiffs have admitted that the suit property is the joint family property. They also admitted the sale of the suit property on 08.09.2000 in favour of the 5th defendant. However, the suit was filed only on 19.10.2009. The Hindu Succession Amendment Act was brought into force by Act 39 of 2005 and as per the proviso to Section 6(1) of the amended Hindu Succession Act, there is a specific bar to challenge the disposition or alienation including any partition or testamentary disposition of property which had taken place before 20th day of December, 2004. In view of such amendment introduced to Hindu Succession Act, the suit itself is not maintainable. Even though the present plea with regard to maintainability of the suit is raised as the first time before this Court by the 5th defendant, the same being the pure question of law can be raised even at this stage as held in AIR 1978 Madras 192 (V.Bapu Kalingarayar v. Rajam), AIR 1978 Madras 21 (Chellammal v. Vallimmal) and 2008(2) SCC 350 (Chief Engineer, Hydel Project and others v. Ravinder Nath and others). With regard to the scope of amendment to Section 6 of the Hindu Succession Act, the decision of the Apex court reported in 2016(2) SCC 36 (Prakash v Phulavati) is relied on. When the suit itself was filed long after the amendment made to Hindu Succession Act in Section 6 and when the Hindu Succession Amendment Act, 2005 being the Central Act replaces the amendment made by Tamil Nadu Amendment Act, 1989, the claim of the plaintiffs as coparcener is not maintainable. Once the amendment was brought into force to the Hindu Succession Act, the rights of the parties will have to be decided only on the basis of the amendment made to Section 6 and not under the TamilNadu Act. This Court, in a decision reported in 2014 (2) CTC 113 (K.M.Thangavel v. K.T.Udayakumar) has interpreted Section 6 of the Hindu Succession Act 1956 by Hindu Succession (Amendment) Act, 2005 in conjunction with the amendment introduced by the Tamil Nadu amendment Act 1989 and the said decision is squarely applicable to the present case. The said decision also is followed in the subsequent decision 2014 (3) CTC 688 (Dhanalakshmi v. Janaki Ammal).

Therefore, the claim of the plaintiffs are liable to be rejected which the lower appellate Court has rightly done.

9. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

10. The present Second Appeal is filed by the plaintiffs challenging the reversing finding of the lower appellate Court. Their grievance is that the lower appellate Court erred in law in dismissing the suit on the ground that the suit is bad for partial partition, while such suit can be maintained based on the facts and circumstances of the case.

11. No doubt, both sides have advanced their respective arguments before this Court elaborately on the question of entitlement of the plaintiffs in seeking partition. While the learned counsel for the appellants sought to rely upon the Tamilnadu Act 1 of 1990 justifying the claim of the plaintiffs, the learned counsel for the respondents relied on the proviso made to Section 6 of the Hindu Succession Act pursuant to the amendment made in the year 2005. Therefore, it is contended by the learned counsel for the respondents that the plaintiffs are not entitled to claim right over the properties which were already disposed of earlier to the amendment brought to Hindu Succession Act in the year 2005.

12. It is not in dispute that these questions, placing reliance on the above said provisions of Central and State laws, are made as the first time before this Court. It is also not in dispute that there is no clear cut pleadings by the respective parties touching upon these questions before the Courts below or submissions made by them at any point of time either before the trial Court or before the appellate Court. No issue was framed to that effect. However, it is contended by the learned counsel for the respondents that it is a pure question of law which can be gone into by this Court and decided based upon such question of law. No doubt, this Court could do so provided there were sufficient pleadings of the respective parties before the Courts below with regard to this aspect. Learned counsel for the respondents submitted that even in the absence of the pleadings or the issues raised by the Courts below on the above said question of law dealing with the maintainability of the claim made by the plaintiffs, this Court, based on the

pleadings as such available can go into such question and decide the matter. Certainly, this Court could consider this aspect if such question can be decided without adverting to the factual aspects of the matter and discussions made by the Courts below involving such question. I do not think that such exercise can be done in this case, at this stage, without there being proper pleadings of the parties and discussions made by the Courts below. Therefore, I am of the view that apart from the question as to whether the suit is bad for partial partition, the other question which is raised before this Court as the first time, that too, by the learned counsel for 5th defendant, touching upon the entitlement of the plaintiffs based on the above said two enactments, should also be gone into and decided by the Courts below after considering the respective pleadings and the evidence let in by them. Even for deciding the pure question of law, the factual and material pleadings on both side touching upon such question of law must be available for this Court to decide. In my considered view the details as such available are not sufficient for this Court to go into such question.

13. Even otherwise, the matter needs to go back to the trial Court as I have noticed yet another and very crucial flaw in the manner in which the suit was disposed of by the trial Court. The trial Court, while granting the relief of partition to the plaintiffs, though has written the judgment containing 26 paragraphs, has not at all made any discussion either on the issues already framed or by raising proper issues and given its findings and reasonings for granting such relief in favour of the plaintiffs, in any of the paragraphs except in paragraphs Nos.23 and 24. The trial Court extracted the plaint averment at paragraph No.2; written statement averment of the 3rd defendant at paragraph No.3; referred to the documents marked by the respective parties and the persons who deposed on their side at paragraph No.4; framed the issues at paragraph No.5. At paragraph Nos.6 to 9, the trial Court extracted the evidence of P.W.1 in her chief as such; at paragraph Nos.10 and 11 it has extracted the cross examination of P.W.1; at paragraph Nos.12 to 14 the evidence of P.W.2 was extracted as such. The cross examination of P.W.2 was extracted in paragraph No.15; the evidence of D.W.1 was extracted at paragraph Nos.16, 17 and 18; the cross examination of D.W.1 was extracted at paragraph No.19 and 20; the written submissions filed on behalf of the plaintiffs were extracted as such in paragraph Nos.21 and 22 and the written submissions

made on behalf of the 5th defendant was extracted at paragraph No.23. Thereafter, at paragraph No.23A, the trial Court has given its one and only finding and conclusion on the first issue, as to whether the plaintiffs are entitled for partition, as follows:

( Tamil )

The translated version of the above:

(Perusal of the evidence, documents and the submissions made by either side, it is clear that the plaintiffs are having right of 2/5th share in the suit property. Therefore, question No.1 is answered, finding that the plaintiffs are entitled for a preliminary decree for 2/5th share in the suit property.)

Therefore, it is apparent on the face of its judgment that the trial Court has not at all discussed the respective pleadings of the parties and the evidence let in by them and given the finding based on such discussion. On the other hand, after simply extracting the pleadings, evidence and submissions, the learned trial Judge by a single line finding granted the relief. Such conclusion, without there being any discussions and findings cannot be sustained. I wonder as to how this was not noticed by the first appellate court. Had it been noticed, the first appellate court itself would have remitted the matter to the trial Court for fresh consideration. No doubt, at paragraph No.24, the trial Court found that the sale deed in favour of 5th defendant is not binding on the plaintiffs since the plaintiffs are entitled to the share in the suit property. For arriving at such conclusion, the trial Court obviously placed its reliance on the so called finding rendered to issue No.1. Therefore, in my considered view, the judgment rendered by the trial Court cannot be sustained in the eye of law as it does not contain discussion of facts, reasoning and the independent findings on the issues based upon the pleadings and the evidence of the respective parties.

14. Needless to say, the trial Court being the Court of first instance necessarily has to go into the pleadings, evidence and submissions of the respective parties and make thorough discussion of the same and give its finding on each issue based on such discussion followed by conclusion of such issue. These are all not

empty formalities and on the other hand, they form the life line of the fair trial. In fact, the fair conduct of the trial is considered like the foundation of a building. Unless such foundation is strongly laid by the trial Court, decision making process of the appellate forum will be a futile exercise. When such great responsibility is vested on the trial Court, it is very much paining to note that the trial Judge, in this case, seems to have not realized such judicial duty and responsibility vested on her under Order 41 Rule 31 C.P.C. On the other hand, it is evident that she had chosen to dispose of the suit in a manner unconceivable and liable to be deprecated without any hesitation.

15. No doubt, the appellate Court allowed the appeal and dismissed the suit on the only ground that the suit is bad for partial partition. Even for such finding rendered by the lower appellate Court, there must be some contrary findings rendered by the trial court with regard to that aspect. In fact no issue to that effect was framed by the trial Court. As already stated supra, there is absolutely no finding or discussion by the trial Court.

16. Therefore, I am of the view that without going into any of the contentions raised before this Court and expressing any view on the merits of such contentions, the suit has to be remitted back to the trial Court for deciding the matter afresh. Both the parties can also make their additional pleadings touching upon the question of law raised before this Court as the first time. Accordingly, the second Appeal is allowed on the sole question of law that the granting of decree by the trial court in favour of the plaintiff is without discussion of facts and rendering any finding on the issues. Consequently, the judgment and decree of both the Courts below are set aside and the matter is remitted to the trial Court for fresh consideration. As this Court is only remitting the matter to the trial court for fresh consideration, the other substantial questions of law raised in this Second Appeal at the time of admission are relegated to the trial Court to consider and decide along with the issues already framed and further issues, if any, to be framed based on the additional pleadings of the parties as stated supra. As I am not going into the merits of the contentions raised in other aspects, various case laws cited by both sides are not discussed. The trial court shall dispose of the suit on merits and in accordance with law within a period of four months from the date

of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**