

Peddu Reddiar Vs. Kothanda Reddi

Peddu Reddiar Vs. Kothanda Reddi

SooperKanoon Citation : sooperkanoon.com/792382

Court : Chennai

Decided On : Sep-28-1965

Reported in : AIR1966Mad419

Judge : Venkataraman, J.

Acts : Transfer of Property Act - Sections 2, 5, 9 and 118; Hindu law, 1939

Appeal No. : Second Appeal No. 616 of 1962

Appellant : Peddu Reddiar

Respondent : Kothanda Reddi

Advocate for Pet/Ap. : Sri. Krishnan

Judgement :

(1) The first defendant is the appellant in the second appeal which arises out of a suit filed by the plaintiff for recovery of possession of items 1 to 7 of the A schedule to the plaint or in the alternative for a partition of the 15 items listed out in the B schedule to the plaint and for an allotment of a half share therein to the plaintiff. Items 1 to 7 of the A schedule are the items 1 to 7 of the B schedule. Items 8 to 15 of the B schedule are other items. The case of the plaintiff is that the 15 items listed out in the B schedule belonged to the brothers Peddu Reddi (first defendant) and Sanjeevi Reddi, that there was a division in status between them under Hindu law in 1939 but there had been no partition by metes and bounds. In 1947, under Ex. A. 2 dated 5-6-1957, Sanjeevi Reddi sold his undivided half share

in all the 15 items to one Ellappa Reddi for Rs. 4000. The further case of the plaintiff is that sometime thereafter there was an oral arrangement between Ellappa Reddi, the purchaser and Peddu Reddi by which Ellappa Reddi was to take the whole of items 1 to 7 of the A schedule; and that Ellappa in pursuance of that oral arrangement into possession of those items.

Then under Ex. A. 1 dated 2-8-1949 Ellappa Reddi sold items 1 to 7 of the A schedule to the plaintiff for Rs. 2000, and it is on that footing that the plaintiff filed the suit in 1957 for recovery of possession of those items.

(2) The first defendant conceded the half share of Sanjeevi Reddi in all the items in B schedule except items 5 and 7 which he alleged belonged to his wife the second defendant. He denied the partition arrangement between Ellappa and himself and further contended that in any case it would be invalid in law, because according to him a partition between co-owners would have to be evidenced by a registered deed in writing. He also pleaded that in respect of items 8 to 11, Ellappa gave up his half share in those items in discharge of a mortgage Ex. A-7 dated 7-4-1944 for Rs. 600 which had been executed by Sanjeevi Reddi in his favour.

(3) The second defendant claimed items 5 and 7 and a half share in the well in item 6.

(4) The plaint originally contained only the A schedule but by an amendment the alternative relief of a half share in the B schedule items was prayed in case the arrangement between Ellappa and Peddu Reddi was found either untrue or invalid. For the purpose of this alternative relief, Ellappa Reddi's legal representative, his son, was impleaded as the third defendant. He is a minor, but he filed a written statement supporting the plaintiff.

(5) The learned District Munsif who tried the suit held that the arrangement between Ellappa Reddi and Pedu Reddi set up by the plaintiff was not true. He also held that the second defendant was entitled to items 5 and 7. He granted a decree only on the basis of a half share of the plaintiff in the items in B schedule excepting items 5 and 7. As a matter of fact, B schedule listed not only half the extents and therefore he declared the title of the plaintiff's half share in those items

excepting items 5 and 7. But he granted a decree for possession of specific portions of items 1 to 4 of the B schedule, because the first defendant claimed only the other portions thereof (Para 38) and in the rest of the items 7 to 11 (mistake for 8 to 11) he granted a decree declaring that the plaintiff was entitled to common possession only and constructive or symbolical delivery of possession from the first defendant.

(6) The first defendant preferred an appeal which was heard by the learned Subordinate Judge, and the plaintiff also preferred cross objections. The appeal of the first defendant was mainly in respect of the half share in items 8 to 11 of B schedule and that his case that Ellappa Reddi had given up those items in discharge of the mortgage Ex. A. 7 should have been accepted. His further point was that the sale deed Ex. A. 1 taken by the plaintiff conveyed to him only items 1 to 7 and not any portion of items 8 to 11 and therefore the plaintiff was not entitled to any declaration in respect of the half share in items 8 to 11 of the B schedule. The contention of the plaintiff in his cross objections was that items 1 to 4 of A schedule and one fourth share in the well in item 6 of the A schedule should have been specifically decreed to him. He conceded the title of the second defendant in items 5 and 7 and her half share in the well.

(7) The learned Subordinate Judge, differing from the learned District Munsif, found that the arrangement between Ellappa Reddi and Peddu Reddi set up by the plaintiff was true and that as a result of that arrangement Ellappa Reddi and subsequently the plaintiff had been in possession of the whole of items 1 to 4 of A schedule with enjoyment of 1/4th share in the well in item 6. A contention was raised before him that the arrangement even if true would not be valid in law. But he expressed the view that even an oral partition between co-owners is permissible and he proceeded on the basis that there were some admissions of the first defendant in his written statement regarding possession of items 1 to 4 of A schedule. He accordingly allowed the cross objections of the plaintiff and granted a decree specifically in items 1 to 4 of the A schedule and a one-fourth share in the well in item 6. On his view the alternative relief of the plaintiff to a half share in the items 1 to 15 listed in the B schedule did not specifically arise. But the learned Subordinate Judge indicated that, in view of the presence of the third

defendant and his consent to the plaintiff obtaining a decree, there could be no objection to such an alternative decree being passed. The learned Judge did not however, specifically consider the plea of the first defendant that in respect of items 8 to 11, Ellappa had surrendered his right therein in discharge of the mortgage, Ex. A. 7.

(8) The first defendant has preferred this appeal. The first point raised by Sri V. Krishnan, the learned counsel for the Andhra Pradesh, is that the arrangement between Ellappa Reddi and Peddu Reddi is not true and that the learned Subordinate Judge therein is binding on Managing Committee in second appeal. The learned counsel, however, urges that in coming to that finding the learned Subordinate Judge committed an error in paragraphs 8 and 9 of his judgment, in thinking that the additional written statement of the first defendant contained admissions of the truth of the arrangement. What the learned Subordinate Judge refers to is that the very case of the first defendant that Ellappa Reddi gave up his rights to a half share in items 8, 9 and 11 in the B schedule would go to render probable the arrangement between Ellappa Reddi and Peddu Reddi. But even assuming that there was an error, I am satisfied that this error has not vitiated the finding of the learned Subordinate Judge about the truth of the arrangement. He has discussed the evidence thereon in paragraph 8 of his judgment. He 4 of the A schedule had been specifically in the enjoyment of Ellappa and subsequently by the plaintiff and that they had been paying kist.

There is sufficient evidence in support of that finding. There is also the broad fact that under Ex. A. 1 dated 2-8-1949 Ellappa sold items 1 to 7 of the schedule specifically, which indicates the truth of the arrangement. For, if there had been no such arrangement at all and Ellappa was merely entitled to a half share in all the 15 items, the simplest thing for him would have been to sell to the plaintiff his half share in all the items. The probabilities thus are clearly in favour of the arrangement and altogether I do not see sufficient reason to disturb the finding of the learned Subordinate Judge about the truth of the arrangement. The other question of fact pleaded by the appellant that Ellappa gave up his half share in items 8 to 11 for pa gave up his half share in items 8 to 11 for discharging the mortgage under Ex. A. 7 would not really arise at all, in view of the finding that

items 1 to 4 were specifically allotted to Ellappa.

But, however, I have no hesitation in accepting the finding of the learned District Munsif that there is no evidence in support of that case of the first defendant and that the probabilities are that the mortgage was extinguished by Ellappa out of the sale consideration of Rs. 4000. That is the recital in the sale deed Ex. A. 2. The endorsement of discharge in Ex. A. 7 also does not refer to any arrangement as pleaded by the first defendant, that the mortgage became extinguished as a result of Ellappa giving up the half share in items 8 to 11.

(9) The question of law, however, remains, whether the arrangement, by which items 1 to 4 of A schedule and one fourth share in the well in item 6 were allotted specifically to Ellappa, is valid in law. Ellappa and Peddu Reddi were co-owners. An oral partition between co-owners is valid in law. Sec. 9 of the Transfer of Property Act says that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. A partition between co-owners it may perhaps be said to involve a transfer of property because in the specific properties allotted to a particular co-owner the interest which the other co-owners had previous to the partition is given up and to that extent it may be said to be a transfer of property. But the Transfer of Property Act itself does not expressly require such a partition to be in writing, and there is no other provision of law requiring such a partition to be evidenced by writing. The only Section in the Transfer of Property Act which can possibly be held to apply is Sec. 118 dealing with exchange. That runs thus: "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange". A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale".

S. 54 dealing with "sale" of course requires an instrument in writing for sale of a property worth more than Rs. 100 in value. Sec. 118 was construed by the Calcutta High Court in Gyannessa v. Moharakanessa, (1898), ILR 25 Cal. 21. There also the question involved was whether an oral partition was valid. Both the learned Judges concurred in holding that it was valid. Macpherson J. gave the

following reason:

"Assuming that there was what amounted to an 'exchange' within the words of S. 118 between the vendor defendants and the plaintiffs, the undivided interest of the former in all the other properties being exchange for the undivided interest of the latter in the jote, the Transfer of Property Act does not apply to the transaction. The exchange was intended to and did effect a partition. The completed transaction was the partition by which the parties held in severalty the lands which had been before held in common. The law does not require a partition to be effected by an instrument in writing, and the right of partition being an incident of property held as this property was, the right is not, according to the second section, affected by any of the provisions of the Act. The Act, moreover, does not profess to deal with partitions or the way in which they are to be effected".

In other words, the reasoning of Macpherson J. was that in essence partition was the transaction which was effected and not an exchange. Ameer Ali J. expressed himself thus:

"S. 118 in my opinion is not applicable to cases where some of the co-owners possessing an undivided share in several properties take by arrangement a specific property in lieu of their share in all. Sec. 118, as its language shows, refers to cases where two persons owning two specific properties transfer or convey their respective ownership one to the other".

(10) In other words, according to the learned Judge what S. 118 contemplates is where there are two persons, A owning property X and B owning property Y, if A gives X property to B and takes Y property from B then it is an exchange. But in the case of co-owners A is not the sole owner of X property and B is not the sole owner of Y property and therefore the section will not apply.

(11) This decision was followed by another Bench of the same court in Satyakumar Banerjee v. Satya Kirpal Banerjee, (1909) 10 Cal LJ 503: 3 Ind Cas 247, where the learned Judges referred to a decision of the Privy Council in Rewun Persad v. Mt. Radhe Beeby. (1846-51) 4 Moo Ind App 137 (PC) in which their Lordships regarded it as undisputable that a division of joint property might be

effected without an instrument in writing.

(12) Again in *Latchumammal v. Gangammal*, (1911) ILR 34 Mad 72 it was held that an oral partition between two Hindu widows was valid, and that there was no objection to it in the Transfer of Property Act. In *Ma Sein Nyun v. Maung U*, 25 Ind Cas 498: (AIR 1914 Low Bur 62(1)) the lower Burma Chief Court held, following (1909) 10 Cal LJ 503, that there was abundant authority for the proposition that an oral partition may be effected without an instrument in writing and that the provisions of the Transfer of Property Act do not apply to it.

(13) *Sadasiva Iyer and Napier JJ in Alamelu Ammal v. Balu Ammal*, ILR 43 Mad 849 at 854: (AIR 1915 Mad 103 at p. 105) followed (1911) ILR 34 Mad. 72. In *Madam Pillai v. Badrakali Ammal*, ILR 45 Mad 612: (AIR 1922 Mad 311 (FB)) S. 9 of the Transfer of Property Act was referred to and it was held that an oral transfer of specific property by a husband to his wife in lieu of future maintenance was valid, and did not require any instrument in writing under the Transfer of Property Act. It pointed out that the transaction was neither a gift nor an exchange. In *Ramkishan Rai v. Sheo Sagar*, 73 Ind Cas 462: (AIR 1924 All 304) the Allahabad High Court held that a private partition could be effected without any written document.

(14) In *Imperial Bank of India v. Bengal National Bank Ltd*, ILR 58 Cal 136: (AIR 1931 Cal 223) Ranking C. J. and Ghose J. pointed out (at p. 145 of ILR Cal): (at p. 228 of AIR):

"Partition, release, surrender are all forms of transfer of immoveable property but so far as the Act is concerned they come under no restriction and by S. 9 a transfer of property may be made without writing in every case in which a writing is not expressly required by law. In this category also come charges of immoveable property". The same observation is repeated at pages 147 and 148 (of ILR Cal): (at pp. 228-229 of AIR).

(15) In *Kupuswami v. Rasappa*, AIR 1936 Mad 865 Varadachariar and Mockett JJ. pointed out that there is no specific provision of law enacting that a charge can be created only by a document and referred to ILR 58 Cal 136: (AIR 1931 Cal 223).

(16) In *Mohamed Yahia v. Mt. Bibi Sogra* AIR 1937 Pat 232, also it was held that an oral partition would be valid.

(17) The following commentary in A.I.R. Commentaries on the Transfer of Property Act, on S. 118 Note 5 is instructive:

"The true reason seems to be that the transaction contemplated by the section is a mutual transfer brought about in pursuance of an agreement between the parties & a partition is not such a transaction. The right to partition is legal incident of undivided property and the effect of the definition and specification of the shares in pursuance of that right operates as a mutual transfer between the parties. The mutual transfer of property in such cases is brought about as a consequence of the definition and specification of shares which is a legal incident of undivided property, and not as a consequence of an agreement to transfer property".

This is an expansion of the reasoning of Macpherson J. in (1898) ILR 25 Cal 210. See also the Commentaries in S. 9, note 10, S. 5 note 4; Sec. 2 note 4 and Mullah's Commentary on the Transfer of Property Act Ss. 9 and 118.

(18) Sri Krishnan, learned counsel for the appellant referred to the decision in *Narasimhalu v. Someswara Rao*, 1948-1 Mad LJ 150, at p. 151: (AIR 1948 Mad 505 at p. 505). There certain property had been allotted to the first defendant, as jyeshta bagam or elder brother's share in a partition between him and his younger brother. In a subsequent partition suit brought by the sons of the first defendant the contention of the first defendant was that that property was his separate property and not liable to be divided, the argument being that in the partition arrangement between him and his younger brother, Ramaswami, effected by an arbitration, the allotment of the jyeshta bagam to him must be treated as gift by the first defendant's younger brother after a partition. The learned Judges repelled this contention and held that the property also formed part of the joint family property. They observed

"The argument proceeds, in our opinion, on a misconception of the true nature of a partition arrangement under which each co-owner gets a specific property in lieu of his right in all the joint properties; that is to say each co-sharer renounces his

rights in the other common properties in consideration of his getting exclusive right to and possession of specific properties in which the other co-owners renounce their rights. It is thus a renunciation of mutual rights and does not involve any transfer by one co-sharer of his interest in the properties to the others. That is why it has been held that a partition can be effected orally and without any registered instrument though it may affect immoveable properties of the value of one hundred rupees or more".

The learned Judges referred with approval (1898) ILR 25 Cal 210. But I have pointed out that even on the view that a partition involves a transfer of property from one to the other it is not an exchange, and does not require to be in writing under S. 118 of the Transfer of Property Act.

(19) Mr. Krishnan, faced with the line of authorities mentioned above, sought to distinguish them from this particular case by urging that the transaction put forward by the plaintiff in this case was not a bare partition between the co-owners, Ellappa and Peddu Reddi but that it involved the recognition of the rights of the second defendant in items 5 and 7 which in his submission would involve an exchange under S. 118, and therefore required a registered instrument in writing. But the position is that though the plaintiff came forward with an original case of allotment of items 1 to 7 to Ellappa he later conceded that items 5 and 7 were not divided between Peddu Redi and Ellappa but were acknowledged to be the properties of the second defendant. At any rate, even if a registered instrument in writing was required in respect of items 5 and 7 would not invalidate the allotment of items 1 to 4 and the half share in the well, item 5, to Ellappa by an oral arrangement.

(20) Accordingly, the view taken by the learned Subordinate Judge is correct and this second appeal has to be dismissed. But I may add that if I have taken the view that the oral arrangement between Ellappa and Peddu Reddi was invalid, I would sustain the decree of the lower appellate court by saying that a decree for partition could now be passed in the presence of the third defendant, the legal representative of Ellappa, and in this decree for partition items 1 to 4 and the half share in the well may conveniently and equitably be allotted to the third defendant,

and consequently to the plaintiff since the third defendant has no objection to such a course. The second appeal is accordingly dismissed; but without costs. No leave.

(21) CJ/V.R.B./D.V.C.

(22) Appeal dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com