

Paramasiva Gounder Vs. S.P.Muthusamy

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Court : Chennai

Decided On : Apr-09-2013

Judge : G.Rajasuria

Appellant : Paramasiva Gounder

Respondent : S.P.Muthusamy

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

09. 04.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA
S.A.No.1279 of 2010 and M.P.No.1 o

1. Paramasiva Gounder 2. Karuppanna Gounder .. Appellants vs. S.P.Muthusamy .. Respondent This second Appeal is focussed as against the judgment and decree dated 15.03.2010 passed by the learned Principal District Judge, Erode in Cross Appeal in A.S.No.112 of 2009 in confirming the judgment and decree dated 22.06.2009 passed by the learned Principal Subordinate Judge, Erode in O.S.No.173 of 2007. For appellants : Mr.P.Valliappan For Respondent : Mr.N.Manokaran JUDGMENT This second appeal is focussed by the defendants, animadverting upon the judgment and decree dated 15.03.2010 passed by the learned Principal District Judge, Erode in Cross Appeal in A.S.No.112 of 2009 in confirming the judgment and decree dated 22.06.2009 passed by the learned Principal Subordinate Judge, Erode in O.S.No.173 of 2007.

2. The parties are referred to here under according to their litigative status and ranking before the trial Court.

3. A re'sume' of facts, absolutely necessary and germane for the disposal of this Second Appeal would run thus: (i) One Muthusamy claiming to be the purchaser of the 1/3 rd share of Deivanai, who was a co sharer along with D1 and D2, filed the suit seeking the following reliefs: To pass a decree in favour of the plaintiff and as against the defendants' (a) directing division of the suit properties into 3 equal shares by metes and bounds and with reference to good and bad soil and allot one such share to the plaintiff and put him in separate possession. (b) appointing a Commissioner to divide the suit properties as claimed in column (a) (c) restraining the defendants, their assignees etc., from in any way and in any manner either alienating or encumbering the suit properties to any other 3rd parties including the share of the plaintiff with specific boundaries, till the final partition is effected by means of permanent injunction; (d) directing the defendant to pay the costs of the suit to the plaintiff. (extracted as such) citing the following property described in the schedule of the plaint: Erode R.D., Chengam via Sub-R.D., Perundurai Taluk Mukasi Pidariyur Village, Old S.F.No.19, Punja acre 9.55 kist Rs.10.70 New R.S.No.378 Punja Hec.3.81.0 (punja acre 9.41) the said lands, mamool pathway and cart track rights and all other easementary rights attached thereto. (extracted as such) (ii) The gist and kernel of the plaint averments would run thus: The suit property originally belonged to one Andamuthu Gounder. He had his wife by name Papayee Ammal and the couple gave birth to three sons, viz., D1 Paramasiva Gounder, D2- Karuppanna Gounder and the deceased Marappa Gounder. Marappa Gounder pre-deceased his parents leaving behind his widow Deivanai and his mother Papayee as his legal heirs. Subsequently, it so happened that Deivanai sold her 1/3 rd share in the suit properties in favour of Muthusamy vide sale deed dated 28.03.2007. Since the defendants were not agreeable for amicable partition, he filed the suit seeking the aforesaid reliefs. (iii) Per contra, challenging and impugning the averments/allegations in the plaint, the defendants' jointly filed the written statement, the warp and the woof of the same would run thus: The said Marappa Gounder died intestate on 23.02.1969 leaving behind his widow Deivanai and his mother Papayee and his 1/4th share devolved upon them equally. Subsequently, Andamuthu Gounder died intestate. His th share devolved

upon the two defendants herein and the Marappa Gounder's widow Deivanai as well as the widow of Andamuthu Gounder. As such, the plaintiff's vendor Deivanai was entitled to 3/16 th share in the family properties. However, Deivanai by the end of 1970 after receiving a sum of Rs.7,000/- towards her share, relinquished her right over it. Thereafter, the registered partition deed dated 01.03.1971 emerged among other co-sharers. Wherefore, Deivanai had no right over the suit properties and her alienation of her alleged share in favour of the plaintiff was bad in law. Accordingly, he would pray for the dismissal of the suit. (iv) The trial court framed the relevant issues. (v) Up went the trial, during which the the plaintiff examined himself as P.W.1 along with P.W2 and marked Exs.A1 to A8; and on the defendants' side D.Ws.1 to 3 were examined and Exs.B1 to B5 were marked.

4. Ultimately the trial Court partly decreed the suit allotting 3/16 th share in favour of the plaintiff, so to say, in recognition of the 3/16th share in favour of the plaintiff's vendor.

5. Being aggrieved by and dissatisfied with the same, the plaintiff preferred appeal, whereas the defendants' preferred cross appeal. The court after hearing both sides dismissed the appeal as well as the cross appeal confirming the judgment and decree of the trial court.

6. Challenging and impugning the judgment and decree of the first appellate court in dismissing the cross appeal, this second appeal has been filed on various grounds and also suggesting the following substantial questions of law: a) When the vendor of the respondent had relinquished her share in the suit property after receiving a sum of Rs.7,000/- whether the sale executed by her under Exhibit A1 sale deed, dated 28.03.2007, after such relinquishment in respect of the suit property, is valid in law? b) When admittedly certain properties have been left out in the suit, whether the suit is bad of partial partition? c) Whether the courts below are correct in law in granting 3/16th share in favour of the respondent, especially when his vendor had no right to execute the sale? d) When the appellants had perfected title by ouster also, is the respondent entitled to any relief? e) Whether the courts below are correct in law in ignoring exhibits B1 to B5 material documents and the evidence of D.Ws.1 to 3, which would negate the case of the

respondent? (extracted as such) 7. Heard both sides.

8. The learned counsel for the appellants/defendants would pyramid his argument, which could succinctly and precisely be set out thus: (i) The trial court failed to take note of the fact that certain other properties, which are found mentioned in the partition deed Ex.A7 =Ex.B5 were left out. (ii) There cannot be any piece-meal partition. At the instance of a purchaser of a property out of several joint properties no suit can be filed citing that property alone and seeking partition. (iii) Both the courts below failed to take note of the fact that there was oral relinquishment of the share of Deivanai in favour of other shares, which alone culminated in effecting partition as per Ex.A7 = Ex.B5. Accordingly he would pray for the dismissal of the suit.

9. Per contra, in a bid to torpedo and pulverise the argument as put forth and set forth on the side of the appellants/defendants, the learned counsel for the respondent/plaintiff would advance his argument, which could pithily and precisely be set out thus: (i) No plea was taken in the written statement by the defendant that the suit was bad for want of inclusion of certain other items of suit properties. (ii) There is also no plea taken that the suit was bad for want of adding Deivanai as one of the parties to the suit. (iii) The plaintiff, being the purchaser of a share of one of the co-sharers cannot be compelled to include all the items of joint properties belonging to the said family of the vendor. If at all the other co-shares are aggrieved, it is open for them to file a separate suit for partitioning such properties left out in this suit. (iv) The law is anathema to any oral relinquishment of the share of a co-sharer ignoring the mandate as contained in Section 17 of the Registration Act. Accordingly, he would pray for the dismissal of the second appeal.

10. After hearing both sides, I thought of formulating the following substantial questions of law to the knowledge of both sides.

1. Whether the suit was bad for want of inclusion of the other items of properties found specified in Ex.A7 = Ex.B5, the partition deed?

2. Whether in the absence of any registered deed of relinquishment at the instance of Deivanai in favour of the other co-sharers, the plea of the defendants concerning such relinquishment can be countenanced and upheld by this court?

3. Whether there is any perversity or illegality in the judgments and decrees of the courts below?

11. The learned counsel for the appellants/defendants would cite the following decisions and certain excerpts from it would run thus: (i) 1994 STPL (LE) 18867 (SC) [Kenchegowda (since deceased) by legal representatives vs. Siddegowda alias Motegowda] "16. Therefore, what has been held is that the property had not been allotted in favour of the first defendant in the partition. That is very different from holding that the case of partition had not been accepted by the first appellate court. This being so, a decree for partition could not have been passed on a mere application for amendment. In fact, as rightly urged by the learned counsel for the appellant that the causes of action are different and the reliefs are also different. To hold that the relief of declaration and injunction are larger reliefs and smaller relief for partition could be granted is incorrect. Even otherwise a suit for partial partition in the absence of the inclusion of other joint family properties and the impleadment of the other co-sharers was not warranted in law. Thus, we find no difficulty in allowing these appeals which are accordingly allowed. The judgment and decree of the trial court as affirmed by the first appellate court are restored. However, there shall be no order as to costs." (ii) 2006(1) CTC 26.[Gandhi vs. Saminatha Gounder and another] "4. Mr.V.Raghavachari, learned counsel for the appellant placed reliance on the judgment of the Supreme court rendered in [Kenchegowda (since deceased) by legal representatives vs. Siddegowda @ Motegowda, JT 1994(4) SC 125.In this case, the Supreme Court has laid down the law holding that in a suit for partition when all the joint family properties are not made subject matter of the suit, such suit is not maintainable. The legal position in that regard is well settled, even though the learned counsel for the first respondent would contend that even the existing of the jewel is not known and therefore, the non-inclusion is not deliberate and in any event, it would not affect the relief of partition claimed.

5. I do not agree with the said contention. As stated above, when the plaintiff as a witness has admitted the existence of such valuable jewel as belonging to the joint family, it was the duty on his part to include that as a schedule property. The non-inclusion thereof is certainly fatal to the relief of partition. In my view, absolutely no question of law, nevertheless a substantial question of law, is involved in the matter and the judgment of the first appellate court in coming to a conclusion as if it is not proved that the plaintiff has taken a "Kasu Malai" from the first defendant and therefore, non-inclusion of "Kasu Malai" in the schedule will not affect the relief claimed in the suit is not sustainable. What is important is whether such a property should be included for partition when once it has come to the knowledge of the parties that the said property is available and it is not material as to whether the same is in possession of the plaintiff or the defendant. Therefore, the judgment and decree of the first appellate court is liable to be set aside and the decree and judgment of the trial court is confirmed. Consequently, the second appeal is dismissed as absolutely no question of law involved in this matter. No costs." A mere running of the eye over those precedents would connote and denote that piece meal partition is something that has to be discouraged and that too in a suit for partition, all the suit items should be included.

12. The factual matrix in this case is somewhat different.

13. In the written statement, there is no plea taken by the defendants that the suit was bad for non-inclusion of other items of suit properties. However, the learned counsel for the defendants would hasten to explain and expound by pointing out that the plaintiff having chosen to file the very partition deed Ex.A7, containing various items of joint properties belonging to the family of the vendor, was not justified in not including those properties also as suit properties for partition and for allotment of his vendor's share on equity basis in his favour. Nothing prevented the defendants from adding those items of properties left out. No doubt, Deivanai is not a party here. As of now, it could be understood that she after transferring her alleged 1/3 rd share in favour of the vendor, the plaintiff herein, simply got herself extinct from the scene.

14. At this juncture, I would like to recollect and call-up the following maxim: *res inter alios judicatae nullum aliis praejudicium faciunt* Matters adjudged in the lawsuits of others do not prejudice those who were not parties to them.

15. According to the defendants themselves, there are other items of properties, which originally belonged to the family of Andamuthu Gounder and those properties are found spelt out in Ex.A7=Ex.B5. If at all the defendants are very particular that those properties left out are of insignificant value or *pocu curante* value, then it is for them to add those items of properties in the final decree proceedings and seek for equal partition in respect of all the items of properties and for allotment notionally of the share of Deivanai and on equity basis, ultimately allotting the same in favour of the plaintiff. Allotting such share should be in commensurate with the value of the share as contemplated in the sale deed in favour of the plaintiff executed by Deivanai and it should not be in excess of the value of property purchased by the plaintiff. There is no embargo in law that during final decree proceedings fresh items of properties should not be added, provided there should not be any controversy over it.

16. Axiomatically and obviously, it is clear that according to the defendants' those items left out in the suit were allotted to the other sharers only as per Ex.A7=Ex.B5. I would also like to point out that during final decree proceedings if at all the defendants would come forward for inclusion of the left out items of properties, it is open for the court to include those properties also and notionally divide the suit properties as well as the other properties, which are going to be added and divide those properties and allot notionally 3/16 th share in favour of Deivanai and the court seized of the final decree proceedings is also enjoined to see as to whether the value of the shares purchased by the purchaser from Deivanai, exceeds 3/16th shares. If it is not so, then the entire 3/16th share of Deivanai should be allotted to the purchaser; but on the other hand, if the value of the property purchased by the plaintiff was lesser than the value of 3/16th shares that would be allotted to the share of Deivanai, then only proportionately the share of the plaintiff shall be cut down. As such, the substantial question of law No.1 is decided to the aforesaid effect.

17. I would like to recollect and call up the following decisions of the Hon'ble Apex Court regarding oral relinquishment and certain excerpts from it would run thus: (i) (2008)15 SCC 67.[Ranganayakamma and another vs. K.S.Prakash (dead) by Lrs. And others] "50. A deed of "release" for a consideration is a transaction. When, thus, a release is made for consideration, the particulars of consideration and other particulars which (sic) are required to be averred in the deed being essential elements thereof. Relinquishment of a property by a sister in favour of her brother for a consideration or absence of it, stands on a different footing. Section 25 of the Contract Act must be read and construed having regard to the fact situation obtaining in the cases. In Manali Singhal v. Ravi Singhal it was held : (AIR p.160, para

20) "20. Learned counsel for the defendants has then argued that the impugned settlement is without any consideration. Hence, the same is hit by Section 25 of the Contract Act. The connection of the learned counsel may be an ingenious one but can be brushed aside without any difficulty. Parties more often than not settle their disputes amongst themselves without the assistance of the court in order to give quietus to their disputes once and for all. The underlying idea while doing so is to bring an era of peace and harmony into the family and to put an end to the discord, disharmony, acrimony and bickering. Thus the consideration in such type of settlements is love and affection, peace and harmony and satisfaction to flow therefrom." 54. Section 25 of the Contract Act contains several exceptions, that is to say: (i) if it is in writing; (ii) if it is registered; or (iii) if the same has been executed on account of love and affection. The deed of partition is both in writing and registered. One of the questions which had been bothering this court is as to whether a document had been executed out of love and affection or not. The fact that the parties are near relatives is not in dispute. The love and affection of the sisters on the brothers has categorically been accepted by plaintiff 1 Kanthamma in her deposition, stating: "In the house of defendants 1 and 2 whenever there is a function, as our father died and since we had more affection and faith on defendants 1 and 2, we used to sign the documents without going through the contents".

55. The deed of partition could have also been entered into by way of family arrangement where no registration was required. Such a course of action had not been taken. The parties knew the nature of the document. The appellants and other sisters being highly educated were supposed to know the contents thereof. Their husbands are well off in society. The transaction, therefore, was transparent. Furthermore, the mother was alive. She was also a party to the deed of partition. She must have played a pivotal role. Even if suffering from illness, she might be anxious to see that family properties are settled. Release by an heir other than a coparcener does not need any consideration. A release is valid even without consideration." (ii) (1976)3 SCC 119[Kale and others vs. Deputy Director of Consolidation and others]. "9. Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise Kerr on Fraud at P.364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus: The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend. The object of the arrangement is to protect the family from long-drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of

the family which ultimately results in the unification of the society and, therefore, of the entire country is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administration of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successionis so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The courts, have therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made: A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term family arrangement is applied. Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which

would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements.

10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions: (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family; (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence; (3) The family arrangement may be even oral in which case no registration is necessary; (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable; (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same; (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement. A mere running of the eye over it would indicate and exemplify that the other co-sharers cannot try to deprive the right of the one other co-sharer by pleading that there was oral relinquishment quite antithetical to the mandate as contained in Section 17 of the Transfer of Property Act. As such, the plea taken by the defendants that there was oral relinquishment by the widow of Marappa Gounder is untenable.

18. Over and above that I would like to recollect the jurisprudential point also that the interest of three persons should be protected, viz., (i) the minor (ii) the widow and (iii) the mentally challenged. It thereby connotes and denotes that the widow's right should not be sacrificed at the alter of some imaginary pleas such as the one that there was oral relinquishment and the court should be always reluctant to accept such pleas.

19. Wherefore, both the courts below gave concurrent findings correctly, warranting no interference in this second appeal. The substantial question of law No.2 is decided accordingly.

20. In second appeal, as against such concurrent finding of the facts by both the courts below, no interference is required and no perversity or illegality also is found highlighted before me.

21. Accordingly, the judgment passed by the trial court is confirmed with the following clarification. During final decree proceedings, if at all the defendants would come forward for the inclusion of the left out items of the joint properties, it is open for the court to include those properties also and notionally divide the suit properties as well as the other properties, which are going to be added and divide those properties and allot notionally 3/16 th shares in favour of Deivanai and ultimately on equity basis allot such shares to the plaintiff. The court seized of the final decree proceedings is also enjoined to see as to whether the value of the shares purchased in properties purchased by the plaintiff from Deivanai exceeds 3/16th shares. If it is not so, then the entire 3/16th share of Deivanai should be allotted to the purchaser; but on the other hand, if the value of the shares purchased by the plaintiff was lesser than the value of 3/16th share that would be allotted to the share of Deivanai, then proportionately the share of the plaintiff shall be cut down.

22. With the above clarification, this second appeal is disposed of. No costs. Consequently, the connected miscellaneous petition is closed. To 1. The Principal District Judge, Erode 2. The Principal Subordinate Judge, Erode