

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.02.2015

Decided on : 23.02.2015

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P(NPD) No.354 of 2013
and C.R.P(NPD) No.3979 of 2013
and M.P.No.1 of 2013

Indirani

.. Petitioner / Plaintiff in both CRPs

Vs

1.Saraswathy

2.Geetha

3.Suseela

4.Nirmala

5.Balamani

6.Subramanian

.. Respondents/Defendants in both CRPs

Prayer in CRP NPD No.354/2013 : Civil Revision Petition is filed under Section 115 of Code of Civil Procedure against the fair and final order dated 09.11.2012 made in I.A.No.147 of 2011 in I.A.No.746 of 2007 in O.S.No.123 of 2005 on the file of I Additional Sub Court, Coimbatore.

Prayer in CRP NPD No.3979/2013 : Civil Revision Petition is filed under Section 115 of Code of Civil Procedure against the fair and final order dated 17.07.2013 made in I.A.No.193 of 2013 in I.A.No.746 of 2007 in O.S.No.123 of 2005 on the file of I Additional Sub Court, Coimbatore.

For Petitioners : Mr.P.Saravana Sowmiyan

in both CRPs

For Respondents : Mr.A.Thiagarajan for
in both CRPs RR1 to RR5

M/s.T.Balaji for R6
M/s.B.Radhika for R7 & R8

COMMON ORDER

CRP NPD No.354 of 2013

This revision is directed against the order dated 09.11.2012 passed in I.A.No.147 of 2011 in I.A.No.746 of 2007 in O.S.No.123 of 2005 by the I Additional Sub Court, Coimbatore.

2. The petitioner had instituted the suit O.S.No.123 of 2005 on the file of the First Additional Sub Judge, Coimbatore against the respondents 1 to 6 for partition claiming 1/6th share by metes and bounds. After contest, the trial court passed a preliminary decree. Thereupon, the defendants 1 to 5 filed I.A.No.746 of 2007 for passing final decree. When the application was pending, the petitioner filed I.A.No.147 of 2011 under Sections 2, 3, 4 and 5 of Partition Act and 151 of CPC seeking for permission to purchase the sharers of the respondents 1 to 5 for the value of Rs.4,25,000/- or any value which the court may deem it fit and proper for the petition property and for direction to the respondents 1 to 5 to sell their 5/6th

shares in the property of the petitioner.

3. The petitioner has averred in the affidavit filed in support of the petition that the trial court has decreed the suit in part and dismissed in respect of some of the properties by a decree dated 07.11.2006. Aggrieved by the order, the petitioner has filed an appeal in A.S.No.26 of 2007 and in the meanwhile, the respondents 1 to 5 filed I.A.No.746 of 2007 for passing of final decree. On 14.03.2007, the respondents 1 to 5 had given a registered power of attorney in favour of one Tamilselvi. Based on the power of attorney, the agent had executed a registered sale agreement with wife of the sixth respondent on 22.03.2007 agreeing to sell the undivided 5/6th share for Rs.4,25,000/-.

4. The petitioner has further stated that the property is a residential house alongwith two shops which is incapable of division amongst themselves. By the sale agreement, the respondents have shown their intention to sell their undivided share to the third party who belongs to a different community. As a co-owner, she has got a right of pre-emption to purchase the undivided share of the respondents. Since the property belonged to her paternal grandfather and she is the only sharer living in the suit property, she has got a

very great sentimental attachment towards the suit property, that she is very particular that the property should be retained within their family and should not go out of the family.

5. The application was resisted by the respondents by filing a counter stating that the period of sale agreement was over and thereby there was no sale deed effected so far and as such, the petitioner is not entitled to seek for the relief directing the respondents 1 to 5 to sell 5/6th share to the petitioner; that the Advocate Commissioner was already appointed in final decree proceedings who in turn submitted his report alongwith surveyor for division of the suit property which would amply prove that the property is divisible; that the petitioner, at no point of time evinced interest to purchase the share of the respondents though the agreement of sale was entered on 22.03.2007 and the respondents 1 to 5 had no intention to sell the property to the petitioner and also there is no pre-emptive agreement between them and hence the present petition compelling the respondents 1 to 5 to sell their share to the petitioner is against constitutional law and the petition seeking such direction can only be filed when the purchaser filed a suit for partition and therefore the present petition is unsustainable in law.

6. The trial court, following the decision of the Hon'ble Supreme Court in ***Gautam Paul v. Debi Rani Paul*** reported in ***AIR 2001 SC 61*** held that the petition is not maintainable. Aggrieved by the order, the petitioner has filed revision petition in CRP NPD No.354 of 2013.

CRP NPD No.3979/2013 :

7. This revision arises out of the order dated 17.07.2013 made in I.A.No.193 of 2013 in I.A.No.746 of 2007 in O.S.No.123 of 2005 on the file of I Additional Sub Court, Coimbatore.

8. When the above CRP NPD 354 of 2013 was pending, the petitioner filed I.A.No.193 of 2013 under Order 1 Rule 10 and Section 151 CPC to implead the respondents 7 & 8 as respondents 3 and 4 in I.A.No.746 of 2007. In the affidavit filed in support of the petition, the petitioner has averred that when the CRP No.354 of 2013 was listed for admission, this court raised a query whether the petitioner has impleaded the respondents 7 and 8 in the final decree application and also made an observation that why there were not impleaded in the final decree application.

9. The application was opposed by the respondents stating

that the respondents 7 and 8 are not necessary and proper parties in the application. The trial court rejected the application. Aggrieved by the order, this revision is filed.

10. Mr.P.Saravana Sowmiyan, learned counsel for the petitioner submitted that the property in question is a dwelling house, where the petitioner is residing and the respondents have not offered to sell their shares to the petitioner before entering into an agreement of sale with a stranger, that since the preferential right of purchase of shares of the other co-sharers have been denied to the petitioner, the petitioner has to enforce his pre-emptive right, but the trial court misconstrued the judgment reported in **2012 (3) CTC 495 [N.Manickam v. Kanagarajan & Ors.]** while dismissing the petition. The learned counsel further submitted that the respondents 7 and 8 are necessary parties in this proceedings.

11. Per contra, Mr.A.Thiagarajan, learned counsel for the respondents submittd that the sale agreement was entered into in the year 2007 but till now, sale deed was not effected in favour of the third party and that the petitioner has no right of pre-emption at this stage as per the dictum laid down by the Apex Court in **AIR 2001 SC 61 [Gautam Paul v. Debi Rani Paul]**. It is further submitted that

based on the agreement of sale, the proposed parties cannot claim any right in this property and therefore the application for impleading was rightly dismissed by the trial court.

12. The Hon'ble Supreme Court in the judgment cited supra in **AIR 2001 SC 61 [Gautam Paul vs Debi Rani Paul And Ors]** has held as follows -

There is no law which provides that co-sharer must only sell his/her share to another co-share. Thus stranger/outsideers can purchase shares even in a dwelling house. Section 44 of the Transfer of Property Act provides that the transferee of share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. Section 44 adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case Section 4 of the Partition Act comes into play. Except for Section 4 of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied with. As seen above one of the conditions is that the outsider must sue for partition, Section 4 does not provide the co-sharer a right to preempt where the stranger/outsideer does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal Interpretation may be given, interpretation cannot be one which gives a right which the Legislatures clearly did not intend to confer. The

Legislature was aware that in Suit for Partition the stranger/outsider, who has purchased a share would have to be made a party. The Legislature was aware that in a Suit for Partition the parties are inter-changeable. The Legislature was aware that a Partition Suit would result in a decree for Partition and in most cases a division by metes and bounds. The Legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the Legislature did not provide that the right for pre-emption could be exercised "In any Suit for Partition". The Legislature only provided for such right when the "transferee sues for partition". The intention of the Legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger/purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition. The Interpretation given by the Calcutta, Patna, Nagpur and Orissa High Courts would result in nullifying the express provisions of Section 4, which only gives a right when the transferee sues for partition. If that interpretation were to be accepted than in all cases, where there has been a sale of share to an outsider, a co-sharer could simply file a suit for partition and then claim a right to purchase over that share. Thus even though the outsider may have, at no stage, asked for partition and for the delivery of the share to him, he would be forced to sell his share. It would give to a co-sharer a right to pre-empt and purchase whenever he/she so desired by the simple expedient of filing a Suit for Partition. This was not the intent or purpose of Section 4. Thus the view taken by Calcutta, Patna, Nagpur and Orissa High Courts, In the aforementioned cases, cannot be said to be good law.

13. This Court, while considering the application filed by a co-sharer seeking to enforce the right of pre-emption, in **2012 (3) CTC 495 [N.Manickam v. Kanagaraj]** has held as follows -

20. In this case, admittedly, respondents 2 and 3 were impleaded in I.A.No.932 of 2007 filed by the first respondent for passing final decree and allotment of his half share of property in I.A.No.932 of 2007. Therefore, when the stranger purchaser also joined in the final decree application and prayed for partition of their half share, it can be stated that he prayed for actual division and therefore, the revision petitioner is entitled to exercise his right of pre-emption as per the judgment in 2000 (8) SCC 330. The position would be different if the first respondent alone had applied for passing of final decree and separate possession of his share and in that context, the revision petitioner will not have right to exercise his right of pre-emption. But, in this case, the purchasers viz., respondents 2 and 3 herein also joined the first respondent in the final decree application in I.A.No.932 of 2007 and prayed for division of their half share and therefore, as stated supra by the Honourable Supreme Court, the revision petitioner gets a right to exercise the right of pre-emption in their application and therefore, the application under section 22 of the Hindu Succession Act is maintainable.

14. In the decision relied on by the learned counsel for the petitioner reported in **2012 (3) CTC 495** cited supra, one co-sharer sold his undivided share in favour of a third party pending final decree application. The purchaser, joining with his vendor, filed an application for passing final decree. While so, the other co-sharer

filed a petition under Section 22 of the Hindu Succession Act seeking his right of pre-emption. The application was opposed on the ground that the pre-emptive right can be claimed when the purchaser files a suit for partition and separate possession, the application in the partition suit was not maintainable. This Court, relying upon the judgment reported in ***AIR 1967 Mad. 156 [Ramaswami v. Subramania]***, held that the application filed under Section 22 of the Hindu Succession Act is maintainable as the purchasers were already impleaded in the final decree application. In the judgment reported in ***Babulal v. Habibnoor Khan reported in 2000 (5) SCC 662***, the Hon'ble Supreme Court has held that the application by the members of the family to purchaser stranger's share under Section 4 of the Partition Act is maintainable only if the stranger moves for getting partition and separate possession of his share. The same view was taken in the judgment reported in ***2000 (4) CTC 503 (SC)*** in the case of ***Gautam Paul v. Debi Rani Paul***.

15. Following the decisions rendered by the Hon'ble Supreme Court in ***2000 (5) SCC 662 [Babulal v. Habibnoor Khan]*** and ***2000 (4) CTC 503 (SC) [Gautam Paul v. Debi Rani Paul]***, this Court, in ***2010 (5) CTC 70 [V.Govindaswamy v. Mangammal]*** has held as follows -

*20. As ruled by the Hon'ble Supreme Court in the decisions referred in **Babulal v. Habibnoor Khan**, 2000 (5) SCC 662 : AIR 2000 SC 2684 and **Gautam Paul v. Debi Rani Paul**, 2000 (4) CTC 503 (SC) : AIR 2001 SC 61 : 2000 (8) SCC 330, referred to above, the subsequent purchaser/8th respondent who purchased the 5/6th share has not filed any Suit for partition and separate possession of 1/6th share and an alternative relief to appoint an Advocate commissioner to sell the property and out of the sale proceeds to pay 1/6th share to the petitioner. The petitioner herein had filed the Interlocutory Application before the Court below, seeking a totally different prayer to direct the Respondents, subsequent purchaser to sell their 5/6th share to the Petitioner is not legally sustainable, hence, the Interlocutory Application was rightly dismissed by the Court below.*

16. In view of the facts circumstances of this case, I am of the opinion that the judgment relied upon by the learned counsel for the petitioner does not have any bearing to the facts of this case, but it only supports to the case of the respondents. In the instant case, first of all the sale has not been effected in favour of a third party, secondly the alleged purchasers are not parties to the suit and thirdly the alleged purchase does not claim partition and separate possession in the suit property. The principles laid down by the Hon'ble Supreme Court in **AIR 2001 SC 61** and by this Court in **2010 (5) CTC 70**, cited supra squarely apply to the case on hand. In such factual

situation, the applications filed by the petitioner were rightly rejected by the trial court. I do not find any reasons to interfere with the impugned orders.

17. In the result, both the Civil Revision Petitions are dismissed with a cost of Rs.5,000/- payable by the petitioner. Consequently, connected Miscellaneous Petition is closed.

23.02.2015

Index:Yes
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To

The I Additional Subordinate Judge,
Coimbatore.

K.KALYANASUNDARAM,J

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Pre-delivery orders in
C.R.P(NPD) No.354 of 2013
and C.R.P(NPD) No.3979 of 2013

23.02.2015