

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Delivered On: 23.02.2017

Reserved On: 10.02.2017

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.Nos.458 and 459 of 2009

- 1.Mrs.P.Maduri Gajapathi Raju
- 2.Sri.P.Alak Narayan Gajapathi Raju
- 3.Sri.P.Monish Gajapathi Raju
- 4.Smt.P.Sidani Gajapathi Raju

...Appellants in both S.As./Defendants

Vs.

- 1.Mrs.Radha Gajapathi Raju
- 2.Mrs.Vidhya Singh
- 3.Mrs.Urmila Prakash
- 4.The Executor,
Maharani Vidyavathi Devi Trust, Vizianagaram
General I.S.Gill, Sikh

- 5.Sri.P.Anand Gajapathi Raju (Deceased)
 - 6.Sri.Ashok Gajapathi Raju
 - 7.Mrs.R.V.Sumeetha Prasad
 - 8.Sudha Gajapathi Raju
 - 9.P.Urmila Gajapathi Raju
 - 10.Kumari P.Sanchaita Gajapathi Raju
- ...Respondents/ Plaintiffs
in S.A.No.458/2009

(RR8 to 10 brought on record as LRs of the Deceased R5 vide order of this Court dated 08/12/16 made in CMP Nos.19112 to 19114/16 in SA.No.458/2009)

- 1.Estate of late Maharani Vidyavathi Devi of Vijayanagaram
Rep. by its Trustee, General I.S.Gill, Sikh.
- 2.Mrs.Radha Gajapathi Raju
- 3.Mrs.Vidhya Singh
- 4.Mrs.Urmila Prakash

...Respondents in S.A.No.459/2009

Common Prayer:

Second Appeal filed under Section 100 of C.P.C. praying to set aside the judgment and decree passed in Appeal Suit Nos.305 and 306 of 2004 respectively dated 30.06.2008 passed by the Additional District and Sessions Court Fast Track Court 1, Chennai confirming the judgment and decree in O.S.Nos.2664 of 1997 and 824 of 1999 respectively, on the file of the VIII Assistant City Civil Court, Chennai dated 05.02.2004, dismiss the suit in O.S.Nos.2664 of 1997 and 824 of 1999 respectively, as not maintainable.

Appellants : Mr.N.L.Rajah
Senior Counsel
for Mr.E.Jaya Sankar

Respondents : Mr.Srenik S.Jain for
Mr.P.Subba Reddy
for R1 to R3 in SA.458/09, and R4 in S.A
459/09
and R2 to R4 in SA.459/09
Mr.G.K.Muthukumar
for R10 in SA.458/09
No Appearance
for R4 and R6 in SA.458/09 and
R1 in SA.459/09
R5 - died and R7 Not ready in notice
in SA.458/09
Mr.V.Bhiman for M/S.Sampathkumar
Associates for R4 in
S.A.458/09 & R1 in S.A 459/09

COMMON JUDGMENT

The second appeals have been filed praying to set aside the judgment and decree passed in Appeal Suit Nos.305 and 306 of 2004 respectively, dated 30.06.2008 passed by the Additional District and Sessions Court Fast track Court 1, Chennai confirming the judgment and decree dated 05.02.2004 in O.S.Nos.2664 of 1997 and 824 of 1999 respectively, on the file of the VIII Assistant City Civil Court, Chennai.

2.Before advertng to the merits of the case in appeals, to understand the nature of dispute, it is inevitable to begin this judgment with the following pre-lude:

(i)Maharaja Alakh Narayana Gajapathi Raju was Raja Sahib of Vijayanagaram. The Vijayanagaram Samasthanam had a large Estate

with immovable and movables classified as divisible and indivisible. The said Maharaja Alakh Narayana Gajapathi Raju died on 25.10.1937 leaving behind him, his wife Maharani Vidyavathi Devi and two sons P.Vijayarama Gajapathi Raju and P.Visweswara Gajapathi Raju. At the time of the demise of Maharaja Alakh Narayana Gajapathi Raju both sons were minors.

(ii)The Samasthanam was brought under the Management of Court of Wards from 1935 to 30.06.1946. During the time when the Estate was managed by the Court of Wards, Vijayarama Gajapathi Raju made a claim before the Court of Wards for his share in the properties, the matter was referred to Sir B.Archie Rale, a retired Judge of Madras High Court for enquiry. Ultimately, the claim was settled by way of compromise, in which, one Vijayananda Gajapathi Raju executed a deed of release in favour of Vijayarama Gajapathi Raju and Visweswara Gajapathi Raju. After the enactment of Estate (Abolishment and Conversion into Ryotwari) Act, 1948, the Vijayanagaram Estate was notified under the Act. Apprehending taking over of the Estate, Vijayarama Gajapathi Raju, the then Maharaja filed a suit in O.S.No.120 of 1948 before the Sub Court, Visakhapatnam for partition of the joint family property. In this suit, he claimed large number of immovable properties and a substantial number of jewels were impartiable. Claiming permogmiture right over impartiable properties, which was later transferred to Madras High Court and re-numbered as C.S.No.495 of 1949. Even at the time when the suit for partition was filed, there was several other ancillary litigations by and against the Samasthanam by several people which are not so relevant to the facts of this case.

(iii)The partition suit filed by Vijayarama Gajapathi Raju was tried by Madras High Court. In the said case, an interim report was filed by the Joint Receiver on 09.01.1950, which is marked as Ex.A4. An objection was filed by the respondents to the preliminary report and in response, the plaintiff has filed a statement providing item wise explanation for the objections raised by the defendants. After considering the interim report and the objections and the statement of the plaintiff, Madras High Court passed a preliminary decree for partition in that suit on 11.12.1950. As per the preliminary decree, the plaintiff Vijayarama Gajapathi Raju, defendants Maharani Vidyavathi Devi and P.Visweswara Gajapathi Raju were each entitled to 1/3 share in the partiabale properties of the joint family of which they were members along with deceased Maharaja Alakh Narayana Gajapathi Raju.

3.The core dispute between the parties at that point of time was to identify partiabale Estate and impartiable Estates, because, the Estate which were impartiable has to devolve upon

the eldest son as primogenitor. Therefore, while the plaintiff was seriously contending many of the properties as impartiable, the defendants were pleading contrary. Further, the plaintiff in that suit was harping on the point that certain immovable properties which have been subsequently acquired have been incorporated in the original Estate. So those properties must be held to be impartiable and also claimed that out of 581 jewels, 141 items are items of regalia, which were not partible and therefore, his younger brother and mother have no share in them. Hence, not satisfied with the preliminary decree of the Madras High Court, the parties went to Supreme Court, preferring appeal.

4.The Hon'ble Supreme Court in Civil Appeal No.177 of 1961, after discussing the facts at length, dismissed the suit making observation on each item of properties whether it is divisible or indivisible or otherwise. While taking note of the representation made by the Counsel, the Hon'ble Supreme Court made it clear that with regard to properties in respect of which, no finding has been specifically recorded by the Courts below, it would be open to the parties to ask the trial Court to deal with them and consider the rival contentions of the parties in respect of them. This order was passed by three Judges Bench of the Hon'ble Supreme Court on 19.03.1963. After the disposal of the appeals in the above said manner, the Sub-Ordinate Court, Visakapatnam seized the matter and renumbered it as O.S.No.21 of 1963.

5.After the above said judgment of the Hon'ble Supreme Court, the litigating parties have come to terms and has filed a memorandum of compromise dated 27.09.1963 extracting the history of the litigation and reason for settlement. They agreed to settle their differences in the manner set out in the compromise memo. The said terms of the compromise memo is now the bone of contention in the present second appeal.

6.C.S.No.335 of 1988 (On the file of Madras High Court) later renumbered as O.S.No.2664 of 1997 on the file of the VIII Assistant City Civil Court, Chennai was filed by Mrs.Radha Gajapathi Raju, Mrs.Vidhya Singh and Mrs.Urmila Prakash. They are wife and daughters of P.Visweswara Gajapathi Raju. The suit is pitted against P.Vijayarama Gajapathi Raju and Maharani Vidyavathi Devi Trust for partition claiming 1/3 share in the suit scheduled property. The Estate of late Maharani Vidyavathi Devi represented by Trustee filed C.S.No.121 of 1984 on the file of High Court, Madras which was transferred to the City Civil Court, Chennai and renumbered as O.S.No.824 of 1999 on the file of the VIII Assistant City Civil Court, Chennai against Vijayarama Gajapathi Raju and legal representatives of

Visweswara Gajapathi Raju. Pending appeal, Vijayarama Gajapathi Raju died and his L.Rs. were brought on record. Precisely, as of now, all the three main characters who were alive at the time of filing of the suit are no more. While the Maharani, the mother of Vijayarama Gajapathi Raju and Visweswara Gajapathi Raju, is now been administered by a Trust, the legal representatives of her two sons are now continuing the litigation.

7.The case of the first plaintiff in O.S.No.2664 of 1997 is that she is the widow of Visweswara Gajapathi Raju and the other two plaintiffs are her children. The partition suit in O.S.No.120 of 1948 on the file of the Sub Court, Visakapatnam was later transferred to Madras High Court and re-numbered as C.S.No.495 of 1949 on the file of Madras High Court. In that suit, the joint family properties situated in Tamil Nadu were not partitioned, when the Single Judge of the Madras High Court declared the properties with Admiralty House, Ooty are impartiable. The Division Bench reversed the decision of the High Court and passed a decree in respect of 106 items. On appeal, the Supreme Court remanded the matter back to the lower Court with direction to decide upon whether the property is partible or impartiable. Wherever no specific finding given by the Hon'ble Supreme Court, according to the plaintiff, by the said direction, it is open to the parties to ask the Court below to deal with them and consider them.

8.The subsequent compromise entered between her husband and Vijayarama Gajapathi Raju did not include the present property in dispute. Her husband has not relinquished his share in the schedule mentioned property and therefore, her husband along with the first and second defendants namely, Vijayarama Gajapathi Raju and Maharani Vidyavathi Devi Trust are entitled for 1/3 shares each. Therefore, the property which is in joint possession of all the three sharers are to be divided into three parts and converted into separate possession by metes and bounds.

9.Denying the claim of the plaintiff, the defendants took a preliminary objection in their written statement contending that the plaintiffs have no basis to make a claim for partition in the suit as the legal heir of Visweswara Gajapathi Raju, since there is no evidence to show that the husband of the first plaintiff died and therefore, she cannot claim as legal heir of the deceased person. Without establishing the death of her husband, the first plaintiff have no right to seek the relief. Hence, the suit to be dismissed in limini.

10.The further averment in the written statement is that the earlier partition suit ended in compromise and duly recorded by

the sub Court Vijayanagaram in O.S.No.21 of 1963 wherein, the first defendant and his brother who is the husband of the first plaintiff had entered into a memo of compromise and inter alia, the husband of the first plaintiff has given up his right over the properties which he claimed as partible in O.S.No.120 of 1948 and also in all other properties which has been left by over sight or otherwise. Consequent to this compromise decree dated 27.09.1963, the pending suits in other Courts were withdrawn and the compromise decree has been put into force. Therefore, there is no cause of action to file a subsequent partition suit by the plaintiff, since it is barred by Order II Rule 2 of CPC.

11.The Trial Court based on the pleadings framed the following issues:

- "1.Whether the suit is not maintainable?
- 2.Whether the plaintiffs have any share in the suit property?
- 3.Whether the plaintiffs can claim any share in the schedule mentioned property on behalf of P.Visweswara Ganapathy Raju Garu?
- 4.Whether the suit is liable to be dismissed under Order II Rule 2 of Civil Procedure Code?
- 5.Whether the plaintiffs are in joint possession along with the defendants?
- 6.Is there any cause of action for this suit?
- 7.Whether the court fee paid is correct?
- 8.To what reliefs the parties are entitled?"

12.The other suit in O.S.No.824 of 1999 which was originally filed before the Hon'ble High Court and taken on file in C.S.No.121 of 1984 and which was later transferred to the City Civil Court, Chennai was filed by late Maharani Vidyavathi Devi of Vijayanagaram represented by its Trustee, Lieutenant General I.S.Gill, wherein, it is contented by the plaintiff that the first defendant P.Vijayarama Gajapathi Raju is entitled for 2/3 share in the suit property and the trust is entitled for 1/3 share in the trust property, as per the compromise decree passed in O.S.No.24 of 1968 on the file of the District Court of Visakapatnam.

13.After the decree, the plaintiff has spent Rs.18,994.55 for fencing and engaging watchman and evicting encroachers for which, the defendant has to share a proportion of expense which is Rs.12,662/-. Since the first defendant has not paid the amount in respect of demand, suit for recovery of money and partition. This suit was contested by the defendant on the ground that already the suit property is a subject matter in O.S.No.24 of 1968 when a compromise has been entered by way of a

final decree regarding the shares of the property and therefore, there is a bar to file second suit for partition. The plaintiff should work out his right of that decree by filing appropriate application in that suit and is not entitled to file a separate suit in respect of the same subject matter. Regarding the money claimed towards the expenses incurred in connection with the suit property, the contention of the defendant is that without any authorisation, if the plaintiff has incurred any expenditure, the defendant is not liable to share the expense, the plaintiff failed to intimate the defendant at the time of incurring expenditure and now he cannot claim the expenses which the plaintiff never authorised and further, the claim being a money claim, it is barred by limitation.

14. In the written statement filed by the second defendant, it was contended that Maharani Vidyavathi Devi wife of late Maharaja Alakh Narayanan Gajapathi Raju of Vijayanaragam died in the year 1957. As per the compromise, she is entitled for 1/3 share in the suit property. On her death, the plaintiff who claims himself as trustee of Sri Maharaja Vidyavathi Trust which seems to have been creation of a Will has filed the suit since the earlier suit for partition, her husband has not relinquished the share in the suit schedule property, she is also entitled for 1/3 share in the suit schedule property along with the plaintiff and hence sought for allowing the suit granting 1/3 share to the plaintiff and 1/3 share to the defendants 2 to 4 based on the pleadings.

15. The trial court has framed the following issues and additional issues:

- "1. Is the suit for partition and possession maintainable?
2. Is the plaintiff entitled to Rs.12,602/- as claimed in the plaint?
3. Is not the claim for Rs.12,662/- barred by limitation?
4. To what reliefs are the parties entitled?

Additional Issues:

1. Whether the defendants 2 to 4 are entitled to 1/3 share?"

16. The trial Court after examining the witnesses, decreed both the suits and passed preliminary decree in O.S.No.2664 of 1997 directing the defendants to divide the suit property into three equal shares and allot one share to the plaintiffs by metes and bounds and put separate possession of the plaintiffs by appointing the Commissioner. In O.S.No.824 of 1999, preliminary decree was passed directing the defendant to partition the suit property into three equal shares and separate possession of 1/3 share to the plaintiff by metes and bounds in

good and bad soil. In respect of the money claim, the suit was dismissed and the counter claim made by the defendants seeking 1/3 share in the property through her husband was declined.

17.The aggrieved defendants 5 to 8 in both the suits preferred A.S.Nos.305 and 306 of 2004. The lower Appellate Court formulated the following points for determination:

"Whether both suits are maintainable? Whether plaintiffs are in joint possession along with the defendants? Whether suit is barred under Order II Rule 2 of CPC? Whether the relinquishment deemed to have been made by the first plaintiff's husband is not valid as no registered relief deed is executed in respect of plaint schedule property? Whether it requires compulsory registration? Whether it creates new rights?"

18.Through a common judgment, the first Appellate Court dismissed both the appeals confirming the judgment passed by the trial Court in O.S.No.2664 of 1997 and O.S.No.824 of 1999. The aggrieved defendants 5 to 8 have preferred the second appeals raising the following substantial questions of law:

"1)In the facts and circumstances of the case whether the lower courts in a subsequent proceeding could review a Judgment and decree passed in an earlier proceeding when such judgment and decree has attained finality?

2)In the facts and circumstances of the case whether the lower courts could hold that the compromise decree passed in an earlier proceeding required registration when such compromise decree was between two brothers and did not result in creating of any new interest but only in rearrangement of existing rights?

3)In the facts and circumstances of the case whether a second suit is maintainable when an earlier suit was a comprehensive one relating to division of all assets to which the brothers could stake any claim and when such suit had ended in a compromise decree being passed?

4)In the facts and circumstances of the case whether the lower court was right in allowing a decree in an earlier proceeding to be questioned when clearly that law is to the effect that even a preliminary decree for partition is a final decision and is no longer open to question by either party

except in an appeal, review or revision petition as provided by law?

5) In the facts and circumstances of the case whether the lower court could hold that the Plaintiffs wherein joint possession of the suit schedule property with the defendants only on the basis of the Urban land tax receipts obtained by the Plaintiffs?"

19. The learned counsel for the appellants at the outset submitted that he is not pressing the Second Appeal in S.A.No.459 of 2009, in view of the final decree passed in O.S.No.824 of 1999 on 05.02.2004 wherein, 1/3 share of the plaintiff in that suit namely, Estate of Late Maharani Vidyavathi Devi of Vijayanagaram represented by its Executor Trustee has already been measured through Advocate Commissioner and 1/3 share has been handed over to the decree holder. Therefore nothing survives in the appeal, so he is not pressing the said appeal.

20. Insofar as the second appeal in S.A.No.458 of 2009 is concerned, the contention of the learned counsel for the appellants is that the dispute between the brothers regarding partible property as well as impartible property was settled long back by way of a compromise memo dated 27.09.1963 and till his brother known to be alive, there was no dispute about that. The party to the compromise memo, in letter and spirit had honoured their part of obligation and have acted upon it. After the disappearance of his brother Visweswara Gajapathi Raju, his wife without any factual basis or legal substance has instituted the suit for partition, which goes contrary to the terms of compromise and also against the settled principles of law and bar under Order II Rule 2 of CPC.

21. According to the learned Senior Counsel, the intent of the parties to the compromise decree and the content of the compromise decree, if read together, it is very clear that Visweswara Gajapathi Raju, late husband of the first plaintiff has given up all claims in the properties which are not included by oversight or otherwise. Till date, he has not questioned the validity of the compromise or made any claim over the property. His whereabouts are not known and he is only presumed to be dead, since not heard for more than seven years. Till date, the compromise is not challenged by the party to the compromise, but by the wife of one of the party belatedly after 22 years.

22. The first Appellate Court has erred in holding that the compromise decree passed in the earlier proceedings requires registration, which is contrary to the settled position of law

that when a compromise decree is passed between the co-owners, which does not create any new interest, but only a re-arrangement of existing rights, no registration is required. The first Appellate Court has exceeded its jurisdiction by reviewing the judgment and decree passed in the earlier proceedings and interpreting the terms of the compromise decree quite contrary to its content and intent of the parties.

23. Per contra, the learned counsel for the respondents contended that the suit property is admittedly, the joint family property of late Maharaja Alakh Narayana Gajapathi Raju, which devolved upon his wife and two sons. As per Clause 1 A of the compromise memo, being a joint family property, the plaintiff is entitled for 1/3 share in the suit property. Only in respect of 60 items of properties mentioned in I.A.No.222 of 1956 in O.S.No.120 of 1948, Visweswara Gajapathi Raju has relinquished his right under Clause 1 B. Whereas, the suit property is mentioned as Item 72 B in the list of 106 Items admitted to be joint family property by the first defendant himself in his statement to the joint Receivers report filed in C.S.No.495 of 1949. Therefore, the said property will not fall under the category of 1 C which says that in joint family Item of property left out in the aforesaid claim by oversight or otherwise having mentioned in the list of joint family property, the suit property cannot be a property left out.

24. Therefore, as per Clause 1 A, 1 B and 1 C or under any other clause of the compromise deed, P.Visweswara Gajapathi Raju the late husband of the first plaintiff had not given up or relinquished or released his 1/3 claim in the suit property. The plaintiffs are not making any further claim upon property not claimed as partible in O.S.No.120 of 1948. The plaintiffs and the defendants are consensus about the nature of the property. It is a divisible one and had been included in the list as Item 72 B. Therefore, the suit is not covered under Clause 4 of the compromise deed. It is contended by the learned counsel for the respondents that the suit property does not fall under any of the Clause pointed out by the appellants to exclude or deny the right of the plaintiffs to claim share in the property which is admittedly the joint family property held in common by the three legal heirs of late Maharaja Alakh Narayana Gajapathi Raju.

25. The Courts below held in favour of the plaintiff broadly for the following reasons:

(a) The compromise decree touching upon the immovable property not registered and compromise decree are not exempted under Section 49 C of the Registration Act.

(b) Admittedly, the suit property is the joint family property. The third Clause in the compromise decree which

relates to left out properties by over sight or otherwise is a vague statement and it cannot be accepted legally.

(c)The property excluded from partition by mistake continues to be the joint property of the family and it must be divided among the sharers.

(d)The suit is not liable to be dismissed under Order II Rule 2 of CPC since in the earlier litigation, the property is not left out, but specifically mentioned in the list of properties furnished to the Commissioner. Therefore, the property has to be shared among the three sharers.

(e)The property is in possession of the second defendant who is maintaining the same had constructed a compound wall and guarding

it through security personnels to take care of the property from encroachment.

(f)Exhibits A12, A13, A14 and A15 shows that the plaintiffs are paying their 1/3 share in the maintenance of the suit property to the Trust and also paid the urban land tax demanded.

26. In order to impress upon the Court that the Courts below have erred in law while arriving at the above conclusion, the learned counsel for the appellants cited the following judgments:

(a)For the point of non registration of compromise memo, the learned counsel cited,

(i)MANU/SC/1224/2005 (Amteshwar Anand Vs. Virender Mohan Singh and Others):

"17. The validity of the assignment was however questioned by the appellants on the ground that the first two agreements were not registered. The submission is untenable. Section 17(1) of the Registration Act, 1908 in so far as it is relevant, requires under Clause (b) thereof, registration of "non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title

or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property". Sub-section (2) of Section 17 creates exceptions to the mandatory requirements of Section 17 (1)(b) and ©. One of the exceptions made in Section 17(2) of the Registration Act, 1908, is Clause (i). This exception pertains to "any composition deed." In other words all composition deeds are exempt from the

requirement to be registered under that Act (See: Govind Ram v. Madan Gopal, MANU/PR/0020/1944. The Composition Deed in this case was a transaction between the members of the same family for the mutual benefit of such members. It is not the appellants' case that the agreements required registration under any other Act. Apart from this, there is the principle that Courts lean in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds particularly when the parties' have mutually received benefits under the arrangement (See: Kale and Ors. v. Deputy Director of Consolidation and Ors. MANU/SC/0529/1976: [1976] 3SCR202). Both the courts below had concurrently found that the parties had enjoyed material benefits

under the agreements. We have ourselves also re-scrutinized the evidence on record on this aspect and have found nothing to persuade us to take a contrary view. Furthermore, in this case the agreements had merged in the decree of the Court which is also excepted under Sub-section 2 (vi) of Section 17 of the Registration Act, 1908 17 (2) (vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter of the suit or proceedings."

(ii) MANU/SC/1332/2006 (N. Khosla Vs. Rajlakshmi (dead) and ors.):

"26. In Capt. (Now Major) Ashok Kshyap (appellant) v. MANU/SC/0001/1987 Mrs. Sudha Vasisht and Anr. (respondents) [1987] 2SCR 151, the award of the Arbitrator, though declared the share of the parties in the property, it is created a right by itself, in favour of one party to get particular sum from another party and right to obtain the payment and on payment the obligation of relinquishment of right or interest in the property. This Court held on an analysis of the award that it did not create any right in any immovable property and as such it was not compulsory to register it.

27. This Court in the case of Sardar Singh v. MANU/SC/0102/1995: Krishna Devi (Smt) and Anr [1994] 3SCR717 held in paragraph 12 page 26 (SCC) as under:

It is, thus, well settled law that the unregistered award per se is not inadmissible in evidence. It is a valid award and not a mere waste paper. It creates rights and obligations between the parties thereto and is conclusive between the parties. It can be set up as a defence as evidence of resolving the disputes and acceptance of it by the parties. If it is a foundation, creating right, title and interest in praesenti or future or extinguishes the right, title or interest in immovable property of the value of Rs.100 or above it is compulsorily registrable and non-registration render it inadmissible in evidence. If it contains a mere declaration of a pre-existing right, it is not creating a right, title and interest in praesenti, in which event it is not a compulsorily registrable instrument. It can be looked into as evidence of the conduct of the parties of accepting the award, acting upon it that they have pre-existing right, title or interest in the immovable property."

(b) Regarding bar of second suit for partition, the learned counsel for the appellants cited the following judgments:

(i) MANU/SC/0101/2004 (Kunjan Nair Sivaraman Nair Vs. Narayanan Nair and Ors.):

"10. Order II Rule 2, sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based. Therefore, there must be identical cause of action in both the suits, to attract the bar of Order II Sub-rule (3). The illustrations given under the rule clearly brings out this position. Above is the ambit and scope of the provision as highlighted in Gurbux Singh's case (supra) by the Constitution Bench and in Bengal Waterproof Limited (supra). The salutary principle behind Order II Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicated in successive litigations. It is, therefore, provided that the plaintiff must not; abandon any part of

the claim without the leave of the Court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the Court."

(c) Regarding challenge to compromise memo, the learned counsel cited,

(i) MANU/SC/4376/2006 (Tulsan Vs. Pyare Lal and Ors.):

"7. Respondents had filed a suit. It may be a suit for injunction, but therein, the parties resolved their disputes and differences. A compromise petition was filed. A decree was passed in terms thereof. The parties were bound thereby. A consent decree in terms of Order 23, Rule 1 of the Code of Civil Procedure need not be confined only to the reliefs prayed for. It may not be confined to the subject matter of the suit. Although, the consent decree was passed in a suit for injunction, for all intent and purport it was a preliminary decree passed in a suit for partition. A fresh proceeding could not be initiated for giving effect thereto, even if Respondents' contention that their right to possess under the consent decree were not found to be enforceable by the Revenue Authorities was to be accepted. A consent decree, it is trite, remains valid unless it is set aside. It would be binding on the parties. Although, the principles of res judicata stricto sensu would not apply, the principles of estoppel would. In the plaint it was accepted that a compromise decree was passed. The High Court while passing its judgment in the second appeal also noticed the same. Thus, in the subsequent suit, the effect of the consent decree could not have been ignored."

(ii) MANU/SC/0373/1961 (T.V.R. Subbu Chetty's Family Charities Vs. M. Raghava Mudaliar and Ors.):

"10. The principal point which has been urged before us by Mr. R. Keshav Aiyangar on behalf of the appellant is that in substance the respondent has ratified the impugned transaction, has received benefits under it,

and by his conduct has affirmed it, and so it is not open to him to challenge its validity and binding character. In support of this argument he has canvassed for our acceptance the proposition that if a person with full knowledge of his rights assents to a transaction which may otherwise be voidable at his instance and takes benefits under it, he is subsequently precluded from disputing its validity. In support of this argument he has relied on a decision of this Court in Sahu Madho Das v. Pandit Mukand Ram. In that case this Court has held that it is settled law that an alienation by a widow in exercise of her powers is not altogether void but only voidable by the reversioners who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding. This Court also observed that it is a principle of general application underlying many branches of the law that a person who with full knowledge of his rights has once elected to assent to a transaction voidable at his instance and has thus elected not to exercise his right to avoid it, cannot go back on that election and avoid it at a later stage; having made his election he is bound by it. The argument is that though the respondent may not be a party to the impugned transaction, if by his conduct it can be said that he has elected to uphold it and has received benefit under it he cannot be allowed to go back upon the election."

27. The learned counsel for the appellants, in the light of the above said judgments, summed up his arguments that the memorandum of compromise dated 27.09.1963 marked as Ex.P6 had completely settled all the issues and claims between the predecessors to the parties to the current litigation. Therefore, the subsequent suit is totally barred under Order II Rule 2 of CPC and by principles of Estoppel. Having entered upon compromise, both the brothers have acted upon it and they never questioned about the validity of the compromise decree. It is the wife of the plaintiff's brother who is not a party to the compromise is agitating before the Court, a matter which has been settled long back in the earlier proceedings. Visweswara Gajapathi Raju has given a solemn undertaking that he will not make claim in any of the properties and he is giving up his

claim on those properties which has already been settled and those properties where no settlement so far arrived. The plaintiff having admitted that the suit property was part of the earlier proceedings, the subsequent proceedings is patently barred by the principles of res judicata which the Courts below has failed to appreciate.

28.The learned counsel for the respondents referring the following judgments:

(2012) 8 SCC 148 (Union of India Vs. Ibrahim Uddin and another);

(2012 AIR SCW 2162 (Maria Margarida Sequeria Fernandes and others Vs. Erasmo Jack de Sequeria (Dead) through L.Rs.) submitted that it must be the endeavour of the Court to critically examine the pleadings and documents and pass orders after taking into account the pragmatic realities.

29.The concurrent finding of the High Court under Section 100 of CPC can be interfered only when there is existence of Substantial Questions of Law, in case the finding of the Court is factually incorrect and perverse. Insofar the case in hand is concerned, the Courts below have properly considered the facts of the case and evidences let in by the parties.

30.Therefore, the short point in this appeal is that whether the present suit for partition is maintainable, in the light of compromise entered between Vijayarama Gajapathi Raju and Visweswara Gajapathi Raju and whether the Exhibits A12, A13, A14 and A15, which are tax receipts will confer any Title to the respondents for the said purpose.

31.The memorandum of compromise entered between Vijayarama Gajapathi Raju and Visweswara Gajapathi Raju reveals the intention and purpose of entering into the compromise through the following words:-

"whereas, the second party has with the assistance of his advocates examined the history of each item in respect of which no decision was given and is convinced that most of the items claimed as divisible are impartiable and a few of them are not worth fighting.

(emphasis added)"

32.For the reasons above stated, on the following terms, parties have given quitus to the prolonged multiple litigations pending at various Courts at different stages and also future litigation.

(1)(I)(a)the items of properties claimed as partiable in O.S.120/48 in respect of which no decision has been given by any of the courts

(b)60 items of property claimed in I.A.222/56 (I.A.7/62 in O.S.120/48).

(c)any joint family item of property left out in the aforesaid claims by oversight or otherwise.

(II)A share in the 'Dowry fund' of Alak Rajeswari which reverted to the 1st party in pursuance of the resolution of the Trust Committee constituted under the Trust Deed of 28.10.1912 and to file a petition in the Supreme Court in S.C.A.305/61 requesting the Court to allow the appeal of the 1st party without costs. The 2nd party shall not be liable to repay any amount already withdrawn relating to this dowry fund).

(III)Payment of interest at 6% on his share of Rs.7,21,567-3-9 of the internal debt and agree to receive interest at 1/100% per annum in accordance with the decree in C.S.24/40 on the file of the High Court Madras, which was sought to be enforced as a result of the compromise in Supreme Court Appeals 184 to 191/1951; that the 2nd party need not pay back any amount already drawn in connection with this matter.

(IV)His one third share in the Vizianagaram House at Waltair Highlands at Coonoor, Elkhill House and Little Shoreham at Ooty together with their appurtenant buildings and sites in favour of the 1st party.

(V)His rights with respect to the one fourth share in the twelve items of jewellery claimed as Stridhanam by Dowager Maharani Lalita Kumari Devi and decreed in her favour in S.C.A.170 to 177/61 in favour of the 1st party.

(VI)His claim to a shar in the amounts drawn by the 1st party out of the compensation deposited by Government in respect of portions of Admiralty House acquired by the Government in favour of the 1st party.

(VII)All claims put forward by the 2nd party against the 1st party or the 3rd party;

(2)That the 2nd party do hereby affirm:-

(I)The correctness of the claim of the 1st party in application 1541/53 in C.S.No.495/49(685/54 same as I.A.5/62 in O.S.120/48) to payment of one third share of Rs.9,38,143-1-5 with interest thereon at 6% per annum from 1-7-1949.

(II)The sale of family jewels moveables and immovables by the 1st party as binding and made for a justifiable and legal necessity of the joint family.

(III)The validity of the charitable and educational Trust created by the 1st party called the "Maharajah Alak Narayan Society of Arts and Science" and the endowments made by the 1st party thereto including Lanka lands of Kotipalli and Veeravallipalam situate in East Gadavari District.

(IV)The compromise dated 22-9-1962 entered into in the Supreme Court between the 1st party and the State of Andhra Pradesh in W.P.72/57 and special leave petition 524/57 in the Supreme Court relating to the notification of the above said Lankas under the Madras Act 26 of 1948 and the grant of pattas in favour of the 3rd party in respect of the said Lanka lands.

(V)The right of the 3rd party for being impleaded as a party in O.S.120/48 and to their being allowed to withdraw the entire Lanka income now lying with the Receiver, or to the 1st party withdrawing the said income and paying the same over to the 3rd party and the right of the 3rd party taking over possession of the said Lanka lands from the Receiver.

(VI)The validity of the transactions effected by the 1st party in favour of (a) sale to and in favour of Sri M.S.Ramaswamy Chettiar dated 2-5-1960 (b) agreement of sale dated 16-4-1952 in favour of Sri Palaniappa Chettiar (c) agreement of slae dated 2-5-1960 in favour of Madras Co-operative and Printing and Publishing Society Ltd of the vacant sites forming part of the Admiralty House, other than those acquired by the Government under the Land Acquisition Act;

(3)That the 1st party and 2nd party shall have no more claims or counter claims against each other, that the 2nd party shall not be liable to account to the 1st party or the 3rd party or the Government or Local Bodies for arrears of taxes or other dues on any of the properties in any manner under any account and the 1st party shall not be liable to account to the 2nd party in any manner and under any account.

(4)That the 2nd party shall not make any further claim that any of the properties not claimed as partiabale in O.S.120/48 is divisible, or that he has any interest in any such property.

(5)That the 2nd party shall agree that all the properties for which 'pattas' have been granted or to be granted to the 1st party under the Madras Act 26 of 1948 are the absolute

properties of the 1st party in respect of which he has not claim excluding ground rent pattas regarding Admiralty House and the grounds which shall vest in the 2nd party along with the executors of the Estate of Rani Vidyavati Devi;

(6) That the 2nd party do hereby relinquish all rights in the lands for which pattas have been granted or are to be granted to him under Sec.47 of Madras Act 26 of 1948 to and in favour of the 1st party or the 3rd party as the case may be.

(7) That the 2nd party shall withdraw all the petitions and claims made by him against the 1st party and pending in the subordinate Court, Vizianagaram in O.S.120/48 and 52/52."

33. Insofar as the suit property is concerned, as pointed out earlier, in C.S.No.495 of 1949 on the file of the Madras High Court, an application was filed in No.2541 of 1949. The Receiver submitted an interim report as per the order of the High Court dated 10.11.1949. For which objection was filed by Visweswara Gajapathi Raju, wherein, he has given a list of properties about 87 in number, both movable and immovable which were according to him, the joint family properties and also partible Estates.

34. The plaintiff Vijayarama Gajapathi Raju on his part filed, his statement of facts in relation to the Receiver's report for partition. In that report, the suit property has been included as Item 72 B. Having been included in the list of properties, this property falls under Clause 1 A of the terms of compromise which refers items of property claimed as partible in O.S.No.120 of 1948 in respect of which, no decision has been given by any of the Courts. When the second party entered into compromise, in unequivocal term, it has stated that he hereby given up, relinquished and released completely and absolutely his claim to the item of properties in which no decision has been given by any of the Courts. Thus, it is evidently clear that the suit property which forms part of the properties mentioned in the list as partible but no decision rendered on the date of compromise the husband of the first plaintiff has completely released his right.

35. The lower Appellate Court while considering Ex.P6 has miserably failed to read the compromise deed as a whole. When each of the Clauses are loaded with meaning and sense, the lower Appellate Court had read the Clause in isolation and has held that this Clause does not make any sense. It is very clear that the property which is now under dispute is admittedly a partible property and it has been included in the list of property as Item 72 B. However, no decision given by any of the Courts about this property. Therefore, the second party namely,

Visweswara Gajapathi Raju has consciously given up, relinquished and released completely and absolutely his claim. Further, the compromise terms had been fully honoured by both parties and even now the validity of Ex.P6 is not challenged.

36. Therefore, it is too late for the day for the wife of Visweswara Gajapathi Raju to question the compromise decree, and to try to give her own interpretation for the terms of compromise ignoring the letter and spirit of Ex.B2. If really there was something left to be tested or interpreted the parties to the compromise decree would have approached the Court which has passed the decree. A new suit with new set of facts contrary to the terms of the compromise decree after lapse of 25 years is beyond any legal comprehension.

37. It is not the case of the plaintiff that she was asked to protect the property or spend on the property by the defendants. If she had incurred any expenses in protecting or maintaining the property, it is an voluntary act without any request or authority or necessity. Therefore, payment of kist and urban tax through Exhibits A12, A13, A14 and A15 are not a relevant fact to test the title of the plaintiff.

38. This Court finds that both the Courts below have legally erred in reviewing and undoing the compromise decree passed three decades ago. Ex.P6 was acted upon by letter and spirit by the signatories to the compromise and not questioned by the party to the compromise decree before the competent Court. Whiles, a third party in a separate suit, claiming right through one of the party to the compromise is not maintainable. The suit squarely falls within the scope of Section 11 of CPC and Order II Rule 2 of CPC. The compromise being an arrangement between the parties who had existing right in the properties and compromise only records the rearrangement of the existing right, such an instrument needs no registration. For want of registration a valid compromise cannot be thrown out nullifying all the subsequent actions followed as a consequence of the compromise decree.

39. Therefore, this Court has no doubt that the judgment of the Courts below is perverse and deserve to be set aside. The judgment and decree of the Courts below set aside. Suit O.S.No.2664 of 1997 on the file of VIII Assistant City Civil Court, Chennai dismissed.

40.In the result, the Second Appeal in S.A.No.458 of 2009 is allowed and the Second Appeal in S.A.No.459 of 2009 is dismissed as not pressed. No order as to costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

To

- 1.The Additional District and Sessions Judge,
Fast Track Court 1, Chennai-1.
- 2.The VIII Assistant City Civil Judge,
Chennai.

Copy to

The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to M/S.Sampathkumar & Associates, Advocate Sr.11918
+3cc to Mr.P.Subba Reddy, Advocate Sr.11750
+1cc to Mr.E.Jayasankar, Advocate Sr.11695

S.A.Nos.458 and 459 of 2009

br[co]
srg 13/4/2017