

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:25.02.2020

DELIVERED ON:02.06.2020

CORAM:

THE HON'BLE MR.JUSTICE V.PARTHIBAN

S.A.No.605 OF 2012

1.N.Ramamoorthi

2.N.Nallappan

3.K.Gunasekaran ...Appellants/Appellants/ 3 to 5 Defendant

Vs.

1.N.Jayachandran

2.N.Sathishkumar ...Respondents 1 & 2/Respondents 1 & 2/Plaintiff

3.Nallasamy

4.Saraswathi ...3 & 4 Respondents/3 & 4 Respondents/
1 & 2 Defendants

Second Appeal filed against the judgment and decree dated 15.02.2010 passed by the Principal District Judge, Erode, in A.S.No.85 of 2009, confirming the judgment and decree dated 26.03.2009 passed by the Principal Sub-Judge, Erode, in O.S.No.349 of 2005.

For Appellants : Mr.N.Manoharan

For Respondents: Mr.R.Jayaprakash for
M/s.M.Guruprasad

For R1 and R2

For R3 and R4 - No appearance

JUDGMENT

This Second Appeal is filed by defendants 3 to 5 as against the judgment and decree, dated 15.02.2010, passed by the Principal District Judge, Erode, in A.S.No.85 of 2009, confirming the judgment and decree, dated 26.03.2009, passed by the Principal Sub-Judge, Erode, in O.S.No.349 of 2005, which was one for partition and separate possession.

2.The appellants are the defendants 3 to 5 in the suit proceedings and the respondents 1 and 2 herein are the plaintiffs. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3.The facts which gave rise to the filing of the suit, in brief, would run thus:

(a)The respondents 1 and 2/plaintiffs have approached the trial Court by filing O.S.No.349 of 2005 seeking for partition and separate possession of the suit properties. According to the plaintiffs, the suit schedule properties were ancestral properties, tracing back the genealogy to the great grandfather one Arunachala Gounder. The said great grandfather Arunachala Gounder had died long ago intestate, leaving behind him his two sons, viz., Periyanna Gounder and Ramasamy Gounder. The plaintiffs are the grandsons of Ramasamy Gounder. Both Periyanna Gounder and Ramasamy Gounder also died. Ramasamy Gounder left behind his son Nallasamy and his wife Saraswathi and the plaintiffs are the sons of Nallasamy and Saraswathi. Nallasamy is the first defendant and Saraswathi is the second defendant in the suit proceedings.

(b)In regard to the other Branch, viz., Periyanna Gounder, he left behind him two sons, viz., Chidambaram and Sadasivam. Chidambaram sold his property to one Mohana Gounder. According to the plaintiffs, there was a partition among Sadasivam, the sons of Mohanasundaram (purchaser from Chidambaram) and Nallasamy/the first defendant (father of the plaintiffs). In the partition, Nallasamy (D1) was allotted a share.

(c)After the partition, it appears that Nallasamy(D1) had executed a Settlement Deed on 08.07.1993, which was marked as Ex.A1, in favour of his wife Saraswathi, who was the second defendant, to an extent of 20 cents, out of 5.68 acres, share allotted to him. Saraswathi, gave Power of Attorney, dated 11.03.1996 (Ex.A2), in favour of one Ramamoorthy, who is the 3rd defendant and the first appellant herein. The third defendant Ramamoorthy(D3) sold 20 cents by way of Sale Deed, dated 09.09.1997, to one N.Nallappan, who was defendant No.4 and the second appellant herein, which was marked as Ex.A3. The said Nallappan (D4) in turn sold the property to defendant No.5-Gunasekaran, who is the 3rd appellant herein, on 06.05.2005, which was marked as Ex.A4.

(d)The plaintiffs being sons of D1(Nallasamy) and D2 (Saraswathi), filed the suit for partition, contesting the above transaction as being illegal and void, since as co-

parcenars, they were entitled to their shares in respect of the entire extent of 5.68 acres allotted to their father Nallasamy (D1) and the 20 cents given by way of Settlement to D2-wife of D1 was impermissible and illegal, as D1 has no independent right to partition the joint family property.

(e) The suit was resisted by defendants 3 to 5 stating that the suit was not maintainable and the same was filed after the period of limitation. The suit was also not maintainable for the reason that the Settlement Deed dated 08.07.1993 (Ex.A1) in favour of the second defendant (Saraswathy) was not put to challenge. Neither the sale deed dated 09.09.1997 (Ex.A3) in favour of the 4th defendant nor the sale in favour of the 5th defendant by the 4th defendant on 06.05.2005 (Ex.A4) was put to challenge. Therefore, the claim of partition, without there being any contest with regard to the correctness of the earlier transactions, was not maintainable. The contesting defendants also raised the ground that even otherwise, the plaintiffs are not entitled to seek partition in respect of the property came into their possession by way of the Sale Deeds.

(f) The trial Court, which went into the issues, decreed the suit in favour of the plaintiffs by judgment dated 26.03.2009. According to the trial Court, the plaintiffs established their case for partition and the transactions through Exs.A1 to A4 cannot be held to be legal transactions. The trial Court has held that D1, being a co-parcener of the property, had no right to settle a portion of the co-parcenary property in favour of the second defendant. Once the second defendant did not derive any title on such illegal settlement (Ex.A1, dated 08.07.1993), further transactions, by way of sale, to D4 and D5, would also be illegal. In that view of the matter, the suit was decreed.

(g) As against the judgment and decree of the trial Court, dated 26.03.2009, an appeal was preferred by defendants 3 to 5 in A.S.No.85 of 2009 and the appeal was also dismissed on 15.02.2010, confirming the judgment and decree of the trial Court. In fact, as far as D1 and D2 are concerned, they were set ex-parte in the trial proceedings. Challenging the said dismissal decree, dated 15.02.2010, the appellants in the first appeal, viz., defendants 3 to 5, are before this Court with the present Second Appeal.

4. The Second Appeal was admitted by this Court on the following Substantial Questions of Law:

"1) Whether the Courts below have committed an error in holding Ex.A1 Settlement Deed to be invalid when only a small portion out of the entire extent of the joint family property had been settled on the second defendant by her husband, namely the first defendant,

out of love and affection?

2)Whether the Courts below have committed an error in holding that Ex.A2 to A4 Sale Deeds are invalid?

3)Whether the findings of the Courts below that the property conveyed under Exs.A1 to A4 is not in the possession of D5, is perverse?

4)Whether the Courts below have committed a serious error in not considering Ex.B1 Partition Deed, dated 11.09.2000 and rendered a perverse finding that there was no partition between the plaintiffs and their father in respect of their family properties?"

5.Mr.N.Manoharan, the learned counsel appearing for the appellants/defendants would submit that the suit filed by the plaintiffs, sons of D1 and D2, for partition against the subsequent purchasers was a collusive suit. He would submit that D1 and D2 were conveniently set ex-parte in the suit proceedings. The plaintiffs, being aware of the transactions, commencing from Settlement in favour of the second defendant and the subsequent execution of Power of Attorney, dated 11.03.1996 (Ex.A2) and the sale of the suit property to D4 on 09.09.1997 (Ex.A3) and the further sale of the property to D5, on 06.05.2005 (Ex.A4), leisurely approached the trial Court for partition, after the last purchase by the 5th defendant in 2005.

6.Mr.N.Manoharan, the learned counsel would also submit that already there was a partition effected in 2000, by way of Partition Deed dated 11.09.2000 (Ex.B1) and the execution of partition deed among the plaintiffs and D1, the father of the plaintiffs, was not mentioned at all in the plaint. In fact, the learned counsel would submit that Ex.B1 was executed for a lesser extent and in which case, the partition suit should have been filed immediately thereafter and not after the purchase of the property by D5 in 2005. According to him, withholding of Ex.B1, by the plaintiffs, amounted to playing fraud on the Court and the claim of the plaintiffs ought to have been dismissed on that ground alone.

7.The learned counsel would further submit that the plaintiffs have not challenged the Settlement Deed dated 08.07.1993 (Ex.A1), the Sale Deed dated 09.09.1997 (Ex.A3) and the Sale Deed dated 06.05.2005 (Ex.A4) and therefore, the suit was hit by Section 31 of the Specific Relief Act, 1877. He would further submit that the Settlement Deed was executed on 08.07.1993, the suit for partition was filed on 27.10.2005 and hence, the suit was barred by limitation. The learned counsel would submit that according to the plaintiffs, the settlement was not acted upon and therefore, the Settlement in favour of D2

not to be recognized. The said contention by the plaintiffs was contrary to the legal principles, since handing over of the physical possession of the property under Settlement Deed is not sine qua non for presuming the validity of the Settlement deed, as held by Courts.

8. In support of the above contention, the learned counsel would rely on the decision of the Hon'ble Supreme Court of India in RENIKUNTLA RAJAMMA (D) BY L.R.S. VS. K.SARWANAMMA (2014(4) CTC 572). The learned counsel would refer to Paragraph No.11 of the judgment, which is extracted hereunder.

"11. Sections 124 to 129 which are the remaining provisions that comprise Chapter VII deal with matters like gift of existing and future property, gift made to several persons of whom one does not accept, suspension and revocation of a gift, and onerous gifts including effect of non-acceptance by the donee of any obligation arising thereunder. These provisions do not concern us for the present. All that is important for the disposal of the case at hand is a careful reading of Section 123 (supra) which leaves no manner of doubt that a gift of immovable property can be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. When read with Section 122 of the Act, a gift made by a registered instrument duly signed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the donee. That such acceptance must be given during the life time of the donor and while he is still capable of giving is evident from a plain reading of Section 122 of the Act. A conjoint reading of Sections 122 and 123 of the Act makes it abundantly clear that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of Transfer of Property Act, 1882. Judicial pronouncements as to the true and correct interpretation of Section 123 of the T.P. Act have for a fairly long period held that Section 123 of the Act supersedes the rule of Hindu Law if there was any making delivery of possession an essential condition for the completion of a valid gift. A full bench comprising five Hon'ble Judges of the High Court of Allahabad has in Lallu Singh v. Gur Narain and Ors. AIR 1922 All. 467 referred to several such decisions in which the provisions of Section 123 have been interpreted to be overruling the Hindu Law requirement

of delivery of possession as a condition for making of a valid gift. This is evident from the following passage from the above decision where the High Court repelled in no uncertain terms the contention that Section 123 of the T.P. Act merely added one more requirement of law namely attestation and registration of a gift deed to what was already enjoined by the Hindu Law and that Section 123 did not mean that where there was a registered instrument duly signed and attested, other requirements of Hindu Law stood dispensed with:

"7. Dr. Katju, on behalf of the appellant, has strongly contended that by Section 123 it was merely intended to add one more requirement of law, namely, that of attestation and registration, to those enjoined by the Hindu Law, and that the Section did not mean that where there was a registered document duly signed and attested, all the other requirements of Hindu Law were dispensed with. Section 123 has, however, been interpreted by all the High Courts continuously for a vary long period in the way first indicated, and there is now a uniform consensus of opinion that the effect of Section 123 is to supersede the rule of Hindu Law, if there was any, for making the delivery of possession absolutely essential for the completion of the gift. We may only refer to a few cases for the sake of reference, Dharmodas v. Nistarini Dasi (1887) 14 Cal. 446, Ballbhadra v. Bhowani (1907) 34 Cal. 853, Alabi Koya v. Mussa Koya (1901) 24 Mad. 513, Mudhav Rao Moreshwar v. Kashi Bai (1909) 34 Bom. 287, Manbhari v. Naunidh (1881) 4 All. 40, Balmakund v. Bhagwandas (1894) 16 All. 185, and Phulchand v. Lakkhu (1903) 25 All. 358. Where the terms of a Statute or Ordinance are clear, then even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the clear meaning of the enactment but where such is not the case, then it is our duty to accept the interpretation so often and so long put upon the Statute by the Courts, and not to disturb those decisions, vide the remarks of their Lordships decisions, of the Privy Council in the case of Tricomdas Cooverji Bhoja v. Sri Sri Gopinath Thakur AIR 1916 P.C. 182. We are, therefore, clearly of opinion that it must now be accepted that the provisions of Section 123 do away with the necessity for the delivery of possession, even if it was required by the strict Hindu Law."

9. In the above case, it has been clearly held by the Hon'ble Supreme Court that if there is a Registered instrument

duly signed and attested, the other requirements are to be dispensed with, inter alia meaning that the possession need not be handed over.

10. The learned counsel, in regard to the limitation aspect would rely on a decision of this Court in T.A.YUVARAJ AND OTHERS VS. T.BALAKRISHNAMA AND OTHERS [(2010)7MLJ 52]. The learned counsel would particularly draw the attention of this Court to Paragraph No.22, which is extracted hereunder:-

"22. In the previous paragraph, it has been pointed out that a case of ouster and adverse possession extinguishing the right the plaintiffs in the suit property has been made out by the defendants. It has also been held that the possession of the first defendant became adverse to that of the plaintiffs from 25.1.1963, the date of Exhibit B2 settlement deed. Therefore, from the said date the possession of the property by first defendant became one for himself and it shall not be deemed to be a possession on behalf of the plaintiffs also. As such, the limitation for seeking partition and separate possession viz., started from the said dated 25.1.1963. The contention of the plaintiffs that they were not aware of the existence of such a settlement deed cannot be believed, as there are sufficient evidence to show that despite the fact that the first defendant was dealing with the property as if it were his absolute property by executing registered documents, the plaintiffs kept quite. As the suit has not been filed within 12 years from the date on which the possession of the first defendant became adverse. The present suit filed by the plaintiffs is to be held as one barred by limitation. We have seen that though Lakshmayee, the mother of the plaintiffs did have a common 1/3rd share in the suit property by virtue of Exhibit A4 partition deed, after her death in 1961, Arumugham Naicker executed a settlement deed under Exhibit B2 on the supposition that Arumugham Naicker and Yuvaraj alone were the legal heirs entitled to succeed to the share of Lakshmayee and thus, they were entitled to the suit property in equal moieties. The same was done purporting confer title in respect of his ½ share and thus making the first defendant Yuvaraj, as the absolute owner of the suit property. It is the case of the defendants that thereafter the first defendant perfected title to the suit property in its entirety by ouster and adverse possession by excluding the plaintiffs over and above the period of limitation prescribed under the Limitation Act and

that thus the rights of the plaintiffs got extinguished by ouster. It has also been held that the suit is barred by limitation. Therefore, the suit filed by the respondents herein/plaintiffs for partition deserves to be dismissed on that score alone."

11. In the above case, the learned Judge of this Court has held in similar circumstances that the suit was barred by limitation and dismissed the suit on that ground alone.

12. The learned counsel for the appellants/defendants would also rely on the decision of the Hon'ble Supreme Court of India in S.P. CHENGAL YARAYA NAIDU (DEAD) BY LRS. VS. JAGANNATH (DEAD) BY LRS AND OTHERS [(1994) 1 SCC 1], wherein, the Hon'ble Supreme Court has held that non production and even non-mentioning of a document at the trial would tantamount to playing fraud on the Court. On noticing the fraud played on the Court, the Hon'ble Supreme Court has set aside the impugned judgment of the High Court. Paragraph No.6 of the judgment is reproduced below:

"6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

13. Besides, the learned counsel for the appellants/defendants would rely on the decision of the Hon'ble Supreme Court in SUHRID SINGH ALIAS SARDOOL SINGH VS. RANDHIR SINGH AND OTHERS [(2010)12 SUPREME COURT CASES 112]. Paragraph No.7 of the judgment is extracted hereunder.

"7. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act."

14. In the above case, the Hon'ble Supreme Court has held that when annulment of a document is prayed by a non-executant, the person has to seek for declaration that the deed is invalid. Only then, the plaintiffs can contend that subsequent transactions (Exs.A1 to A4) do not bind them.

15. For the same proposition, the learned counsel would also rely on the decision of the Hon'ble Supreme Court in BOARD OF TRUSTEES OF PORT OF KANDLA VS. HARGOVIND JASRAJ AND ANOTHER [(2013) 3 SUPREME COURT CASES 182]. The learned counsel would refer to paragraph Nos. 26 to 30, which read as follows:

"26. Mr. Ahmadi next argued that the termination of the lease being illegal and non est in law, the plaintiff-respondents could ignore the same, and so long as they or any one of them remained in possession, a decree for injunction restraining the Port Trust from interfering with their possession could be passed by the Court competent to do so. We are not impressed by that submission. The termination of the lease deed was by an order which the plaintiffs ought to get rid of by having the same set aside, or declared invalid for whatever reasons, it may be permissible to do so. No order bears a label of its being valid or invalid on its forehead. Any one affected by any such order ought to seek redress against the same within the period permissible for doing so. We may in this regard refer to the following oft quoted passage in Smith v. East Elloe Rural District Council (1956) 1 All ER 855. The following are the observations regarding the necessity of recourse to the Court for getting the invalidity of an order established:

"An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

This must be equally true even where the brand of invalidity is plainly visible : for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects."

28. The above case was approved by this Court in Krishnadevi Malchand Kamathia & Ors. v. Bombay Environmental Action Group and Ors. (2011) 3 SCC 363, where this Court observed:

"19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to

approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the Petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

29. To the same effect is the decision of this Court in *Pune Municipal Corporation v. State of Maharashtra and Ors* (2007) 5 SCC 211, where this Court discussed the need for determination of invalidity of an order for public purposes:

"36. It is well settled that no order can be ignored altogether unless a finding is recorded that it was illegal, void or not in consonance with law. As Prof. Wade states: "The principle must be equally true even where the 'brand of invalidity' is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court".

He further states:

"The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another." xx xx xx xx

38. A similar question came up for consideration before this Court in (1992) 1 LLJ 283 SC ...

39. Setting aside the decree passed by all the Courts and referring to several cases, this Court held that if the party aggrieved by invalidity of the order intends to approach the Court for declaration that the order against him was inoperative, he must come before the Court within the period prescribed by limitation. "If the statutory time of limitation expires, the Court cannot give the declaration sought for".

30. Reference may also be made to the decisions of this Court in (1997) 1 SCC 9, Naduvil (dead) and Ors. (1996) 1 SCC 435 and Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. etc. (1997) 3 SCC 443, where this Court has held that an order will remain effective and lead to legal consequences unless the same is declared to be invalid by a competent court."

16. In the above case, the Hon'ble Supreme Court has categorically held that any document, unless it is declared to be illegal or invalid, will be in operation for all purposes. In fact, the Hon'ble Supreme Court has referred several decisions and held that unless a document is declared illegal or invalid, such document cannot be wished away.

17. The learned counsel would, therefore, submit that both the trial Court and the lower appellate Court have completely overlooked the legal principle and both the Courts have misdirected itself by allowing the claim of the plaintiffs in utter disregard to the above factors and legal principles. Therefore, the judgments and decrees of both the Courts below are liable to be interfered with.

18. Mr. R. Jayaprakash, the learned counsel appearing for the respondents 1 and 2/plaintiffs would submit that the plaintiffs were not parties to any of the documents, viz., Exs. A1 to A4 and therefore, the transactions through the said documents are not binding on them at all. He would draw the attention of this Court to the findings of the trial Court as well as the lower appellate Court that the Settlement Deed was not acted upon with reference to D.W.1's evidence, who was D4 in the suit proceedings. D4 was the father of D3. The learned counsel would further submit that the claim of ownership by the last purchaser (D5) did arise before the full partition and such claim could be made against D1, only after final decree by the Court in the partition suit. The learned counsel would also submit that D5 had not tendered any evidence and therefore, the suit was rightly decreed.

19. The learned counsel Mr. N. Manoharan appearing for the appellants/defendants would submit that the written statement was jointly filed by D3, D4 and D5 on 08.05.2006 and D4 was examined as D.W.1 on behalf of the defendants.

20.Mr.Jayaprakash, learned counsel appearing for the respondents 1 and 2/plaintiffs would rely on two decisions in support of his contention, viz.,

(i)RAMDAS VS. SITABAI AND OTHERS [2009(7) SUPREME COURT CASES 444]. He would rely on Paragraph Nos.16 to 19, which are extracted hereunder:-

"16.It is settled law under the Transfer of Property Act, that a purchaser cannot have a better title than what his vender had. The possession which is claimed by the defendant No. 3-Ramdas (appellant herein) in respect of the entire land bearing Gat No. 19 area admeasuring 2.56H of Mouza Padoli was also illegal and without proper sanction of law. So long as the property is joint and not- partitioned, the defendant no. 3-Ramdas (appellant herein) is not entitled to get possession of the said land. Even otherwise, the appellant herein having purchased the land from defendant No.1- Sudam could be entitled to be declared at the most to the extent of half share of the said piece of land having stepped into the shoes of his vendor and could not have asked for and claimed ownership and possession over the entire land of Gat No. 19 admeasuring 2.56 H.R.

17. Without there being any physical formal partition of an undivided landed property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share. Reliance in this regard may be placed to a decision of this Court in M.V.S. Manikayala Rao Vs. M. Narasimhaswami & Ors. [AIR 1966 SC 470], wherein this Court stated as follows:

"Now, it is well settled that the purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. His only right is to sue for partition of the property and ask for allotment to him of that which, on partition, might be found to fall to the share of the co- parcener whose share he had purchased."

18. It may be mentioned herein that the aforesaid findings and the conclusions were recorded by the Supreme Court by placing reliance upon an earlier judgment of this Court in Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh & Ors. [AIR 1953 SC 487], wherein this Court held as under:-

"All that (vendee) purchased at the execution sale, was

the undivided interest of co-parcener in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work-out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour (Emphasis added)

19. In view of the aforesaid position there could be no dispute with regard to the fact that an undivided share of co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court."

21. In the above case, according to the learned counsel, the Hon'ble Supreme Court has held that the joint family property cannot be divided detrimental to the interest of co-sharers. A purchaser of the joint family property not partitioned is not entitled to possession and he cannot derive any title through such transaction.

22. Another decision relied on by the learned counsel for the respondents 1 and 2/plaintiffs is the case of SHYAM NARAYAN PRASAD VS. KRISHNA PRASAD AND OTHERS [(2018) 7 Supreme Court Cases 646]. The learned counsel would draw this Court's attention to Paragraph Nos.12 to 16, which are extracted hereunder:-

"12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.

13. In 1975 (1) SCC 160, this Court was considering a similar question. In the said case, C. Krishna Prasad, the appellant along with his father Krishnaswami Naidu and brother C. Krishna Kumar formed Hindu undivided

family up to October 30, 1958, when there was a partition between Krishnaswami Naidu and his two sons. A question arose as to whether an unmarried male Hindu on partition of a joint Hindu family can be assessed in the status of undivided family even though no other person besides him is a member of the family. It was held that the share which a coparcener obtains on partition is ancestral property as regards male issue. It was held as under:

"The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see p. 272 of Mulla's Principles of Hindu Law, 14th Ed.). A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten". (emphasis supplied)

14. 2009 (15) SCC 184, it was held as under:

"It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid." (emphasis supplied)

15.2013 (9) SCC 419, a contention was raised by the defendant No. 1 that after partition of the joint Hindu family property, the land allotted to the share of defendant No. 2 became his self acquired property and he was competent to transfer the property in the manner he desired. It was held that the property which

defendant No. 2 got by virtue of partition decree amongst his father and brothers was although separate property qua other relations but it attained the characteristics of coparcenary property the moment a son was born to defendant No. 2. It was held thus:

"A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which Defendant 2 got on partition was an ancestral property and till the birth of the plaintiff he was the sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of Defendant 2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth Defendant 2 could have alienated the property only as karta for legal necessity. It is nobody's case that Defendant 2 executed the sale deeds and release deed as karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale deeds and release deed, the parties can work out their remedies in appropriate proceeding." (emphasis supplied)

16. Therefore, the properties acquired by defendant No.2 in the partition dated 31.07.1987 although are separate property qua other relations but it is a coparcenary property insofar as his sons and grandsons are concerned. In the instant case, there is a clear finding by the trial court that the properties are ancestral properties which have been divided as per the deed of partition dated 31.07.1987. The property which had fallen to the share of defendant No.2 retained the character of a coparcenary property and the plaintiffs being his sons and grandson have a right in the said property. Hence, it cannot be said that the suit filed by the plaintiffs was not maintainable."

23.The learned counsel for the respondents 1 and 2/plaintiffs, therefore, would submit that in respect of a co-parcenary property, there cannot be any separate right. Therefore, the Settlement Deed Ex.A1, dated 08.07.1993, executed by the first defendant in favour of D2, was not a valid execution.

24.In fact, the learned counsel would submit that the trial Court as well as the lower Appellate Court have rightly understood the claim of the plaintiffs and decreed the suit. Therefore, the judgments and decrees of the Courts below are liable to be upheld.

25.Considered the submissions of the learned counsels for the appellants/defendants and the respondents 1 and 2/plaintiffs and perused the materials and pleadings placed on record.

26.As rightly contended by the learned counsel for the appellants/defendants 3 to 5, the trial Court has committed fundamental error in allowing the suit and the lower Appellate Court has also committed the same error in affirming the same. First of all, the trial Court ought to have seen the bona fides of the suit filed by the plaintiffs, in the facts and circumstances of the case. Already on 11.09.2000 itself, partition was effected among the plaintiffs and their father D1, though for lesser extent. Without disclosing the said partition (Ex.B1) in the plaint, the plaintiffs sought partition of the suit property.

27.As held by the Hon'ble Supreme Court of India in the case of S.P.CHENGAL YARAYA NAIDU (DEAD) BY LRS. VS. JAGANNATH (DEAD) BY LRS AND OTHERS [(1994)1 SCC 1], relied on by the learned counsel for the appellants/defendants, referred to supra, the person, who approaches the Court seeking for partition, must disclose all the facts and produce all the documents to that effect. Therefore, non-mentioning of Ex.B1- the Partition Deed, by the plaintiffs, amounted to playing fraud on the Court. Therefore, on that ground, the plaintiffs could have been non-suited. Unfortunately, both the Courts below have not gone into those aspects and simply accepted the claim of the plaintiffs as against the defendants.

28.Moreover, as contended by the learned counsel for the appellants/defendants, the plaintiffs have not chosen to challenge any of the transactions right from Settlement Deed, dated 08.07.1993 (Ex.A1), Registered Sale Deed dated 09.09.1997 in favour of 4th Defendant (Ex.A3) and the other Registered Sale Deed, dated 06.05.2005, in favour of D5 (Ex.A4) and in the absence of challenge to these documents, the plaintiffs cannot

simply take a stand that they were not parties to the documents and therefore, the same did not bind them. Such stand taken by the plaintiffs is contrary to the legal principle as extracted supra. Therefore, on this ground also, the plaintiffs are liable to be non-suited.

29. Further, the suit was filed after the purchase of the suit property by D5 on 06.05.2005 and very conveniently, D1 and D2 were set ex-parte. Therefore, the contention of the contesting defendants that the suit was a collusive one has to be accepted, coupled with the fact that the suit was filed only after the last transaction dated 06.05.2005 (Ex.A4) when the 5th defendant purchased it from the 4th defendant. This conclusion is further strengthened by the fact that the plaintiffs though have executed a partition deed under Ex.B1, on 11.09.2000, ought to have filed partition suit immediately thereafter for any remaining portion of the property to which they have a claim. All the facts would cumulatively show that the suit filed by the plaintiffs for partition lacks bona fides and unfortunately both the Courts below have not touched upon the said aspect.

30. The conclusion reached by the Courts below regarding the possession was not handed over by D2, in pursuance of Settlement Deed dated 08.07.1993 (Ex.A1), is also contrary to the legal principles as held by the Hon'ble Supreme Court in 2014 (4) CTC 572. The operative portion of the Ruling was also extracted supra.

31. Moreover, the Settlement Deed executed on 08.07.1993 (Ex.A1), which gave rise to the further transactions like Exs.A2 to A4, dated 11.03.1996, 09.09.1997 and 06.05.2005, respectively, and the filing of suit in 2005 is hit by limitation, as held by the learned Judge of this Court in paragraph No.22 of the decision in T.A.YUVARAJ AND OTHERS VS. T.BALAKRISHNAMA AND OTHERS [(2010)7MLJ 52], which was also extracted supra.

32. In the light of the discussion supra, the irresistible conclusion this Court could arrive at is that the Judgments and decrees of the Courts below are not to be sustained, as they are contrary to the established legal principles on various aspects, as narrated above.

33. From the entirety of the conclusion reached by both the trial Court as well as the lower Appellate Court, this Court finds that the Courts below have erred in overlooking many legal principles, which are germane to decide the lis between the parties. But unfortunately, both the Courts below have completely gone astray in not appreciating the core principles of law, which are applicable for proper and correct adjudication

of the claims as between the parties, in the facts and circumstances of the present case. Therefore, this Court has to hold that the judgments and decrees of both the Courts below are to be set aside.

34. In the above circumstances, the Second Appeal is allowed. The judgment and decree dated 15.02.2010, passed by the Principal District Judge, Erode, in A.S.No.85 of 2009, confirming the judgment and decree, dated 26.03.2009, passed by the Principal Sub-Judge, Erode, in O.S.No.349 of 2005, are hereby set aside and the Substantial Questions of Law framed by this Court are answered in favour of the appellants/defendants. No costs.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The Principal District Judge, Erode.

2. The Principal Sub-Judge, Erode

3. The Section officer

VR Section

High Court, Madras 104.

S.A.No.605 of 2012

SSP (CO)

SP (05/11/2020)

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