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**(2008) 04 MAD CK 0043**  
**In the Madras High Court**  
**Case No : Second Appeal No. 737 of 1996**

Gopaliappa

APPELLANT

Vs

Madanagiriappa, Muniappa, Nanjudappa and Thimmarayappa

RESPONDENT

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**Date of Decision :** 04-04-2008

**Acts Referred:**

Limitation Act, 1963 — Article 144

**Citation :** (2008) 4 MLJ 781

**Hon'ble Judges :** V. Dhanapalan, J

**Bench :** Single Bench

**Advocate :** V. Raghavachari, for the Appellant; Sanjay Baba, for V. Nicholas, for the Respondent

**Final Decision :** Dismissed

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## Judgement

V. Dhanapalan, J.—The plaintiff in the suit is the appellant herein. Aggrieved by the judgment and decree dated 22.02.1996 passed in A.S.

No. 17 of 1996 on the file of the Sub Court, Hosur in reversing the judgment and decree of the Court of the District Munsif, Hosur in O.S. No.

189 of 1983 dated 12.11.1992, the plaintiff has preferred this appeal.

2. The case of the plaintiff, Gopaliappa, as put forth before the Trial Court is as follows:

i. The plaintiff is in possession and enjoyment of the suit property by way of a registered Sale Deed dated 22.04.1968 executed by the first

defendant. Prior to the purchase of the suit schedule property by the plaintiff, it was in the possession of the first defendant by way of an oral

partition among the defendants in the year 1965; Till the execution of the Sale Deed in favour of the plaintiff, the first defendant was in possession

of the suit schedule property. The second defendant is in possession of the

remaining two acres of land in the same Survey Number and defendants

3 and 4 also possess their share of land in the neighbouring Survey Numbers. In the Sale Deed executed by the first defendant, the second

defendant signed as a witness.

ii. While the first defendant had left Kanimangalam Village before several years and is working in Karnataka, the defendants 2 to 4 also had left

Kanimangalam Village before five years and are residing in Pagalur. The defendants do not have any right in the suit schedule property and it is the

plaintiff who is in possession and enjoyment of the same. Since he refused to re-sell the property, the defendants developed animosity with him. He

was supervising the lands of one Ammakka. Due to the animosity with the plaintiff, the defendants objected to the possession of the suit property

by the plaintiff in view of the Revenue Records and tried to trespass into the property. Hence, the plaintiff filed a suit in O.S. No. 189 of 1983

claiming declaration of title and permanent injunction.

3. The case of the defendants 2 to 4 as stated in the written statement is as follows:

i. The plaintiff is not in possession and enjoyment of the suit schedule property. The lands in question were not partitioned in the year 1965 and the

suit schedule property was not allotted to the first defendant out of the said lands and the remaining portion of the lands also were not allotted to

other defendants. The defendants 2 to 4 are entitled to their due share in the suit schedule property and the plaintiff has not paid tax in respect of

the said property. The second defendant has not signed as a witness in the sale Deed.

ii. They are illiterates and there had been no partition among themselves; they are in joint possession and enjoyment of the family properties. Since

the plaintiff is their relative, he has fraudulently obtained the first defendant's thumb impression in the Sale Deed. As per the Sale Deed dated

22.04.1968, the possession of the suit schedule property was not given to the plaintiff and only the defendants are in possession of the suit

schedule property.

iii. the first defendant has not executed any Sale Deed in favour of the plaintiff and the defendants are paying tax in respect of the property in

question and they are in possession of the same; even the patta stands in their

favour and not in favour of the plaintiff and as such, there is no necessity for them to trespass into the property in question.

4. The Trial Court, on consideration of the facts and circumstances of the case, has held that the Sale Deed dated 22.04.1968 executed by the plaintiff is true and holding so, decreed the suit in favour of the plaintiff. Aggrieved by the judgment of the Trial Court, the defendants 2 to 4 went on appeal before the Lower Appellate Court in A.S. No. 17 of 1996.

5. The Lower Appellate Court, on evaluation of the oral and documentary evidence available on record, raised the following questions for consideration:

- i. Whether the averment of the plaintiff that there was an oral partition in the year 1985 is true ?
- ii. Whether the Sale Deed dated 22.04.1968 said to be executed by the plaintiff is true, valid in law and binding on the defendants?
- iii. Whether the defendants are barred by the principle of estoppel in respect of the suit schedule property, in view of the signature of the second defendant in the Sale Deed ?
- iv. Whether the appeal is permissible in law?

6. On an analysis of the evidence on record and on consideration of the facts and circumstances of the case, the Lower Appellate Court allowed the appeal, thereby reversing the judgment of the Trial Court. Aggrieved by the judgment of the Lower Appellate Court, the plaintiff has approached this Court for the aforesaid relief.

7. This Court, on 22.05.1996, admitted the Second Appeal on the following substantial questions of law:

- i. Whether the Lower Appellate Court is right in reversing the well considered judgment and decree of the trial court ?
- ii. Whether the Lower Appellate Court has not erred in not drawing adverse inference against the defendants?
- iii. Whether the court below has not erred in not seeing that defendants have not challenged the validity of the sale made in favour of the appellant 15 years prior to the institution of the suit and are therefore, precluded from challenging the sale deed in the present proceedings ?
- iv Whether the Lower Appellate Court has not failed to note that the defendants

have accepted the execution of the sale deed and are therefore

precluded from challenging the same on the facts and circumstances of the case?

8. Heard Mr. V. Raghavachari, learned Counsel for the appellant and Mr. Sanjay Baba, learned Counsel for the respondents.

9. Learned Counsel for the appellant has put forth the following contentions:

i. The Lower Appellate Court should have seen that the suit property had been allotted to the share of the first defendant and he had sold it to the

appellant under Ex.A1 on 22.04.1968 and it is also admitted by D.W.1 that UDR patta issued includes the name of the defendants 2 to 4 that they

are not aware of the sale made by the first defendant to the plaintiff/appellant.

ii. The Lower Appellate Court should have seen that the appellant had proved his exclusive possession in and over the suit property and had

examined P.Ws.2 and 3, uninterested testimonies and had produced Exs.A2 to A4 and the order of the court below in failing to appreciate the

said documents properly and correctly had resulted in serious miscarriage of justice.

iii. The Lower Appellate Court should have seen that the first defendant had sold the property to the appellant and the same had been attested by

the second defendant, who is the owner of the northern side of the suit property. The second defendant had not examined himself to deny the

attestation and the non-examination is fatal to the case of the defendants; the learned Appellate Judge should have therefore held that the

defendants are playing fraud upon the purchaser/appellant and had suppressed material evidence from the court and its order to the contrary is

legally unjustified.

iv. That the Lower Appellate Court should have seen that the case of the defendants is highly artificial and unbelievable and it should have seen

that:

(a) D.W.2 had admitted he is aware of the sale by the first defendant to the plaintiff in 1968;

(b) the sale is not challenged by the defendants;

(c) the name of the plaintiff is included in the UDR patta and no objection had been filed by the defendants or at least no document had been

marked to prove the objections alleged to have been made;

(d) D.W.1 had alleged he is aware of the sale only after the filing of the suit but he had produced documents under Ex.B5 which had been secured

which prior to the suit and no objection had been raised challenging the sale made 15 years prior to the institution of the suit.

v. the Lower Appellate Court should have seen that the appellant had purchased the property from the first defendant and his Vendor was in

absolute possession of the property and he had put the purchaser in possession of it and the order of the court that the plaintiff/appellant should file

a suit for partition is not tenable especially after 28 years of purchase.

vi. the Lower Appellate Court should have seen that the appellant had established the defendants are owners of more than 14-16 acres of land and

even assuming the partition had not taken place, the Court should have seen that equities can be worked in favour of the purchaser and his

possession deserves to be protected.

10. In support of his contentions, learned Counsel for the appellant has placed reliance on the following decisions:

i. In 1936 PC 408 in the case of Alluri Venkatapathy Raju v. Dantuluri Venkatanarasimha Raju and Ors., the Privy Council has held as under:

The learned Judges of the High Court have agreed with the trial Judge that Venkatraghvaraju died after his father, and the question arises whether,

at the time of his death, he was a member of a Hindu coparcenary with Akkiraju and Ramaraju, or whether he was separate from them in estate.

On this point, the High Court, dissenting from the Subordinate Judge, holds that, though the estate was not partitioned by metes and bounds, there

was a severance of the joint status, with the result that they held the estate, not as joint tenants, but as tenants-in-common. The learned Counsel for

the parties have invited their Lordships' attention to various cases which define the nature of a Hindu coparcenary and the relations of its members

inter se, and enunciate the principles which should be followed in determining the question of the severance of the joint status. The leading case on

the subject is Appovier v. Rama Subba Aiyar (1), where Lord Westbury expounds the law in these terms:

According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of

the joint and undivided property, that he, that particular member, has a certain

definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family.

After stating that the property ceases to be joint property, if it is held in defined shares, and that an actual partition of the property is not necessary for making the family a divided family, he makes the following observations:

It is necessary to bear in mind the two-fold application of the word "division". There may be a division of right, and there may be a division of property.

ii. In *Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others*, , the Supreme Court has held as under:

It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which

is in their possession which could throw upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai*

v. *Manichavasaka Pandara*, Lord Shaw observed as follows:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract

doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this

may be right enough-they have no responsibilities for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordship's

opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their

possession which would throw light upon the proposition.

iii. In *Ganapath Sahu and Another Vs. Smt. Bulli Sahu and Others*, , the High Court of Orissa has held as under:

10. ...The question for consideration is whether the entire sale deed would be declared invalid and inoperative on the ground that she transferred

much more than her own interest in the disputed lands. On this ground the sale deed cannot be invalidated in toto. It would be valid and operative

to the extent of defendant 4's interest in the disputed lands. Her interest in the disputed lands is two annas, two and one-fourth pies. The sale deed

is valid to the extent it transfers her two annas, two and one-fourth pies interest in the disputed lands and it is invalid in respect of the excess

interest transferred.

11. The result of the aforesaid discussion is that the plaintiffs' suit for a declaration that they have title to the disputed properties to the exclusion of

defendant 4 is to be dismissed. Their prayer that the sale deed, Ext.A be declared invalid as a whole is also to be dismissed. A declaration is to be

given that the sale deed is valid to the extent it transmits two annas and one-fourth pies interest of defendant 4 in favour of defendants 1 to 3 and is

invalid in respect of the excess interest transferred. Defendants 1 to 3 would be in joint possession with the other co-sharers.

iv. In 1987 (100) L.W. 173 in the case of Muthuramalingam and other v. R. Nachimuthu Gounder and 11 Ors., this Court has held as follows:

11. As to when an attestation will be binding has been laid down in Ethirajammal v. G.Lakshmi Devi 91 L.W. 590 at 595. Only when there is a

conscious act of abandonment, such an attestation will be binding, not otherwise. Therefore, the failure to examine either the first defendant or the

fourth defendant clearly goes to prove that these debts were neither antecedent in point of time nor could they be called valid or binding debts.

From this point of view, no case has been made out for interference with the bindings of the court below.

11. In response, while countering the arguments made by the learned Counsel for the petitioner, the first and foremost contention put forward by

the learned Counsel for the respondents is that the appellant/plaintiff is not in possession and enjoyment of the suit schedule property. He has

submitted that since the appellant/plaintiff is a relative of the respondents/defendants, he has fraudulently obtained the first defendant's thumb

impression in the Sale Deed and as per the Sale Deed dated 22.04.1968, the possession of the suit schedule property was not given to the plaintiff

and only the defendants are in possession of the suit schedule property. He has strenuously contended that the first defendant has not executed any

Sale Deed in favour of the plaintiff and that the defendants are paying tax in respect of the property in question and they are in possession of the

same and even the patta stands in their favour and not in favour of the plaintiff. It is his vehement contention that the burden of proof lies on the

appellant/plaintiff to establish that there was a partition amongst the defendants and upon his failure in that respect, the lower appellate Court has

rightly dismissed the suit and as such, this appeal deserves no consideration.

12. The learned Counsel for the respondents has further contended that the appellant/plaintiff's reliance in the second defendant's witnessing

Ex.P.1, sale deed, need not be given credence since the other defendants had not witnessed the said document and it is only the second defendant

who had witnessed it. In this regard, pointing out that all the four defendants are illiterates, he has argued that nowhere in his evidence nor in his

plaint, P.W.1 has stated that he had read over the recitals to the second defendant and in such a case also, the second defendant's witnessing

Ex.P.2, sale deed cannot add any strength to the appellant/plaintiff's case. It is his further contention that if at all the appellant/plaintiff had been

aggrieved, he should have filed only a suit for partition and not a suit for declaration of title and permanent injunction. In his last limb of argument,

on the question of principle of estoppel, he has contended that since Ex.P.1, sale deed has been witnessed only by the second defendant, it has a

binding force only on him and not on the rest of the defendants and as such, the other defendants are not estopped from questioning the oral

partition alleged to have taken place among the defendants.

13. In support of his contentions, the learned Counsel for the respondents has relied on a decision reported in V.C. Thani Chettiar and Another

Vs. Dakshinamurthy Mudaliar and Others, , wherein this Court has held as under:

10. ...It is in my opinion, clearly established that a purchaser from a member of a Hindu joint family does not acquire a right to be considered

himself a member of the joint family in place of the vendor, or a right to have joint possession of the family property in place of the vendor, nor, of

course, does he acquire any right to possession of any specific part of the property, that being a right which the vendor himself does not possess.

The only right which the purchaser has in such a case is a right to sue for partition and procure to be allotted to himself the share which would have

gone to his vendor....

Now, two things seem to me necessarily to follow from the proposition that the

plaintiff is not entitled to joint possession of the family property;

first, that she cannot rely on the ordinary rule that the possession of one co-tenant is the possession of all; the plaintiff not being entitled to

possession, the possession of the other co-owners cannot help her.

Secondly, that the possession of other parties cannot be adverse to the plaintiff, because adverse possession denotes exclusion of somebody

entitled to possession, and if the plaintiff is not entitled to possession, she cannot be excluded. Therefore, I am not prepared to agree with the

learned Judge's view that the plaintiff's case is barred under Article 144, Limitation Act.

12. Though the above discussion has proceeded with reference to an alienation of a share of the family property by an undivided coparcener, there

will be no material difference in law even if there had been a disruption of the joint status, so long of course, as there has been no division by metes

and bounds. Though severance in status may render the rule of survivorship inapplicable and deprive the eldest male member of his rights as karta,

so far as possession and enjoyment are concerned, no change occurs. The result is that a purchaser of the share of a divided member of the family

would not be entitled to joint possession with the other members. For instance, a divided member will be entitled to reside in the family house. But

his transferee certainly will not be so entitled. The remedy of the alienee of the undivided share of a divided member is also a suit for general

partition.

14. While answering the substantial questions of law involved in this appeal, it would be not only useful but also necessary to look into as to

whether the lower appellate Court is correct in coming to the conclusion that the oral partition among the defendants is not true and that the sale

deed dated 22.04.1968 executed by the first defendant in favour of the plaintiff, though genuine, does not bind the defendants 2 to 4 and as such,

the plaintiff cannot seek the relief of declaration of title and instead, has to only file a suit for partition.

15. As regards the partition alleged to have been happened among the defendants 1 to 4, it is to be noted that there is no whisper in the plaint as to

the details of the property and among whom the suit property has been partitioned. In particular, when it is the specific case of the plaintiff that he

had purchased the property belonging to the first defendant by way of Ex.P.1, sale deed, here again, the plaint remains silent as to which property the first defendant had got out of the partition among the defendants. In fact, the plaintiff has not at all stated in his evidence that the oral partition took place in 1965 as he has averred in the plaint. His deposition to the effect that (i) the defendants 1 to 4 had been living separately for thirty years prior to the date of Ex.P.1 and (ii) the defendants 3 and 4 got their share of property to the north of the second defendant's property and that he does not know the survey number of their property does not seem to be in support of his own case. Further, in his cross-examination, he has categorically admitted that subsequent to getting the sale deed executed in his favour, he had not filed any application seeking a separate patta and that he had not filed any adangal to prove his possession of the suit property subsequent to the date of Ex.P.1, sale deed. During the course of his cross-examination, he had also admitted that Ex.A.3, copy of adangal is dated subsequent to UDR patta and that the kandhaaya receipts are also dated subsequent to filing of the suit. Even P.W.2 who is said to be the plaintiff's relative, has deposed that he does not know as to when the alleged partition took place and what were the properties involved in the partition. Similarly, P.W.3 also, in his evidence, has stated that he has no knowledge as to when exactly the partition took place and that he is also not aware of the extent of property conveyed to the plaintiff through Ex.P.1, sale deed nor is he aware of the extent of property which the defendants got conveyed through the alleged partition. In fact, he has deposed to the effect that he had not at all seen Ex.P.1, sale deed.

16. Further, it is seen that even in Ex.P.1, sale deed on which heavy reliance is placed upon by the plaintiff, there is no mention that there was an oral partition in 1965 amongst the defendants, as claimed by the plaintiff. That apart, the plaintiff has not proved, by any form of evidence whatsoever, much less any clinching evidence, that the first defendant had been in separate possession of the suit property from 1965 to 1968. In the patta marked as Ex.P.4, the name of the plaintiff is not found singly, but, it is found along with the name of the defendants too. In this context, it needs to be stated that the finding of the Trial Court based on the mere fact that the plaintiff's name is found in the Ex.P.4, patta and hence, he is in

separate possession of the suit does not all appear to be convincing, as found by the lower appellate Court. Though it is the strong case of the plaintiff that the second defendant has witnessed Ex.P.1, sale deed, the plaintiff has neither averred in the plaint nor stated in his evidence that the recitals of Ex.P.1 were read over to the second defendant when particularly and admittedly, all the defendants are illiterates. Furthermore, even assuming but without conceding that the second defendant had witnessed Ex.P.1, sale deed, there is no reason as to why the other defendants had not witnessed the same. Had the other defendants too witnessed Ex.P.1, sale deed, it can safely be concluded that the oral partition had taken place in the defendants' family. Thus, viewed from this perspective, it cannot be said that the defendants are barred by the principle of estoppel to question the oral partition which had been alleged to have taken place and accordingly, this Court is of the considered view that the Trial Court has miserably erred in holding that there was an oral partition amongst the defendants and that the lower appellate Court has rightly reversed the said finding rendered by the Trial Court. Thus, from this piece of conclusion alone, it can be concluded that the first defendant was not in separate possession and enjoyment of the suit property.

17. Coming to the genuineness of Ex.P.1 and its binding effect on the defendants 2 to 4, finding that the second defendant has not rebutted his witnessing Ex.P.1 during the course of his deposition, the lower appellate Court has found that Ex.P.1, sale deed is a genuine one, but, at the same time, does not have any binding effect on the defendants 2 to 4 inasmuch as the plaintiff's case is that the suit property which he got conveyed is that of only the first defendant and as such, the plaintiff has to file only a suit for partition. It is quite relevant to note in this context that the judgment reported in AIR 1955 Madras 288 in the case of V.C. Thani Chettiar and Anr. v. Dakshinamurthy Mudaliar and Ors. relied on by the learned Counsel for the respondents does have a subsisting force in support of the defendants' case. That apart, the plaintiff could have at least raised the plea of adverse possession either in the plaint or during the course of his deposition. In the event of such a plea not being raised either in the plaint or during the course of deposition, this Court is of the considered opinion that even in this respect, it has been rightly concluded by the lower

appellate Court that Ex.P.1, sale deed has a binding effect only on the first defendant and not on the rest.

18. Thus, in nutshell, when the burden of proof lies on the part of the plaintiff to prove that partition had taken place amongst the defendants and

that he had got conveyed the property of the first defendant by way of Ex.P.1, sale deed and has been in separate possession of the suit property,

it is for him to clearly establish the same without any speck of doubt. Having failed in his endeavour to prove the same, the plaintiff's case has to

fall to ground and in that view of the matter, the substantial questions of law raised in this appeal are to be answered against the appellant/plaintiff

and they are accordingly answered. In view of the foregoing narration of legal aspects, this Court finds that the reliance placed by the learned

Counsel for the appellant/plaintiff on the judgment of the Privy Council and other judgments can hardly be of any help to support the

appellant/plaintiff's case for the reason that it has been clearly in the said Privy Council judgment itself that the proceeds of undivided property

must be brought, according to the theory of an undivided family, to the common chest or purse which is not so in the instant case.

In fine, the judgment and decree of the lower appellate Court in reversing the judgment and decree of the Trial Court are confirmed and

consequently, this Second Appeal which is devoid of any merit, is dismissed without any order as to costs.