

(2004) 12 AP CK 0062

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 4086 of 2004

K.T. Afzal Khan

APPELLANT

Vs

Kunsetty Ramesh Babu, Kunsetty Madhusudhan Rao and
Kunsetty Krishna Murthy

RESPONDENT

Date of Decision : 31-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 8
Registration Act, 1908 — Section 17(1), 17(2)
Stamp Act, 1899 — Article 40, 44, 2(10), 2(24), 57

Citation : (2005) 1 ALD 700 : (2005) 1 ALT 696

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : O. Manohar Reddy, for the Appellant; P. Gangaiah Naidu, for the Respondent

Final Decision : Allowed

Judgement

T. Ch. Surya Rao, J.—The revision petitioner assails the order dated 29.07.2004 passed by the learned I Additional District Judge, Cuddapah, in S.R.No.4609/2004 in I.A.No.717/2004 and I.A.No.718/2004 in O.S.No.12/2004. Under the impugned order, the learned Judge held that the document in question dated 06.09.1997 was a family arrangement.

2. The facts germane in the context, which elucidate the baffling question about the nature of the document, need be set forth at the outset. The revision petitioner filed the suit O.S.No.12/2004 on the file of the Senior Civil Judge, Cuddapah, against the respondents herein for recovery of an amount of Rs.7,74,767/-. According to him, he purchased the Cinema Hall of the fourth respondent in two moieties under two different sale deeds. The fact that the existence of tax arrears and the bank loan on the projector floated by the fourth respondent were concealed and not divulged to him at the time of the sale transaction; and that later the fourth respondent agreed to clear the arrears but

failed to do so. He, therefore, was constrained to clear off the bank loan and pay the tax arrears to some extent to the Department and for recovery of those amounts, he laid the suit. However, no relief was sought as against the respondents 1 to 3 herein who are defendants 2 to 4 and the brothers of the fourth respondent. Accompanying the suit, he filed a petition under Order 38, Rule 8 of the CPC (for brevity "the C.P.C.") seeking attachment before judgment of the house property bearing No.16/531, Chinna Chowk Polam, Cuddapah. When conditional attachment was ordered and effected, the respondents 1 to 3 herein filed a claim petition under Order 38, Rule 8 of the C.P.C. for raising the attachment on the premise that the house property in dispute which was allotted to the father of the respondents in the partition was later given to the respondents 1 to 3 in a family arrangement and evidencing the said arrangement the document dated 06.09.1997 came to be executed by the members of the family and, therefore, the respondents 1 to 3 had exclusive rights over the said house property.

3. Initially the claim petition was filed, as aforesaid, on the file of the Senior Civil Judge, Cuddapah. The learned Judge directed the claim petitioners to pay the stamp duty and penalty as per Article 40 of the Indian Stamp Act (for brevity "the Act") assessing the stamp duty at Rs.8,434/- having been of the view that the document in question was a partition deed, with penalty at 10 times thereon. The claim petitioners objected to for the said course. Subsequently, the claim petition was transferred to the Court of the I Additional District Judge, Cuddapah. During the course of enquiry in the claim petition when the document in question had been sought to be introduced, an objection as regards its admissibility for want of stamp duty and registration was raised. That objection was not sustained under the impugned order. Sri O. Manohar Reddy, learned counsel appearing for the revision petitioner, represents that the document in question is nothing but an instrument of partition since shares have been allotted to the members of the family. On the other hand, Sri P. Gangaiah Naidu, learned senior counsel appearing for the respondents, represents that the document in question is squarely a family arrangement under which the father wanted to give the property to two of his sons.

4. In view of the above contentions, the question that falls for my determination is as to the nature of the transaction under the questioned document. Admittedly, there had been a partition of the joint family properties in between the respondents and their father late K. Rama Subbaiah in June, 1991. As per the advice of the elders in the oral partition, properties were divided and the suit house in question fell to the share of the late Rama Subbaiah and other properties were given to each one of the respondents. Evidencing the said oral partition, an instrument of partition was executed on 04.09.1997 and was registered four days thereafter, i.e., on 08.09.1997. In the period interregnum, the document in question had come to be executed. The nomenclature of the document is "partition list of joint family properties". In the preamble portion of the document, again it has been referred to as "partition list of properties".

Thereafter, a reference has been made about the division of the properties made earlier and about the performance of the marriages of the daughters and the properties given to them at the time of their marriages. Thereafter, it has been recited that the remaining property in "A" schedule property that has fallen to the share of late Rama Subbaiah after his lifetime, should go to Ramesh Babu and Krishna Moorthy, respondents 1 and 3 herein jointly and other shareholders had no interest thereon. All of them signed the said document. Admittedly, Rama Subbaiah passed away on 26.03.2001. The impugned document obviously has come into effect since the date of death of late Rama Subbaiah.

5. Having regard to the fact that the partition was effected orally earlier and evidencing the same a regular instrument of partition was executed and got registered, although a reference has been made about the division of the properties mentioning the schedules containing the properties that had fallen to the shares of the individual members of the family inter alia in the document in question, under the circumstances, it could not have been conceived to be an instrument of partition again. Obviously the instrument of partition contains the properties that has fallen to the share of the individual members of the family, "A" schedule mentioned property as described in the document in question has fallen to the share of the father. It is nobody's case that an arrangement has been made inter alia in the said instrument of partition about the said property after the lifetime of Rama Subbaiah. Perhaps, in that view of the matter, the parties conceived to have another document executed amongst themselves. A perusal of the document in a holistic vision shows that mentioning of the properties that has fallen to the share of the individual members of the family is nothing but a reiteration. Significance seems to have been attached only to the transfer of "A" schedule mentioned property after the demise or lifetime of the father of the respondents. Now, under the impugned document, the said property should devolve upon the respondents 1 and 3 jointly to the exclusion of the other sons and daughters of late Rama Subbaiah. In construing a document, paramount importance shall have to be given to the intention of the parties although the nomenclature of the same renders some help in adjudicating the nature of the document but that is not decisive. When admittedly there had been oral partition effected by the elders and the same was evidenced later by an instrument of partition executed amongst the members of the joint family preceding the execution of the document in question although got registered four days thereafter, there was no need or occasion for the parties again to have another instrument of partition executed amongst themselves. For the foregoing reasons, the contention that the document in question amounts to an instrument of partition cannot be countenanced. Adverting to the contention that document in question is a family arrangement/family settlement, it is appropriate at the outset to consider the principles of Hindu Law. A transaction of this sort has been dealt under Sections 192, 193 and 248B of the Principles of Hindu Law. In Mulla Principles of Hindu Law, 15th edition, at page 335, it has been mentioned as under:

"Family arrangement or family settlement as it is sometimes termed, generally meets with approval of the Court and the Court always leans in favour of a transaction relating to any such arrangement which ensures peace and goodwill among the family members. This does not rest on any special rule of Hindu law but flows from general principles and policy of law. It is governed by a special equity peculiar to itself and where the terms are fair, taking into consideration the circumstances of the case, the Court makes every effort to recognize and sustain it..... Thus, for instance, members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. It is not necessary that the arrangement should be amongst all members of the family arrayed one against the other. The prime factor is that it should be in the interest of the family."

6. At page 336, it has been further dealt as under:

"It is not necessary that there can be a family arrangement only between members of a joint family. It can be entered into by members of any family though in most cases such arrangements are arrived at among members of a joint family. It may be noted that any such transaction is not the creation of an interest. In such an arrangement, ordinarily, each party takes a share or interest in the property by virtue of the independent title which is admitted to that extent by the other parties. But every party who takes benefit under it need not necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary to show is that the parties are related to each other in some way and have a possible claim or even a semblance of a claim or some other ground as, say affection.

The expression "family" in the contest of family arrangement is not to be understood in a narrow sense of being a group of persons who are recognized in law as having a right of succession or having a claim to a share in the property in dispute. It is sufficient if the arrangement is between near relations. Family arrangement as such can be arrived at orally. It may be partly in writing and partly oral as evidenced by conduct of the parties. Its terms may be recorded in writing as a memorandum of what was agreed upon between the parties. The document which contains the arrangement does not require registration unless, by itself it creates interest in immovable property. A memorandum is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration. And in such a case even if the document is not registered, it can be used for a collateral purpose, for instance, for the purpose of showing the nature and character of possession of the parties in pursuance of the arrangement. A family arrangement can, as a matter of law, be implied from a long course of dealing between the parties. The conduct of various members of the family may be relevant to show

that their actings, viewed as a whole, suggest the existence of such arrangement."

[Emphasis is mine]

7. In Halsbury's Laws of England, 3rd Edition, Vol.17 at pages 215 and 216 it has been mentioned thus:

"A family arrangement is an arrangement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful and disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when decided the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."

[Emphasis is mine]

8. Having due regard to the above excerpts from the Halsbury's Laws of England, the Apex Court in *Maturi Pullaiah and Another Vs. Maturi Narasimham and Others*, held in para 17 thus:

"Briefly stated, though conflict of legal claims in praesenti or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such an arrangement than to avoid it."

[Emphasis is mine]

9. Having regard to the matrix in that case, the Supreme Court was of the view that the document in question, namely, Ex.B.1 did not bring about a division by metes and bounds between the parties. It did not also affect interests of the parties in immovable properties in praesenti. What in effect the document said was that the parties would continue to be members of the joint Hindu family and that one of the members would manage the family properties as before and that

when they effect a partition in future the members would get the shares as enumerated therein, the Apex Court ultimately was of the view that Ex.B.1 was nothing but a family arrangement. Significance, in the process, has been attached to the fact that there was no creation of interest in praesenti in favour of any of the parties in respect of immovable properties. Ultimately, the Apex Court held that in view of the same, the document in question does not require any registration.

10. Following the above Judgment, a three Judge Bench of the Apex Court in Shambhu Prasad Singh Vs. Mst. Phool Kumari and Others, held that it was not necessary that there must exist a dispute, actual or possible in the future, in respect of each and every item of property and amongst all members arrayed one against the other and it would be sufficient if it was shown that there were actual or possible claims and counter-claims by parties in settlement whereof the arrangement as a whole had been arrived at, thereby acknowledging title in one to whom a particular property would fall on the assumption that he had anterior title therein. Again in S. Shanmugam Pillai and Others Vs. K. Shanmugam Pillai and Others, the Apex Court reiterated its earlier verdict in Pullaiah v. Narasimham (referred to supra).

11. In Kale and Others Vs. Deputy Director of Consolidation and Others, the Apex Court reviewing the case law on the point enunciated the following principles thus:

- 1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
- 2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
- 3) The family arrangements may be even oral in which case no registration is necessary;
- 4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in Immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) 17(1)(b) of the Registration Act and is, therefore, not compulsorily registrable;
- 5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the

settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

[Emphasis is mine]

12. In England Courts are averse to disturb family arrangements but would try to sustain them on broadest considerations of the family peace and security. This concept of a "family arrangement" has been accepted by Indian Courts but has been adapted to suit the family set up of this country which is different in many respects from that obtaining in England. As in England so in India, Courts have made every attempt to sustain a family arrangement rather than to avoid it, having regard to the broadest considerations of family peace and security. It is now fairly settled from a conspectus of the above Judgments of the Supreme Court that the family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family. The members of the family who are parties to such family settlement must have some antecedent title, claim or interest even a possible claim in the property, which is acknowledged by the parties to the settlement. Such an arrangement between the members of the family is for the benefit of the family so as to ensure peace and security by avoiding litigation or by saving the honour of the family.

13. Such family settlement may be oral or in writing. But when once if the terms of the family settlement are reduced into writing such settlement requires registration inasmuch as it either creates or extinguishes rights over the properties in favour of the members of the family who are parties thereto. If for any reason a memorandum of settlement is prepared after such arrangement between the members of the family distinguishing it from the transaction of settlement by itself, such memorandum need not be registered inasmuch as memorandum does not by itself create or extinguish any right over the properties.

14. Keeping in view the above principles, turning now to the matrix of the instant case, partition of the properties has preceded the so-called arrangement said to have been made under the document in question. In that view of the matter, it cannot be said that there has been a dispute bona fide that might arise in respect of the properties in question. It is only the property that has fallen to the share of the father which is sought to be given to two of his sons to the exclusion of other sons and daughters. By no stretch of the imagination, it can be said that there can be any possible claim or bona fide dispute in respect of that property

that might arise either in praesenti or in future. After the demise of the father, automatically that property shall have to be shared equally by all the members of the family. But father now wanted to give the property exclusively to two of his sons after his lifetime. In that view of the matter, he seeks to transfer his right over the property that has fallen to his share in the family in favour of two of his sons to the exclusion of other sons and daughters. Therefore, it is obvious that there has been transfer of property by one co-owner in favour of two of the co-owners. It is not discernible from the document that there had arisen some dispute over the property that had fallen to the share of the father in the partition and the parties wanted to resolve the same. At any rate, it is obvious that the document seeks to convey the property by incorporating the terms inter alia therein. It cannot be called as a memorandum regarding the arrangement so as to evidence the said transaction. Therefore, the document in question cannot be called as a family settlement or arrangement. Even otherwise assuming for a moment that it is a family settlement still it requires registration since it is not a memorandum of family settlement but the document incorporates the terms of the settlement it requires to be registered assuming for a moment that it amounts to a family settlement.

15. This then turns to the vexed question as to what exactly the nature of the document in question. Obviously, the father wanted to convey the property that had fallen to his share, after his lifetime to respondents 1 and 3 to the exclusion of his other heirs. A "will" could have been executed by late Rama Subaiah during his life time in respect of the property that had fallen to his share but no such document was executed. Having regard to the fact that there has been severance in status the moment the partition was effected followed up by the division of the properties, by no stretch of the imagination, it can be construed that it had been a case of relinquishment or release of his share by the father in favour of his two sons to the exclusion of his other sons and daughters. The other transactions covered by the Stamp Act are deed of Conveyance or Settlement.

16. Sub-section (24) of Section 2 of the Act defines "Settlement". It reads as under:

" "Settlement" means any non-testamentary disposition in writing, of movable or immovable property whether by way of declaration of trust or otherwise made -

(a) in consideration of marriage;

(b) for the purposes of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or

(c) for any religious or charitable purpose; and includes an agreement in writing to make such a disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition."

[Emphasis is mine]

17. Clause (b) of sub-section (24) of Section 2 of the Act clearly shows that if a person wants to distribute his property among his family or those for whom he desires to provide or for the purpose of providing for some person dependent on him, it becomes a settlement. In my considered view, the document in question will not attract the transaction of settlement inasmuch as it has not been the object of distribution of property by the settler nor providing whether by distribution or otherwise a provision in favour of a person who is a dependent on him. Having regard to the fact that there has been partition of the properties earlier and thereby division of status amongst the parties, the beneficiary under the document cannot be a dependent on his father. In that view of the matter, the transaction will not attract the nomenclature of settlement as defined u/s 2(24) of the Act.

18. The documents which deal with the conveyance of the property have been dealt u/s 2(10) of the Act. The provision reads as under:

"Conveyance: - "conveyance" includes a conveyance on sale, every instrument and every decree or final order of any civil Court, by which property, whether moveable or immovable, or any estate or interest in any property is transferred to, or vested in or declared to be of any other person, inter vivos, and which is not otherwise specifically provided for by Schedule-I or Schedule-I-A, as the case may be.

Explanation-I: - An instrument whereby a co-owner of any property transfers his interest to another co-owner of the property and which is not an instrument of partition, shall, for the purposes of this clause, be deemed to be an instrument by which property is transferred inter vivos. Explanation-II: - An instrument whereby a partner transfers his share in the property of the partnership business to another partner or to other partners, whether separately or together with transfer of other business assets on retirement or dissolution or whereby contributes to the capital of the partnership firm by transferring his right and title to, or interest in any property, is for the purpose of this clause an instrument by which property is transferred."

[Emphasis is mine]

19. The transaction of conveyance is a residuary provision, which encompasses in itself those transactions pertaining to movable and immovable properties, which are not specifically provided for by the Schedule under the Act. There has been no sale under the impugned document. But, certainly, there has been transfer of property by the father in favour of two of his sons and, therefore, it is a transfer inter vivos albeit not in praesenti. From the above facts it is obvious that it is not a case of relinquishment or release. In order to be classified as a relinquishment or release, there must be joint interest amongst the persons in the transaction. The transaction in question is said to have preceded the transaction of partition and thereby severance in status. The distinction between

relinquishment or release and conveyance is appropriate here to be considered. A document by which one co-owner purports to abandon or relinquish this claim to the share to which he would be entitled in consideration of a certain sum received through adjustment of accounts would be in the nature of a release within Article 44 of Schedule 1- A. In such a case there need be no conveyance as such by the co-owner in favour of the other co-owners. A document under which a Hindu coparcener purports to give up his rights to the family property in favour of the remaining coparceners would not be a deed of conveyance but a deed of release. But in order to be classed as a release, the executant of the instrument having common or joint interest along with others should relinquish his interest, which automatically results in the enlargement of the interest of others. Where he executes the document in respect of his share in favour of particular co-owner, it cannot be treated as a release and must come within the definition of conveyance. In *Kothuri Venkata Subba Rao and Others Vs. District Registrar of Assurances, Guntur*, Full Bench of this Court while answering a reference u/s 57 of the Act had considered the distinction between a conveyance and release or relinquishment. In the process, it was held in para 12 thus:

"It is now well settled that in order to determine the nature of an instrument, neither the nomenclature nor the language which the parties may choose to employ in framing the document is decisive. What is decisive is the actual nature and the character of the transaction intended by the executant."

20. That was a case where ten persons purchased jointly two plots of land under two registered sale deeds for constructing a cinema theatre. They were in enjoyment of the properties jointly as co-owners. Later for reasons best known to them, four out of ten persons did not want to continue in business and executed relinquishment deeds dated 31.05.1976 in favour of remaining six persons who were inclined to continue in business after receiving a consideration of Rs.12,000/- each. Those documents were tendered before the District Registrar. The District Registrar took the view that the documents should be treated as conveyance deeds on sale for consideration of Rs.12,000/- each. Having been aggrieved by the orders of the District Registrar, the parties approached the Commissioner of Survey Settlements and Land Records. The learned Commissioner made a reference to the Court as aforesaid. Having regard to the said facts, this Court was of the view that the documents should be construed as deeds of conveyance on sale but not deeds of release or relinquishment. In the process, in paras 9 and 10 it was observed thus:

"9. The definition of conveyance is very comprehensive so as to include not only a sale deed but also any instrument under which the property is transferred inter vivos. According to this definition, all transfers of property movable or immovable on sale or otherwise but not otherwise specifically provided for by the schedule are chargeable as conveyance. The transfers otherwise provided for in the schedule are composition deed No.22, exchange of property No.31, release No.55, settlement No.58, transfer No.62, transfer of lease No.63 and declaration

of trust No.64.

10. A deed of release is an instrument by which one of the co-owners releases or renounces his interest in the specified property and the result of such release would be the enlargement of the share of the other co-owner. Thus there is a clear and marked distinction between a deed of conveyance and a deed of release."

21. From the above, it is obvious that once the document is not a family settlement or any of the transfers envisaged under the Transfer of Property Act and the Indian Stamp Act, it should invariably fall within the category of residuary provision of conveyance. A fortiori when there has been transfer of interest in the property after the lifetime of the father in favour of two of his sons. The Court below has not considered these aspects and on an erroneous view of the matter held that it is a case of family arrangement. For the foregoing reasons, the Civil Revision Petition is allowed but under the circumstances there shall be no order as to costs.