
(2011) 06 MAD CK 0534
In the Madras High Court
Case No : S.A. No. 792 of 1993

Pavalayee

APPELLANT

Vs

Periannan and Others

RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 107, 107(d), 115
Hindu Succession Act, 1956 — Section 14, 14(1)

Citation : (2011) 6 CTC 509

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : V. Ayyadurai, for the Appellant; P. Mathivanan, Advocate for Respondent Nos. 1, 2 and 4 to 9 in S.A. No. 792/93 and for Respondent Nos. 1 and 5 to 10 in S.A. No. 793/93, for the Respondent

Final Decision : Allowed

Judgement

R. Subbiah, J.—Since common issues are involved and the parties are same, both Appeals are disposed of by the common judgment. S.A. No. 792 of 1993 has been filed by the Plaintiff, by name, Pavalayee, in O.S. No. 564 of 1984 on the file of Principal District Munsif Court, Salem, against the judgment and decree dated 6.12.1989 made in A.S. No. 37 of 1989 on the file of II Additional District Court, Salem, reversing the finding of the Trial Court.

2. S.A. No. 793 of 1993 has been filed by Defendants 1 & 2, by name, Venkatachalam and Govindan, in O.S. No. 755 of 1983 on the file of Principal District Munsif Court, Salem, against the judgment and decree dated 6.12.1989 made in A.S. No. 94 of 1989 on the file of II Additional District Court, Salem, whereby the judgment and decree of the Trial Court were set aside and a preliminary decree was granted.

3. The parties in O.S. No. 755 of 1983 are related thus:

One Uruma Nadar is a common ancestor of Hindu joint family and he had two

sons Sreeranga Nadar and Palaniappa Nadar. The said Sreeranga Nadar had two wives, (i) Sreerangayee, and (ii) Pavalayee and he had couple of sons through each wife. Periannan @ Ponnumalai and Kandasami are the sons born to the first wife Sreerangayee and Venkatachalam and Govindan are the sons born to the second wife Pavalayee.

4. Periannan filed a Suit in O.S. No. 755 of 1983 (relating to S.A. No. 793 of 1993) against his father and his three brothers for a preliminary decree of partition and separate possession of his 1/5th share in the suit properties consisting seven items, stating that originally the suit properties belonged to his grandfather Uruma Nadar, who died intestate and thereafter, his sons, Sreeranga Nadar and Palaniappa Nadar, divided the entire family properties among themselves as per the registration deed dated 25.12.1959 by metes and bounds, in which, the suit properties were allotted to the share of Sreeranga Nadar, father of the Plaintiff Periannan. Sreeranga Nadar, as a Kartha of joint family consisting of himself, the Plaintiff and his brother Kandsamy and two sons born to the second wife, managing the entire suit properties, which are ancestral in nature. Though the Plaintiff is living separately, he is deemed to be living jointly along with other members of a joint family. He demanded partition of his 1/5th share, but his father has not done so. Hence, Periannan filed the said Suit for partition and separate possession of his 1/5th share in the suit properties.

5. The said Suit was resisted by the 1st Defendant, his father Sreeranga Nadar stating that the suit properties were already divided long before and the Plaintiff was given his share in the joint family properties. Since the partition was already effected, there is no joint family between himself and the Plaintiff. In fact, the Plaintiff had sold his share of the properties to the third parties and hence, no more division is necessary and the Plaintiff is not entitled to 1/5th share in the suit properties.

6. The 4th Defendant Kandasamy, the Plaintiff's own brother, filed a Written Statement stating that he is also entitled to 1/5th share in the partition from his father.

7. The other Suit O.S. No. 564 of 1984 (S.A. No. 793 of 1993) has been filed by the second wife of Sreeranga Nadar, viz., Pavalayee as against the sons born through the first wife to Sriranga Nadar, viz., Periannan and Kandasami and their respective wives for permanent injunction restraining the Defendants from interfering with her peaceful possession and enjoyment of the suit properties. It is the case of Pavalayee that she is the owner of the suit properties consisting three items and herself and Palaniappa Nadar (the brother of her husband) had purchased the properties on 16.10.1942 and 4.7.1956 and they had divided the properties among themselves and by virtue of a Partition Deed dated 25.12.1959 between themselves, the first item of the suit properties fell to her share, in which the Defendants have no right whatsoever. So far as item No. 3 (first two items in the other Suit), originally the same was allotted to the share of her husband Sreeranga Nadar during the partition between himself and his brother

Palaniappa Nadar on 25.12.1959 and thereafter, the said Sreeranga Nadar had executed a Settlement Deed dated 19.12.1982 in favour of Pavalayee in respect of item No. 3. Thus, Pavalayee had obtained possession and enjoyment of the properties. Patta was issued in her name and she has been paying Kist and the electricity charges for the electric motor in the well. Since the Plaintiff refused the demand made by the Defendants to sell the suit properties in their favour, they made attempts to evict forcibly from the Suit lands and under such circumstances, she filed the Suit for injunction.

8. The said Suit was resisted by the Defendants denying the purchase of properties by her and Palaniappa Nadar and also the partition between themselves and stated that the suit properties are not the private properties of Pavalayee. Item No. 3 property could not be settled by Sreeranga Nadar in favour of Pavlayee since it forms part of the joint family properties of his four sons. Therefore, she is not entitled to get injunction.

9. The Trial Court framed necessary issues and tried both the Suits together and recorded evidence in O.S. No. 755 of 1983. On the side of the Plaintiff, Periannan examined himself as P.W. 1 and marked Exs. A-1 to A-15 and on the side of Defendants, D.Ws. 1 to 3 were examined and Exs. B-1 to B-5 were marked. The Trial Court, after considering entire evidence both oral and documentary, dismissed the Suit for partition (O.S. No. 755 of 1983 filed by Periannan) and decreed the Suit O.S. No. 564 of 1984 filed by Pavalayee. Aggrieved over the same, Periannan filed A.S. No. 37 of 1989 against the injunction granted in the Suit filed by Pavalayee and A.S. No. 94 of 1989 against the dismissal of the Suit filed by him for partition, before the District Court, Salem. The II Additional District Court, Salem, by its common judgment dated 6.12.1989, partly allowed the Appeal in A.S.S. No. 37 of 1989 by confirming the injunction granted in respect of items 1 & 2 properties and rejected the injunction granted in respect of item No. 3 to Pavalayee. So far as A.S. No. 94 of 1989 is concerned, the Lower Appellate Court granted a preliminary decree of partition and separate possession of 1/5th share from and out of the properties allotted to Sreeranga Nadar as per Ex. A-8-Partition Deed dated 25.12.1959. Questioning the rejection of injunction in respect of 3rd item of the property in A.S. No. 37 of 1989, Pavalayee filed S.A. No. 792 of 1993 and Venkatachalam and Govindan, the sons of Pavalayee and Sreeranga Nadar filed S.A. No. 793 of 1993 against the preliminary decree granted by the Lower Appellate Court in A.S. No. 94 of 1989. During pendency of both Appeals, Kandasamy, the brother of Periannan and one of the sons of Sreeranga Nadar born through his first wife Sreerangayee, died and his legal representatives were brought on record as Respondents 5 to 10.

10. In addition to the substantial question of law framed by this Court at the time of admission of the Second Appeals, as requested by both sides, at the time of hearing, the additional substantial questions of law are framed for consideration:

1. Whether the judgment and decree of the Lower Appellate Court amounting to error of law in allowing I.A. No. 494 of 1989 filed for receiving Exs. A-16 to A-18

as additional evidences and reversed the well considered judgment of the Trial Court solely on the basis of such additional evidence while refusing preventive relief of permanent injunction with regard to item No. 3 of the Suit schedule properties in O.S. No. 564 of 1984 and would render the judgment and decree of the Lower Appellate Court as invalid and opposed to law?

2. Whether the judgment and decree of the Lower Appellate Court constitutes error of law for want of deciding the material issues of--

(i) not challenging the Settlement Deed under Ex. B-2 dated 19.12.1982;

(ii) failure to consider the conclusion of the Trial Court that the Suit item No. 3 is not forming part of properties in Ex. A-8-Partition Deed allotting share to Sreeranga Nadar?

(iii) the conduct of Plaintiff in not seeking partition with reference to the house property which is admittedly a joint family property which would establish prior partition between the Plaintiff and Sreeranga Nadar along with others?

3. Whether the judgment and decree of the Lower Appellate Court is vitiated in view of settled principle of law that no quantum of evidence can be let in without substratum of pleading inasmuch as there is no averment in the amended Plaint in O.S. No. 755 of 1983 seeking partition challenging the settlement made in favour of Pavalayee/Appellant under Ex. B-2 dated 19.12.1982 or for seeking the relief of setting aside Ex. B-2?

(4) Whether the judgment and decree of the Lower Appellate Court is vitiated for want of considering the claim of Pavalayee/Appellant in terms of Section 14 of the Hindu Succession Act, 1956?

11. Heard the learned Counsel for the parties and perused the materials available on record. To avoid contusion, the parties are hereinafter referred to as per their ranking in S.A. No. 792 of 1993.

12. It is the submission made by the learned Counsel for the Appellant Pavalayee and the other Appellants that there are three items of properties in O.S. No. 755 of 1983, out of which, items 1 & 2 are the individual properties of Pavalayee, who got the same in a partition between herself and Palaniappan, the brother of her husband. The Lower Appellate Court has come to the conclusion that since items 1 & 2 are her individual properties, she is entitled for injunction in respect of those properties, against which, no Appeal has been filed by the 1st Respondent (Periannan). Therefore, the issue with regard to items 1 & 2 properties had become final. The dispute is only with regard to item No. 3 in the injunction Suit filed by Pavalayee. Item No. 3 consists of two items; one is 83 cents in R.S. No. 261/6 and another item is 42 cents in R.S. No. 290/4 totalling to 1.25 acres, which are the properties of item 1 & 2 in the partition Suit filed by the 1st Respondent. Apart from these two items, the 1st Respondent-Periannan sought for partition in respect of 5 other properties also.

13. So far as these two properties are concerned i.e. items 1 & 2 in the partition Suit, they are allotted to the share of the husband of Pavalayee, viz., Sreeranga Nadar under the Partition Deed dated 25.12.1959 marked as Ex. A-8. The said Sreeranga Nadar executed a Settlement Deed in respect of those properties in favour of the Appellant Pavalayee under Ex. B-2. Though it is contended by the 1st Respondent-Periyannan in the partition Suit that since items 1 & 2 are ancestral properties, his father has no right to execute a Settlement Deed in favour of his second wife Pavalayee and hence, he is entitled to 1/5th share in the suit properties, it is the submission of the learned Counsel for the Appellants that the execution of Settlement Deed is only a voidable transaction and unless it is set aside, the Settlement Deed is valid. In the instant case, absolutely, no prayer has been made to set aside the Settlement Deed, more so, it is the case of the 1st Respondent that the said Sreeranga Nadar, as a Kartha of Hindu Joint Family, has no right to execute Settlement Deed in respect of ancestral properties. Under such circumstances, if the Plaintiff has got any grievance that under the Settlement Deed, his share also has been transferred, he ought to have made a prayer to set aside the Settlement Deed. But, the Lower Appellate Court, without considering these aspects, granted a preliminary decree with regard to items 1 & 2 of the properties stating that the 1st Respondent-Periannan is entitled to 1/5th share of the properties allotted to Sreeranga Nadar under Ex. A-8-Partition Deed dated 25.12.1959.

14. Learned Counsel for the Appellants further submitted that the 1st Respondent's father Sreeanga Nadar had adduced evidence that already a partition has been effected in respect of the joint family properties; 56 cents has been allotted to the share of Periannan; he had sold the same to third parties; he had separated himself from the joint family and settled at Kallakurichi. In view of the partition that had already been taken place, there is no question of existence of joint family properties for partition and therefore, once more partition for Suit schedule properties does not arise in this case. The learned Counsel has also relied upon the judgments reported in Guramma Bhratar Chanbasappa Deshmukh and Another Vs. Malappa, ; Sushil Kumar and Anr Vs. Ram Prakash and Ors, and R. Kuppayee and Another Vs. Raja Gounder, in support of his contention that the alienation of joint family properties by Kartha is valid.

15. With regard to the allotment of 56 cents to the 1st Respondent, it is the submission of the learned Counsel for the Appellant that it was the case of the 1st Respondent that 56 cents allotted to him is the property of his mother, who got the same under a Settlement Deed executed by his grandfather Uruma Nadar and his father Sreeranga Nadar on 25.1.1942; after the demise of his mother, the property came into his hands and it was not the joint family property and therefore, it cannot be said that 56 cents was allotted to Periannan in the partition. In order to prove the same, absolutely, no pleading in the Written Statement filed by the 1st Respondent in the Suit by Pavalayee and he has not marked any document before the Trial Court, whereas before the Lower Appellate Court, by way of additional evidence, the 1st Respondent filed three documents

Exs. A-16 to A-18; out of which, Ex. A-17 is the Settlement Deed dated 25.1.1942 executed by Uruma Nadar and Sreeranga Nadar in favour of Periannan's mother Sreerangayee and Pavalayee. The Lower Appellate Court, by taking into consideration of these documents as additional evidence, has held that the 1st Respondent got the property of 56 cents only from his mother and that it is not the joint family properties of Sreeranga Nadar and his four sons and granted the preliminary decree of partition and separate possession of 1/5th share in the other properties i.e. items 1 to 3 to the 1st Respondent. In this regard, the learned Counsel submitted that for receiving additional evidence, the lower Appellate Court has not assigned any valid reason. In the absence of any pleading with regard to the allotment of 56 cents, the lower Appellate Court ought not to have accepted the additional evidence; but, it had received the additional evidence, by giving a go-by to all the cardinal principles stipulated under Order 41, Rule 27, C.P.C., and arrived at a finding that the 1st Respondent is entitled to partition as per Ex. A-8, Partition Deed dated 25.12.1959, by relying upon Ex. A-17, which is not legally sustainable. Therefore, the finding rendered by the Lower Appellate Court based on additional evidence is liable to be set aside. Further, after execution of Settlement Deed, the properties settled in favour of Pavalayee are her absolute properties, as per Section 14(1) & (2) of the Hindu Succession Act. In support of his contentions, the learned Counsel has relied on the decisions reported in Venukuri Krishna Reddi and Another Vs. Kota Ramireddi and Others, Mahavir Singh and Others Vs. Naresh Chandra and Another, Pushpa Bai Stalin v. Dhaya Poomkamazh, AIR 2003 Mad. 54 and Mangayarkarasi Ammal, M. Velayudham, V. Mahendran and V. Elango Vs. Suresh Bafna Proprietor of Madras Mercantile Agency,

16. Countering the said submissions, the learned Counsel for the 1st Respondent submitted that the father of the 1st Respondent-Sreeranga Nadar adduced evidence as D.W. 1 that the partition had already been effected. But, in order to prove the same, neither oral nor documentary evidence was produced as to what are the properties allotted to each of the co-parceners in the so-called partition. The learned Counsel further submitted that had the theory of partition been true, they would have produced tangible evidence or at least they would have given particulars about the properties allotted to each of the co-parceners. Except making a bald statement in the evidence, no details were given in the so-called partition, which itself would prove the falsity of the case projected by the Appellant. The learned Counsel further submitted that without consent of the co-parceners, the Kartha is not entitled to execute a Settlement Deed. Moreover, the plea that Kartha is entitled to execute a Settlement Deed in respect of joint family properties has not been raised before the Courts below. The 1st Respondent-Periannan was not aware of the Settlement Deed executed by his father in favour of Pavalayee and only from the injunction Suit filed Pavalayee in O.S. No. 504 of 1984, he came to know that items 1 & 2 properties in the partition Suit were settled in favour of Pavalayee. Since the Plaintiff is not a party to the Settlement Deed, there is no need to make a prayer for setting side the

Settlement Deed. In support of his contentions, the learned Counsel has relied on the judgments reported in Ponnammal alias Guruvammal and Others Vs. Kanthammal and Others, In Re: Thirupathiammal ; R. Kuppayee and Another Vs. Raja Gounder, Chandrasekaran Vs. Palanisamy and Others, ; and Shanmugaiah and Ganesan Vs. Thirumalayandi alias Thirumalai Pandaram, Velu Pandaram alias Subbiah, Jayarathinammal, Thayammal, Muthammal and Valliammal,

17. With regard to the receipt of additional evidence by the Lower Appellate Court, the learned Counsel for the 1st Respondent submitted that P.W. 1 had categorically stated that he got 56 cents from his mother. Only in order to substantiate the said evidence, before the Lower Appellate Court, Exs. A-16 to A-18 were marked. Therefore, no infirmity could be found in the finding rendered by the Lower Appellate Court by accepting additional evidence.

18. In view of the above submissions made by the learned Counsel on either side, the questions that arise for consideration are,--

(1) Whether the theory of earlier partition, as projected by the 1st Respondent, is true?

(2) Whether the Settlement Deed executed by Sreeranga Nadar in favour of Pavalayee is a voidable one?

(3) Whether the Appellant is entitled for partition as per Ex. A-8 dated 25.12.1959?

(4) Whether the reception of additional evidence by the Lower Appellate Court is not legally sustainable?

19. With regard to the first question, it is the submission of the learned Counsel for the Appellant that even before filing of the partition Suit by the 1st Respondent-Periannan, there was a partition in the joint family, in which 56 cents land was allotted to him. To strengthen the same, he also relied upon the evidence of D.W. 1-Sreeranga Nadar, the father of the 1st Respondent, who had stated in his evidence that the joint family properties were already partitioned, in which 56 cents were allotted to the 1st Respondent-Periannan.

20. On the contrary, it is the case of the 1st Respondent that Uruma Nadar and Sreeranga Nadar had executed a Settlement Deed in favour of Sreerangayee and Pavalayee settling each 56 cents and after the demise of Sreerangayee, he got the same from his mother and the said property was not a joint family property, available for partition. Therefore, it is incorrect to state that already partition took place in respect of the joint family properties even before the filing of the Suit. Though the Settlement Deed executed by Uruma Nadar in favour of the mother of the 1st Respondent dated 25.1.1942 was not marked before the Trial Court, he had spoken about the same in his evidence. The said Settlement Deed was marked as Ex. A-17 before the Lower Appellate Court.

21. It is pertinent to state that except the oral statement made by D.W. 1, no

other tangible evidence was produced to prove the case that already partition was effected in the joint family properties. Had the theory of partition been true, D.W. 1 would have stated in his evidence to the effect that when the alleged partition took place, what are the properties allotted to each of the co-parceners, etc. But the evidence of D.W. 1 is very vague with regard to the so-called partition among the co-parceners. Under such circumstances, there is no difficulty in coming to the conclusion that no partition had been taken place among the co-parceners before filing the Suit.

22. The next question is, whether the 1st Respondent is entitled for partition of his 1/5th share in the suit properties covered under Ex. A-8-Partition Deed dated 25.12.1959 executed between the father of the 1st Respondent Sreeranga Nadar and his brother Palaniappa Nadar. It is the case of the 1st Respondent that the suit schedule properties in O.S. No. 755 of 1983 consisting of seven items, were allotted to his father in a family partition under Ex. A-8. Since his father got the properties by way of family partition, these properties are ancestral properties and therefore, the 1st Respondent is entitled for a share in the said properties. Though the Trial Court dismissed the Suit, the Lower Appellate Court has granted preliminary decree of partition only in respect of the properties covered under Ex. A-8, which deed covers only three items of suit properness. The first three items of suit properties in O.S. No. 755 of 1983 are extracted hereunder:

23. So far as the other four properties are concerned, they are not covered under Ex. A-8. Hence, as per the finding rendered by the Lower Appellate Court, the 1st Respondent is entitled to a share in respect of first three items of properties. It is pertinent to state that the first two items of properties, namely, S. No. 259/4 measuring to an extent of 1.76 acres and 0.83 cents under S. No. 261/6 were settled by Sreeranga Nadar in favour of his second wife Pavalayee under Ex. B-2. Therefore, according to the Appellant, since the first two items were already settled under Ex. B-2 dated 19.12.1982 the 1st Respondent is not entitled for partition in respect of the said items, whereas it is the contention of the 1st Respondent that the said properties, being ancestral in nature, his father has no right to execute any Settlement Deed in respect of those properties in favour of Pavalayee and therefore, he is entitled for proportionate share in the said properties also.

24. In this regard, the learned Counsel for the Appellant submitted that Sreeranga Nadar, being a Kartha of Hindu joint family, is entitled to alienate the joint family properties and it is a voidable contract and unless there is a prayer for setting aside the Settlement Deed, the relief of partition cannot be granted. It is the reply of the 1st Respondent that since he is not a party to the Settlement Deed, no need arises for asking the relief for setting aside the Settlement Deed; particularly when the execution of the Settlement Deed in favour of Pavalayee was without the consent of other co-parceners, it is not valid. To get an answer to the questions, whether the Settlement Deed executed in favour of Pavalayee is voidable in nature and whether the prayer for setting aside the Settlement

Deed is necessary to claim a share in the properties in items 1 & 2 by the 1st Respondent, it would be appropriate to see the judgments relied on by both sides.

25. Learned Counsel for the Appellant relied on the decision reported in Guramma Bhratar Chanbasappa Deshmukh and Another Vs. Malappa, wherein it has been held as follows:

A coparcener, whether he is natural born or adopted into the family, acquires an interest by birth or adoption, as the case may be, in the ancestral property of the family. A managing member of the family has power to alienate for value joint family property either for family necessity or for the benefit of the estate. An alienation can also be made by a managing member with the consent of all the coparceners of the family. The sole surviving member of a coparcenery has an absolute power to alienate the family property, as at the time of alienation there is no other member who has joint interest in the family. If another member was in existence or in the womb of his mother at the time of the alienation, the power of the manager was circumscribed as aforesaid and his alienation would be voidable at the instance of the existing member or the member who was in the womb but was subsequently born, as the case may be, unless it was made for purposes binding on the members of the family or the existing member consented to it or the subsequently born member ratified it after he attained majority. If another member was conceived in the family or inducted therein by adoption before such consent or ratification, his right to avoid the alienation will not be affected.

26. In Sushil Kumar and Anr Vs. Ram Prakash and Ors, the Hon"ble Supreme Court has held as follows:

In a joint Hindu Mitakshara family, a son acquires by birth an interest equal to that of the father in ancestral property. The father by reason of his paternal relation and his position as the head of the family is its Manager and he is entitled to alienate joint family property so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an antecedent debt. The power of the Manager of a joint Hindu family to alienate a joint Hindu family property is analogous to that of a Manager for an infant heir.

27. On the other hand, the learned Counsel for the 1st Respondent has relied on the following judgments. In R. Kuppayee and Another Vs. Raja Gounder, , the Hon"ble Apex Court has held as follows:

The position in Hindu law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to the ancestral immovable property or coparcenary property. He can, however, make a gift within reasonable limits of ancestral immovable property for "pious purposes". Though the alienation must be by an act inter vivos and not by will, but the extended meaning given to the words "pious purposes" enables the father to make a gift of ancestral immovable property within reasonable limits to

a daughter at the time of her marriage or even long after her marriage. However, the extended meaning has not been extended to the gifts made in favour of other female members of the family.

28. In *Chandrasekaran Vs. Palanisamy and Others*, a Division Bench of this Court has held that--

5.....Here in this case, the First Defendant has gifted all his properties which were available after alienation in favour of his wife and it is not a case of gift of ancestral property within reasonable limits, and it would not bind the share of the Plaintiff. We are of the view that the First Defendant had no right to settle the Plaintiff's 1/3rd share in the joint family properties in favour of Third Defendant and therefore, the Deed of Settlement dated 5.6.1974 would not bind the Plaintiff's share in the Plaint B schedule properties.

29. In *Ponnammal alias Guruvammal and Others Vs. Kanthammal and Others*, this Court has held as follows:

2. The law in this province is perfectly clear that a person who is not a party to the decree or a document is not bound to sue for its cancellation. At page 279 in *C.R. Ramaswami Aiyangar, represented by his mother and next friend Lakshmi Ammal Vs. C.S. Rangachariar and Others*, , the legal position has been, thus, explained:

If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist.

30. In *Re: Thirupathiammal* it has been held as follows:

The Plaintiff not being a party to the above Sale Deed and the Plaint allegations being to the effect that the said sale deed is a sham transaction, the Plaintiff need not pray for cancellation of the document. Prima facie third parties are not bound by a document of the description in question and are not obliged to sue for cancellation.

They can ignore the document and ask for the appropriate relief that they may be entitled to on that footing and pay the proper Court-fee thereon without asking cancellation.

31. This Court in *Sargunam Ammal Vs. Jayarama Padayachi and Others*, , has held that it is also well settled law that a gift or coparcenary property can be made with the consent of all the coparceners. In *Mulla's Hindu Law*, 15th Edn., 346 (para 258) it is stated that a coparcener can make a gift of his interest with the consent of the other coparceners.

32. In *Shanmugaiah and Ganesan Vs. Thirumalayandi alias Thirumalai Pandaram, Velu Pandaram alias Subbiah, Jayarathinammal, Thayammal, Muthammal and*

Valliammal, this Court has held that it is well settled proposition of law that one of the coparceners in the coparcenary without the consent of the other coparceners cannot execute a Settlement Deed, as one done in the case on hand.

33. A reading of the above judgments would show that one co-parcener cannot create a Settlement Deed with regard to the share of other coparceners without the consent of the co-parceners. If a settlement is made without the consent of other co-parceners, then the question that has arisen is, whether the prayer for setting aside the settlement is necessary in the event of one of the co-parceners seeking for partition in the properties. In my considered opinion, the principles enunciated in *Guramma Bhratar Chanbasappa Deshmukh and Another Vs. Malappa*, , relied on by the Appellant are appropriate for answering this issue. A reading of the above judgment would show that if a member of joint family properties alienated the joint family properties, the said alienation would be voidable at the instance of the other co-sharers. When the alienation is voidable in nature, the 1st Respondent, who is seeking for partition of properties, ought to have asked for setting aside the said settlement.

34. Though umpteen judgments were relied on by the learned Counsel for the 1st Respondent that since he is not a party to the proceedings, there is no need for asking the relief of cancellation of the Settlement Deed, in my considered opinion, in those judgments factual scenario is totally different from the case on hand. In the instant case, the father, as a Karma, had settled the properties in favour of his second wife. Under such circumstances, the said transaction would be voidable in nature. Therefore, the prayer for setting aside the Settlement Deed is must and as such, the decisions relied upon by the 1st Respondent in this regard cannot be made applicable to the facts of the present case. Therefore, in my opinion, the 1st Respondent is not entitled for partition in respect of items 1 & 2 of the suit properties, namely, S. No. 259/4 & 261/6 i.e. item 3 in O.S. No. 564 of 1984 filed by the Appellant-Pavalayee for injunction.

35. The learned Counsel for the Appellant further submitted that the Lower Appellate Court has not assigned any valid reason for reception of the additional documents marked as Exs. A-16 to A-18. It is the case of the 1st Respondent that Sreeranga Nadar, before the Trial Court, as D.W. 1 had adduced that partition had already been effected, in which, 56 cents was allotted to the share of 1st Respondent-Periannan, whereas the 1st Respondent contended that he derived the said 56 cents from his mother after her demise, who got the same under the Settlement Deed dated 25.1.1942, marked as Ex. A-17. This piece of evidence was made by P.W. 1 to disprove the case of the Appellant that there was an earlier partition in which 56 cents were allotted to Periannan, but he has not marked the Settlement Deed and other connected documents before the Trial Court and he marked the same before the Lower Appellate Court. Now, it is the submission of the Appellant that no pleading in this regard made in the Written Statement filed in the injunction Suit and, as such, the Lower Appellate Court ought not to have received those documents and taken into consideration the

same for reversing the finding of the Trial Court. To strengthen his arguments, the learned Counsel for the Appellant has relied on the judgments reported in Venukuri Krishna Reddi and Another Vs. Kota Ramireddi and Others, ; Mahavir Singh and Others Vs. Naresh Chandra and Another, and Mangayarkarasi Ammal, M. Velayudham, V. Mahendran and V. Elango Vs. Suresh Bafna Proprietor of Madras Mercantile Agency, and submitted that only under certain circumstances, the additional evidence could be accepted. The Hon"ble Apex Court, in Mahavir Singh and Others Vs. Naresh Chandra and Another, has held as follows:

5. Before we proceed further we would like to refer to the scope of an Application under Order 41, Rule 27, C.P.C. Section 107, C.P.C. enables an Appellate Court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order 41, Rule 27, C.P.C. The principle to be observed ordinarily is that the Appellate Court should not travel outside the record of the Lower Court and cannot take evidence on Appeal. However, Section 107(d), C.P.C. is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The Court is not bound under the circumstances mentioned under the Rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the Court, which is, of course, to be exercised judiciously and sparingly. The scope of Order 41, Rule 27, C.P.C. was examined by the Privy Council in Kessowji Issur v. Great Indian Peninsula Rly. Co., 9 Bom LR 671 (in which it was laid down clearly that this rule alone can be looked to for taking additional evidence and that the Court has no jurisdiction to admit such evidence in cases where this Rule does not apply. Order 41, Rule 27, C.P.C. envisages certain circumstances when additional evidence can be adduced:

- (i) the Court from whose decree the Appeal is preferred has refused to admit evidence which ought to have been admitted, or
- (ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree Appealed against was passed, or
- (iii) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

In the present case, it is not the case of either party that the first situation is attracted. So far as the second circumstance noticed above is concerned, question of exercise of due diligence would not arise because the scientific equipment concerned from which examination is sought to be made itself was not in existence at the time of trial and so that clause is also not attracted. In the third circumstance, the Appellate Court may require any document to be produced or any witness to be examined to enable it to pronounce the judgment,

or for any other substantial cause. The expression "to enable it to pronounce judgment" has been the subject of several decisions including Syed Abdul Khader Vs. Rami Reddy and Others, wherein it was held that when the Appellate Court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the Court delivering it. It is only a lacuna in the evidence that will empower the court to admit additional evidence (see: Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others, But a mere difficulty in coming to a decision is not sufficient for admission of evidence under this Rule. The words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule would apply as noticed by the Privy Council in Kessowji Issur v. G.I.P. Rly. It is under these circumstances such a power could be exercised. Therefore, when the First Appellate Court did not find the necessity to allow the Application, we fail to understand as to how the High Court could, in exercise of its power u/s 115, C.P.C., have interfered with such an order, particularly when the whole Appeal is not before the Court. It is only in the circumstances when the Appellate Court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the First Appellate Court passed the order on the Application filed under Order 41, Rule 27, C.P.C., the whole Appeal was before it and if the First Appellate Court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order u/s 115, C.P.C. In this regard, we may notice the decision of this Court in Gurdev Singh and others Vs. Mehnga Ram and another, in which the scope of exercise of power u/s 115, C.P.C. on an order passed in an Application filed under Order 41, Rule 27, C.P.C. was considered. When this decision was cited before the High Court, the same was brushed aside by stating that the principle stated therein is not applicable to the facts of this case. We do not think so. The High Court ought not to have interfered with such an order.

6. Shri Gopal Subramaniam, learned Senior Counsel for the Respondents submitted that now that the documents had been sent to the laboratory concerned and the opinion had been ascertained, the matter can certainly be examined by the Court. We cannot agree as this trend, if allowed, would result in that at any stage of the case either in the First Appeal or the Second Appeal, the additional evidence is sought to be adduced on the ground that better scientific evidence can be adduced, the process would become unending. It is only in the circumstances prescribed under Order 41, Rule 27, C.P.C. such power can be exercised. He contended that if the order of the High Court could not be sustained on the ground that the entire Appeal was not before it, the order of the First Appellate Court also cannot be sustained because while examining the effect

of the evidence in the course of the Appeal, the Application under Order 41, Rule 27, C.P.C. could have been dismissed. But the argument ignores the fact that if the First Appellate Court had deemed it necessary to allow the parties to adduce additional evidence, it ought to have examined the entire evidence and when it was rejecting the Application, it felt that the evidence already on record was sufficient one way or the other. In that view of the matter, we do not wish to express any opinion on this matter as it is open to the parties to urge that aspect of the case in an Appeal that may arise on disposal of the matter by the First Appellate Court.

36. A mere reading of the said provisions of law would clearly show the conditions under which admission of additional evidence could be made. But the learned Counsel for the Appellant submitted that the circumstances mentioned in the said judgment are not applicable to the present case and, therefore, the additional evidence ought not to have been accepted by the Lower Appellate Court. But, in my considered opinion, I find that before the Trial Court, though P.W. 1 had categorically stated in his evidence that he obtained 56 cents from his mother and not by way of partition, he has also failed to mark the Settlement Deed executed by his grandfather in favour of his mother before the Trial Court. The relevant portion of the evidence of P.W. 1 in his cross-examination reads as follows:

Since he has omitted to mark the documents before the Trial Court and the same was accepted as additional evidence by the Lower Appellate Court, it cannot be said that absolutely there is no material on record to receive these additional documents as additional evidence by the Lower Appellate Court. I am of the view that even though no reasons have been recorded before admitting evidence under Order 1, Rule 27, if the reception of such evidence could be justified under that Rule, it cannot be excluded from consideration. Under such circumstances, I am of the opinion that the judgments relied upon by the learned Counsel for the Appellant cannot be made applicable to the facts and circumstances of the case and I do not find any infirmity in the reception of additional evidence by the Lower Appellate Court.

In view of the foregoing reasons, the 1st Respondent is not entitled for partition and separate possession in respect of Items 1 & 2 of the properties in O.S. No. 755 of 1983. Since it is admitted that Item No. 3 of the property in S. No. 258/13A measuring to an extent of 0.90 cents in the said suit, is covered under Ex. A-8, he is entitled for partition and separate possession of his 1/5th share in item No. 3 of the property alone. Under such circumstances, the findings of the Lower Appellate Court are partly set aside and the questions of law are answered accordingly. To this extent, S.A. No. 793 of 1993 is allowed in part. No costs.

So far as S.A. No. 792 of 1993 is concerned, the Lower Appellate Court has granted injunction in respect of items 1 & 2 alone and rejected injunction granted by the Trial Court in respect of item No. 3 in O.S. No. 564 of 1984. In view of the finding arrived at in S. No. 793 of 1993, I am of the opinion that the Appellant is

entitled for injunction in respect of all the suit properties. Hence, S.A. No. 792 of 1993 is allowed. No costs.