HIGH COURT OF KERALA

Bench : Mr. Justice A. Badharudeen

Date of Decision: 5th April 2024

REGULAR SECOND APPEAL NO. 433 OF 2022

SANDHYAVU …APPELLANT

VERSUS

PETER …RESPONDENT

Legislation and Rules:

Order XLII Rule 1, Section 100 of the Code of Civil Procedure (C.P.C)

Sections 54 and 118 of the Transfer of Property Act, 1882 (T.P. Act)

Section 17 of the Registration Act, 1908

Subject: Dispute over the right of way in property inheritance, questioning the validity and requirements of a family settlement or arrangement.

Headnotes:

Property Inheritance Dispute – Plaintiff and Defendant, brothers, in dispute over right of way to their respective inherited properties – Claim of a family settlement involving exchange of land parcels for pathway access – Trial court and appellate court ruled in favor of the plaintiff, denying existence of a valid family arrangement and emphasizing the need for registration under T.P. Act and Registration Act [Paras 4-22].

Oral Family Settlement – Defendant's contention of an oral family settlement for exchange of property (plaint E schedule for plaint C schedule pathway) – Reliance on judicial precedents favoring oral family settlements – Trial court and appellate court found lack of convincing evidence for such a settlement [Paras 9-11, 18-24].

Essentials of Family Arrangement – Held – A family arrangement made orally does not require registration, but must be proved with cogent and convincing evidence – In the present case, defendant's claim of family arrangement for exchange of properties not satisfactorily established – Pathway through plaintiff's property found to be legitimate. [Para 23-24]

Decision – Dismissal of Regular Second Appeal – The Court finds that the family arrangement or settlement is not established, and the formation of the pathway as contended by the plaintiff is substantiated – Regular Second Appeal dismissed, upholding the decisions of the trial court and first appellate court. [Para 25-26]

Referred Cases:

- Kale v. Deputy Director of Consolidation, (1976) 3 SCC 119
- Hari Shankar Singhania and others v. Gaur Hari Singhania and others, (2006) 4 SCC 658
- Arumuga Velaiah K. v. P.R. Ramaswamy and another, (2022) 3 SCC 757

Representing Advocates:

For Appellant: G.Krishnakumar, B.S.Suraj Krishna

For Respondent: Dileep D Bhat, Suchithra K.R., Sunil N.Shenoi, Ganesh.S.Pai, Girish Gopi, Arun E.A

JUDGMENT

Dated this the 5th day of April, 2024

This Regular Second Appeal has been filed under order XLII Rule 1 read with Section 100 of the Code of Civil Procedure ('C.P.C.' hereinafter) challenging the decree and judgment in A.S.No.5 of 2019, dated 21.12.2019 on the files of the Court of the II Additional Sub Judge, Ernakulam arose from decree and judgment in O.S.No.353 of 2012 dated 12.10.2017 on the files of the Munsiff Court, Kochi. The appellant is the defendant and the respondent is the plaintiff in the above suit.

2. Heard the learned counsel for the appellant as well as the learned senior counsel appearing for the respondent. Perused the relevant materials and the verdicts under challenge.

3. Parties in this appeal shall be referred as “plaintiff” and “defendant” with reference to their status before the trial court.

4. In this matter, the plaintiff filed the suit for recovery of possession as well as injunction. According to the plaintiff, the father of the plaintiff and the defendant, by name George Areeparambil owned 10 cents of land on the strength of a Sale Deed No.1181/1984 of S.R.O, Kochi. Out of the same, 3 cents forming its eastern portion was settled in favour of the plaintiff as per the Settlement Deed No.1683/1995 of S.R.O, Kochi, and the same is plaint A schedule property. According to the plaintiff, the plaintiff and his family have been residing in the house constructed by the plaintiff in plaint A schedule property from 1996 onwards. The remaining extent out of 10 cents i.e. 7 cents of land along with the family house were given to the defendant by virtue of a Settlement Deed No.3029/1998 of S.R.O, Kochi, and the same is plaint B schedule property. According to the plaintiff, there is a pathway for the ingress and egress towards plaint A schedule property provided by the father along the northern portion of plaint B schedule property in eastwest direction to reach the corporation road west. The father of the plaintiff and defendant died in the year 2005 and thereafter the defendant expressed dissatisfaction regarding the use of the said pathway. Thereafter, the defendant obstructed the pathway on 13.09.2011. Later, a complaint was lodged and accordingly the defendant consented to shift the pathway from north of the plaint B schedule property towards the southern portion of the plaint B schedule property and the plaintiff agreed for the same. The said pathway is shown as plaint C schedule pathway. The defendant constructed compound wall separating the plaint C schedule pathway from the remaining property of the plaint B schedule property. It was contended that after providing plaint C schedule pathway, the defendant demanded portion of land out of plaint A schedule property, though he had no right to do so. The plaintiff claimed right of easement by necessity over plaint C schedule pathway.

5. The defendant appeared and filed written statement. The contention *inter alia* is that the present corporation road on the western side of B schedule property was originally a *'thodu'.* It is only in the year 2003 - 2004, the corporation had laid concrete slabs over the north canal and concreted the pathway. It was contended that later dispute arose between the plaintiff and Chakkalakkal family regarding access towards

plaint A schedule property available through their property. Pursuant to the dispute with the Chakkalakkal family, the plaintiff approached C.I. of Police, Palluruthy and preferred a complaint against the defendant. The defendant was summoned before the police and matter was referred for counseling and conciliation to Janamythri Police. Then through mediation, a settlement was arrived at, in which the defendant agreed to provide a pathway having a width of 6 links and a length of 70 links along the southern boundary of the plaint schedule property and in return the plaintiff agreed to provide a strip of land along the northern side of plaint A schedule property. Accordingly, the property was measured and sketch was prepared with the help of Village Officer, Rameswaram. Thereafter, the defendant left 6 links wide pathway coming an extent of 420 sq.links along the southern boundary of the plaint B schedule property as pathway to the plaintiff by demolishing latrine and toilet situated at that place. The plaintiff also left 420 sq.links of land on the northern side of his property to the defendant and thereafter the defendant constructed a boundary wall along the northern and eastern boundary of the plaint A schedule property and also on the northern side of 6 links wide pathway provided to the plaintiff. The defendant also put up a gate on the western end of the pathway and enclosed the pathway to his exclusive possession. The plaintiff did not have any right of easement through plaint B schedule property since the same was given on exchange.

6. The trial court recorded evidence and tried the matter after addressing rival contentions. PWs 1 and 2 examined and Exts.A1 to A4 marked on the side of the plaintiff. DWs 1 and 2 examined and Exts.B1 to B3 marked on the side of the defendant. Exts.C1 and C2 series were marked as court exhibits. Ext.X1 also were marked.

7. Finally, the trial court granted decree in favour of the plaintiff, mainly holding that, if at all there was exchange of the properties that should have been by a registered document as provided under Section 118 of the Transfer of Property Act, 1882 (hereinafter referred to as the “T.P. Act” for short) and under Section 54 of the T.P. Act.

8. Though, appeal was filed before the Appellate Court, vide A.S.No.5/2019, the learned Sub Judge
confirmed the finding of the trial court and dismissed the appeal.

9. The learned counsel for the appellant/defendant mainly argued on the submission that as part of a family settlement entered into

between the plaintiff and the defendant, plaint C schedule pathway was given to the plaintiff and in exchange of plaint C schedule pathway, plaint E schedule property form part of plaint A schedule property was given to the defendant. The learned counsel given much emphasis to the evidence of DWs 2 and 3 to substantiate the family settlement, along with the evidence of DW1. It is also argued that the oral family settlement would not require registration. It is submitted that the trial court as well as the Appellate Court wrongly appreciated the legal position as regards to the legal effect of a family settlement and its impact, while granting decree in favour of the plaintiff. The learned counsel for the defendant placed Three Bench decision of the Apex Court reported in ***[1976 KHC 809 : 1976 (3) SCC 119 : AIR 1976 SC 807 : 1976 (3) SCR 202 Kale v. Deputy Director of Consolidation,*** wherein the Apex Court considered many earlier decisions and finally held as under:

"In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide oneso 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 andshould not be induced by fraud, coercion or undue influence;

(3) The family arrangements may be even oral inwhich case no registration is necessary;

(4) It is well settled that registration would benecessary 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 S.17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to thefamily 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 not 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 owners, 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."

10. The learned counsel for the defendant also placed decision of the Apex Court reported in ***[2006 KHC 626 : 2006 (4) SCC 658 : AIR 2006 SC 2488 : JT 2006 (4) SC 251] Hari Shankar Singhania and others v. Gaur Hari Singhania and others,*** wherein the Apex Court after referring the decision in ***Kale's*** case
(supra) held in paragraph No.67 as under:

"67. Conclusion: better late than never

We have already referred to the concept of family arrangement and settlement. The parties are members of three different groups and are leading business people. We, therefore, advise the parties instead of litigating in the court they may as well concentrate on their business and, at the same time, settle the disputes amicably which, in our opinion, is essential for maintaining peace and harmony in the family. Even though the parties with a good intention have entered into the deed of dissolution and to divide the properties in equal measure in 1987, the attitude and conduct of the parties has changed, unfortunately in a different direction. Therefore, it is the duty of the court that such an arrangement and the terms thereof should be given effect to in letter and spirit. The appellants and the respondents are the members of the family descending from a common ancestor. At least now, they must sink their disputes and differences, settle and resolve their conflicting claims once and for all in order to buy peace of mind and bring about complete harmony and goodwill in the family."

11. Latest Three Bench Decision of the Apex Court reported in ***[2022 KHC 6090 : 2022 (2) KHC SN 8 : 2022 KHC OnLine 6090 : 2022 (2) SCALE 405 : 2022 (1) KLT OnLine 1158 : 2022 (3) SCC 757 : 2022 SCC OnLine SC 95] Arumuga Velaiah K. v. P.R. Ramaswamy and another,*** also has been placed to substantiate the point raised by the learned counsel for the defendant. In paragraph No.22 of the said decision, the Apex Court held as under:

"We shall now consider the citations relied upon by the respondents:

a) Kale and Others v. Deputy Director of consolidation, (1976) 3 SCC 119, is a case which had a checkered history in which a discussion on the effect and value of family arrangements entered into between the parties with a view to resolve disputes once and for all, came up for consideration. It was observed that in the case of a family settlement, usually there would be an agreement which is implied from a long course of dealing, but such an agreement would be embodied or effectuated in a deed to which the term "family arrangement" is applied. Such a family arrangement is not applicable to dealings between strangers but is in the context of maintaining the interest and peace of the members of the family. In paragraph 10 of the said judgment, this Court has adumbrated on the essentials of a family settlement which could be usefully extracted as under:

"10. In other words to put the binding effect and the essentials of a family settlement in a concretized form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bonafide 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 voluntaryand should not be induced by fraud, coercion or undue influence;

(3) The family arrangements may be evenoral in which case no registration is necessary,

(4) It is well settled that registration wouldbe 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 S.17(2) (sic) (S.17(1) (b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties tothe 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 orpossible, 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."

After reviewing several judgments of this Court, the Privy Council and other High Courts, this Court in paragraph 20 indicated the following propositions:

"We would, therefore return the reference
with a statement of the following general propositions:

(1) A family arrangement can be madeorally.

(2) If made orally, there being nodocument, no question of registration arises.

(3) If though it could have been madeorally, it was in fact reduced to the form of a "document" registration (when the value is Rs. 100 and upwards) is necessary.

(4) Whether the terms have been "reducedto the form of a document" is a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose with which it was written.

(5) If the terms were not "reduced to theform of a document", registration was not necessary (even though the value is Rs. 100 or upwards); and, while the writing cannot be used as a piece of evidence for what it may be worth, e.g. as corroborative of other evidence or as an admission of the transaction or as showing or explaining conduct.

(6) If the terms were "reduced to the formof a document" and, though the value was Rs. 100 or upwards, it was not registered, the absence of registration makes the document inadmissible in evidence and is fatal to proof of the arrangement embodied in the document."

Ultimately, this Court held that the family arrangement in the nature of a compromise which was considered in that case did not require registration. It was further held that since the existence of the family arrangement was admitted in that case, the same was binding on the principle of estoppel. Also, even if the family arrangement could not

be registered it could be used for collateral purpose, i.e. to show the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose of applying the rule of estoppel which flowed from the conduct of the parties, who, having taken benefit under the settlement for seven years, later tried to resile from the settlement."

12. Refuting the contentions raised by the learned counsel for the defendant, the learned Senior counsel appearing for the plaintiff submitted that, there is no family settlement as contended by the plaintiff and on no stretch of imagination, the arrangement, if any, as pleaded by the defendant would be held as a family arrangement or family settlement. If there was any exchange of properties in between the plaintiff and the defendant, as contended by the defendant, for which, registration of conveyance is absolutely necessary, as found by the trial court as well as the appellate court. The learned counsel also read out the relevant paragraphs of the trial court as well as the appellate court judgments to contend that the trial court and the appellate court rightly appreciated the rival claims, while negativing claim of family settlement and granting decree in favour of the plaintiff, protecting right in use of plaint C schedule pathway of the plaintiff and directing surrender of plaint E schedule property of the plaintiff after removing the plaint D schedule structures therein. The learned counsel argued that in the decisions placed by the learned counsel for the defendant, partition of properties in between sharers by oral arrangement was considered and the said decisions have no application in the present case, where the dispute is in relation to a pathway originally provided through the northern side was shifted to the southern side.

13. In view of the rival arguments, this appeal is admitted, raising the following substantial questions of law:

1. What are the essentials to succeed a claim for family arrangement or family settlement?

2. Whether a family settlement or family arrangement made orally would require registration?

14. The learned counsel for the plaintiff and the learned counsel for the defendant argued at length on the substantial questions of law.

15. In the instant case, a Commissioner was deputed and he had filed Exts.C1 and C2 reports and Ext.C2(a) plan, wherein plaint A, B, C and E schedule properties were identified. Since, the dispute is with regard to plaint C and E schedule properties, it is to be noted that as per Ext.C2(a) plan, the property located as plaint C schedule is 420 sq.links and the plaint E schedule property is also 420 sq.links.

16. In this matter, the case of the plaintiff is that, father of the plaintiff executed Ext.A1 title deed in favour of the plaintiff and there existed a way towards plaint A schedule property along the northern portion of B schedule property (the remaining 7 cents of property) in east-west direction to reach the corporation road on the northern side. PW1 given evidence supporting the said contention and also raising a specific contention that, on 13.9.2011, DW1 obstructed the said way and thereafter, he preferred a complaint before the police and accordingly, there was suggestion from the defendant to shift the pathway from the northern side of the plaint B schedule property towards the southern portion of the plaint B schedule property and accordingly, the plaint C schedule pathway came into existence. The family settlement and exchange of plaint E schedule for plaint C shedule was emphatically denied.

17. Per contra, the case of the defendant is that, there was no way available to the plaint A schedule property at any point of time and there was no corporation road on the western side, since the same was a *'thodu'* before 2003 – 2004. Further contention is that, the way available to the entire extent of 10 cents of property, is through Chakkalakkal family.

18. In this matter, the learned counsel for the defendant given emphasis to the evidence of DW1 to DW3 to establish the exchange of plaint C schedule and E schedule between the plaintiff and the defendant, as part of family arrangement. DW1, the defendant supported the case of the defendant. The evidence of DW2, the corporation councilor, was read *in extenso* by the learned counsel for the plaintiff and the defendant. On reading of evidence of DW2, who, admittedly, was the junior of the present counsel for the defendant, is that, as part of settlement, a way, capable of carrying car was provided as C schedule, in exchange of the same, plaint E schedule property was given to the defendant. Neither in chief examination nor in cross

examination, DW2, did not state the date on which the so called settlement was arrived at.Though he had given evidence that properties were measured by the Village Officer and plans were prepared, he did not know the name of the Village Officer, also, he did not see the plans so prepared. How far the evidence of DW2 is acceptable is a vital aspect. As per Exts.C1 and C2 (a), the width of the plaint C schedule pathway is only 1.2 meter, evidently, not capable of carrying atleast a small car through the said portion. If so, evidence given by DW2 in support of the family settlement, by exchange of property, by providing a road capable of carrying a car, could not be found. The trial court as well as the appellate court disbelieved the evidence of DW3, who is none other than the brother of the defendant, since DW3 given evidence that he was not in good terms with the plaintiff.

19. It is pointed out by the learned counsel for the defendant that, in Ext.A4, the title deed of the defendant, the father did not state existence of a way as contended by the plaintiff and the same would indicate that the father never intended to provide a pathway through the defendant's property at any point of time.

20. Whereas, the learned counsel appearing for the plaintiff given much emphasis to Ext.A3, a will deed executed by the father as on 25.11.1997 before the execution of Ext.A4 as on 24.8.1998, to contend that, though Ext.A3 become infructuous in view of Ext.A4 and the title in favour of the defendant, there was recital in Ext.A3 that, *towards the plaint A schedule property, a pathway was available through the northern side of B schedule*. It is argued further that the second attesting witness in Ext.A3, none other than the plaintiff, given evidence in support of Ext.A3 and proved the same. The learned counsel for the defendant submitted that, as per Ext.B2 filed before the People's Council for Social Justice, it was endorsed that the father also participated in the dispute, when dispute as to pathway was considered.

21. On perusal of Ext.B2, it is noticed that, as on 28.1.2004, George (father of the plaintiff and defendant) and Sandhyavu, the defendant participated in the discussion with regard to the price of the property, but no amicable settlement worked out. Therefore, as per Ext.B2, George never stated that there was no way available to plaint A schedule property.

22. In this case, the trial court as well as the appellate court negatived the contention raised by the defendant, mainly disbelieving

the family arrangement and also highlighting the necessity of registration of such exchange. The trial court relied on Section 54 of T.P. Act and Section 17 of the Registration Act, 1908, to hold that transfer in case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, could be made only by a registered instrument.

23. Insofar as a family arrangement or a family settlement is concerned, if it is made orally without there being any document, the said family arrangement does not require registration. But, in order to establish a family arrangement or a family settlement effected orally, there should be sufficient pleadings to that effect and the said pleadings should be proved by cogent and convincing evidence. In the instant case, the case of the plaintiff is that, the father originally made available a way through the northern side of the plaint B schedule property and when the defendant expressed dissatisfaction of using the said way, by consent, the same was shifted to the southern side and the same is plaint C schedule pathway. But the case of the defendant is that, plaint A schedule property had no way through plaint B schedule and when Chakkalakkal family denied the way available to plaint A schedule, as part of family settlement, in exchange of plaint B schedule property, plaint C schedule pathway was given.

24. Insofar as the family settlement by exchanging plaint C and E schedule properties is concerned, the same is not properly proved and the evidence of the crucial witness DW2 also is not in support of case put forward by the defendant, since the width of the plaint C schedule pathway is only 1.2 meter, not capable of carrying a car, as deposed by DW2. To summarise, the family

arrangement or settlement is not at all established in this case to find exchange of plaint C schedule pathway for plaint E schedule. Contrary to the above, formation of plaint C schedule way, as contended by the plaintiff, is established by evidence. Thus, the trial court and the first appellate court rightly found so and the said verdicts do not require any interference.

25. Answering the substantial questions of law as above, it is held that the appeal is liable to fail.

26. In the result, this Regular Second Appeal fails and is dismissed.

All interlocutory orders stand vacated and all interlocutory applications pending in this Regular Second Appeal, stand dismissed.

Registry shall inform this matter to the trial court as well as the appellate court, forthwith.