

**(1917) 01 MAD CK 0015**  
**In the Madras High Court**

Aiyavier

APPELLANT

Vs

Subramania Aiyar and Others

RESPONDENT

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**Date of Decision :** 09-01-1917

**Acts Referred:**

**Citation :** AIR 1918 Mad 395 : (1917) 6 LW 22 : (1917) 32 MLJ 439

**Hon'ble Judges :** Oldfield, J;Abdur Rahim, J

**Bench :** Full Bench

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## **Judgement**

Abdur Rahim, J.—The 3rd defendant who died since the institution of the suit at the age of about 92 was the grandfather of the plaintiffs -

1st and 2nd respondents and divided brother of 1st defendant's father. He purported to make a settlement of the family property on 16th May

1911 by Exhibit A and the question under litigation was how far if at all it was valid and binding. Both the Courts have found that the settlement

was not brought about by the exercise of fraud or undue influence on the part of the 1st defendant and I am unable to say that the finding is vitiated

in law as contended for the 1st and 2nd respondents by the onus of proof being wrongly laid on them. The finding was arrived at on a

consideration of all the circumstances and the evidence bearing on the point, and we are not at liberty to re-open it in second appeal. The

Subordinate Judge, however, held that the settlement was validly revoked by the 3rd defendant by Ex. B inasmuch as according to him the 3rd

defendant had executed Exhibit A under a mistaken notion that the plaintiffs were not of sound mind Exhibit B had been executed not, as the

Subordinate Judge wrongly imagined after the institution of the suit but before it and it was under this mistake as to its date that he raised an

additional issue and called for a finding upon the effect of the deed of revocation.  
- It is undoubtedly strange that the plaintiffs should not have relied upon the alleged revocation in the plaint itself and it is also remarkable that the 3rd defendant should not have joined as a plaintiff in getting the deed of settlement set aside, if the allegations of the plaintiffs were well-founded. However that may be, even granting that the plaintiffs were not in fact of unsound mind as stated in Exhibit A, that in itself would not be sufficient in law to invalidate the settlement, Apart from any question as to whether the 3rd defendant at the time he executed the deed understood the nature of his act, - which plea so far as it was raised at the trial has been negatived - the mistaken assumption only bears upon the motive which induced the 3rd defendant to execute Exhibit A and does not amount to mistake as to his rights which would justify the court in passing a decree for its cancellation.

2. It is clear from the provisions of Exhibit A by which the 3rd defendant sought to make a complete partition of the family properties, allotting to himself and the plaintiff the shares to which they were respectively entitled, that he intended to create a division of status and property. That being so, there can be little doubt that the settlement which he sought to make of his own share was valid in law. It is undoubtedly settled law that a co-parcener cannot make a gift of his undivided share See *Baba v. Tima* ILR (1883) M. 357 and *Ramanna v. Venkata* ILR (1888) M. 246. But once the co-parcenary is converted into tenancy-in-common, there is no bar to a member of the family disposing of his share by gift, and can make no difference in law that both the partition and gift were effected by means of one and the same instrument.

3. But the settlement under Exhibit A is of specific properties (in schedule A) which the 3rd defendant reserved to himself for his share. That a Hindu father can partition the family property between himself and his sons is well established in this Presidency. See *Kandasami v. Doraisami Iyer* ILR (1880) M. 317, *Murugayya Maniyakaran Vs. Palaniyandi Maniyakaran through his mother and guardian Sundaralakshmi Ammal and*

Another, , It is hardly disputed that the fact that there are grandsons can be no bar to the exercise of his rights; for the grandsons' right is to stand

in the shoes of their father. The question then arises, should the death of the son make any difference. There is no express decision on this point,

but it is difficult to see why it should. The right of a father to partition family property between himself and his sons and their sons would seem to

include the right to make such partition when the sons are dead and grandsons alone are living. A partition at the will of the father can only be valid

if it is equal and fair. In this case there can be no doubt that it was so as was conceded before the District Munsif and is amply clear from the facts.

4. The Subordinate Judge's judgment must be set aside and the decree of the District Munsif restored with costs here and in the court below.

Oldfield, J.

5. I entirely agree and only wish to add a few words regarding the scheme of the settlement, Exhibit A and Mr. T. Rangachariar's argument from

its terms. It no doubt begins with a statement that plaintiffs have lost their right to the settlor's properties, because they are of unsound mind. But,

looking to the fact that it was apparently drafted without legal advise and to the clear statements contained in its later provisions, I find no difficulty

in holding that the settlor's intention was to make a partition, the reference to plaintiffs' incapacity having no effect, except that their shares were

vested during its continuance in 1st defendant for their benefit. As they were never really incapable, that and the further provisions for 1st

defendant's reversionary interest never took and never could have taken effect. Exhibit A being essentially an expression of intention to adopt a

divided status, my learned brother's conclusion follows, that the gift of the settlor's share to 1st, defendant is valid, notwithstanding that it is

contained in the same document.

6. I therefore concur HI the decree proposed.