
(1929) 04 MAD CK 0033
In the Madras High Court

A.M. Narayana Sah

APPELLANT

Vs

A. Sankar Sah and Others

RESPONDENT

Date of Decision : 09-04-1929

Acts Referred:

Citation : AIR 1929 Mad 865 : (1930) ILR (Mad) 1 : 121 Ind. Cas. 1 : (1929) 30 LW 751 : (1929) 57 MLJ 685

Hon'ble Judges : Pakenham Walsh, J

Bench : Division Bench

Judgement

Pakenham Walsh, J.—This is a suit by the plaintiff for partition of joint family properties and for delivery of his share. One Munusami Sah,

Sankar Sah (1st defendant), Chinnasami Sah and Ponnu-sami Sah were four brothers. The 1st defendant is one of the above four who is alive.

Munusami Sah had three sons and a daughter. One son Sudarsana Sah filed C.S. No. 63 of 1910, got a share and separated himself from the

family; the second son Chender Sah is the 10th defendant and plaintiff is the third son. Various other members of the family are set out in the

genealogical tree and it is unnecessary to particularise them further here. The plaintiff is the appellant.

2. There are only two questions in the appeal: one of fact and one of law. The one of fact is, whether the contract with the Madras Corporation

was a separate business of the 1st defendant or a joint family business. The learned Judge has found on the question of fact that it is a joint-family

business and I have no hesitation in agreeing with him. The family was one which traded by taking contracts, but the plaintiff alleges that this

contract with the Madras Corporation was solely carried on by the 1st defendant. Paragraph 9 of the plaint states that the 1st and 8th defendants

have been carrying on a family trade in gold lace, lametta and other goods and have also been carrying on the family contracts on behalf of the

joint-family with the Government, for the supply of badges and for stitching uniforms to the Army, Police, etc. Under such circumstances, there is

no reason to suppose that the contract with the Corporation would also not have been a joint-family business. The chief argument urged against

this is that in the written statement filed by the present 1st defendant in the partition suit he puts himself down as a debtor to the family in a sum of

Rs. 9,000 (Item No. 214). This admittedly represents the value of materials which had been handed over to the family by one Chockalinga

Naicker who was indebted to the family and had undertaken the contract with the Corporation. At the time of this partition suit, the contract with

the Madras Corporation had not been taken up by the plaintiff's family and the plaintiff in that suit was therefore not concerned with it. The 1st

defendant has explained why under the circumstances he showed himself as a debtor for this amount to the family. In the Thundn-kanakku with a

Chetti for sums borrowed on account of this contract, there is a credit for Rs. 1,359-3-9 in respect of lametta which obviously refers to joint-

family business in that commodity. Moreover, the 10th defendant who supports the plaintiff's case that the contract business was not joint-family

business admits that he was writing the accounts for it. He stated first that he only began to do so in 1915 but had to admit that he had written them

ever since the contract was entered into in 1910 and he could only give the lame explanation that he wrote them" as he was asked to. The other

adult members of the family were in fact writing these accounts though plaintiff professes that he kept entirely aloof. The 8th defendant admits that

the contract was a joint-family one and I have no hesitation in agreeing with the finding of the Court of First Instance in this matter.

3. The second question, which is one of law, is much more difficult and turns on the point whether the share taken by the plaintiff's branch of the

family when his brother Sudarsana became divided is to be taken into account or not in making the present partition. The learned Judge following

the decision in Manja-natha v. Narayana I.L.R.(1882) M. 362 has held that the share must be taken into account and he has accordingly granted

the plaintiff only 112 instead of 118. We have been asked to make a reference to a Full Bench as to whether this decision is still good law. The

grounds urged against its correctness may be summarised as follows:

(1) That it proceeds on a wrong principle of law in holding that the share of any member or branch of an undivided Hindu family can be predicated

before an actual partition is made and that a view opposite to Manjantha v. Narayana I.L.R.(1882) M. 362 has been taken in Pranjivandas Shivilal

v. Ichharam I.L.R.(1915) B 734.

(2) That the Smriti Chandrika which is invoked by the learned Judges in Manjanatha v. Narayana I.L.R.(1882) M. 362 in support of their view has

since been held to be not an authority and that failing this the Mayukha which holds in an opposite sense is good law in this Presidency unless it is

opposed to the Mitakshara.

(3) That the argument relied on that those who have capacity to confer spiritual benefits on the common ancestor ought to take equal shares, is no

longer sound in law.

(4) That even as regards equality, it cannot be secured by taking a previous division into account, that such a course may actually work inequality

and that it is impracticable in execution. We are asked to hold that the correct law is that adopted in Pranjivandas Shivilal v. Ichharani I.L.R.(1915)

B 734 in which Manjanatha v. Narayana I.L.R.(1882) M. 362 was considered and dissented from.

4. Turning to the first argument, the principle that the share of any member cannot be predicated until the partition is actually effected was laid

down by the Privy Council as long ago as Appo-vier v. Ramasubba Aiyan (1866) 11 M.I.A. 75 . Lord Westbury says:

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

the joint and undivided property, that he, the particular member, had a certain definite share.

5. Mayne on Hindu Law, page 346, paragraph 270, is also quoted. He says:

It is common to say that in an undivided family each member transmits to his issue his own share in the joint property, and that such issue takes per

capita inter se, but per stirpes as regards the issue of other members. But it must always be remembered that this is only a statement of what would

be their rights on a partition. Until a partition all their rights consist merely in a common enjoyment of the common property, to which is further

added the right of male issue to forbid alienations, made by their direct ancestors.

6. It is urged on the other side that though it may not be quite correct to talk about any branch or member having a vested interest in a joint family,

nevertheless in this Presidency a member has in a certain sense a definite share at any moment which he can alienate and that his power to alienate

extends to the share to which he would be entitled if division took place at the time of alienation and the alienee's right will not be diminished by

subsequent births in the coparcenery. *Chinnu Pillai by guardian Ramachandram Pillai Vs. Kalimuthu Chetti*, . It is also urged that advances made to

a coparcener for private purposes and not for the benefit of the family considered as a whole can be adjusted at partition. (*Sreemutty*

Soorjeemoney Dossee v. Denobundoo Mullick (1857) 6 M.L.A. 540). It is further contended for the respondent that one branch cannot take

more than its share by effecting a separate partition amongst its members while the rest of the family remains united and it was endeavoured to

deduce this equality of the sons from the text in *Yajnavalkya* 120 and *Vignanesvara's* commentary thereon. Mr. Srinivasa Aiyangar for the

respondents has furnished a translation of the text and of the commentary. Speaking for myself, I do not see any reason to prefer it to that given in

Setlur. The latter translates *Pitruthas* "'according to father.'" It appears to me to be preferable to "'through the fathers.'" It is also the translation in

Mandlik. In the commentary it is no doubt true that the words *Pithrud-waraneva* are very emphatic and I take it that they literally mean "'verily

through the door formed by the father.'" The words *N aswaroopapekshaya* which Mr. Srinivasa Aiyangar translates "'not by reason of their own

personal being'" are if I may say so respectfully better rendered by *Cole-brooke* "'not with respect to themselves'" though it is difficult to give an

exact English equivalent of *Swaroop*. I may note that in a case before my learned brother *Devadoss*, J. and myself the very same text and the

same commentary have been quoted to show quite the opposite thing, namely, that the sons really represent the grandfather's estate and that the

only way the father comes in is as a mere measure or quotient. For the purposes of the present case, it appears to me to be immaterial which view

we adopt, i.-e., whether we stress the importance of the father or reduce him to a mere mathematical quotient, because the text does not throw

any light on whether the father's share is to be deemed to remain the same at the second partition as it was before the partition which is the point in

question here. There is no doubt that the view of the Privy Council in *Sree-mutty Soorjeemoney Dossee v. Denobundoo Mullick* (1857) 6 M.I.A.

540 must have been well known to their Lordships at the time they decided *Manjanatha v. Narayana*. I.L.R.(1882) M. 362.

7. The second argument is about the *Smriti Chandrika*. It is urged firstly that some later decisions go to show that it is no longer of force in the

Madras Presidency and secondly it is pointed out that even if it is an authority it has no application to the present case. As regards the first point

we are referred to *Narasimha Charlu v. Venkata Singaramma Kristnayya v. Venkat-ramayya* I.L.R.(1882) M. 362 and *Kodali Kristnayya and*

Others Vs. Kodali Guravayya and Others, Although *Kodali Kristnayya and Others Vs. Kodali Guravayya and Others*, does not show that the

Smriti Chandrika was referred to, it will be seen from *Kristnayya v. Venkatramayya* that its authority was urged in defence of the view which the

Court ultimately declined to accept. Curiously enough, in that case, the learned Counsel who supported the view which was opposed to the *Smriti*

Chandrika is reported as quoting *Manjanatha v. Narayana* I.L.R.(1882) M. 362 to show that the *Smriti Chandrika* ought not to be accepted

where it differs from the *Mitakshara*; whereas in *Manjanatha v. Narayana* I.L.R. (1882) M. 362 it is actually invoked in aid of the Court's decision.

Their Lordships decided the case *Krist-nayya v. Venkatramayya* (1903) 19 M.L.J. 723 (F.B.) following an unreported decision in A.S. No. 170

of 1901 by three Judges, Subramania Aiyar, Benson and Bhashyam Aiyangar. The judgment in *Kristnayya v. Vcnkatramayya* (1903) 19 M.L.J.

723 (F.B.) does not mention the *Smriti Chandrika* at all and the learned Judges merely say ""We do not think that this contention,"" (i.e., that the

son of a reunited brother would not have the status of a reunited member with his uncle) can be supported by any text of the Hindu Law or by any

reported case. In that case *Abhai Churn Jana v. Manga* I.L.R.(1892) C. 634 Janav was relied on. But the most important case cited by the

plaintiff to show that the *Smriti Chandrika* is not an authority in this Presidency is *Kodali Kristnayya and Others Vs. Kodali Guravayya and Others*,

Phillips, J., at page 505 remarks:

In *Kristnayya v. Venkatramayya* (1903) 19 M.L.J. 723 (F.B.) a Full Bench of this Court held that this contention of proportionate shares could not be supported by any text of the Hindu Law and was opposed to the fundamental conception of the status of an undivided Hindu family or of a reunited Hindu family. Whether this passage in *Smriti Chandrika* was quoted before the learned Judges in that case does not appear from the report; but it was quoted in a later case reported in *Narasimha Charlu v. Venkata Singaramma* I.L.R.(1909) M. 165: 19 M.L.J. 719 in which a Bench of this Court declined to accept the authority of the *Smriti Chandrika* and followed a previous Full Bench ruling.

8. The learned Judge states that there is one case in which a single Judge of this Court (*Sankaran Nair, J.*) held the contrary view, but that the balance of authority was in favour of the view that on reunion the members are remitted to their former status. The *Smriti Chandrika* lays down the opposite of this. The other Judge in that case, *Krishnan, J.*, expressed no opinion about the *Smriti Chandrika*. At the time when *Man-janatha v.*

Narayana was decided there was some uncertainty whether when one member becomes divided the question whether the others separated or remained joint was purely one of fact. It is now settled law that it is simply a question of fact and no legal fiction of separation and reunion has to be invoked. The last decision on this point is AIR 1925 49 (Privy Council) . In the present case, the very terms of the first division state that the rest of the family remained joint. Vide Ex. A. (plaint in C.S. No. 63 of 1910, paragraph 4). The importance of this point lies in this that if the rest of the

family remained joint, as they undoubtedly did, the *Smriti Chandrika* which refers only to partition after the family has become reunited and says

that under these circumstances division may be unequal if the reunited partners had brought unequal shares to the common, stock has no

application and can be merely used as an analogy. In fact Mr. Srinivasa Aiyangar frankly admitted that he did not rely on the *Smriti Chandrika* to

support his position and argued that even in *Manjanatha v. Narayana* I.L.R. (1882) M. 362 it was only used by way of analogy. The danger of

such an analogy has been pointed out in *Debi Parshad v. Thakur Dial* I.L.R. (1875) A. 105 (F.B.) a Full Bench case. Their Lordships say:

It is dangerous then to draw an analogy from the special rules which apply to the devolution of the shares of re-united brethren. Indeed, the

circumstance that rules have been specially prescribed to regulate the devolution of the common property of re-united brethren affords ground for

arguing that they were exceptions to the ordinary rules regulating the partition of the common property of an undivided family.

9. Therefore, as regards the second argument it would appear (1) that the authority of the Smriti Chandrika in this Presidency has been doubted

and departed from, (2) that even if it is accepted, it has no application to the case where the family remains joint after the partition and in the view

of Allahabad it even tells the other way. The importance of this lies in the fact that one of the reasons why the Bombay High Court in *Pranjivandas*

Shivlal v. Ichharam I.L.R.(1915) B. 734 felt itself entitled to dissent from the Madras decision was that the Madras High Court relied on the

authority of the Smriti Chandrika which has no direct authority in Gujarat wherefrom the Bombay case came, and that the *Mayukha* was opposed

to it. If the Smriti Chandrika has no authority in Madras or if the passage relied on does not apply to the case before us, and if it cannot be shown

that the principle laid down in the *Mayukha* is opposed to the *Mitakshara*, then the argument that we should follow the principle of *Mayukha*

receives great weight.

10. The third ground of argument is that one of the reasons of the decision in *Manjanatha v. iNarayana*, I.L.R.(1882) M. 362 namely, that equality

of funeral oblations implies equality in partition is now obsolete, as religious efficacy as a test for a heritage has been exploded by a series of cases

of which *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar* (1914) L.R, 41 IndAp 290 : J.L.R. 42 C. 384 : 1914 27 M.L.J. 333

(P.C.) is the latest and that religious efficacy is now confined to cases of rival claims to succession between two bandhus of equal status, where it is

said that the greater religious efficacy of one may be accounted as a ground of preference over the other. On the other side, it was pointed out that

the son of the great-grandson is not one of the coparcenary, because he cannot offer the funeral cake although from the point of consanguinity he is

the direct descendant of the propositus.

11. Mayne, 9th edition, page 347, Section 271.

12. Coming now to the fourth argument, that the alleged inequity of not taking into account the previous partition is not a fact, it was remarked in

the Bombay case that if the family had increased in wealth since the partition, it would be depriving that branch in which partition had taken place

of their share in that increase to make the second partition with reference to the first and it was also observed that it would deprive them of the

benefit which they would have got by survivorship from one or more of the stirpes in the interval between the partitions. Hayward, J., says:

It seems to me, indeed, impracticable to frame any rule which would ensure absolute equality for all circumstances.

13. On the other side, it is argued that according to the law in Bombay sons and grandsons cannot claim partition against their fathers and uncles

while the latter are alive and that this makes an important distinction when considering the argument of the Bombay High Court that the other

members of the family can divide if they wish to and if they choose to remain united they take the risk of doing so. In other words, as was tersely

stated by Muthuswami Aiyar, J., in *Manjanatha v. Narayana* I.L.R.(1882) M. 362 :

It is anomalous to hold that in a case where two brothers, each of whom may have several sons and grandsons, desire to separate, all the members

should be forced to separate, the sons and grandsons, from their father and grandfather.

14. These are the arguments that have been adduced for and against the supposed equity of the doctrine laid down in *Manjanatha v. Narayana*

I.L.R.(1882) M. 362

15. The fourth argument which deals with the practicability of having regard to a previous partition is of considerable importance, though, of

course, if the law clearly enjoins that such a partition must be taken into account, then in spite of all difficulties, the law must be carried out; but the

difficulties are very considerable. In *Manjanatha v. Narayana* I.L.R.(1882) M. 362 Muthuswami Aiyar, J., distinctly states that he does not

overlook the matter of survivorship, and is not to be understood as saying that the right of survivorship on the birth of new coparceners between

the first and second partitions will in no case increase or decrease the shares to be allotted at the second partition. It is obvious that if the principle

is to be applied even while the pro-positus is alive and capable of begetting more sons, it might happen that the share taken by one member or

members of a branch at the first division would be greater than the share which

that branch would be entitled to at the time of the second division; consequently its members at the second division would get nothing at all or might even be held to be indebted to the other branches. When the propositus be dead, it is clear that the share of each branch may be increased by survivorship. It is therefore absolutely impossible to start the calculation by predicating a fixed share to each stirpes or by stating that the share which the stirpes held at the time of the first partition is the same as it held at the second. We must therefore certainly begin at the other end by calculating the shares as if the family were being partitioned for the first time and then deduct from the branch the share which it has already drawn. This again leads to considerable difficulties. Suppose one member to have been very anxious to leave the coparcenary and to have had a partition effected taking only a small amount of what really was due to him. When we are calculating the amount to be taken by this branch at the second division, are we to take it that this member received his full share on the previous occasion or merely debit the branch with what he actually took? Again, if the share is not taken in money but in property, have we got to go back and calculate the value of the property at the time of the previous division or are we to take it at its present value? Even in the present case, we have had two contentions (assuming that the view of the learned Judge is correct) as to the method of division, one is that since at the former partition A.M. Sudarsana Sah who went away took $\frac{1}{12}$, the present plaintiff's branch (plaintiff and his brother) should take one-quarter minus $\frac{1}{12}$, i.e., $\frac{1}{6}$ th or each $\frac{1}{12}$ th. This is the method which has been adopted by the learned Judge of this Court and it is the method which was contended for but not allowed in the Bombay case. On the other hand, it is argued for the plaintiff that we should consider that there are 11 shares left in the family after the departure of A.M. Sudarsana Sah of which plaintiff would get one share or $\frac{1}{11}$ th of the whole estate. It was argued that the result in *Manjanatha v. Narayana* I.L.R.(1882) M. 362 was reached by this method, but Mr. Srinivasa Aiyangar for the respondents has shown that in the Madras case the result obtained can be reached by the other method. The principle of stare decisis has, of course, been strongly urged upon us. But there do not appear to have been any reported cases since *Manjanatha v. Narayana* I.L.R.(1882) M.

362 where this precise point arose. In A.S. No. 223 of 1917, the question was whether, when a father only had separated both from his own

father and from his son and the son remained joint with his grandfather, the son was liable for a mortgage binding on the latter. In that case,

Manjanatha v. Narayana I.L.R.(1882) M. 362 was only referred to on the question as to whether the withdrawal of some members of a branch

affected the application of the principle of representation as between the different branches. Sir John Wallis, C.J., notices the decision in

Pranjivandas Shivilal v. Ichharam in the following words:

The decision in Manjanatha v. Narayana I.L.R.(1882) M. 362 has been dissented from in Bombay in Pranjivandas Shivilal v. Ichharam" on

grounds to some extent peculiar to that Presidency. As at present advised, I see no sufficient reason for differing from it in this Presidency; but,

whatever the basis on which Mainckam's share should be calculated on a fresh partition, I think the parties to Ex. I clearly manifested the intention

that Manickam should remain united with his grandfather's branch.