

(1948) 12 MAD CK 0012
In the Madras High Court

Arunagiri Goundan

APPELLANT

Vs

Vasantharoya Goundan and Others

RESPONDENT

Date of Decision : 13-12-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2

Citation : (1949) 62 LW 223 : (1949) 1 MLJ 373

Hon'ble Judges : P.V. Rajamannar, C.J

Bench : Division Bench

Judgement

P.V. Rajamannar, C.J.—This is an appeal by the first defendant in O.S. No. 39 of 1944 in the Court of the Subordinate Judge of Salem

against a preliminary decree for partition passed therein. The suit was originally instituted by seventeen persons, but as the 13th plaintiff died

pending suit, plaintiffs 18 to 21 were added as his legal representatives, and when the suit came up for hearing, there were twenty-one plaintiffs.

There were six defendants. The suit for partition was based on the allegation that the plaintiffs and defendants were members of a joint Hindu

family and the properties set out in the plaint schedule belonged to them as members of the family. The suit was contested only by defendants 1

and 3 who admitted the relationship set out in the pedigree filed along with the plaint so far as their relationship with plaintiffs 1 to 3 was concerned,

but denied that plaintiffs 4 to 21 were related to them (defendants) in the manner set out in the pedigree. The contesting defendants further denied

that even plaintiffs 1 to 3 were entitled to any relief because they were not members of a joint family along with the defendants. The learned

Subordinate Judge found that plaintiffs 4 to 21 were related to the defendants as claimed by them (plaintiffs) and that the suit properties were the

joint family properties of plaintiffs and defendants. He therefore passed a preliminary decree for partition in accordance with the shares to which

the parties would be lawfully entitled accepting the pedigree attached to the plaint and marked as Ex. P-i in the case. As already mentioned, the 1st

defendant is the only party who has chosen to appeal against this decree.

2. According to the case set out in the plaint, Arunachala Goundan the grandfather of the 1st plaintiff had two brothers whose names were not

known. Plaintiffs 1 to 3 and defendants 1 to 6 were the descendants of Arunachala Goundan by his only son Karia Goundan alias Annamalai

Goundan, while plaintiffs 4 to 21 were the descendants of the two brothers of Arunachala Goundan. The properties which form the subject-matter

of the suit were acquired by the members of the family by their joint exertions. In accordance with the custom which prevailed in the family, the

eldest son of the eldest line always occupied the position of the manager of the family. The members of the family were all living together and as

their number increased, several dwelling houses were built for them from the common fund. The proximate cause for the institution of the suit was

the action of the 1st defendant in instituting O.S. No. 62 of 1942 against defendants 2 to 6 and the deceased elder brother Chinna Arunachala for

a partition of the suit properties completely disregarding the claims of the entire body of the plaintiffs.

3. Having regard to the status and the habits of the persons whose claims are involved in this suit, it is difficult to expect any documentary evidence

of the relationship between the parties going back to several generations. Oral evidence as to relationship of parties who must have died a

considerable time before the living memory of the oldest member of the family, namely, the 1st plaintiff, is bound to be discrepant and easily

susceptible to criticism. We are therefore thrown back on evidence of conduct and other circumstances which by a cumulative effect render one or

other conclusion possible as to the truth of the case set up by the plaintiffs. It is true that the names of the alleged two brothers of Arunachala

Goundan the ancestor of the branch of plaintiffs 1 to 3 and defendants 1 to 6 are not known. But there is evidence that Attukara Goundan and

Mattukara Goundan were the sons of one of his brothers and Mondri Goundan and Nanja Goundan were the sons of the other brother. There is

not much dispute as to the relationship to be traced from these four persons.

4. The learned Subordinate Judge came to the conclusions that the plaintiffs and defendants were members of a joint family and owned in common

the properties set out in the plaint schedule after a consideration of the several circumstances which he gathered from the evidence. We have been

taken through the evidence and we have come to the same conclusion as the Subordinate Judge came. The circumstances which have impressed

us most are the following. The plaintiffs and the defendants with their families all reside in houses more or less adjacent but all of them in a compact

compound, which is definitely fenced off from the rest of the village. They have common granaries and common places for storing fodder and

agricultural implements. It is in evidence that some of the houses were built by Arunachala the father of the 1st defendant and some others, by

Chinna Arunachala the elder brother of the 1st defendant. The 1st defendant's explanation for the position of the houses and for the fact that his

brother and father had built them with money belonging to the family was that it was due to an assurance that they would all be permanent

labourers on the lands belonging to the 1st defendant's branch. The learned Subordinate Judge did not accept this explanation and we think rightly.

It is most unlikely that if the members of the branch of the 1st defendant were in the position of landlords and the others, in the position of mere

labourers, the houses of the latter would have been built in such close proximity to The houses of the former.

5. Though it is not clear if Karia Goundan, the son of Arunachala Goundan, was possessed of any property, according to the evidence now on

record, the properties were acquired only by Arunachala the father of the 1st defendant and Chinna Arunachala his elder brother. Even according

to the 1st defendant, his father originally migrated into this village from a neighboring village, and he admitted I hat along with him from the very

inception Attukara Goundan and Mattukara Goundan, Pandara Goundan, Nanja Goundan and others worked with his lather. This admission of his

goes a long way in rendering the plaintiffs' case probable that the members of this family came to the village and worked jointly taking lands on

lease. In course of time the family was also able to acquire lands for itself.

6. In spite of slight variations there is significant agreement between the

evidence of the; 1st defendant and the evidence on behalf of the plaintiffs as to the manner of distribution of the produce from the lands. The 1st defendant admitted that originally his father and subsequently his eldest brother would give definite quantities of paddy to each male and female member of the family of the plaintiffs. Only he would add that this distribution was really in the nature of payment of wages. I referred to his elder brother as the "head," that is, as the manager of the family. According to the plaintiffs' witnesses, there was a division of the produce at the thrashing floor in accordance with the needs of each branch of the family. But the fact remains that the plaintiffs were enjoying the income from the suit properties, and if we reject the case of the first defendant that they were coolies and were paid wages, the only inference left is to accept the case of the plaintiffs that they were members of a joint family.

7. There is some evidence which the learned Judge has accepted that the expenses of the marriages of the members of the family were met out of family funds. Like-wise, other expenses such as medical charges were also met in the same way. P.W. 4 is the family physician who has deposed to this and the learned Judge saw no reason to disbelieve his evidence. We too see no reason to reject this evidence. The result is that there is evidence of joint living, of joint exertion, of joint acquisitions and joint enjoyment of the suit properties. In view of this evidence, we do not consider it to be a material flaw in the plaintiffs' case if they have not been able to establish by direct evidence that plaintiffs 4 to 21 were the descendants of two brothers of Arunachala, the ancestor of the branch of defendants 1 to 6 and plaintiffs 1 to 3.

8. The learned advocate for the appellant urged, that it was most improbable that for such a length of time the several members of the family should have continued to be joint, but that is not surprising because apparently education had not destroyed mutual confidence and trust and the spirit of individualism had not made inroads into habits of communal living.

9. We therefore agree with the learned Subordinate Judge that the plaintiffs and the defendants are members of a joint Hindu family and the suit properties belong to them as such. It is not the case of the 1st defendant that there has been a division in the family at any time. The plaintiffs therefore are clearly entitled to a decree for partition.

10. There is one matter however relating to procedure which calls for some comment. The onus in this case initially lay with the plaintiffs to establish their case and quite properly the case began with the examination of the first witness for the plaintiffs on 9th March, 1945. But the learned Subordinate Judge then followed a somewhat curious procedure. Before the evidence of the first witness for the plaintiffs was concluded, he summoned the 1st defendant as a Court witness and examined him on certain matters. He was again examined on 14th March, 1945, on which date P.W. 1 was also further examined. Again on 21st March, 1945, the 1st defendant was recalled and further examined by Court. The plaintiffs' advocate was also permitted at this stage to put questions to him. Finally, after the plaintiffs had closed their evidence, the 1st defendant examined himself as the first witness for the defence. The learned Judge in his judgment apparently referring to this procedure relies upon Order 10, Civil Procedure Code. We are of the opinion that the learned Judge was not justified in following this course and Order 10, Rule 2 of the Code does not contemplate such procedure. Order 10, Rule 2 runs thus:

At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

At the outset it must be pointed out that this does not provide for an examination on oath. This provision was intended to be used to elucidate the matters in controversy in suit before the trial began. This is not a provision intended to be used to supersede the usual procedure to be followed at the trial. Their Lordships of the Judicial Committee in *Manmohan Das v. Musammat Ramdei* (1931) 35 C.W.N. 925, made the following remarks when their attention was drawn to a similar procedure adopted at the trial:

At the trial before the Subordinate Judge the evidence first recorded is that of the defendant, Behari Lal, who is described as a "Court witness" and appears to have been called into the witness-box by the Judge himself. The record before their Lordships discloses no justification for this unusual proceeding. No doubt under Order 10, Rule 3 any party present in Court

may be examined orally by the Court at any stage of the hearing, and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party. But this power is intended to be used by the judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18.

We are, however, satisfied, that this procedure has not resulted in any miscarriage of justice.

11. The appeal is dismissed with costs.