

(1922) 03 MAD CK 0036
In the Madras High Court

Chelasami Atchamma and Others

APPELLANT

Vs

Chelasami Venkatasubbayya and Others

RESPONDENT

Date of Decision : 22-03-1922

Acts Referred:

Citation : AIR 1922 Mad 423 : 70 Ind. Cas. 748 : (1922) 16 LW 268

Hon'ble Judges : Phillips, J;Devadoss, J

Bench : Division Bench

Judgement

Phillips, J.—Plaintiff's husband in this case and defendants Nos. 1 to 3 re the sons of one Chelasami Ramaswamy by his second wife. He had also two sons by his first wife and in 1892, a partition of the family property was effected. The reason for effecting the partition was that the first wife had died and there were disputes between the first wife's two sons and their step-mother.

2. The question for decision in the appeal is whether, in that partition, all the members of the family became divided including not only the sons by the first wife but also the minor sons by the second wife or whether the father and the minor sons by the second wife remained a joint undivided family. It is the plaintiff's case that not only did the two sons by the first wife become divided but that all the members of the family effected a partition. There is no doubt a presumption that when there is a partition in a family there is a total partition and not merely a partial partition but this is a presumption which can be rebutted, and the circumstances in each case will show how much importance is to be attached to the presumption and what amount of evidence would be necessary to rebut it. In the present case the partition was effected by the father from his sons and for a special reason, namely, that the sons by the first wife were not getting on well with the second wife. There was, therefore, good reason for separating himself from his two sons but that reason does not apply to a separation between himself and the minor sons of his second wife who is still alive and, as a matter of fact, subsequently bore another son. The presumption in this case, therefore, is not so strong as it might be in other circumstances.

3. As regards the evidence of this partition, we have two of the partition lists prepared at the time, Exhibits C and XIV. (Exhibit C is the list of property that fell to the share of Narasimhulu, the elder son of Ramaswami. He is called co-sharer No. 2 and the younger brother co-sharer No. 3; and apparently the father was co-sharer No. 1, although it is not specifically stated, but it is the only other sharer that is definitely mentioned in the document. Similarly, Exhibit XIV is a list of property that fell to the share of Ramaswami and his three minor sons, and there again we have the reference to Narasimhulu No. 2 share-holder and Venkataratnam No. 3 share-holder. It would appear from these facts that there was a division into three shares, that one share was allotted to each of the two major sons and the remaining share to the father and the three minor sons jointly. Mention is made of six shares in several places and in order to ascertain the shares of Narasimhulu and Venkataratnam it was necessary to find out what was the one-sixth share to which each of them was entitled and consequently to divide the property into six shares. The mere recital that there were six shares does not in any way show that there was actual division by metes and bounds into six shares, and that theory is negated by the fact that the four shares which fell to the father and his minor sons are not divided but are treated as one single share. From these documents it appears quite clear that there was no partition between the father and his minor sons by his second wife.

4. There is, however, some oral evidence adduced for the plaintiff that, as a matter of fact, the partition was effected between all the members of the family. These witnesses have not been believed by the Subordinate Judge and I think that he has given good reasons for rejecting that oral evidence which is opposed to these two partition lists.

5. In addition to these partition lists there are recitals in subsequent documents. Exhibits XV, XVI and XVII, in which the family of Ramaswami and his sons by his second wife is treated as undivided. Exhibit XVI, a sale-deed of Immovable property purports to have been executed by Ramaswami and his "undivided" sons. Exhibit XVII is a document executed by two of his sons alone in 1905 after their father's death and the recital therein is that the sale was effected on account of "our necessity," namely to discharge the debts contracted by "our father." If they were divided from their father there would have been no necessity for them to discharge his debts, although there might have been a moral obligation to do so. The recital in the documents that it was "our necessity" strongly supports the theory of non division.

6. Exhibit XV, executed in 1906, is a sale-deed by all the brothers two of them being majors and the other two being minors and these minors are said to be represented by their guardian and undivided brother. All these recitals, made at a time when the matter was not at all in dispute, are of importance in deciding the question and they satisfactorily show that there really was no division between Ramaswami and his sons by his second wife.

7. The plaintiff relies on an admission made by the four sons in the plaint in

Original Suit No. 19 of 1912. In paragraph 3 of that plaint they state that "before 4th defendant was born, the plaintiff's father, the late Ramaswami, had effected a division of the entire property possessed by his family and apportioned on the same to himself, to plaintiffs Nos. 1, 2 and 3, to the 1st defendant's husband and to the second defendant's father, about twenty years ago, without any liabilities." No doubt that is a statement that the parties had become divided, and it is contended on behalf of the plaintiff that that is sufficient to rebut all the other evidence of non-division. The first defendant states that this statement was put in to the plaint by his Vakil and is not in accordance with the instructions given by him. The Subordinate Judge has not believed the statement, for the Vakil stated that he had drafted it on instructions, but, whatever may be the reason for this statement, it stands entirely by itself and is contradicted by the conduct of the parties after the statement was made; for it is not disputed that since 1913, the brothers were all Irving jointly and enjoying their property in common. I do not think that this admission, though it is a strong piece of evidence, is sufficient to rebut the other evidence in the case, and I would, therefore, find that in 1892 the only partition that was effected was between Ramaswami and his two elder sons.

8. Another argument is put forward in appeal, namely, that the statement in the plaint in Original Suit No. 19 of 1912 in itself effects a partition between the defendant and the plaintiff's husband on the ground that this is an unequivocal declaration of the intention of the parties to become divided. We have been referred to a number of cases dealing with this question of declaration of intention, two of which are *Sashi Bhusan Panignahi v. Labanyabati Debya* 43 Ind. Cas. 981 and *Yadeo v. Namdeo* 64 Ind. Cas. 536 : 30 M.L.T. 53 : 17 N.L.R. 145 : 26 C.W.N. 393 : 42 M.L.J. 219 : 15 L.W. 565 : 20 A.L.J. 481 : 24 Bom. L.R. 609 : 49 C. 1 : A.I.R.(1922) (P.C.) 216. In the first case it was held that the statement made in a Will that the testator was divided from his brother coupled with the fact that he divided his property under the Will as a divided member was sufficient to establish the intention. In the second case recital in a deed of adoption was also held to be sufficient evidence to prove intention. But, as is pointed out by the Privy Council in *Suraj Narain v. Iqbal Narain* 18 Ind. Cas. 30 : 35 M.L.T. 194 : 17 C.W.N. 393 : 11 A.L.J. 172 : (1913) M.W.N. 183 : 17 C.L.J. 288 : 24 M.L.J. 345 : 15 Bom. L.R. 456 : 16 O.C. 129 the intention must depend on the facts of each case, and certain cases have been cited for the respondents to show other circumstances, in which the intention was not proved. I may also refer to the remarks in *Girja Bai v. Sadashiv Dhundiraj* 37 Ind. Cas. 321 : 43 C. 1031 : 43 I.A. 151 : 12 N.L.R. 113 : 20 C.W.N. 1085 : 14 A.L.J. 822 : 20 M.L.T. 78 : (1916) 2 M.W.N. 65 : 18 Bom. L.R. 621 : 4 L.W. 114 : 24 C.L.J. 207 : 31 M.L.J. 455 in which it was stated that the intention to separate may be evidenced in different ways, either by explicit declaration or by conduct. In the present case the declaration relied on is in paragraph 3 of the plaint in Original Suit No. 19 of 1912 which I have stated above. That is merely a recital that twenty years ago the parties became divided in status. It also contains further recital that on the

death of the father seven or eight years ago, his share devolved on a son who was not born at the partition. I have found that the first statement is not a correct statement of fact and, similarly, it is shown that the statement of the father's share devolving on the then unborn son is also incorrect. The question then is whether two statements of facts which are not correct can be said to constitute a declaration of the intention of the persons making it to become separate in status. The statement itself does not expressly mention any such intention but it may be treated as showing the intention if there is any other circumstance which would show that intention. In the present case there is no attending circumstance from which such an intention can be deduced. The statement was made for purposes of litigation not in a suit against another member of the family but against those who had actually become divided twenty years ago. It is possible that the plaintiffs in that case may have wished the other side to believe that they were divided although really they knew they were not divided and had no intention of becoming divided, and this if it were done merely with the wish to make the other side believe, does not amount to an expression of their intention to become divided. It may be reprehensible conduct on their part to deceive the other side but that does not constitute a declaration of their intention. In the absence of anything to show that the plaintiffs in that case had any intention to separate and in the presence of circumstances which show that subsequently they continued to be joint, I think it is quite impossible to hold that there was any declaration of their intention. In this view Appeal No. 39 fails and must be dismissed with costs.

9. Appeal No. 59 is by, defendants Nos. 1 to 5 and relates to one item of property which was acquired by the brothers admittedly as separate property. It is contended for the appellants that it was thrown into the, common stock and should also be treated as joint family property. No doubt, it was acquired in a litigation on which the funds of the family were spent and the whole of the family got a share in this property but that is no reason for holding that they held it as joint family property. There is no other evidence to show that they deliberately threw it in the common stock and in the absence of this, the appeal must fail and be dismissed with costs.

Devadoss, J.

10. I agree.