
(1917) 02 MAD CK 0002
In the Madras High Court

Hussain Sahib and Others

APPELLANT

Vs

Hassan Saib and Others

RESPONDENT

Date of Decision : 23-02-1917

Acts Referred:

Citation : 41 Ind. Cas. 184 : (1917) 5 LW 835

Hon'ble Judges : John Wallis, C.J.;Seshagiri Aiyar, J;Oldfield, J

Bench : Full Bench

Judgement

John Wallis, C.J.—This is an appeal from the prevailing judgment of Mr. Justice Sadasiva Aiyar affirming the judgment of the District Judge

of South Canara, Mr. Justice Tyabji dissenting.

2. The parties are Muhammadans and the suit was brought by the plaintiff for partition of the suit properties which, he alleged, belonged to the joint

family of the plaintiff and the defendants. The parties are descendants of one Abdul Razak, whose four sons executed a partition deed in 1818.

Their family residence was at Manki in North Canara, but the third brother Hussain Sahib with the assistance of the 4th brother Hammed Sahib

started business at Souda in South Canara. That business has been carried on down to the present time by the two brothers and their descendants.

Various properties had been acquired in the name of one or other of the senior members of the family and all the members of the family have been

maintained out of the income of properties and the profits of the business. The accounts which have been preserved show that during the lifetime of

Hassan, who died in 1870, accounts were kept in his name, and that since that time, they have been kept in the name of representatives of the

senior and junior branches. In the course of years the descendants of the

younger brother Hammed became more numerous than the descendants of the elder brother Hassan and the family have now four residences at Manki, three of which are occupied by descendants of the junior brother.

If this, were all the evidence in the case, the conclusion would naturally follow that the two brothers of the family were living and trading together on equal terms. It is quite common for the descendants of a Muhammadan trader to live and trade together for more than one generation and to acquire property in the names of one or other male members of the family, and in such a case the property is understood to be held for the several members of the family in the shares to which they are entitled under Muhammadan Law in succession to the common ancestor. Such a case recently came before this Court in a suit for the partition of properties of one of the leading Muhammadan firms in Madras. The present case, however, is not so simple. The contesting defendants rely on the partition of 1818 and on a document Exhibit XVI which is said to have been executed by Hassan, the senior brother, in 1845 before starting on a pilgrimage to the holy places and purports to be in the handwriting of the younger brother Hammed and to be written with his full consent. The evidence of the aged witnesses who were called to speak to its execution is practically worthless, as was pointed out by the District Judge. But other witnesses speak to the handwriting of some of the attesting witnesses and one of the plaintiff's witnesses speaks to a recognition of the document by some of the junior branch. It is also admitted by some members of the junior branch in their written statement in this case. Exhibit XVI has been accepted by the District Judge and the two learned Judges who heard the appeal and we are not prepared to differ from them. It recites that Hassan had carried on business and had acquired property of the value therein mentioned, and states that deducting Rs. 500 which he took on starting for Mecca the balance had been distributed into eight shares, of which his younger brother Hammed Sahib, who had been with him till then doing such acts as he was directed to do and who was to remain when he started for Mecca, was to have one; another share was to go to his wife and the remainder to his son Moiddin Sahib, who was to pay his two sisters Rs. 1,000.

3. It has been found by the District Judge and by the two learned Judges who

heard the appeal that this document was never acted upon. Hassan Sahib returned from the pilgrimage and the business was carried on without any division. Mr. Justice Tyabji was further of opinion that in the events which happened no effect could be given to it. He, however, relied strongly on the recitals which it contained, that the business and properties therein referred to belonged to Hassan, the senior brother, as was admitted by the junior brother, and in these circumstances he was inclined to think that the business continued to belong to Hassan until his death in 1870. This was also the position taken up by the appellants in their 23rd ground of appeal, where they say that The lower Court ought to have held that members of Hammed's branch were only servants, assistants and managers and payments made to them were either by way of wages or as charity." On the hearing of the appeal it was realised that this was too extreme a position, and Mr. K. Srinivasa Iyengar who appeared for the appellants conceded that they should be entitled to a one-eighth share, and acting on this concession Mr. Justice Tyabji in his judgment awarded them a 1/8th share down to death of Hassan in 1870. As to the subsequent period he considered that an agreement between the two branches to share equally in the future profits of the business might be inferred from the fact that the subsequent accounts stood in the names, of members of both branches.

4. On the other hand, Mr. Justice Sadasiva Aiyar was of opinion that the conduct of the two brothers and the members of the family after Hassan's return from the pilgrimage about 1845 was such as might be expected from brothers who considered themselves equal partners in the business and equal co-owners of all their properties, and he accordingly agreed with the District Judge that the two branches were entitled to partition in equal shares. On the whole, I have come to the conclusion that this is the right conclusion to be derived from the evidence as a whole. I fully appreciate, if I may say so, the force of Tyabji, J.'s observations as to the danger of attaching too much importance to the fact that in a trading family like this a son or junior brother has been allowed to take part in the management and been maintained out of the profits. I have often had to try cases in which claims to a partnership or a share arising out of facts like this have been made and failed. Every case, however, must stand on its

own circumstances. In this case the plaint was presented in January 1909 and we have to draw inferences from the course of conduct pursued for over sixty years by both branches. Assuming that properties of the value mentioned in Exhibit XVI belonged to Hassan in 1845, it is not shown that the younger brother who got a share on the partition in 1818 had no other property of his own. Exhibits XVIII, XX and XIX show that three items of the suit properties were acquired in his name in the years 1844, 1846 and 1849. Exhibits XXVI, XXVII and XCV show properties acquired in Hassan's name in 1836, 1848 and 1854. Hammed, admittedly, managed the business during his brother's absence on pilgrimage. There is nothing in the evidence to suggest that after his return they agreed to go on trading on the basis that Hammed and his family should be entitled only to a one-eighth share on the basis of Exhibit XVI. There is no direct evidence of any specific agreement as to the terms on which they were to carry on the business and all that we can do is to draw the appropriate inference from their subsequent conduct. It is not suggested that during Hassan's lifetime or subsequently, the members of the junior branch were treated in any way less favourably than the senior branch., On the contrary, owing to their larger numbers, much larger expenditure was incurred on them When the junior brother Hammed died in 1866, the properties, Exhibits XVIII, XIX and XX which stood in his name and which the contesting defendants suggest were held by him benami for the elder brother Hassan, were transferred not to Hassan's name but to the name of his eldest son Dodda Moidin. But this may be explained on the ground that he was then looking after the properties at Manki. The transfer, as Exhibit A shows, was made with the consent of his son Abdul Razak. Hassan died in 187C and his eldest son Moidin died in 1889. Exhibit B is the genology prepared by the Village officers on that occasion and shows the family as consisting of the two sons of Abdul Razak, namely, Hassan and Hammed and their descendants. And Exhibit C is the application for the transfer of registry of the properties standing in his name. It describes the descendants of Hassan as near heir, and the descendants of Hammed as distant heirs and is signed by both branches. The person described as near heirs were the persons entitled to succeed under the Mohammadan Law and the mention of the others shows that they were regarded as having an interest in the properties. These

properties, referred to in Exhibit C, were the properties in North Canara. The properties in South Canara were transferred to the name of Abdul

Razak of the junior branch who was managing the business at Souda. On his death the properties standing in his name were registered in the name

of his half-brother Sanna Hassan. In 1897 both Dodda and Sanna died within a day of each other. Exhibit D is a genealogy prepared on that

occasion. It is signed by the members of both branches and states that ""all the heirs mentioned herein (that is to say, all the surviving members of

both branches) belong to an undivided family. Besides these there is no other near heir"". The question was settled by a compromise. Some of the

properties were registered in the name of the 9th defendant of the senior branch and the rest in the name of Mahomed Siddiq of the junior branch,

Exhibits F1 and F2. Exhibit E1 is the statement taken from the contesting 9th defendant in this suit. He says: The deceased and I are elder and

younger brothers and there are heirs of the second branch and being members of an undivided family, not only the management of the lands but all

remaining affairs are conducted as a whole by our household."" This is a very significant statement. He goes on to say that, as senior member of the

senior branch, he alone was the hukdar or manager and that it would not be convenient that the property should be registered in the name of the

widow. And in another statement, Exhibit E 2, he says: ""Now I being the chief heir of the deceased and moreover I being the heir according to law

and Muhammeadan Shastras, I state that the kudtala may be entered in my name. In the undivided family of the two branches and in our household

my father looked after the management until his death and all the members of the family are supplied with necessities from our household. The

kudtala should be transferred to my name as stated by me."" Exhibit E 3 by the 22nd defendant stated that they were the members of an undivided

family but that the registry should be in the name of the wife of the deceased. Exhibit E4, a statement from the plaintiff's father, stated that the

members of this family as well as the members of the family of Moidin Sahib were undivided up till now. We are living together as members of an

undivided family,"" but that he had no objection to the kudtala being transferred to the widow's name. Exhibit E5 is the widow's statement. She also

stated that ""the deceased, my husband and his brothers and all the heirs shown in the annexed genealogy are members of an undivided family. No

division has been made up to this time."" This is clearly a statement that they were all interested in the properties. Exhibit E7 is a statement of Alli

Sahib, a member of the junior branch, which objected to some of the properties being transferred to the name of Hammed Sahib son of the

deceased on the ground that he remained in Manki village, whereas the kudtala of the properties in Souda had, therefore, been transferred to the

names of persons who remained there to look after the management of the properties.

5. These statements, made by members of both branches in Exhibit E series that both branches were members of an undivided family and

interested, as heirs, in the properties to be registered, are, I think, very important evidence of the terms on which the two branches lived and

carried on business for sixty years before the institution of this suit. It seems to me to amount to an admission on the part of the senior branch that

the junior branch were interested in all the properties as well as in the business; and when with this we consider the facts that the business was

carried on since 1870 in the names of members of the senior and ""junior branches and that the junior branch, admittedly, were dealt with on terms

of perfect equality with the senior branch and owing to their numbers had three establishments maintained for them at Manki as against one for the

senior branch, the proper inference, I think, is that for a very long Series of years the two branches lived and traded together on the footing that

they were entitled to equal shares in all the properties as well as in the business; in other words, that they acted as if the business had been carried

on from the first by the two brothers Hassan and Hammed without any division between them. Something is said in the judgments of the learned

Judges about the fact that the parties belong to the class of Navayats" or new comers, who many years ago, married Konkani women and as

found in *Khatija v. Ismail* 12 M. 380 4 : Ind. Dec. (n. s) 614 conformed to Hindu customs and manners to a very great extent and were not over

fond of division.

6. It is not the plaintiff's case here that the family is in any way bound by the rules of Hindu Law. But I think that the fact that they belong to this

class of Navayats may be taken into account with the rest of the evidence, for the purpose of explaining the footing on which they lived and traded

for so many years.

7. Lastly, I think there is great force in the observation of Sadasiva, Aiyar, J., as to the application to this case of the recent ruling of their

Lordships of the Judicial Committee in *Mahomed Musa v. Aghore Kumar Ganguli* (2) 28 Ind. Cas. 930 : 42 O. 801 : 19 C. W. N. 260 : 13 A. L.

J. 229 : 17 M. L. T. 143 : 2 L. W. 258 : 21 CRI. L. J. 231 : 28 M. L. J. 648 : 17 Bom. L. R. 420 : (1915) M. W. N. 621 that "Actings and

conduct of parties might give rise to estoppel, where such actings and conduct have produced alterations of circumstances so great that without

great loss and inconvenience the parties cannot be put back in their original position".

8. For these reasons, I agree with the judgment of Sidasiva Aiyar, J., and would dismiss the appeal with costs.

Oldfield, J.

9. I agree and have nothing to add.

Seshagiri Aiyar, J.

10. I agree, I confess that it is only the absence of reliable evidence as to what took place between 1845 and 1870 and the failure of the parties to

concentrate their attention upon the nature, the extent and the object of the drawing from the partnership accounts that have led me to hold with

Sadasiva Aiyar, J., and the District Judge that the two branches of the family of Hassan and Ahmed should divide the properties equally. Mr.

Rosario has drawn our attention to all the weak points in connection with Exhibit XVI. It is true that there is no satisfactory evidence as to the

custody of this document. It is also true that this document has never been referred to in any of the subsequent documents. At the same time it must

be remembered that the parties did not seriously question its genuineness in the lower Court. There is evidence in support of its execution. The

District Judge has acted on that evidence and the two learned Judges who heard the appeal have come to the conclusion that the document is

genuine. Under these circumstances, I agree in thinking that we must start with the conclusion that Exhibit XVI was executed by Hassan in 1845

prior to his departure for Mecca, that it is in the handwriting of Hammed and that the statement that the document has his consent was written by

him. This undoubtedly is a weighty circumstances in favour of the contention

advanced by Mr. Sitarama Rao that the assets of the partnership in the year 1845 belonged wholly to Hassan. As against this we have the fact that in the year 1844 Hammed did acquire property which after his death in 1866 was transferred to Dodda Moideen, the son of Hassan. We have the further fact that from 1845 to 1848 the business was solely managed by Hammed. It is clear that Hassan contemplated the possibility of his not returning to India at the end of the pilgrimage. But as a matter of fact, he did come back in 1848. There is nothing to show what was the position of affairs in that year. No doubt, the business continued to stand in the sole name of Hassan until 1870. There is nothing to indicate the exact position occupied by Hammed during this period. From 1870 onwards the accounts of the firm stood in the names of two people, one from each branch of the family. In the kudtala transfer proceedings, we find statements to the effect that both the branches lived as a joint family (vide Exhibit E series). In Exhibits C and D there is a column in which the members of both the branches are mentioned as heirs. It is true that the members of the senior branch are there styled as near heirs, and those of the junior branch as distant heirs. That is because the form of the document contained these two columns. Under Muhammadan Law there can be no question of a distant heir. What the recording authorities meant was that the members of Hassan's branch were heirs under the Muhammadan Law, and that those who were called distant heirs were persons who being, the heirs of the co owner were entitled to the property which stood in the name of Hassan. As was pointed out long ago in this Court in *Khatija v. Ismail (1)* Nawayats while regulating their succession according to Muhammadan Law follow the Hindu Law as regards their mode of living and of dealing with each other. They originally belonged to the Hindu community and were living among Hindus, whose business habits they apparently found convenient to adopt in their trade concerns. It is clear that except for business purposes the members of this family did not regard themselves as in any way coming under the Hindu Law. Therefore the fact that in the proceedings relating to the transfer of registry, both branches of the family were mentioned as heirs is a strong indication of co-ownership. There is the further fact that the junior branch possesses a larger number of dwelling-houses than the senior branch. They seem to have

drawn more money from the partnership than the senior branch. Such a state of affairs is inconsistent with the suggestion that the junior branch

acted either as servants, agents or managers of the business and had no proprietary interest in the concern. These facts also are inconsistent with

the theory that all the members of the junior branch were entitled to was only an eighth share in the business. It is clear that Exhibit XVI was never,

acted upon, Hassan might have intended that it should be given effect to in case he did not return. On his return apparently, the document was

ignored altogether. In the subsequent accounts kept by the partnership, there is nothing to indicate that the junior branch was to have only an eighth

share in the business.

11. The position of affairs, therefore, is this The senior of the two brothers had some exclusive property which he brought into the business early in

1818. Soon after he was joined by his younger brother. In 1845 he estimated the amount due to him to about Rs. 25,000 and was willing that

under certain circumstances an eighth part of this amount should go to his younger brother. From 1845 to 1848 the business was solely managed

by the younger brother. From 1848 to 1870 the business was managed by both the brothers, although the business stood in the name of the elder

brother alone. From 1870 to the date of the suit, the accounts stood in the joint names of two members of the family, one from the senior and

another from the junior branch. Moneys were drawn out indiscriminately by both the branches, a larger amount being drawn by the junior branch

than by the senior branch. Each branch had large establishments; all their common expenses were met from the partnership funds. The members of

each of the branches recognized the other as being co-heirs with them in the proceedings relating to the transfer of registry. There was at no time

any settlement of accounts or ascertainment of profits. Properties were purchased indiscriminately in the names of the members of both the

branches of the family. The members" stated before responsible officers of Government that they lived together as members of a joint family. In my

opinion, the true inference to be drawn from these facts is that both the branches regarded themselves as equally entitled to the profits of the

business, and to the properties purchased from the business, and that consequently, the conclusion come to by the District Judge that it should be

divided half and half is right. This appeal should be dismissed with costs.