

(1924) 04 MAD CK 0064
In the Madras High Court

Krishnaswami Naidu and Others

APPELLANT

Vs

Perumal alias Mammaya Naidu and Another

RESPONDENT

Date of Decision : 17-04-1924

Acts Referred:

Citation : 83 Ind. Cas. 84

Hon'ble Judges : Phillips, J

Bench : Single Bench

Judgement

Phillips, J.—This suit is brought for partition by the plaintiff against his brother the first defendant and the latter's minor sons. The second appeal was first of all dismissed for default on 26th April 1923 :and it was afterwards restored to file on 26th March 1924. The second respondent was given up and the appeal has now come on for hearing. Unfortunately the pleadings in this case are not before me. How-ever, from the facts found by the learned Subordinate Judge and from the abstract of the pleadings in the judgment the, following appear to be the facts upon which the second appeal has to be decided.

2. In 1910, the plaintiff brought a suit, against the first defendant and his father for partition.- He withdrew that suit with leave to bring another; but he failed to pay the costs, which was the condition on which leave to sue again was granted. He continued to live jointly with his father and brother and after the former's death with the latter until disputes arose, which culminated in this suit. The plaintiff obtained a decree in the lower Courts and the defendants now appeal. It is contended that the present suit is. barred under Order XXIII, I1; 1 (3). The contention for the appellant is that the plaintiff became divided in status by reason of his filing the plaint in the previous suit of 1910 and that consequently the present suit which is also for partition is identical in nature with the previous suit and is, therefore, barred under Order XXIII. No doubt it is true that, when there has been an unequivocal declaration by a member of a joint family of his intention to divide and this has been communicated to the other members of the family, this declaration effects a division in status. This was laid down by the

Privy Council in *Girja Bai v. Sadashiv Dhundiraj* 37 Ind. Cas. 321 : 43 C.P 1031 : 20 C.W.N 1085 : 14 A.L.J. 822 : 20 M.L.T. 78 : 12 N.L.R. 113 : (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 : 43 I.A. 151 and in a later case in *Ramalinga Annavi v. Narayana Annavi* 68 Ind. Cas. 451 : 45 M.P 489 : 39 M.L.T 255 : (1922) M.W.N. 399 : 26 C.W.N. 929 : AIR (1922 (P.C.) 201 : 43 M.L.J. 428 : 16 L.W. 639 : 24 Bom.L.R. 1209 : 20 A.L.J. 839 : 37 C.L.J. 15 : 49 I.A. 168 it was held that division in status took effect from the date of the declaration, namely, in the case of a suit, the date of the plaint. On the authority of these two cases, it is now contended that the plaintiff became divided on the date he filed the plaint in 1910; but "do not think that their Lordships of the Privy Council intended to lay down as a general principle that the filing of a suit for partition is sufficient in all cases to constitute a severance in status. Nor do I think that there is any authority for holding that every such declaration is irrevocable. To hold so would hardly do justice in many cases; for instance, a member of a family in a fit of anger might communicate his intention to the other members to become divided. If this contention that it is irrevocable is correct, nothing that he could do thereafter could affect the, question and although he might withdraw his declaration in a few hours" time, severance would have been effected. For this proposition, the cases decided by the Privy Council are certainly no authority. The principle; underlying these cases is that when; there is a definite intention to divide that intention should be given effect to; but where, as in this case, that intention has been expressed but shortly afterwards negated by the withdrawal of the partition suit, the mere filing of the suit cannot be deemed to be a sufficient proof of that intention in the light of subsequent events. This point was considered in *Palaniammal v. Muthuvenkatachalla Maniagarar* 43 Ind. Cas. 833 : 33 M.L.J. 759 where it was held that it was open to a co-parcener, who has filed a suit for partition, to abandon that intention before the suit proceeds to a decree, and to continue in a state of jointness. The same view was taken by another Bench of this Court in *Vemi Reddi Seshu Reddi v. Nallappa Reddi Raghava Reddi* 57 Ind. Cas. 800 : 11 L.W. 611. I, therefore, hold that in this case there was no division in status effected by : the filing of the prior suit.

3. It has been found as a fact that, after that suit was withdrawn, the family continued to live together jointly but after the father's death, the first defendant would not allow the plaintiff a share; in the family property. The plaintiff allegation that the family was living jointly after the withdrawal of the suit is not denied in the written statement and is found to be true. The defendant did not plead severance of status but pleaded that the plaintiff was not entitled to a share because he had been adopted into another family. This adoption has been found to be untrue. The question now arises, therefore, whether, when a member of a family has withdrawn a suit for partition, he is precluded from bringing another suit for the possession of his share of the property, by reason of Order XXIII, Rule 1. A very similar case was decided by the Calcutta High Court in *Gopal Chandra Banerjee v. Purna Chandra Banerjee* 4 C.W.N. 110 and it was held that

the second suit was not in respect of the same subject-matter, within the meaning of Order XXIII. This case has been approved of by a Full Bench of this Court in *Pandillapalli Singa Reddi v. Yeddula Subba Reddy* 35 Ind. Cas. 185 : 31 M.L.J. 48 : 20 M.L.T. 62 : (1916) 2 M.W.N. 1 : 4 L.W. 1 : 39 M.P 987 . It seems to me clear that the second suit is in no respect of the same subject-matter as the first suit. In the first suit the plaintiff wished to become divided for some reasons or other, and to enforce his right to partition, whereas in the Second suit, while his right to a partition was still subsisting, he was dispossessed of his share and consequently treating that as the basis of his action he seeks to recover his share. This view which I have taken was not the one adopted by the learned Subordinate Judge and, therefore, I do not think it is necessary to deal with the criticisms directed against his judgment. Finding that Order XXIII is not a bar to this suit, the decree of the lower Appellate Court is correct, and this second appeal must be dismissed with costs.

4. The memorandum of cross-objections filed by the first respondent coming on again this day for further argument the Court delivered the following

JUDGMENT

5. In view of the above finding that the family remained joint, the memorandum of objections must be allowed and in modification of my order of yesterday, the District Munsifs decree will be restored with costs both here and in the lower Appellate Court (including the costs of the memorandum of objections--one Vakil's fee).