

(1945) 12 MAD CK 0021
In the Madras High Court

M.Y.A.A. Nachiappa Chettiar

APPELLANT

Vs

M.Y.A.A. Muthu Karuppan Chettiar and Others

RESPONDENT

Date of Decision : 18-12-1945

Acts Referred:

Citation : AIR 1946 Mad 398 : (1946) ILR (Mad) 858 : (1946) 59 LW 227 :
(1946) 1 MLJ 310

Hon'ble Judges : Rajamannar, J

Bench : Division Bench

Judgement

Rajamannar, J.—The plaintiff, who is the appellant and the first defendant who is the first respondent are the sons of one M.Y.A. Annamalai Chettiar. The plaintiff is the son by the second wife and the first defendant by the first wife. Defendants 2 to 4 are the sons of the first defendant. The fifth defendant is the mother of the plaintiff and the sixth defendant is his sister. Annamalai died on 18th September, 1926. Before his death he executed on 21st August, 1926, a will (Ex. D-I) in and by which, after stating that he owned a money-lending firm in Puttalam and Immovable properties and moveables, etc., in Karaikudi, he appointed two persons as executors and provided that his eldest son, the first defendant, should get Immovable property worth Rs. 35,000 as jeshtabagam from and out of his properties. after his lifetime. He also made certain provisions for his junior wife and others and finally directed that all his remaining moveable and Immovable properties should be taken by his two sons, the plaintiff and the first defendant, in equal. moieties. On the same day he executed a power of attorney in favour of one Lakshmanan Chettiar conferring on him power to sell to any person all or any of his lands, leases and charges and to sign and execute all necessary transfers and other instruments and to execute a deed of gift of the properties that he possessed in Puttalam in favour of his sons Muthukaruppan and Nachiappan (first defendant and plaintiff). In pursuance of the power conferred on him by this document,. Lakshmanan Chettiar on behalf of Annamalai Chettiar executed on 2nd September, 1926, two documents, viz., (1) a deed of gift of properties valued at about Rs. 1,65,000 in favour of the first

defendant and the plaintiff in equal moieties (Ex. D-3), (2) a deed of sale in favour of the first defendant alone of Immovable properties for a sum of Rs. 32,500, the consideration being stated as a portion of the sum agreed, to be paid by the vendor, i.e., Annamalai, to the first defendant at the time of his (Annamalai's) second marriage (Ex. 29-a). On the same day one M.Y.A. Chidambaram Mudali, another agent of Annamalai, made in favour of the first defendant a transfer of a leasehold of certain properties for a consideration of Rs. 2,500 (Ex. 29-b). Admittedly this leasehold right belonged to Annamalai himself. All these three documents related to Immovable properties in Ceylon and were registered there on 18th September, 1926.

2. The first defendant was a minor at the time of his father's death, but attained majority soon thereafter and the estate appears to have been handed over to him by the executors sometime in 1931 and ever since he has been in control of the affairs of the family including the business. The plaintiff attained majority in April 1939 and was married in May 1940. Sometime before the marriage there appears to have been an attempt to bring about a division by a Panchayat, Ex.D-11 is a muchilika executed both by the plaintiff and the first defendant on the 1st May, 1940, in which they both agree to arrange for a Panchayat being constituted in the month of Ani that year and for a partition to be effected within Avani. The legal effect of this document will have to be considered later. It is enough now to state that nothing came out of this muchilika. On the 1st December, 1941, the plaintiff issued a notice demanding partition and the suit was filed on the 17th June, 1942.

3. According to the appellant's allegations in the plaint the family properties comprised the following (1) Immovable properties in British India set forth in Schedule A to the plaint; (2) A money-lending firm at Puttalam in Ceylon;; and (3) Moveables in the shape of jewels and silver ware.

4. The plaintiff alleged that his father had no power of disposition, as the properties, belonged to the joint family and the will was consequently void. He also averred that the provision in the will allotting Immovable properties worth about Rs. 35,000 to the first defendant as an extra share was invalid and not binding on him. He prayed for the following reliefs:

- (a) that an account may be taken of the joint properties of the family;
- (b) that the first defendant may be directed to render an account of his management of the family properties including the firm of M.Y.A. at Puttalam;
- (c) that a scheme may be settled for the due management of the charities mentioned in the schedule infra;
- (d) that after providing for the interests of the fifth and sixth defendants-herein, the bona fide liabilities of the family, if any, be discharged and the residue of the property of the said family may be divided between the plaintiff and the first defendant in equal shares, defendants 2 to 4 continuing to be joint along with

the first defendant;

(e) for the appointment of a receiver of the family properties and to issue an injunction to restrain the first defendant from selling, charging or otherwise disposing of any of the family properties;

(f) for the appointment of a Commissioner to divide the joint family properties by metes and bounds;

(g) that the first defendant may be directed to pay the costs of the suit to the plaintiff; and

(h) for such other reliefs as the Court deems fit.

5. The schedule to the plaint described the Immovable properties situated in British India.

6. The written statement of the first defendant who was the main contesting defendant is the most material in the case and brought out many facts not even adverted to in the plaint. The first defendant pleaded inter alia that the Court had no jurisdiction to entertain the suit in so far as it related to Immovable properties situate in Ceylon; the plaint never made mention of any Immovable properties in Ceylon; but it is now common ground that there are Immovable properties of considerable value in Ceylon, either acquired with the profits of the money-lending firm, or forming the assets of the firm. The first defendant further stated that it was perfectly competent to his father to dispose of his properties in Ceylon by will, because the joint family system was unknown to the law as administered in Ceylon. He referred to the three documents of September, 1926 executed by his father's agent already mentioned. His case was that the two documents in his favour were executed in discharge of a promise by his father at the time of his second marriage with the plaintiff's mother. The first defendant also relied upon the much like dated 1st May, 1940 and pleaded that the plaintiff was precluded thereby from impeaching any of the conveyances by his father in his favour. The first defendant was otherwise willing to a partition of properties situate in British India.

7. There was a rejoinder by the plaintiff in which the validity of the conveyances relied upon by the first defendant were impeached and it was also stated that they were executed merely for avoiding the heavy death duties prevailing in Ceylon and were never intended to be real transactions governing the rights of the family. . The plaintiff further stated that the documents had been executed by persons not duly authorised.

8. Issues were framed both on the merits and on the question of jurisdiction. The learned Subordinate Judge held that he had no jurisdiction to entertain the suit in respect of the Immovable properties in Ceylon and made a decree in favour of the plaintiff for partition of the Immovable properties in British India and for division of the moveable properties existing in Ceylon including the money-lending firm in Puttalam, but excluded from the scope of the decree the

Immovable properties situate in Ceylon. In determining the income from the Immovable properties in Ceylon as part of the assets of the business, the income derived from the properties conveyed to the first defendant by the two deeds referred to in the written statement was directed to be excluded from the account, as the title of the first defendant to these properties could not be determined here. A Commissioner was appointed for dividing the British Indian properties by metes and bounds into two equal shares of which the plaintiff would be entitled for delivery of one share. There was also a decree in favour of the plaintiff for a half share of the net assets of the money-lending business in Puttalam.

9. The fifth and sixth defendants had made claims for maintenance and residence and for an account of certain moneys deposited with the family and the Subordinate Judge made certain directions regarding them, which will be referred to later on. The plaintiff has filed this appeal in respect of the Immovable properties in Ceylon, which have been excluded from the decree made by the trial Court and the fifth and sixth defendants have filed a memorandum of cross-objections in respect of some of the reliefs claimed by them.

10. To decide the question of jurisdiction raised in this case, it is necessary to recapitulate the following facts : There is a joint family business at Puttalam in Ceylon. There are Immovable properties in Ceylon, which have either been acquired out of the profits of this business, or during the course of the business by being bought in in discharge of debts owing to the business. Out of these, properties of a stated value of Rs. 35,000 have been conveyed by the father to the first defendant alone by means of two documents executed in Ceylon. The plaintiff challenges the validity of those transfers. There is, therefore, a dispute as regards the title to the Immovable properties comprised in these deeds. The plaintiff claims a half share in these properties as well.

11. It is necessary to state at the outset that for the purpose of deciding this question the suit should be considered to be an ordinary suit for partition of joint family properties in which inter alia there is a dispute as regards the partible nature of certain items of Immovable property. There are of course the incidental reliefs of accounting, framing of a scheme for the management of the charities, the appointment of a receiver, etc., but these are not really material. Essentially the suit is one for partition of what are alleged to be the properties of an undivided Hindu family. During the course of his argument, Mr. Ramswami Aiyar tried to introduce a new element based on a new conception affecting the nature and scope of the present suit. He suggested that it was in part a suit for the taking of accounts of a dissolved partnership. He sought to treat the joint family business on a separate footing as if it were a contractual partnership with all its legal incidents. He began to describe the Immovable properties in Ceylon as assets of the business, presumably in contra-distinction to assets of the joint family.

12. It is clear that it would be totally wrong to import the incident of a

partnership to work out the rights and liabilities of the members of a trading family, engaged in a business. The joint family carrying on its ancestral trade is not a partnership in law. Section 5 of the Partnership Act is a statutory recognition of this position. Venkatasubba Rao, O.G.J., says in *Ramaswami Chettiar v. Srinivasa Iyer* (1935) 70 M.L.J. 214

The true legal position, therefore is, that as between the coparceners, the fact that the family is engaged in trade does not convert it in relation to that trade, into a partnership." (Vide Mayne, 10th edition, Section 304).

It follows that in the case of families whose occupation is trade, there is no distinction between family properties and trade assets. All the trade assets will be joint family property. Likewise the entire joint family property will be liable for the debts incurred in the trade. The fact that any particular property was acquired with the profits of the business would not impress such property with any peculiar incident as an item of partnership asset. We shall have to refer again to this aspect when dealing with one of the contentions of the appellant on the question of jurisdiction.

13. Treating the suit as one for partition of Immovable property, it would fall directly within Section 16 (b) of the Code of Civil Procedure, according to which a suit for the partition of Immovable property should be instituted in the Court within the local limits of whose jurisdiction the property is situate. But the explanation is important. It says that in this section " property " means " property situate in British India." The result is that a suit for partition of Immovable property outside British India would not be covered by this provision. To determine, therefore, whether the Court of the Subordinate Judge of Devakottah has jurisdiction to entertain this suit in so far as it is, or as it must be deemed to be for partition of Immovable properties in Ceylon, that is, outside British India, one must go to the well-established rules of private international law.

14. The basic rule appears to us to be undisputed. It is stated thus by Dicey 5th edition, page 203):

Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for (1) the determination of the title to, any Immovable situate out of England (foreign land); or (2) recovery of damages for trespass to such immovable; or (3) the administration of a foreign charity under the supervision of the Court or the settlement of a scheme for such a charity.

In Halsbury (2nd edition, volume 6 at page 218) the rule is stated in the following terms:

The English Courts have, in general, no jurisdiction to determine directly the title to a foreign immovable, nor can they entertain any action which substantially involves the determination of such title.

Parker, J., in *Deschamps v. Miller* (1908) 1 Ch. 856 , states the rule in similar

terms:

In my opinion, the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of Immovable property out of the jurisdiction.

This rule is founded on the general principle that the Courts of any country have no jurisdiction over, that is, have no right to adjudicate upon any matter with regard to which they cannot give an effective judgment. No nation can execute its judgment against Immovable property in the country of another. Moreover, if the Sovereign of a country has, in fact, the power to transfer the ownership or possession of property in that country, it would only be the judgment of his Courts in regard to such property, which would be decisive as to the right to such property. This rule has been uniformly applied both in England and in India. In *British South Africa Co., v. Companhia de Mocambique* (1893) A.G. 602 it was held by the House of Lords that the Supreme Court of Judicature had no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad even in a case when there was no competent Court in the country in which it was situate. In *In re Hawthorne Graham v. Massey* (1883) L.R. 23 Ch. D. 743, the title to certain Immovable property in Saxony was in dispute between A and B. A sold the property in Saxony, received payment of the purchase money and took a mortgage for the balance. Both A and B being in England, an action was brought by B to make A account for the purchase money, but the suit was dismissed for want of jurisdiction. In *Deschamps v. Millar* (1908) 1 Ch. 856, it was held that the English Court will not adjudicate on a question of title to Immovable property situate in Madras. In that case the plaintiff sought to impeach a settlement made by his father of Immovable property in Madras.

15. The Judicial Committee in *Nilkanth Balwant v. Vidya NaiMxanna* (1930) 59 M.L.J. 379 : L.R. 57 IndAp 194 : ILR 54 Bom. 495 held that a Court in the Bombay Presidency had no jurisdiction to try a suit on a mortgage so far as it related to properties in Kolhapur state, which is outside British India. At page 502 their Lordships say:

Inasmuch as the properties in Kolhapur are not within the jurisdiction of any Court in British India the learned Subordinate Judge of Satara had no jurisdiction to try this suit so far as it related to the mortgage properties situate in Kolhapur.

16. Courts have refused to entertain applications to file an award, which dealt with Immovable properties outside British India (vide *V.N. Krishna Aiyar Vs. V.N. Subbarama Aiyar and Another*, and *Upendranath Basu v. Het Lai* ILR (1933)All. 542).

17. Cases of partition are more apposite. The rule in England is stated in *Halsbury* 1st edition Vol. 21 at page 838 thus:

The Chancery division has no jurisdiction to order partition of Immovable property outside the jurisdiction.

The early case of *Cartwright v. Pettus* (1675) 22 E.R. 916 is considered authority for this rule. In that case the Lord Chancellor refused to direct a partition of lands in Ireland, though the parties were in England. Cheshire in his " Private International law ", 2nd edition, at page 539 refers to this case as exemplifying the general principle that no action raising the question of the title to immovables can be entertained by an English Court. In *Keshav v. Vinayak* ILR (1897) Bom. 22 the plaintiffs filed a suit for a declaration of their title to a third share in what they alleged was joint family property, viz-, certain annual allowances from the Government of the Nizam charged on two villages and to recover their share from the defendants to whom the allowances had been paid. While the plaintiffs alleged that the allowances were joint ancestral property the defendants contended that they were the exclusive property of their grandfather to which the plaintiffs' branch had no right. It was held by Parsons and Ranade, JJ., that the District Court of Nasik in which the suit was filed had no jurisdiction to try the suit, because the allowances were in the nature of Immovable property and there was a bonafide dispute as to the title to them and that the plaintiffs could not claim a declaration of title, or ask for the refund of the allowances in a British Court merely because the defendants happened to be residents in British territory. In *Krishnaswami Reddiar alias Rajah Chidambara Reddiar Vs. Venugopala Reddiar* by his agent V.A. Lakshminarasimha Aiyar and Others, , one K filed in 1932 a suit in the Court of the Subordinate Judge of Trichinopoly for recovery of possession of certain properties moveable and immovable, or in the alternative for partition of those properties. A large part of the Immovable properties was situated in Burma, the others being within the jurisdiction of the Court of the Subordinate Judge of Trichinopoly. On 1st April, 1937, when the Government of India Act, 1935, came into operation, Burma ceased to be part of India and a question was raised that the Court of Trichinopoly ceased to have jurisdiction thereafter in respect of the properties situated in Burma and it was held by Mockett and Kunhi Raman, JJ., that the Subordinate Judge of Trichinopoly could continue to pass a decree affecting the properties situated in Burma also, because the right to continue a suit properly filed in a British Indian Court before 1st April, 1937, had not been taken away by the Government of India Act, 1935. But it is clear from the judgment that the decision would have been just the other way if the suit had been commenced after 1st April, 1937, i.e., after Burma had ceased to be part of British India, At page 381 Mockett, J., says:

It is a basic principle of Private International Law that no British Court will entertain a suit affecting Immovable property in a foreign country, nor will a foreign judgment adjudicating on the title to Immovable property within British jurisdiction receive recognition in a British Court ... The decisions of the highest Courts are unanimous.

19. Confronted with what certainly appears to be an insuperable obstacle in his way, the learned Counsel for the appellant had to concede that the appellant could not pray for the relief of partition in specie of the Immovable properties in Ceylon. He also conceded that the Court could not adjudicate on the title to the

Immovable properties, or direct delivery of possession of such properties situate in Ceylon. He however contended that there were exceptions to the general rule which, if applied, would entitle him to a declaration of the appellant's rights in and to these properties and to an adjustment or working out of equities between him and the first defendant. He relied on passages from well-known text-writers and decisions of English Courts, which according to him supported his contention. At page 207 of Dicey's " Conflict of Laws ", 5th edition, the exception is stated thus:

Where the Court has jurisdiction to entertain an action against a person under either Rule 59 or under any of the exceptions to Rule 60, the Court has jurisdiction to entertain an action against such person respecting an Immovable situate out of England (foreign land) on the ground of either (a) a contract between the parties to the action, or (b) an equity between such parties with reference to such immovable.

20. Rule 59 deals with actions in personam when the defendant is in England. The exceptions to Rule 60 are not now relevant. In Westlake's " Private International Law ", the following passage was relied on:

A proprietor of foreign immovables or person interested in such, may be compelled by the English Court, if it has personal jurisdiction over him, to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort.

21. An examination of the decisions cited by the appellant's counsel, which will be dealt with in detail later on and the opinions of well-known writers on the subject leads us to a conclusion, which may be best stated in the language of Article 270 in Volume IV, Halsbury's Laws of England, 2nd edition:

The English Courts have power to exercise a jurisdiction in personam in respect of foreign immovables against persons locally within their jurisdiction in cases where there is an equity between the parties arising from contract, fraud or trust, provided that the decision of title be not directly involved.

22. In the words of Selborne, L.J.:

The Courts of Equity in England are and always have been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilli* within their jurisdiction." (Ewing v. Orr Ewing (1883) 9 A.C. 34

23. In British South Africa Co. v. De Beers Consolidated Mines, Ltd. (1910) 2 Ch. 502 the subject-matter was an English contract to give a mortgage on foreign land. The question Arose whether a clause in the mortgage was invalid, as being a clog on the equity of redemption. It was urged that the " doctrine of clog " is a doctrine peculiar to English law and is not to be found in the Roman Dutch law, by which it was urged the rights of the defendants are to be governed, as the

property was situate in Rhodesia in British South Africa. It was held that the equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of debentures to secure a loan and will be enforced against a contracting party in the jurisdiction, although the floating security to be created by the debentures comprised foreign land where the clog doctrine is possibly not recognised. Dealing with this question Cozens Hardey, M.R., says at page 513:

In my opinion the contract did not create any more than a personal right, as distinct from" a real right, a right which the Courts of this country would enforce in personam. For centuries the Court of Chancery has by virtue of its jurisdiction in personam applied against parties to a contract or trust relating to foreign land the principles of English law, although the lex situs did not recognise such principles.

24. The actual decision is to be found at page 515:

In my opinion, an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the lex situs, is a contract to give a mortgage, which interpartes is to be treated as an English mortgage and subject to such rights of redemption and such equities as the-law of England regards as necessarily incident to a mortgage.

25. It is clear that this case proceeded on the basis of a dispute as regards a contract between the parties entered into in England. In *re Smith : Lawrence v. Kitson* (1916) 2 Ch. 206, in which the decision in *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* (1910) 2 Ch. 502, was followed is again a case in which the contract was to have a legal mortgage of foreign land executed in favour of the plaintiffs in that suit. It was really in the nature of a suit for specific performance of a contract. The only complication in that case was that the person, who had agreed to execute the mortgage, had died before the institution of the suit leaving a will. The properties were situated in the island of Dominica, West Indies and by the law applicable to immovables in that country, an equitable charge was not sufficient to create a valid encumbrance upon property. Eve, J., held that the death of one of the parties to the contract cannot operate to change the law by which the contract was to be construed and prejudice the right of the other party to have specific performance of the contract. The case of *Arglasse v. Muschamp* (1682) 1 Vern. 76 : 23 E.R. 322, decided in 1682 and the case of *Cranstown (Lord) v. Johnston* (1796) 3 vES. jUN. 169 : 30 E.R 952, decided in 1796 are cases in which the Court of Equity in England relieved parties against the fraud played on them by the defendants who were also residents in England, though the fraudulent transactions related to Immovable property outside England. In *Arglasse v. Muschamp* (1682) 1 Vern. 76 : 23 E.R. 322, a fraudulent conveyance had been, obtained by the defendant from the plaintiff in London, that is to say, the fraud was committed in London. The property lay in Ireland. In the other case *Cranstown (Lord) v. Johnston* (1796) 3 vES. jUN. 169 : 30 E.R. 952, there was an award made in England that the plaintiff should pay to

the defendant upon a particular date a certain sum of money at the Lloyds Coffee House. The plaintiff did not pay, as he was then abroad. After returning to England, there was a correspondence between the parties the object of which was to see that the amount due to the defendant was properly secured. Meanwhile, however, behind the back of the plaintiff, the defendant took proceedings in the Courts of St. Christophers, an island in the West Indies and, without even service of process on the plaintiff, procured an absolute sale of the plaintiff's interest in property situate there. The plaintiff, after he came to know of the fraud played upon him by the defendant, brought a suit offering to pay the balance due to the defendant and to have the sale procured by the defendant cancelled. Evidence was also tendered in the case that at the time when the defendant was taking proceedings to obtain an outright sale of the plaintiff's property in St. Christophers, he declared to one Lord Kinnair that he was only taking proceedings to obtain security for his demand. An objection as to jurisdiction was taken, but was overruled by the Master of the Rolls. The following passage in the judgment of the Master of Rolls clearly shows the nature and extent of the jurisdiction, which Courts of Equity in England exercised in respect of foreign Immovable property when gross fraud had been perpetrated by parties resident in England and amenable to their jurisdiction:

Those cases clearly show that with regard to any contract made, or equity, between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England.... Therefore, without affecting the jurisdiction of the Courts there, or questioning the regularity of the proceedings as in a Court of law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws to proceed behind the back of the debtor upon a constructive notice... that he gained an advantage which neither the law of this, nor of any other country would permit.... I will lay down the rule as broad as this. this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice.... I have no scruple to say in this case it would be unconscionable to permit the defendant to avail himself of the laws of this island to procure this state for any other purpose than to pay him his own debt.

He therefore ordered that on payment of the balance due to the defendant, he should reconvey the property purchased by him to the plaintiff.

26. In *In re Clinton : Clinton v. Clinton* 88 L.R. 17 and in *Hope v. Carnegie* (1866) 1 Ch. A. 320, the actions were for administration of a testator's real and personal estates. In both the cases, there was a trust, the defendants were trustees and the equities had to be worked out.. They were cases in which personality and reality were so mixed up that reality could not be dealt with apart from the personalty. In both the cases the decision of the Court was pronounced at a very early stage of the proceedings and did not purport to lay

down any general rule of law. Actually in *Hope v. Carnegie* (1866) 1 Ch. A. 320, Knight Bruce,, L.J. and Turner, L.J., differed as to the proper order to be passed in the case.

27. It will be seen that in every one of these cases the question was one of either " fraud, trust, or contract," to use the words of Marshall, C.J. In the present case,, admittedly, there is no contract; there is no suggestion of fraud. It was faintly suggested that there was a trust, because the first defendant was the manager of the family from 1932 and his possession was to an extent fiduciary in relation to the plaintiff and, therefore, there was ground for the exercise of extraordinary jurisdiction in personam. The appellant's argument on this part of the case rests almost entirely on a stray sentence from the judgment of the Judicial Committee in *Anna-talai Chettiar v. Murugesu Chetti* (1903) 13 M.L.J. 287 : L.R. 30 IndAp 220 ILR 26 Mad. 544 Lord Lindley, delivering the judgment of the Judicial Committee, overruled a contention of the appellant in that case that the manager of the joint family property should be held to be the agent of the members, of the family and said:

Kandaswami Chetti's acts and his payments to the defendants are all attributable to his being the manager of joint family property, of which the defendant had a share; and their Lordships entirely concur with the High Court in holding that, such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent, or of partners; it is much more like that of trustee and cestui que trust.

From this passage the appellant is not justified in advancing an argument that in a suit for partition the Court is called upon to enforce a trust. It has been held over and over again that the manager of a Hindu joint family is not under any of the well known obligations of a trustee with regard to the administration of the funds, of the family.

28. Equally unsound is the appellant's contention that the suit need not be regarded as relating to Immovable properties in Ceylon, because such properties are part of the assets of a partnership; and what the Court is called upon to do is, so to say, to order a winding up of the partnership and distribution of the surplus assets. The argument is sought to be developed by reliance on cases decided in England in which questions as to liability to legacy duties arose for decision and Immovable partnership property had been held to be in the nature of personalty.

Two propositions may be taken as well established:

1. The share of a partner is his proportion of the general assets after their realisation and conversion into money and after demand and discharge of the joint debts and liabilities. It is true that when part of the assets of a partnership is in the shape of Immovable property, each partner is not entitled to a partition in specie of such property. On a dissolution, the property along with other assets

will have to be converted into money and all debts and liabilities should be discharged and it is in the surplus that the partners have a right to share.

2. In England, real estate bought or acquired by a partnership for partnership purposes is as between the partners and as between the real and personal representatives of a partner deceased, personal property and devolves and is distributable and applicable as personal estate. Authority is to be found for this in the elaborate and exhaustive judgment of Kindersley, Vice-Chancellor in *Darby v. Darby*¹, in which occurs the following oft-quoted passage:

Now it appears to me that irrespective of authority and looking at the matter with reference to the principle well established in this Court, if partners purchase land merely for the purpose of their trade and pay for it out of the partnership property, that transaction makes the property personalty and effect a conversion out and out. What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership, all the property belonging to the partnership shall be sold and the proceeds of the sale after discharging of the partnership debts and liabilities shall be divided among the partners according to their respective shares in the capital." (Vide *Re Stokes : Stokes v. Ducroz*², *Forbes v. Stevens : Mackenzie v. Forbes*³.)

29. All this is true, but there are two insuperable difficulties in the way of this contention succeeding. Firstly, a Hindu joint family carrying on business is not a partnership and this aspect has already been dealt with earlier on. Secondly, what may be personalty in England may also comprise Immovable property, with the result that legacy duty will be payable in respect of certain property as personalty, though for the purpose of adjudicating on title, such property may be undoubtedly Immovable property. It follows that the rulings in *Durga Das v. Jai JVarain* ⁴ and *Ismail Ji v. Ismail Abdul*⁶, which dealt with suits for dissolution of partnership have absolutely no bearing upon the point arising in this case.

30. Finally Mr. Ramaswami Aiyar argued that even if the Court would not decree partition of Immovable property outside British India, it may nevertheless take such property into its calculation in adjusting the equities between the parties. Such a contention was negatived as early as 1893 in *Ramacharya v. Anantacharya* ⁶. In the words of Telang, J., doing this would be " doing indirectly that which the law says may not be done directly." In *Subbayya Mudaliar v. Thulasi Mudaliar*⁷, there was a difference of opinion between Spencer, J. and Sadasiva Aiyar, J., whether property in foreign territory belonging to the family could be taken into account in a suit for partition filed in British India. It is not necessary to go into this question, because the opinion is practically unanimous that in a case where there is a dispute as to title to Immovable property in foreign territory, a British Indian Court will have no jurisdiction to adjudicate with regard to it. It is not also necessary to refer to cases cited on behalf of the appellant in which reliefs purely in personam were awarded in respect of the income of property outside British India, but received by a defendant within British India, because they are all cases where there was no dispute as to the

title to the foreign property in question.

31. We therefore agree with the learned Subordinate Judge that he had no jurisdiction to decree a division of Immovable properties in Ceylon, or even to declare that the properties in dispute between the plaintiff and the first defendant are partible joint family properties.

32. This finding is sufficient to dispose of the appeal; but as the learned Subordinate Judge has given his findings on the other issues dealing with the merits of the case set up by either party and as this litigation may not stop here, we shall proceed to briefly indicate our view on the several questions argued before us. At the outset we are faced with this difficulty. Almost every one of the issues, other than issues relating to jurisdiction, relates to Immovable properties in Ceylon. Issues 1,2, 3, 5, 6 and 7 are concerned with the question of the validity of the conveyances executed in September, 1926, in favour of the first defendant alone (Exs. D 29-a and D 29-b). Undoubtedly the law to be applied in determining the rights of parties to these properties is the law prevailing in Ceylon. In the words of Dicey:

The well-established rule is that all rights over and in relation to an Immovable (land) are, subject to certain exceptions, governed by the law of the country where the Immovable is situate (lex situs.).

33. Hence a person's capacity to alienate an Immovable by sale or mortgage inter vivos or to devise an immovable, or to acquire, or to succeed to an Immovable is governed by the lex situs (Dicey pages 585 and 586). The following passage from Story's " Conflict of Laws " is very apposite in this connection:

If a person is incapable from any... circumstance of transferring his Immovable property by the law of situs, his transfer is held invalid, although by the law of his domicile no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the situs, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile. This is the silent, but irresistible result of the principle adopted by the common law, which has not admitted exception.

34. Issue (4) runs thus:

What is the law governing the parties with reference to the Immovable properties in Ceylon?

35. In regard to this issue the position is summarised by the Subordinate Judge in paragraph 41 of his judgment. There is really no evidence as to what the law in Ceylon is in regard to Immovable properties. This fact would naturally render any findings that we may arrive at absolutely of no use. They, of course, will not have the force of a binding adjudication in Ceylon.

36. Applying the law which would govern the parties if the Immovable properties

were situate in British India, we have no hesitation in finding that the father Anna-malai had no power to dispose by will of any of the properties of the joint family. Likewise, he could not alienate by way of sale or gift the properties covered by Exs. D 29-a and D 29-b, in favour of the first defendant alone. The position does not admit of any doubt. The properties were admittedly acquired with the profits of the money-lending business in Puttalam, or formed part of its assets. The money-lending business itself has been found to be the family business. It is on this finding that a decree has been given in favour of the plaintiff for his share in its assets excluding, of course, the Immovable properties and their income; and the first defendant has not challenged that finding before us. It follows that the properties would belong to the joint family. The manager of a joint family and even a father cannot dispose of family property by will, or by settlement, or by gift. He may undoubtedly sell family property for necessity and a father can alienate to discharge an antecedent debt. But the first defendant in this case does not seek to justify the transfers in his favour on any of these grounds. The allotment of an extra share in favour of the eldest son, what is known as jeshthagam, has become obsolete and unenforceable. All these propositions were not seriously challenged by the advocate for the first respondent. We therefore agree with the learned Subordinate Judge, that the documents Exs. D 29-a and D 29-b could not validly convey the exclusive title to the properties mentioned therein to the first defendant and notwithstanding them the properties would continue to be joint family properties liable to be divided between the brothers.

37. The advocate for the appellant raised a further contention that the power of attorney in favour of Lakshmanan Chettiar who executed Ex. D 29-a on behalf of Annamalai, did not confer on him a power to execute a deed of gift or settlement in favour of one of the sons alone. According to him, Ex. D 29-a, though called a deed of sale, is in reality a deed of gift or settlement. In the power of attorney, Ex. D-2 there are only two clauses which have any relevancy. They are clauses 9 and 13. They run as follows:

Clause 9 : "To sell to any person all or any of my lands, leases and charges, whether now belonging to me or which shall belong to me and for that purpose to sign and execute all transfers and other instruments necessary.

Clause 13 : " To execute a deed of gift of the properties I possess in Puttalam in favour of my sons, Muthukaruppan and Nachiappan.

Clause 13 obviously cannot apply, because Ex. D 29-a is in favour of the first defendant only and not in favour of both the sons. If Ex. D 29-a were in reality a sale, then undoubtedly Clause (9) would be sufficient to confer the requisite authority on the agent to execute it. But it is contended that the consideration for Ex. D 29-a is recited therein as a portion of the sum which Annamalai agreed to pay to the first defendant at the time of his (Annamalai's) marrying a second time. Even assuming that there was an enforceable promise by Annamalai--and that was the consideration--it will be doubtful if the transaction could be called a

sale when the transfer is not for a price. We do not desire to pronounce an opinion on this question because, even assuming that this document, Ex. D 29-a, was validly executed it could not, according to the law obtaining in British India, convey a valid title, to the first defendant of what must be deemed to be joint family property.

38. It was mentioned at the beginning that the first defendant strongly relied upon the muchilika dated 1st May, 1940, to which the plaintiff was also a party. The plaintiff, apart from denying its legal effects as contended for by the first defendant, seeks to get rid of it by pleading that its execution is vitiated by the exercise of undue influence by the first defendant on him. The plaintiff's case on this point is very vague and the evidence extremely meagre. So far as we understand it, the plaintiff's case is that his marriage with the daughter of a rich Chettiar in Kandanoor was being negotiated at that time, but the first defendant threatened not to take any part in the marriage, or to expend monies for it, unless the plaintiff agreed to a division and unless he signed the document in question, that the first defendant had the purse with him and that he was a young boy and he did not want to have his marriage broken off and so persuaded by his mother, he had no other alternative but to sign the muchilika. We consider that the plea of undue influence is entirely without substance. This is what the plaintiff himself says in his evidence:

After my marriage was settled, defendant i objected to give me money for the marriage and. for the performance of the marriage in the family house and so my mother advised me to sign in the agreement to get over the objections. As Narayana Chettiar (the bride's father) was a respectable man, I was afraid that the marriage might be cancelled if he came to know of the differences between me and defendant I. So I signed in Ex. D-II.

40. In cross-examination he says:

Defendant 1 told me that unless I signed in the original of Ex. D-i he could not spend money for the marriage.

41. So, apparently, the first defendant wanted to have a division effected and the expenses of the plaintiff's marriage met from the plaintiff's share. In his evidence the first defendant says:

I told my step-mother that plaintiff had become a major and he can have the properties divided and attend to the expenses himself.

42. It is impossible to find evidence of any circumstances, which can lead to an inference of undue influence. It cannot be said that the first defendant was in a position to dominate the will of the plaintiff. The plaintiff had his mother and his maternal relations and their advice. It is not even suggested that he was prevented from having any legal advice. He was about 20 at the time, but in the community to which he belongs, it is an age when the plaintiff can be expected to have good knowledge of the affairs of the world, particularly of matters

relating to money and property. We have no hesitation in holding that the muchilika (Ex. D-11) was not executed by the exercise of undue influence by the first defendant on the plaintiff. At the same time, we are not disposed to attach very much importance to this document as shutting out the plaintiff from putting forward such rights as he may have in law. The only words that could possibly be pressed into the service of the first defendant are the words "in pursuance of the will executed by our father." Now, it is a far cry from these words to what the first defendant would say they imply, viz., "accepting the validity of the documents dated 2nd September 1926, in favour of the first defendant." The document says nothing of the sort. The plaintiff does not say that he will be bound by the deed of sale and the deed of transfer of leasehold in favour of the first defendant. No doubt there is mention of the will; but that leads the first defendant nowhere, for he is not claiming any right in this suit under that will. The will did not bequeath any specific properties to the first defendant and it may be stated, in one sense, there was nothing on which the will could operate, so far as the property in Ceylon were concerned. It is clear that there could be no estoppel against the plaintiff on account of this document. It has not been suggested that acting on the faith of this, the first defendant changed his position or did any act, or suffered any detriment and therefore the plaintiff is prevented from going behind it. The only detriment suggested, viz., that the first defendant took part in the marriage, is, to say the least, fanciful. The advocate for the first defendant tried to say that the document is evidence of an assent or an acceptance on the part of the plaintiff, but was unable to maintain that it could fall within any of the known legal positions of election, or ratification, or the doctrine of approbate and reprobate. It has been held that even an admission made under a wrong impression of the law will not bind a party (vide *Sankaran Nambi v. Nangeeli Amma*¹). Cases in which Courts have upheld transactions acted upon for a number of years, invalid though they may be, are entirely irrelevant. (*Brijraj Singh v. Sheodhan Singh*² and *Subbarao v. Subbarao*⁵.)

43. We therefore do not agree with the learned Subordinate Judge that the two deeds of conveyance in favour of the first defendant (Exs. D 29-a and D 29-b) are valid and binding on the plaintiff because of his execution of the muchilika (Ex. D-11).

44. Though, therefore, we should, if the question were to be decided according to the law of India, be inclined to hold in favour of the plaintiff with regard to his claim for a partition of the Immovable properties covered by Exs. D 29-a and D 29-b, still in accordance with our finding that a British Indian Court cannot have jurisdiction to entertain a suit for partition of Immovable property outside British India, the plaintiff cannot be given any relief in this suit in respect of them. The appeal which is really confined to these properties, fails and is dismissed with costs of the first respondent.

45. There is a memorandum of cross-objections filed on behalf of defendants 5 and 6, the mother and sister respectively of the plaintiff. In their joint written

statement they made the following claims: (1) for maintenance of the fifth defendant; (2) for the residence of the fifth defendant; (3) for an account from the first defendant of the stridhanam and other monies belonging to the fifth defendant entrusted with her husband for investment in the business; and (4) for the marriage and other expenses of the sixth defendant, the daughter. The issues relating to these claims are issues 12, 12 (a), 12 (b), 12 (c), 12 (d) and 13. The learned Subordinate Judge gave a finding only on issue 12 (d). He held that the fifth defendant was not entitled to any separate residence and if any separate residence were necessary, it shall be allotted in the plaintiff's half share of the family house and the actual allotment was reserved to be fixed by the Commissioner. The fifth defendant will no doubt have a right to reside in the family house, but it is extremely unlikely that she would reside anywhere except with her son, the plaintiff. We do not think it necessary to interfere with the finding of the Subordinate Judge in this matter.

46. Issues 12, 12 (a), 12 (b), 12 (c) and 13 were not decided by the Judge. He considered that these issues had got to be dealt with only after the Commissioner had taken an account and determined the assets and liabilities of the family. They were, therefore, reserved for being dealt with after the return of the Commissioner's report. Ordinarily it is the practice to provide for the maintenance of widows and marriage expenses of unmarried girls in the family in the preliminary decree itself; but we do not think that the rights of the fifth and sixth defendants have been injured by such a reservation. Their advocate, however, rightly complains that the reservation made in the judgment has not been properly incorporated in the decree. Clause (7) of the decree as drafted is certainly incomplete and inadequate. We direct that it be modified in accordance with the reservation made in paragraph 51 of the learned Judge's judgment.

47. There was also justification for their complaint that issues 12 (a) and 12 (b) should have been decided. But, before us, on behalf of the first defendant, his Counsel does not object to the Commissioner, who has been appointed to take an account of the business also ascertaining the amount due to the fifth defendant in respect of the amounts belonging to her and invested in the business.

48. The first defendant does not also now dispute the rights of the fifth defendant to a share of the thottam at Puttalam and his admission is recorded. The memorandum of objections will otherwise stand dismissed. No order as to costs.