

(1929) 04 MAD CK 0021
In the Madras High Court

N. Purushothama Rao

APPELLANT

Vs

Mallavarapu Rama Rao and Another

RESPONDENT

Date of Decision : 04-04-1929

Acts Referred:

Citation : AIR 1930 Mad 326 : (1929) 30 LW 251 : (1929) 57 MLJ 720

Hon'ble Judges : Ramesam, J

Bench : Division Bench

Judgement

Ramesam, J.—These three appeals are filed against the judgment in O.S. No. 43 of 1925 on the file of the Subordinate judge's Court of

Nellore. The original plaintiffs were two brothers. The first was a major and the second a minor appearing by his elder brother as next friend. The

2nd plaintiff died during the pendency of the suit. The 1st defendant was their father, the 2nd defendant was the brother of the 1st defendant and

the other defendants were the alienees of defendants 1 and 2. The 8th defendant was the special Receiver appointed in the Insolvency Proceedings

in connection with the insolvency of the 1st defendant who became insolvent while the suit was pending. The suit was filed to declare that the

partition between the 1st defendant and the 2nd defendant in 1915 was unfair and therefore not binding on the plaintiffs, to set aside certain

alienations made by defendants 1 and 2 and also for a partition of the shares of plaintiffs 1 and 2 and recovering possession of them. The

Subordinate Judge found that the partition of 1915 was fair and binding on the plaintiffs and on that footing gave* a decree to the 1st plaintiff for

partition and possession of his share of the properties that were allotted to his branch. Appeal No. 256 was filed by the Receiver (8th defendant),

Appeal No. 257 was filed by the 1st plaintiff and Appeal No. 363 was filed by one of the alienees, the alienation in whose favour was declared not

to be binding on the plaintiffs. We will now take up these appeals in order.

2. In Appeal No. 256 the only point raised by the 8th defendant is that provision should be made in the decree for the discharge of the 1st

defendant's debts out of the joint family properties and that the decree for partition should be only of the rest of the properties that remained after

provision is made for the payment of the debts. The 8th defendant filed a written statement in the Court below saying that as the main object of the

suit was to have the partition of 1915 and the alienations made by the 1st defendant declared invalid and to have them set aside and not a partition

between the 1st defendant and his sons, the validity and binding nature of the debts cannot be gone into in this suit. Apparently, at the time when

issues were framed with reference to this allegation the parties did not think it necessary to raise an issue relating to the debts. The result was that

all the parties and the Subordinate Judge thought that no inquiry about the debts was necessary and the decree passed does not make any

provision for any enquiry and the preliminary decree is a pure decree for partition. Now the 8th defendant wants such a provision to be inserted.

We think it is too late. After all, the creditors do not suffer by our refusing to adopt the course suggested and it does not injuriously affect the

interests of any parties. This appeal is therefore dismissed with costs. The Receiver may pay the costs and take his own costs from the estate of the

insolvent.

3. In Appeal No. 257 the 1st plaintiff is the appellant. He argues that he never intended to separate from his younger brother but his object was

that he and his younger brother should be separated from his father and therefore he was entitled to two-thirds of the properties that were allotted

to his branch or at any rate half of them and the 1st defendant half. We think that both these contentions are not well founded. The 2nd plaintiff,

being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him. If the Court thinks fit to allow partition

on behalf of the minor one can well say that the minor has become divided; but until the decree is passed one cannot say that the minor's interests

are divided from the rest of the family.

4. The 1st plaintiff has divided from the rest of the family. The result is that 1st plaintiff went out of the family and the 2nd plaintiff remained with the family, and consequently the share of the 2nd plaintiff vested in the 1st defendant by survivorship. The Subordinate Judge is right in his conclusion.

This point therefore fails.

5. The second point argued for the 1st plaintiff is that the alienation in favour of the 6th defendant was nominal. We think that the Subordinate Judge is right in the conclusion he arrived at. His reasons are given in paragraph 14 of his judgment with which we agree.

6. The third point is that the partition of 1915 was really unfair. Here also we agree with the conclusion of the Subordinate Judge. The result is Appeal No. 257 also fails and is dismissed with costs.

7. Some grounds are taken against the 3rd respondent. So far as that item is concerned, the 3rd respondent will be entitled to get costs proportionate to that item. The other respondents will get their proportionate costs, i.e. proportionate to their interests.

8. Appeal No. 363 of 1927 is by the 5th defendant. His sale-deed is Ex. V. It was effected for the purpose of discharging the prior mortgage debt under Ex. I. It is also not disputed that the consideration for the sale-deed was paid in discharge of the mortgage debt as the endorsement on the deed shows. The Subordinate Judge following the decision in *Bandhu Ram v. Ram Kishun Sonar* (1923) 21 All. L.J. 354 has held that there was no pressure for the sale and therefore the sale was not binding on the plaintiffs. Whatever may be the law as to the right of a manager to sell when there was no pressure, a father can certainly sell for discharging antecedent debts as here. There is no question about the existence of the antecedent debt or of the fact of its having been paid off. We do not agree with the decision in *Bandhu Ram v. Ram Kishun Sonar* (1923) 21 All.

L.J. 354. I We allow this appeal and hold that this sale is binding on the plaintiffs. We direct that this item be excluded from partition.

9. The 5th defendant will have his costs in appeal and in the Court below.