

(1926) 01 MAD CK 0041
In the Madras High Court

Narayana Sah

APPELLANT

Vs

Sankara Sah and Others

RESPONDENT

Date of Decision : 12-01-1926

Acts Referred:

Citation : AIR 1927 Mad 53 : (1926) 24 LW 621 : (1926) 51 MLJ 621

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Division Bench

Judgement

Kumaraswami Sastri, J.—This is a suit by the plaintiff for a partition of joint family properties, and for the delivery of his share. One

Munuswami Sah, Sankar Sah (1st defendant), Chinnaswami Sah and Ponnuswami Sah were four brothers. The 1st defendant is one of the above

four who is alive. Munuswami Sah had three sons and a daughter. The eldest son Sudaf-sana Sah filed C.S. No. 63 of 1910, got his share and got

himself divided from the family. The decree in that suit is marked as Ex. A. The second son Chender Sah is the 10th defendant. He has a son and

two daughters who are respectively the 20th and 21st defendants. The third son Narayana Sah is the plaintiff in this suit and the daughter

Lakshmi Bai is the 17th defendant. Sankar Sah, the 1st defendant, has five sons and two daughters. Krishna Sah, the eldest son, is the 2nd

defendant and he has a minor daughter who is the 18th defendant. The second son Kasi Sah is dead and the 6th defendant is his minor son. The

third son Gaja-pathi Sah is the 3rd defendant and he has a son who is the 7th defendant and a daughter who is the 19th defendant. The fourth son

Girdraj Sah is the 4th defendant. The fifth son Rajaram Sah is the 5th defendant. The two daughters are the 15th and 16th defendants.

Chinnaswami ? Sah, a brother of the 1st defendant, is the 8th defendant and his son is the 9th defendant. Ponnuswami Sah, the last brother, died, leaving two sons Krishna Sah and Ramakrishna Sah who are the 12th and 13th defendants. Thus there were four branches of the family and the relationship is not disputed, nor is it disputed that there are joint family properties in respect of which a partition is necessary. The plaintiff alleges that he is entitled to one-eighth share in the properties whereas the contesting defendants in the suit, namely, the other two branches of the family and their descendants, state that the plaintiff is only entitled to one-twelfth share as Sudarsana Sah whom I have already referred to got his one-twelfth share and became divided from the family and that it should be taken into account in this partition.

2. One of the questions to be decided is what is the share of the plaintiff and incidentally also what is the share of the 10th defendant who supports the plaintiff. Another question raised in the suit is whether the contract business carried on by the 1st defendant with the Corporation of Madras is joint family business or the separate business of the 1st defendant. The case for the plaintiff and the 10th defendant is that it is the separate business of the 1st defendant while the case of the other defendants is that it is joint family business which the 1st defendant carried on as the head and managing member of the family. There are allegations made in the plaint of waste and mismanagement, but it is unnecessary to consider those allegations as no evidence was let in nor were any arguments addressed on the point as to how far the 1st defendant is liable for any waste or mismanagement. The next question is as regards the rights of the plaintiff and the 10th defendant to mesne profits. Notice was given in the year 1922 by the 10th defendant claiming a share and he would prima facie be entitled to mesne profits from the date of notice, but he claims mesne profits two years earlier on the ground that he was making oral demands for partition which were not complied with.

3. Three questions arise for determination in this suit, viz.:

(1) What is the share which the plaintiff is entitled to?

(2) Whether the contract business carried on by the 1st defendant with the Corporation of Madras is joint family business or the separate business

of the 1st defendant in which the plaintiff and the 10th defendant have no

interest and are not liable for any loss? and. (3) Whether the 10th defendant is entitled to mesne profits for any period earlier than the date of his notice, viz., 7th November, 1922?

4. As regards the shares to which the parties are entitled the 1st question is whether where there is a joint family consisting of more branches than

one and a member of one of the branches separates himself and is given his share that share should be taken into account on a partition between

the other branches. This question has been considered and decided by the Madras High Court in *Manjanatha v. Narayana* ILR (1882) M 363

where Innes and Muthuswami Aiyar, JJ. held that where a joint family in an advanced state of development is broken up by partition, regard must

be had to the successive-vested interests of each branch, and in order to secure equality of shares, division per stirpes at each stage when a new

branch intervenes is necessary. Muthuswami Aiyar, J. puts the question to be decided as follows:

The question therefore arising for determination is whether in cases in which some members of a joint Hindu family separate from it at one time and

the others on a subsequent occasion, regard should be had to the share allotted at the first partition in computing the shares to be allotted at the

second division

and both the learned Judges held in an elaborate judgment that where there are different branches entitled to shares and there has been a partition

in which a member of one branch has received his share the remaining members cannot claim their shares ignoring the share already given to the

member who has separated himself and claim equality as regards partition of the other branches. This decision so far as the Madras High Court is

concerned has not been dissented from and seems to me to be equitable. As is pointed out in that case, if there are two brothers one of whom has

five sons and the other only one son, and if out of the five sons, four sons get their share and separate themselves from the joint family, it will be

inequitable to divide the remaining property equally between the two branches, namely, the undivided son of the first branch and the one son of the

second branch ignoring the fact that the other four brothers of the first branch had received their shares and separated themselves from the joint

family. It is a recognised principle of Hindu Law that in the case of a joint family

consisting of more branches than one the principle of survivorship and the principle of representation in each branch cannot affect the rights of the other branches and that it is only in the case of one branch being entirely extinct the other branches get any advantage by survivorship. It therefore stands to reason that where there is a partition effected between the members of one branch and one of such member goes out, it ought not to affect the vested rights of the other members to their shares in the joint family property; and to give effect to the contention of the plaintiff in this case, namely, that the separation of Sudarsana Sah of the first branch from the joint family makes no difference so far as the shares of the other members are concerned would be virtually to deprive the other members of the joint family of their vested rights to their specific shares, because of something which affects the members of the other branch. I am unable to agree with the view taken in *Pranjivandas Shivilal v. Ichharam* ILR (1915) B 734 as I think that the view taken in that case would really work hardship on the other branches of the joint family. It has now been settled that a member of a joint family may separate leaving the other members as joint and though in the case of a joint family which consists only of sons of one father there may be no difficulty, the hardship pointed out in *Manjanatha v. Narayana* I LR (1882) M. 362 as regards cases where the family is in an advanced state of development and where there are several members is, I think, real. I do not see sufficient grounds for not following the decision in *Manjanatha v. Narayana* I LR (1882) M. 362. I think this is one of the cases where the principle of per stirpes should be applied and it will cause a great deal of hardship and confusion if the ruling in *Manjanatha v. Narayana* I LR (1882) M. 362, which is, in my view, consonant with equitable principles and which has been treated as, good law for several years and partition effected on that footing is not followed.

5. I am therefore of opinion that the plaintiff and the 10th defendant are each entitled to one-twelfth share.

6. The next question is as regards contract business carried on by the 1st defendant with the Corporation of Madras. The evidence of the 1st defendant is that the family is a trading family, that both his father and grandfather were engaged in contract work and that in 1910 owing to there being no contracts in hand he entered into the contract with the Corporation. He

says that the immediate occasion for entering into this contract with the Corporation was that one Chockalinga Naicker, who owed money to the joint family, had entered into a contract with the Corporation which he was not able to carry out and he suggested that this family may take over this contract and also the materials which he had collected for the purpose of this contract and that he (the 1st defendant) entered into this contract with the Corporation and continued to do the work from 1910 to 1922. He says that even now there is some contract with the Corporation. He says that the adult members of the family, defendants 8 and 10, were actually attending to this business, that no objection was taken by any of them till notices passed in 1922 regarding the carry-on of this business. The 10th defendant who is an undivided brother of the plaintiff admits that he was looking after this business from 1910 onwards but states that he did so thinking that it was first defendant's separate business and that he did so at the instance of the 1st defendant who asked him to attend to this business. So far as the 8th defendant is concerned, he in his written statement admits that it is a joint family business and the evidence is that both the 8th and 10th defendants were taking a prominent part in the management of this business. It is not disputed that both the father and the grandfather of the 1st defendant were carrying on contract work. It is admitted that they were carrying on trade in silk thread and Lameta and that they were carrying on contract business with the Army Clothing Department. In the plaint filed by Sudarsana Sah in 1910, he, after referring to the contract with the Army Clothing Department, refers to several other contracts which the parties then took up and I have no doubt that the family was a trading family, one of the important branches of activity being the taking up of contracts. It has no doubt been now settled that in the case of a joint Hindu family it is not open to a member to carry on a new venture so as to make his other co-parceners liable for any loss in that venture. But it can hardly be said on the evidence before me in this case that the contract with the Corporation was a new venture in that sense. No doubt where a family lives by entering into contracts and making profits therefrom it cannot be said that because a contract entered into at one stage is a new venture in the sense that such a contract was not taken up before it makes the contract a new venture in the

sense that the other members are not liable. The question often is the difference in degree or the difference in kind, and so long as the business is a

business which is similar in nature it cannot be said that the business is a new venture which could not bind the other members of the family. In this

case there is the further fact that joint family-funds were utilised without any objection for the performance of this contract with the Corporation.

7. The main ground on which it is sought to prove that this contract is not binding on the plaintiff and the 10th defendant is that the 1st defendant

when, he began this business opened a new account called "Thundu Kanakku" with the firm of R.M. M.S.T. and that moneys were drawn from

that firm for the purpose of this contract business. It is also pointed out that the 1st defendant in the statement of account filed by him in the suit

filed by Sudarsana Sah in 1910 says that he is a debtor to the family to the extent of Rs. 9,000 which represents the value of the materials that

Chockalinga Naicker gave to the family. It is also pointed out that a separate account was kept as regards this contract business. The 1st

defendant says that he kept a separate account because there were partners in this contract business, that originally it was intended to take

Chockalinga Naicker as a partner and work this business, but that Chockalinga Naicker not being satisfactory the idea was given up, that

subsequently there were two partners Krishnamachari and Subramania Aiyar, that the business was an extensive one with partners and that a

separate account was kept. The 1st defendant says that moneys drawn under "Thundu Kanakku" were utilised for joint family business also and he

points out an entry where Rs. 1,000 drawn under the "Thundu Kanakku" was utilised for Lameta business. He also states that he did not keep the

moneys he got from this contract business separate from the other moneys and that all the moneys were indiscriminately utilised for joint family

purposes. Having regard to the fact that the adult members of the family were working in this contract business without any objection from 1910

onwards and also having regard to the fact that the family was a trading family, one of the important branches of their activity being contract

business, and also having regard to the fact that the 1st defendant was not keeping a separate account of the profits derived from this contract

business I do not think I can hold that the contract business entered into by the 1st defendant with the Corporation of Madras was a separate

contract entered into by the 1st defendant in which the plaintiff and the 10th defendant had no interest.

8. The next question is as regards the mesne profits claimed by the 10th defendant. His case is that two years before he gave notice to the 1st

defendant and during his absence in Conjeeveram the lock of the room in which the materials of the Army Clothing Department had been kept was

broken open by the 1st defendant, that since then there were misunderstandings and that he was living separately although he admits that he was

attending to the work. The 1st defendant denies that there were any misunderstandings in connection with the breaking open of the lock. He states

that in the room the surplus stock in respect of the Army Clothing contract"" was kept which was being damaged by being locked up, that he got a

purchaser from Rangoon in respect of the materials that were lying idle there, that as the 10th defendant was absent and as the purchaser was

going back to Rangoon he opened the lock and that it did not give rise to any misunderstanding between the parties. The evidence of the 1st

defendant is supported by the evidence of Krishna Sah who is a respectable witness and who admittedly was one of the persons who mediated

between the 1st and 10th defendants. He states that the 1st defendant was ready to give a share to the 10th defendant, that there was nothing said

about any quarrels before 1922 and that there was no complaint of breaking open the lock as giving rise to misunderstandings between the parties.

The 10th defendant says that Dr. Venkatasami and one Raghul Sah mediated but they are not called. On the evidence I do not think I can hold

that the 10th defendant is entitled to mesne profits for any period prior to the date of his notice in which he called upon the 1st defendant to effect a

partition"".

9. There will therefore be a decree declaring that the plaintiff and the 10th defendant are each entitled to one-twelfth share in the joint family

properties, that the contract business carried on by the 1st defendant with the Corporation of Madras was a joint family business in which the

parties are entitled to profits and liable for losses in proportion to the shares to which they are entitled in the joint family properties, that the 10th

defendant is entitled to mesne profits from the date of his notice, viz., 7th November, 1922 and that the plaintiff is entitled to mesne profits from the

date of the plaint. It will also be declared that the 1st defendant is not liable for any sum claimed in respect of waste or mismanagement alleged in

the plaint. There will be a preliminary decree in the above terms. The suit will be referred to the Official.

10. Referee for taking an account of the joint family properties moveable and Immovable of the debts due to and by the joint family and of the

profits and losses in respect of the various contracts now in hand and on such accounts being taken there will be a final decree for partition giving

to the plaintiff and the 10th defendant one-twelfth share each. The other defendants do not ask for any share.

11. As regards costs the plaintiff and the 10th defendant will be entitled to take their costs incurred up to this date out of the estate and further

provision will be made for the costs of the reference when the final decree is passed.