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**(1915) 02 MAD CK 0019**  
**In the Madras High Court**

Pothi Naiken though his next friend K.N.P.R. Narayanasami Naicker APPELLANT

Vs

K. Nagama Naicker and Others RESPONDENT

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**Date of Decision :** 15-02-1915

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 98(2)

**Citation :** (1915) 28 MLJ 423

**Hon'ble Judges :** Sankaran Nair, J;Oldfield, J

**Bench :** Full Bench

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**Judgement**

Sankaran Nair, J.—This is an appeal by the plaintiff from a decree passed by the Subordinate Judge of Madura dismissing his suit for a,

declaration that a partition, deed alleged to have been executed between the deceased Subba Naik, his paternal uncle and Nagammal, the mother

of the minor plaintiff acting on his behalf, on the 8th December 1907, and a will alleged to have been executed by Subba Naick on the 9th

December 1907, are not genuine; and, in the alternative, that they are invalid and ineffective to affect the plaintiff's right of survivorship to the joint

family properties. Ramasami Naick the plaintiff's father, and Subba Naick his brother were undivided brothers Ramasami Naik died on the 27th

December 1906 leaving his widow Nagammal and a minor son, the plaintiff. She continued to live in the family house with Subba Naick. On the

7th December 1907 she executed a power of attorney in favour of her Sambandhi Ramaswami Naiken who is defendant's 2nd witness. The

power of attorney was executed in order to effect a division of her son's share of the joint family property with Subba Naick. The partition,

however, was not carried out. Subba Naick was ill for some time and he went to

Mallanginar, the village of his brother-in-law Kuppusami Naick in December 1907. A telegram was sent to the Sub-Magistrate of Aruppukottai by one Vyravan Asari P.W. 5 to the effect that Kuppusami Naicken had carried away the properties of Subba Naicken which were deposited for safe custody at Arruppukottai. The Station House Officer went to Mallanginar and took a statement from Subba Naicken on the 4th December. Subsequently the Magistrate also came to the village and took another statement on the 7th. Subba Naicken went back to his village Ramanujapuram and died there either on the night of the 9th or the 10th. The partition deed is dated the 8th. It consists of two parts Ex. 3 and 3 (a). Ex. III recites that as the family properties valued at Rs. 80,000 had been divided in the presence of Panchyatdars, into two equal moieties. ""Our connection shall hereafter be, only by relationship, but we shall have no monetary concern in respect of these properties."" It purports to have been signed by Subba Naicken and by Nagammal by affixing her mark. It is attested by 12 witnesses and by the writer. Attached to that Exhibit III are certain sheets of paper which contain the schedules of properties. They are admittedly not signed either by Subba Naick or Nagammal. They are attested by about 15 witnesses. The District Judge has held that Exhibit III was signed by Subba Naicken and Nagammal, that Exhibit III (a) was not written in Subba Naicken's lifetime and therefore no effect can be given to it: and he finds therefore that Exhibit III effects only a division in status. He finds the will is genuine but it is inoperative because there was no partition of properties before the death. He accordingly dismissed the suit. After Subba Naicken's death the will was presented for Registration and though the Registrar found that Exhibit III was genuine he was of opinion that under the provisions of the Registration Act the document could not be registered as it did not contain any particulars of properties. A suit was then filed (O.S. No. 26 of 1906, Subordinate Court of Madura) to get the document registered. The Subordinate Judge and in appeal the High Court held that Subba Naicken's widow was not competent to present the document for registration and the Registrar was right in refusing to register the document.

2. [His Lordships considers the evidence on the point.]

3. It is next argued that the plaintiff's mother was not justified in consenting to

a division of the properties on that date. It is not denied that under ordinary circumstances she would be entitled, on behalf of her minor son, to enter into an agreement of partition. If a partition cannot take place among members of a Hindu family when there is a minor, then a partition would, in many cases, be impossible. In this family there can be no doubt that his mother was his proper representative. But it is said that Subba Naicken died within a few days after the partition and that she must have known of his impending death and therefore she was wrong in consenting to his partition which had the effect of defeating the right of the minor to take by survivorship the entire property of Subba Naick who has no sons. I am not able to accept this contention. The law will not recognise the contingency or probability of a person's death as a reason for not consenting to a demand for partition which a person is entitled to claim.

4. It was argued before us that as she was not entitled to give her assent to the partition, a declaration by Subba Naik alone of severance of interest would not be of any avail. This question does not arise as I have found that the minor's mother was a consenting party to the partition. But as the question is fully argued and I do not feel any doubt on the question I proceed to give my opinion.

5. I think the question is really concluded by the decision of the Judicial Committee in *Suraj Narain v. Iqbal Narain* 24 M.L.J. 349. Their

Lordships say in that case that "" a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in

severalty may amount to separation : but to have that, effect the intention must be unequivocal and clearly expressed."" In my opinion it clearly

means that it is open to a member of an undivided family governed by the Mitakshara Jaw to effect a separation between himself and the other

members of the family by a declaration to that effect made to the other members. Of course the declaration must be clear and in such a form that it

is not open to him afterwards to say that he still continues to be a member. It is said that their Lordships must not be taken to have decided this

question as their statement of law itself is not clear and it is opposed to their own prior decisions and to the accepted principles of the Hindu Law

of co-parcenary. Before that decision in a series of cases *Bulakee Lal v. Mussamat Indurputtee Koer* (1865) 3 W.R. 41 *Mussamat Vato Koer v.*

Rowshun Singh (1867) 8 W.R. 82 Ram Dyan Kunwar v. Mussamat Phoolbas Koer (1870) 14 W.R. 346 Baghuba Nanda Doss v. Sadhuchurn

Doss (1878) 4 C. 425 Badhacharan Doss v. Kripatlal Doss ILR (1879) C. 474 the Calcutta High Court had taken this view. The Madras High

Court in Subrantanian Maistry v. Narasimhalu Maistry 11.M.L.J. 353 and in Thandayuthapani Kangear v. Raghunatha Kangear ILR (1911) M.

239 had taken the contrary view. Both these views were placed before their Lordships. The opinion of one at least of the commentators of Hindu

Law is clear on the point. In Vyavahara Mayuka, Mandlik on Hindu Law, page 38 it is said that ""even where there is a total absence of any

property, a partition is effected by the mere declaration. "I am separated from thee. For partition is a particular condition of the mind and this

declaration is indicative of the same"". In these circumstances I cannot disregard the expression of opinion by their Lordships of the Privy Council. I

am therefore of opinion that this contention cannot be allowed. The next question that is argued before us is that Exhibit III requires registration and

is therefore not admissible in evidence to prove even a division in status. This objection was not raised in the Lower Court. Subba Naick's widow

Seethammal presented the document for registration and on the Sub-Registrar's refusal she appealed to the District Registrar before whom the

plaintiff contended that the document should not be registered. After hearing both sides the District Registrar refused her application on the ground

that neither Exhibit III nor Exhibit III (a) can be registered, though he found that Exhibit III was genuine. She then filed a suit for an order to direct

registration. The plaintiff contested the suit. It was decided in appeal by the High Court that she was not entitled to present the document for

registration or to get it registered. It would be unjust to allow the plaintiff now after defeating all her attempts to get her documents registered both

before the Registration officers and before the Civil Court to contend that for want of registration the document is invalid. The decision that she

could not get the document registered is binding on him and he is estopped from raising the plea. Moreover the Registrar has decided that Exhibit

III cannot be registered under the provisions of the Registration Act. Assuming that decision is not binding on the parties it is not shown to be

wrong and that the document could be registered. In that case the objection is not of any force. It was while the litigation was pending that the

present suit was filed and I have no doubt that the objection was not raised in the Lower Court because it was then thought that the question of registration would depend upon the result of that decision. For these reasons I am of opinion that the appellant should not be allowed to raise this question in appeal. But as my learned brother disagrees with me, I proceed to give my opinion on the main question whether a will effecting a division in status requires registration.

6. For the decision of this question a division in status may be taken to be a severance of co-parcenary between some or all of the members of an undivided family and although the property is unapportioned and left in joint enjoyment as before. The act may be unilateral as we have already decided. A definite and unambiguous declaration by a member is sufficient to constitute him a divided member though this in my opinion makes no difference in principle. The only changes effected by a division in status are that the share is fixed without liability to increase or diminution by deaths or births and that on the death of a member without sons his share so fixed devolves on his widow or the other heirs who take according to the rule of Hindu Law of succession in the absence of sons. A document declaring such division in status may be taken for this purpose to have no reference to property at all. It effects only a change in status. On principle such a document does not require registration as a person's power of dealing with any specific property is not affected thereby.

7. It is argued that the joint tenancy has been converted into tenancy in common. The differences between the joint tenancy of a Hindu family and as it is understood in English law must be borne in mind. In the former the joint tenancy had its origin in birth and not by conveyance. There is no unity of possession, the managing member being alone entitled to it against the others. There is no unity of title as the members do not derive their interest at the same time. There is no unity of time as they do not hold for the same time and from the same time. There is no unity of interest as some may be entitled to larger shares than others. The chief characteristic of survivorship does not exist as a co-parcener's interest devolves not on all the others but only on his sons if any. A co-parcener's interest again is liable to diminution unlike the interest of a joint tenant in English law.

The notion that a document effecting a severance in status requires registration

is due apparently to the notion derived from English law that the member thereby takes a specific part of the whole as his exclusive property. But a division in status only fixes the share without liability to fluctuation and introduces a new rule of devolution of property in the absence of sons. The rights of the co-sharers are not otherwise varied. The entire property remains common stock, the co-sharers continue interested in every part of it, whatever increment is made to the common stock becomes part of it as before severance no matter by whose exertions it may have been made. The expressive words of Apararka that partition does not create any new right but is only the effect of rendering visible the right already existing, applies strictly to this kind of partition. I am of opinion that a document merely creating a separation in status does not fall within the provisions of the registration Act requiring registration. It does not in itself create any interest and if any is created it is by operation of rules of Hindu Law, not by virtue of the instrument.

8. Exhibit III itself does not in terms divide any specific property. Neither Subba Naick nor the plaintiff derives any title to any specific property under it. It is only documents which on their face show that they come within the terms of the sections of the Registration Act that require registration. Cf. *Jivan Ali Beg v. Basa Mal* (1886) 9 A.P 108. This is also the view taken by this High Court. Mere possibility or probability is not enough. For the same reason if it is a custom or a rule of Hindu Law that in conjunction with the deed operates to create a title to im-moveable property, registration is not compulsory. Grant of waste lands on dharkast in zamindaries and certain estates carried with it according to custom a right of occupancy. But if the document itself does not confer the right, no registration is necessary. *Bamasatni Iyer v. Thirupathi Natch I. L. R.* (1903) M. 43. Similarly a deed of adoption does not require registration though adoption confers on the adopted son an interest in the Immovable property of the family of the adoptive father. Reliance is placed on *Lakshmamma v. Rameswara I. L.R.* (1889) M. 281. In that case, it was decided that an unregistered partition deed cannot be received in evidence to affect even the moveable property referred to there in. It proceeds on the view that the partition therein effected was an indivisible transaction and if therefore it cannot be received to affect Immovable property

either. Here the question is not whether the transaction is one and indivisible. A transaction effecting a division in status is very different from one

effecting a division in properties. Further, the authority of *Lahshamma v. Kameswara* I. L.R. (1889) M. 281. is greatly shaken by the decision in

*Thandavan v. Valliamma* 2 M.L.J. 130, in which it was laid down that a document which is inadmissible to effect a transaction in so far as it affects

Immovable property may be received in evidence so far as other properties are concerned. See also *Naryana Chetti v. Muthji Servai* I. L. R.

(1910) M. 76. In *Upendranath Banerjee v. Umesh Chand Banerjee* 15 C. W. N. 875 it is distinctly stated that the unregistered document there in

question was not produced to prove any collateral transaction. The cases deciding that a lease or a sale cannot be received in evidence in order to

prove the nature of the possession of the party who held under that document have no application. They proceed on the principle that as the

possession of the land in such cases can only be proved by proof of the transaction directly and in terms . affecting Immovable property the

documents are not thereby admissible. I therefore disallow this contention.

9. But as my learned brother disagrees with me, the appeal is dismissed with costs u/s 98 (2) Civil Procedure Code.

Oldfield, J.

10. I have had the advantage of reading my learned brother's judgment and can add nothing in support of his findings, in which I concur, as to the

execution of Exhibit III and the validity of and necessity for the plaintiff's mother's consent to the partition. I regret that I differ from his conclusion

that the partition can be established as regards the Immovable property in suit, notwithstanding that Exhibit III is unregistered.

11. The facts are that the deceased Subba Naick could dispose of his property by will in 2nd defendant's favour, only if he possessed a separate

interest in it. That is, if he was at the date of his death divided in estate from the plaintiff his minor nephew. Exhibit III is alleged to have effected

such a division. Its terms include statements that "" the cash, moveables and immovables court decrees etc., of which these two coparceners are

possessed, valued at Rs. 80,000"" have been divided into equal moieties, that their connection shall hereafter be only by relationship and that they

will get the pattas relating to the lands allotted to their respective shares

transferred to their names separately. There is no further specification of the properties dealt with or which fall to each share. Such specification is wanting also in the will, Exhibit IV, and is given only in the lists, Exhibit III

(a). But they are useless, because, we agree with the lower Court, they were not part of Exhibit III and were not executed by or as part of the act of the deceased.

12. The objection that Exhibit III is unregistered was first taken in this Court; and the arguments for and against it have mainly followed those relied

on by Sadasiva Aiyar, J., on the one side in *Aiyakutti v. Periasami* (1914) 15 M.L.T. 163 and on the other by Spencer, J. in that case and my

learned brother Sankaran Nair, J. in *Subramaniam Aiyar v. Savitriammal* (1908) 19 M.L.J. 228. I am unable to regard the question as concluded

by the authority of the latter decision, because I understand Pinhey, J., who also took part in it, to have proceeded not only on the unregistered

document then in question, but also on the other evidence that a partition had occurred and on the defendant's admissions and to have dissented as

regards some items, in respect of which such evidence or admissions were not available.

13. An attempt has indeed been made in the present case to support the partition by reference, not merely to Exhibit III, but also to the parties "

conduct. It is however unnecessary to decide whether a decision could be founded on the evidence of the latter with or without reference to the

former, because in fact no such evidence has been referred to. The deceased died on the day after the execution of Exhibit III: and, though there is

nothing definite as to the entry of the defendants on the Immovable properties, there is nothing to show that those in charge of the plaintiff's

interests acquiesced in their possession, the evidence being that they contested their right without delay in registration and guardianship

proceedings. The defendants therefore must succeed, if at all, with direct reference to Exhibit III alone.

14. Exhibit III alone and unregistered effected, I concede, a division in status and might perhaps have entitled the defendants to claim a division of

the moveables. But as regards immovables the greatest direct effect that can be claimed for it is that it converted the joint holding into one in

common, that is, it gave each member of the family a vested title to his share,

as it then existed, instead of a right merely contingent on his surviving till a partition might take place. It is not in my opinion possible to hold that this change did not extinguish one kind of right in the property and create another within the meaning of Section 17 of the Registration Act or affect it within the meaning of Section 49. For I see no escape from the dilemma that Exhibit III either does affect the property and should be registered or does not affect and cannot support a claim to it.

15. The alternative view, supported by my learned brother in *Subramania Aiyar v. Savitriammal* (1908) 19 M.L.J. 228 is that "" it is not the written instrument, which makes the alteration"" in the nature of the tenancy, because, ""when by virtue of it the members of the family become divided in interest, then the rule of Hindu Law converts their relation into one similar to a tenancy in common"". But with all due deference I cannot follow him.

For it does not seem to me possible to treat the rule of law as operating: independently of the instrument, when it is the clear effect of the one to invoke the operation of the other. The reference to a rule of law can only mean only that the meaning of the document is determined with regard to it by necessary implication; and there is still no reason why such determination should be recognised, as conferring substantive rights, and neglected, when the necessity for registration is considered.

16. We have been pressed with two alleged instances of titles to Immovable property, originating in unregistered documents, but alleged to be completed by operation of law. Deeds of adoption no doubt do not require registration. But it is doubtful whether even in the case of Sudras the adoption and creation of rights under it are not effected by the giving and taking of the son and not by the deed, which merely evidences it, (1881)

ILR 6 381 (Privy Council) and in any case an adoption must be regarded as equivalent to the birth of a son, whose right may therefore be considered as arising by operation of law. The authority as to leases is *Eamasami v. Tirupathi* ILR (1903) M. 48 and it decides only that, when they are operative to transfer possession as they stand. and only the right to possession is in question you are not to read into them an additional term in order to attract the provisions of the Registration Act, not that they or any other document, relied on as operative on property, is exempt from registration because such operation is merely implicit.

17. It is observed in *Subbamma Aiyar v. Saviiriammal* (1908) 19 M.L.J. 228 with regard to the general policy of the Act that with reference to the

object of Sections 17 and 48, the protection of intruding alienees, it can make little difference in the investigating of title whether the property is

being held by a Hindu joint family as joint tenants or tenants in common. But it is clear that the alienee of a share takes it as it stood on the date of

his transfer and that he may be prejudiced, if the fact that it has been ascertained already, possibly before the death of some co-parcener, which he

would naturally assume has increased it, is withheld from his knowledge.

18. Lastly with reference to the policy of Sections 21 and 32 in particular and the facts that Exhibit III could not have been registered because (1)

it did not contain the detailed description of the property required by the law and (2) was not, as this Court has held, presented for registration

by a competent person in conformity with the latter. As regards (1) the argument adopted by Spencer, J. in *Ayyakutti v. Periasami* (1914) 15

M.L.T. 163 is relied on as entailing that a document, which cannot be registered with reference to Immovable property for defects in the

description, must on that account be treated as operative with reference to it and for other purposes. With great respect this seems to me to

confuse an objection to registration on formal grounds with the argument on a distinct point, the necessity for registration with reference to the

object matter of the document and to involve the anomaly that whilst a document may be operative in spite of the omission of all the particulars,

which Section 21 requires, it might be refused registration and be useless on account of the absence of one only. And as regards (2) the

presentation by an incompetent person the suggestion that the plaintiff's successful opposition to the registration on that ground debars him from

objecting here to the document as unregistered seems to me unsustainable. For there is no inconsistency between his contentions that Exhibit III

should have been registered and that no one concerned to register it did so; and the defendant's argument amounts to no more than this, that the

document should be admitted, because two objections to it, instead of one are available. It may be matter for regret in the circumstances of the

case that defendant's expectations have been disappointed and the deceased's intention abortive. But that is the result of the latter's postponement

of his dispositions until he had no time to make them in a legal way; and the fact that he chose to risk such postponement cannot entitle the Court to

dispense with the requirements of the law for the advantage of his beneficiaries.

19. The question of registration was first raised in this Court. It is possible that the disposition of moveables contained in Exhibit III may be

separable from that of immovables and the document may be operative as regards the former. But as the learned brother's decision prevails, I do

not consider further whether the defendants are entitled to an inquiry on this point. " I would in any case allow the appeal, as regards the

Immovable properties; but without costs. In the circumstances the appeal is dismissed with costs.