

(1936) 03 MAD CK 0010
In the Madras High Court

Ragireddi Subbarao

APPELLANT

Vs

Ragireddi Subbarao and Others

RESPONDENT

Date of Decision : 16-03-1936

Acts Referred:

Citation : (1936) 44 LW 515 : (1936) 71 MLJ 419

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This is a suit for partition of the suit land of about 6 acres 10 cents in extent and recovery of one-third share

therein with mesne profits. The first plaintiff is the son of the second plaintiff. The second plaintiff, the first defendant's father, late Narayanasami

and the second defendant were brothers and formed members of an undivided Hindu family. The family was in possession of considerable

property. In December, 1916, the brothers effected a partition and the properties which fell to each were being enjoyed by the respective

branches ever since the said date. It is alleged in the plaint that at the said partition the suit land which is a cocoanut garden was not divided but

was reserved for a future partition, that the first defendant is in possession of the same wrongfully refusing to effect a partition and delivery of the

same on the ground that his father got the same as and for his jyeshtabagam at the partition between his brothers and that the allotment of any

property which has been given to the first defendant's father as jyeshtabagam is illegal under the Hindu Law and the plaintiffs are therefore entitled

to impeach the same. They accordingly prayed:

that a decree may be passed directing the division into three equal shares of the

jerayati cocoanut garden situate in Mondepulanka village as per

the A marked schedule filed herewith, regarding the same as the joint family property of the plaintiffs, and defendants 1 and 2 and directing that

one share thereof be put in possession of the plaintiffs.

2. The defence was that the partition between the brothers was a family arrangement and was acted upon by all the parties and that the suit

property was allotted to the first defendant's father at the partition with the consent of the second plaintiff and second defendant and it is not open

to them now to impeach the same after the lapse of 11 years. It is clear from the evidence that the family at the time of the partition between the

three brothers was possessed of nearly 60 to 100 acres of immovable property and that there was equal division of all the properties into three

shares except with regard to the suit property which was given to the first defendant's branch in addition. It is also clear that this extra allotment to

the first defendant, was never questioned by the family up to the date of the suit. In fact after the death of the first defendant's father in 1917 there

were leases executed in favour of the first defendant to the knowledge of the second plaintiff and the second defendant and Ex. IX dated 30th

September, 1920, was lease in respect of the suit property executed in favour of the first defendant during his minority after the death of his father

and it was brought about by the second plaintiff and the second defendant. Exs. II and V are leases after the first defendant attained majority and

they were attested by the second plaintiff and the second defendant. It is also concurrently found by both the lower Courts that the case set up by

the plaintiffs that the property was reserved for future division was false and that in the said documents there are clear recitals to the effect that the

suit property was allotted to the first defendant's father as jyeshtabagam. But both the lower Courts however held that as the allotment of any

property towards jyeshtabagam is illegal under the Hindu Law, the first plaintiff is entitled to recover one-sixth share of the suit property though the

second plaintiff and the second defendant will be estopped from recovering any portion thereof by reason of their assent at the time of the partition.

3. It is now contended before me in Second Appeal by Mr. Lakshmananna that the view taken by the lower Courts is not sound.

4. There can be no doubt that the father is entitled to and competent to

represent his sons in a partition with his brothers and a partition effected by him will be binding on the sons unless it is shown that it was fraudulent or unfair or prejudicial to their interests. The fact that some of the members are minors would not prevent the father in virtue of his position as the head of his branch to represent them. Vide *Jamna Prasad and Others Vs.*

Mt. Durga Dei and Another, . There is absolutely no proof that the partition effected between the three brothers was in any way unfair or fraudulent save in so far as this suit property, was allotted to the first defendant's father. The question therefore is whether this allotment of 6 acres 10 cents is such as to render the partition fraudulent or unfair. The family was possessed of nearly 60 to 100 acres. The result of giving the suit property to the first defendant's father will be to deprive the plaintiff's branch of about 2 acres 5 cents and the first plaintiff can be said to have been deprived of half of it. It seems to me that if the partition is otherwise fair, it is open to the father as representative of his branch to consent to this extra allotment and if it was done bona fide it will not be open to his sons to impeach the same. In *Brijraj Singh v. Sheodan Singh* (1913) 25 M.L.J. 188 : L.R. 40 IndAp 161 : ILR 35 All. 337 a father by means of a will purported to divide the family property between his three sons and awarded a double share to the eldest son and one-fourth share to each of the remaining sons, himself taking no share. The arrangement was acted upon for sometime and thereafter it was sought to be impeached on the ground that the father had no right to effect a partition of the joint family property by means of a will and that the allotment of a double share to the eldest son was invalid. But their Lordships negatived both the contentions and upheld the arrangement. Lord Moulton in the course of his judgment observed as follows at page 346:

But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family except with their consent. They had independent rights in it with which he could not interfere.

The main question, therefore, is whether there is evidence sufficient to establish the consent of the plaintiffs Rao Karan Singh and Kunwar Sheodan Singh to this family arrangement. If they accepted it, their acceptance would bind not only them but also their sons, who are the remaining plaintiffs,

as they would be representing in the transaction their respective branches of the family.

5. No doubt the question prominently before the Privy Council was in regard to the right of the father to effect a partition by a will but the principle

upon which the arrangement is upheld will apply to every case where a bona fide partition has been effected by the father as representative of his

branch (vide Mullah's Hindu Law, 8th Edn., p. 391). Mr. Somasundaram relied very strongly on two decisions of our High Court, namely,

Rajangam Ayyar Vs. Rajangam Ayyar through his next friend N. Sankaram Ayyar, and Venkata Reddi v. Kuppa Reddi (1918) 8 L.W. 400 for

the position that the allotment of jyeshtabagam is illegal under the Hindu Law. It is true that the allotment of any property as jyeshtabagam has

become obsolete and the Court would not enforce it. But if the members of a joint family agree in effecting a partition to give some extra property

to their eldest member or even to one of them bona fide, such an arrangement cannot be considered to be illegal on the ground that a certain

property was allotted as for jyeshtabagam or was given in excess of his legitimate share. It is contended it would be virtually an alienation by the

father without any necessity and would be tantamount to a gift and therefore not binding on his sons. But in my opinion it is not accurate to regard

partition as an alienation. No doubt in Venkata Reddi v. Kuppa Reddi (1918) 8 L.W. 400 where a mother represented her minor sons at a

partition the allotment of an extra share to the eldest member of the family was held not binding on the minor sons and it was held that the

transaction may well be regarded as a gift. But in that case the minor himself was the representative of his branch and the mother was representing

him as the natural guardian at the partition. As observed in Venkata Reddi v. Kuppa Reddi (1918) 8 L.W. 400 the mother has no right of

representation in respect of the family property. The position of the father is entirely different. The father is the only person entitled to represent his

sons at a family partition, and "it is only through the father that the sons take their share in the joint family property, whereas the position of the

mother is only that of a natural guardian and her powers can only be adjudged in that capacity. And a guardian has no power to consent on behalf

of the minor to any act which would deprive him of any portion of his property. In this case there is no evidence to show under what circumstances

this extra allotment was made to the first defendant's father who died about 10 years ago. Both the second plaintiff and the second defendant are

acting in violation of the arrangement which they have entered into. One must presume there must have been some consideration which prompted

the adult members of the family to agree to the extra share being given to the first defendant's branch though no doubt the specific case that it was

given to the first defendant's father for meritorious service done to the family has not been proved. In the face of evidence of the conduct of the

family for over a period of 11 years it does not lie in the mouth of the plaintiffs to impeach this transaction. As has been already stated the fact that

there are minor members of the family is no bar to the partition being effected and much more so when there is the father to represent his minor

sons. As observed by the Privy Council:

If the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings, set it aside so far as

regards himself. 7 CWN 578 (Privy Council) .

6. But that is not what is sought to be done in this case. The first plaintiff who was a minor at the time of the partition is not seeking to set aside the

partition as regards himself, but both the father and the son are trying to recover this property on behalf of the entire family. If the first plaintiff was

aggrieved by the partition effected by the father he ought to have filed a suit asking that the entire partition may be re-opened on the ground that it

has prejudicially affected him making his father also defendant and claiming one-sixth share for himself. In such a case it would have been open to

the Court to so adjust the division by allowing one-sixth share to the plaintiff and making the extra allotment divisible among the second plaintiff and

the first and second defendant's branch. But it is not possible to do so owing to the manner in which the plaintiff has framed his case. The lower

Courts were not warranted in making a distinction between the first plaintiff's and the second plaintiff's case. The first plaintiff does not impeach

the partition as unfair and unprejudicial to him and he does not seek to recover any share so far as regards himself and it is not open to the lower

Courts to make any declaration separately in his favour. I therefore reverse the decrees of the lower Courts and dismiss the plaintiff's suit with

costs of this appeal. I direct each party to bear his own costs in the lower Courts.