
(1946) 11 MAD CK 0002
In the Madras High Court

Subbu Naidu and Others

APPELLANT

Vs

Varadarajulu Naidu and Others

RESPONDENT

Date of Decision : 15-11-1946

Acts Referred:

Registration Act, 1908 — Section 17(1)(b)

Citation : (1947) ILR (Mad) 694 : (1947) 60 LW 135 : (1947) 1 MLJ 90

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—This is an appeal brought by defendants 1, 4 and 5 from a preliminary decree for partition and accounts passed by the

District Court of North Arcot. The suit was originally brought by the first respondent in the Court of the District Munsiff at Arni but as the value of

the properties involved was found to be beyond the pecuniary jurisdiction of that Court the plaint was returned to be presented to the proper

Court and was later filed in the Court of the Subordinate Judge at Vellore from where it was transferred to the District Court.

2. The relationship of the parties to one another will appear from the following genealogical table:

Pasam Lingappa Naidu : Muniyammal (6th defendant),

(died 55 years ago). | (died after suit).

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Subbu Naidu Doraiswami Naidu Chinnaswami Naidu Gopal Naidu

(1st Deft). (died in 1932). (2nd Deft.). (3rd Deft).

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| Varadarajulu Naidu. Badrachalam Naidu

| (Plaintiff). (7th Deft).

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Ramakrishna Naidu (4th Deft.). Rajaratna Naidu (5th Deft).

3. The family originally lived in a village called Vallam, North Arcot District, but migrated more than sixty years ago to the village of Oorkudi in the

same district during the lifetime of Pasam Lingappa Naidu, the common ancestor who died in the nineties of the last century. It is common ground,

that the family then owned lands and houses both at Vallam and at Oorkudi, and it is also in evidence that Lingappa Naidu was doing some money

lending on a small scale and acquired some properties. Under the management of the first defendant after Lingappa's death, the money lending

business was expanded and other properties at Oorkudi and elsewhere were purchased. But all was not well with the family as the youngest

brother, the third defendant, fell into evil ways, incurred considerable debts by reckless living and was eventually adjudicated insolvent on his own

petition. The plaintiff's father left the village on account of some misunderstandings and sought employment in Mysore State where he died in 1931

or 1932. In 1926 the plaintiff was married and there was separation in mess between the members who till then were living together. These facts

were not disputed before us.

4. It was the plaintiff's case as disclosed in his plaint and in his evidence that the properties at Oorkudi alone were divided provisionally in 1928 as

the third defendant was running into debts and it was thought desirable, in order to avoid trouble with his creditors, that the family properties should

appear to have been divided, and that the family money lending transactions standing in the name of the first defendant and the properties

purchased from the maternal uncle of the brothers should appear to have become the exclusive properties of the first defendant. When, however an

attempt was made to bring into existence a document to that effect, the plaintiff

and some others did not agree and the attempt was dropped.

Thereafter in 1930, the provisional division of the Oorkudi properties was confirmed and some of the outstandings were also divided between the

parties, the other Immovable properties and outstandings of the business being continued as joint family properties in the management of the first

defendant on the understanding that he should account for these properties and that they should be divided after the disputes relating to the debts

incurred by the third defendant were settled once and for all. After the third defendant obtained his discharge in 1937, the plaintiff demanded his

share of the properties and outstandings which remained undivided and also of the properties subsequently acquired by the first defendant with the

aid of family moneys, but failing to get satisfaction brought the present suit. Defendants 2, 3 and 7 supported the plaintiff and claimed that their

shares also in the suit properties should be separated and given to them.

5. The first defendant and his sons, defendants 4 and 5 filed a joint written statement denying the main averments in the plaint. They alleged that the

properties at Oorkudi were the only family properties and their income was hardly sufficient for the maintenance of the family. The family had no

dealings or funds or out-standings. There was thus no family nucleus out of which other properties could be purchased. There was a complete

partition in September, 1928 of all available family properties and thenceforward the parties lived as members of a divided family. At that partition

the first defendant gave each of his brothers, out of grace, some money out of his own earnings. All the properties now claimed were his own self-

acquisitions. The present suit for partition was therefore not maintainable. The suit was also barred by limitation and adverse possession.

6. The Court below found that the plea of self-acquisition broke down completely at the trial when the first defendant who was the principal

witness for the defence admitted that he carried on money dealings for and on behalf of the family, which was having a surplus income even when

he was 20 years of age, (he Was 77, when he gave evidence) and that all the properties and outstandings which stood in his name in 1928

belonged to the family. Indeed, he disowned the allegations to the contrary in his written statement and stated that they were not based on his

instructions. As regards the properties acquired by him after 1928, the learned

District Judge found that the acquisitions were attributable to the realisation of the outstandings then existing, as the first defendant admitted that he had no money dealings with others after that year. These findings were not challenged before us by Mr. Satyanarayana Rao who appeared for the appellants. This leaves for consideration only the questions as to the maintainability of the suit and acquisition of title by appellants by adverse possession.

7. In order to establish that there was a complete partition in September, 1928, the first defendant produced in the Court below an unregistered

document or instrument of partition purporting to evidence a partition arrangement among the members of the family including the plaintiff and the

properties allotted to the first defendant. As objection was raised to the admission of the document the learned Judge ruled that the document,

being compulsorily registerable u/s 17(1)(b) of the Registration Act and not having been registered, could not be "looked into for any purpose.

Having rejected the document, the learned Judge also excluded oral evidence regarding the details of the partition. On the other evidence on

record he found that, apart from the ancestral lands at Oorkudi and outstandings to the extent of Rs. 20,000 which were admittedly divided the

first defendant was in possession of considerable extent of lands in other villages and outstandings amounting to Rs. 27,900, all of which had been

acquired before 1928. This finding, was, for the most part, based on the admissions of the first defendant himself, and no serious attempt was

made before us to displace it. As these properties were much in excess of the properties which were previously divided between the parties and as

first defendant's attempt to make out that they were his self-acquisitions totally failed, the learned Judge accepted the plaintiff's case that only

some of the properties were divided at the prior partition and the other properties of the family were left in the management of the first defendant as

before to be divided after settlement of the disputes relating to the third defendant's liabilities. Mr Satyanarayana Rao referred to *Kumarappa*

Chettiar v. Adaikkalam Chettiar (1931) 62 M.L.J. 141 : ILR 55 Mad. 483 where it was held that a partition admitted or proved to have taken

place must be presumed to be complete, and that the burden of proving that certain properties were excluded from the partition lay upon him who

alleged it. As has often been pointed out, when both sides have adduced their evidence in the case, the Court has ordinarily to determine the point

in dispute on such evidence and the question of onus becomes immaterial. On the evidence in this case, the conclusion reached by the learned

District Judge seems inevitable and we entirely agree with it.

8. The main attempt of Mr. Satyanarayana Rao before us was to have the excluded koorchit admitted in evidence in the appeal and to establish, on

the strength of it that the first defendant's case of a complete partition in September, 1928 was true or at any rate that his possession of the suit

properties thereafter was exclusive and adverse to the plaintiff. Learned Counsel also complained that the learned Judge wrongly refused to admit

oral evidence to prove that the properties and outstandings which according to the plaintiff, continued joint were, in fact, allotted to the first

defendant's share at the partition.

9. The rejected koorchit has been filed in this Court with a petition for its admission in the appeal under Order 41, Rule 27(1)(a) of the Civil

Procedure Code, which allows a party to produce additional (sic) in appeal where "the Court from whose decree the appeal is preferred has

refused to admit evidence which ought to have been admitted." It was urged that the learned District Judge erred in holding that the unregistered

koorchit was inadmissible "for any purpose." This contention is clearly right. Unlike the Indian Stamp Act which renders an instrument not duly

stamped inadmissible for any purpose," the Indian Registration Act prohibits its admission only for certain purpose (Section 49). Ramayya v.

Achamma (1944) 2 M.L.J. 164 : ILR 1945 Mad. 160 relied on by the learned Judge lends no support to this view. Indeed, Mr. Munilanniah for

the respondents did not attempt to support it. We are therefore of opinion that the document should have been admitted in evidence and, as its

execution by the parties is not disputed before us, we admit it as additional evidence without formal proof.

10. The document is described as "partition koorchit" and it provides that the parties having divided "all our family properties, moveables, lands,

etc." according to the advice of certain panchayatdars, the first defendant, plaintiff, second defendant and third defendant should respectively take

the properties mentioned in A.B.C and D schedules and hold and enjoy them

absolutely. It further provides that the first defendant should take the properties purchased from his maternal uncle Thoddappa Naidu, paying the purchase money himself for which he had executed a promissory note, and also certain other lands as his Jeshiabagam or the special share of the eldest brother. The document then refers to the division on that day of the family debts and outstandings due to the family and concludes by declaring that ""since we have thus agreed and got the properties divided among us in the presence of the panchayatdars we have no properties, debts or cash hereafter to be divided. From this day onwards we have excepting blood relationship no other relationship in respect of assets and liabilities."" It is signed by all the parties and the panchayatdars. Then follows ""A schedule individual No. 1. Subbu Naidu,"" describing the item of Immovable properties allotted to the share of the first defendant. The document, however, seems incomplete in that it does not contain B, C and D schedules showing the items allotted to the other sharers.

11. We mention here, only to dismiss, a somewhat faint suggestion by Mr. Satyanarayana Rao, that the koorchit does not require registration as it is an award of arbitrators though accepted by the parties, and as such was exempted from registration u/s 17(2)(vi) as it stood before the Amending Act of 1929. It is, however, obvious that the partition was effected by the parties themselves, though in the presence of certain panchayatdars who appear to have assisted the parties with their advice as mediators. There is no indication in the document or elsewhere in the evidence that there was any submission to arbitration or that the parties intended to be bound by the decision of the panchayatdars. The koorchit therefore requires registration and, being unregistered, cannot ""affect any Immovable property comprised therein"" nor be received ""as evidence of any transaction affecting such property."" (Section 49).

12. It was, however, urged for the appellants that at any rate the koorchit evidenced a valid partition of all the outstandings due to the family. Apart from the fact that most of these debts, as appears from the evidence, consisted of mortgages of lands and stood on the same footing as the Immovable properties comprised in the document, their division cannot be regarded as a severable part of the transaction valid and operative so far as these assets are concerned. In a family partition, no part of the

transaction can be separated from the rest unless it appears that the parties intended that that part should stand even though the other part should prove ineffectual. Where an instrument of partition provided that "as we have in the presence of the undermentioned panchayatdars divided into equal moieties the cash, moveables and immovables, etc., of which we are now possessed valued at Rs. 80,000, our connection shall hereafter be only by relationship, but we shall have no monetary concern in respect of those properties," a Full Bench of this Court held that the document being unregistered could affect neither the Immovable property, nor, in the absence of any clear intention expressed therein, the moveables, the reasons given being when there is an entire contract and part of it cannot be enforced, the whole goes, whereas it is otherwise when an instrument contains two or more distinct contracts in which case they are severable. *Pothi Naicken v. Naganna Naicker* (1915) 30 M.L.J. 62. That decision governs the present case on this point. *Perumal Ammal v. Perumal Naicker* (1920) 40 M.L.J. 25 : ILR 44 Mad. 196 where an unregistered gift deed comprising moveable and Immovable properties was held good in respect of the moveables is distinguishable. The gift of the moveables was considered severable as there was no reason to suppose that the donor intended it to fail even if the gift proved inoperative as to the Immovable properties. On the other hand *R.N. Samuvier and Another Vs. R.N. Ramasubbier*, where a division of partnership assets consisting of moveables and immovables was held to fail in its entirety for want of registration furnishes a closer analogy.

13. It was next suggested that the concluding declaration that all the family properties had been divided and that there were no more properties, debts or cash left to be thereafter divided was admissible to prove the appellant's case that there was a complete partition in 1928. The suggestion is clearly untenable for that would be admitting the document as evidence of the partition, which is exactly what is prohibited u/s 49, Clause (c).

14. Lastly, it was contended that the document was admissible to prove the adverse character of the first defendant's possession of the lands which were allotted to him under the *koorchit* though such allotment was ineffectual for want of registration. This contention must be accepted, as it is supported by numerous decisions (*vide Nadepena Appamma and Others Vs.*

Saripalli Chinnaveadu (dead) and Others, Kandaswami Mudaliar

and Another Vs. Ponnuswami Mudaliar, purporting to be based on the Privy Council ruling in Varada Pillai v. Jeevaratnammal (1919) 38 M.L.J.

313 : L.R. 46 IndAp 985 : ILR 43 Mad. 244 (P.C.). An attempt was made on behalf of the respondents to show that, on a close examination of

the decision of their Lordships, it lends no support to the view expressed in those cases but, as pointed out by Sir Dinshaw Mulla in his

commentaries on the Registration Act, that view has been accepted by almost all the High Courts in India, and we do not feel disposed to refer the

point to a Full Bench as we were invited to do especially as the point is of no more than academic interest on the facts of this case.

15. The plaintiff has put forward two answers to the above contention. In the first place it is said that even if the first defendant's possession be

taken to have been adverse to the plaintiff from the date of the "koorchit, viz., the 26th September, 1928, the suit have been brought within the

period of limitation, the appellant's exclusive title has not become perfected. As already stated, the suit was originally instituted in the Court of the

District Munsiff, Arni, on the 23rd September, 1940, i.e., just three days before the expiry of twelve years. The plaint was ordered to be returned

on the 23rd January, 1943, for presentation to the proper Court, as the suit was found on objection taken by the defendants, to be beyond the

pecuniary jurisdiction of that Court. The plaintiff, however, took back the plaint from that Court only on the 27th January, and re-presented it in the

proper Court, viz., the Court of the Subordinate Judge, Vellore, on the 29th January. The question is, whether, having regard to these dates, the

suit can be considered to have been filed in time. The plaintiff is clearly entitled u/s 14 of the Limitation Act to a deduction of the period between

the 23rd September, 1940, and , the 23rd January, 1943, when the plaint was ordered to be returned. Mr. Munikanniah, however, claimed that

the period up to the 27th January should be excluded which no doubt would bring the suit within time. He contended that the period of exclusion

u/s 14 extended till the plaint was actually returned to the plaintiff, or, at any rate, till a reasonable time elapsed after it was ordered to be returned.

We are unable to accept this contention. The exclusion provided for in Section 14 is of the time during which the plaintiff has been prosecuting with

due diligence, the infructuous proceedings, and Explanation I to that section shows that the exclusion should cover the day on which the proceedings therein (i.e., infructuous suit or application) ended. Now Order 7, Rule 10(2), Civil Procedure Code, provides that on returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it. Such endorsement was made in the present case on the 23rd January itself when the order was passed, and there is nothing to indicate, that it was made by the Judge in Chambers without the knowledge of the plaintiff and his pleader as was suggested. As the endorsement is an essential formality and the plaint cannot be returned before it is made, the plaintiff is, no doubt, entitled to claim exclusion of time till then. The proceedings in the former suit cannot reasonably be said to have ended before such endorsement is made. But the plaintiff is not, in our opinion, entitled to any deduction thereafter except perhaps where he can show that the Court delayed the return of the plaint in spite of his endeavour to take it back. In such cases the Bombay High Court allowed exclusion of the further period also, but it is unnecessary for us to express any concluded opinion on that point as there is no suggestion here that the plaint was not ready for return till the 27th January. The view we have expressed above finds support *Maneklal Mansukhbhai v. The Suryapur Mills Co., Ltd.* ILR (1927) Bom. 477 and *Neerendrabhooshan Lahiri v. Berhampur Oil Mills, Ltd.* ILR (1933) Cal. 1122

16. Mr. Munikanniah referred to *Sinna Karuppan v. Muthiah Chettiar* (1925) 22 L.W. 816 *Zafar Uddin v. Debt Prasad* ILR (1939) All. 709 and *Muhammad Din v. Gurbaksh Singh* AIR 1933 Lah. 611 as supporting his contention. On an examination of the facts of these cases it would appear that the only point decided was that the proceedings in the former suit or application could not be considered to have come to an end as soon as the Court recorded an order that the plaint should be returned. It was apparently not necessary to consider what further deduction the plaintiff was entitled to claim beyond that date. In such circumstances, observations to the effect that the period to be excluded u/s 14 extends up to the date of the "actual return" of the plaint can only be regarded as loosely worded and not as laying down the proposition that whatever time the

plaintiff allows to elapse before he actually takes back the plaintiff should also be excluded, for that would be allowing him to take advantage of his

own delay. It follows therefore that the first defendant's possession must be held to have been sufficiently long to found a title by prescription if it

was really exclusive and adverse to the plaintiff, which it would be if the extra allotments which the koorchit purports to make in his favour were

intended to be real and not merely fictitious and colourable. This brings us to the other answer of the plaintiff to the plea of adverse possession.

17. Mr. Munikanniah urged that the said allotments under the koorchit were merely make-believe, being part of a scheme to put the family

properties except those at Oorkudi which were then divided in order to lend an appearance of reality to the whole transaction out of the reach of

the third defendant's creditors. The koorchit having been excluded from the record altogether, the evidence adduced at the trial makes no specific

reference to it but, as we have already observed, such evidence leaves no room for doubt that the extra properties and outstandings then left in the

hands of the first defendant could not have been intended to be taken by him exclusively for his share. It will be recalled that, in addition to the

3, acres 56 cents, of nanja and about 8 acres of punja lands and outstandings of the value of about Rs. 5,000 which the first defendant got just like

the other sharers, a whole lot of properties in Vallam and other villages, and outstandings due to the family amounting to Rs. 27,900 (which

exceeded those allotted to the shares of all the branches put together) were left in the hands of the first defendant. It was most improbable that this

disproportionately large extent of family property could have been allotted to his share. Conscious that this striking disparity needed explanation,

the first defendant attempted to make out that all except the Oorkudi properties were his self-acquisition, and that he gave to each of his brothers

some of the outstandings as a matter of grace. But this case, as already stated, broke down completely at the trial when the first defendant was

compelled to admit that they were all family properties. As regards the lands purchased by him in 1919 from Thoddappa Naidu, he shuffled and

prevaricated and spoke of having borrowed from one Nandagopal Naidu on a promissory note for paying the purchase money and discharged that

debt after 1928 with his own earnings. The learned District Judge has discredited the whole story and found that the purchase was paid for from

the family funds, a finding with which we entirely agree. In such circumstances, the recitals in the koorc it regarding the allotment to the first

defendant of the Immovable properties other than case admittedly divided between the parties can only be regarded as invented with ulterior

motives, the truth being, as we have found already agreeing with the learned District Judge, that these properties along with the outstandings which

were not divided were left in the management of the first defendant as before to be divided later after the troubles of the third defendant with his

creditors were over. In this view no question arises of adverse possession on the part of the appellants, as to which there is no evidence apart from

these recitals in the koorchit.

18. It remains only to deal with the appellant's complaint regarding the exclusion of oral evidence as to the details of the alleged complete partition

of 1928. Mr. Satyanarayana Rao contended that although the koorchit was not receivable as evidence of the partition for want of registration, the

first defendant should have been allowed to adduce oral evidence regarding the same. The argument, as we understand it, was that a partition of

Immovable properties could be validly effected by oral agreement, as there was no provision in the Transfer of Property Act requiring an

instrument in writing for the purpose. It was, therefore, open to the appellants to prove that all the Immovable properties and outstandings due to

the family existing in 1928, other than those admittedly divided among the members were effectually allotted to the share of the first defendant,

although the koorchit which embodied the arrangement was inoperative and inadmissible to prove the partition for want of registration. This

argument overlooks Section 91 of the Indian Evidence Act. It is true that a valid partition arrangement can be effected orally, but where the terms

of the arrangement have been reduced to the form of a document Section 91 prohibits the admission of any evidence of the terms except the

document itself or secondary evidence of its contents where such evidence is admissible. Where, therefore, the instrument of partition, being

unregistered, cannot be admitted as evidence of the transaction, oral evidence to prove the terms of the agreement is barred. This was held by a

Full Bench of this Court in Ramayya v. Achamma (1944) 2 M.L.J. 164 : ILR 1945 Mad. 160. Mr. Satyanarayana Rao however suggested that

this ruling could not stand after the recent decision of the Privy Council in *Ram Rattan v. Parmanand* (1946) 1 M.L.J. 295 : L.R. 73 IndAp 28 :

ILR 1946 Lah. 63 (P.C.). Our attention was called to the report of the arguments of Counsel where the Full Bench case appears to have been

cited to their Lordships, though there is no reference to it in their judgment. Reference was also made to a recent judgment of Somayya, J., in *Ittoli*

Moidin Koya's son Koyatti and Others Vs. Imbichi Koya and Others, where that learned Judge, referring to a similar suggestion before him,

observed :

The Judicial Committee did not refer to the difficulty of admitting other evidence when the transaction was admittedly reduced to writing and that

writing was inadmissible either u/s 35 of the Stamp Act or under Sections 17 and 49 of the Registration Act. But there is no doubt that the Judicial

Committee had no difficulty in finding a partition on other evidence. But whether other evidence is admissible to prove the details of the partition is

still open to doubt. It is not clear whether oral evidence was accepted only in proof of the division in status or to prove the details of the partition.

When the question directly arises hereafter in this Court, we may have to consider whether the Full Bench decision in *Ramayya v. Achamma*

(1944) 2 M.L.J. 164 : ILR 1945 Mad. 160 is good law after the decision of the Judicial Committee.

We do not share the learned Judge's doubts. We are of opinion that other evidence to prove the details of the partition is inadmissible, and that the

reasoning and conclusion of the Full Bench on the point is not affected by the decision of their Lordships. The Full Bench were dealing with a suit

for ejectment and recovery of possession of specific properties where the plaintiff could succeed only by proving her title. The partition deed

whereby those properties had been allotted to her deceased husband's share having been held to be inadmissible for want of registration, she

sought to prove such allotment by other evidence ; in other words, she sought to prove the terms of the partition by means of other evidence. This,

it was held, she could not do, having regard to Section 91 of the Evidence Act. The position, however, was different, in the case before the Judicial

Committee. There, the plaintiff had sued for partition. The defence, among other things, was that the parties having separated previously ½the suit

in the present form does not lie. To prove the previous partition the defendant filed two memoranda which were held to constitute an instrument for

partition, and, being unstamped and unregistered, inadmissible in evidence for any purpose. Their Lordships then proceeded to discuss the oral

evidence prefacing the discussion with the remark that "the most important question is whether partition had been effected before the institution

of the suit in December, 1939, and they found that a physical division of much of the joint property in February 1939, was established. They

accordingly dismissed the suit except as regards the lands which the defendant admitted to be joint. It will thus be seen that the oral evidence

considered by their Lordships was in support of the plea that, there having been a previous partition, the suit in the present form, i.e., framed as

one for partition, did not lie. In other words, their Lordships considered the oral evidence to find out whether the fact of a partition prior to the suit

was established. The discussion of the evidence also shows that they were considering it only from that point of view. As Section 91 of the Indian

Evidence Act excludes oral evidence only in proof of the terms and not of its existence as a fact, of a contract, grant or other disposition of

property, no reference was made to that section in the judgment nor to the Full Bench decision which related to its applicability.

19. In the present case, the appellants sought to prove by oral evidence not the fact of a previous partition, for that was admitted by the plaintiff,

but its terms, to show that there was a complete partition of all the family assets and liabilities and that the properties now claimed by the plaintiff to

have been kept joint were allotted to the share of the first defendant. Having put forward the koorchit as evidencing a genuine partition and

allotment of properties among the sharers, the appellants cannot be allowed to prove its terms by other evidence when the document itself is not

receivable as evidence for want of registration.

20. In the result, the appeal fails and is dismissed with costs.