

(1933) 07 MAD CK 0004
In the Madras High Court

The Official Assignee

APPELLANT

Vs

Neelambal Ammal

RESPONDENT

Date of Decision : 26-07-1933

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 108

Citation : AIR 1933 Mad 920 : 147 Ind. Cas. 417 : (1933) 38 LW 792 : (1933) 65 MLJ 798

Hon'ble Judges : Reilly, J;Burn, J

Bench : Full Bench

Judgement

Reilly, J.—This is an appeal against the decision of Stone, J. in an insolvency matter. On the application of some creditors, three brothers,

Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, were adjudged insolvents by this Court in February, 1929. They were described in

the order as "'of C. K. Narayana Ayyar & Sons'". The petitioning creditors did not mention, and the learned Judge who made the adjudication

order was obviously unaware, that Ramanatha Ayyar had died five years earlier. There is no suggestion that any application was made to the Court

for the administration of his estate u/s 108 of the Presidency Towns Insolvency Act. Ramanatha Ayyar had left a minor son, Subrahmanya Ayyar.

In May, 1929, the minor's mother, Meenakshi Ammal, sent a notice to the Official Assignee that Ramanatha Ayyar, Sundaresa Ayyar and

Viswanatha Ayyar had carried on business not as members of a joint family, but as partners under a partnership deed of the 26th May, 1913, that

the minor was entitled to a third share of the Immovable property which the partners had bought out of profits of their business and that the Official

Assignee had no right to claim that third share of the property. Apparently in

consequence of that notice the Official Assignee in August, 1929, gave notice of a motion for a declaration ""that the business carried on by C.K. Sundaresa Ayyar and C.K. Viswanatha Ayyar under the name and style of G.K. Narayana Ayyar and Sons was a joint family business carried on for the benefit of the joint family consisting of themselves and C.K. Rule Subrahmanya Ayyar, son of C.K. Ramanatha Ayyar, a deceased son of the said C.K. Narayana Ayyar, and that the assets of the said family, including the shares therein of the said Subrahmanya Ayyar, are liable for the payment of the debts incurred in the said business."" And in support of that motion the Official Assignee put in a report to the effect that the business was started by Narayana Ayyar, the father of Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, that Narayana Ayyar retired from active business in 1911 or 1912, leaving Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, to manage the business on behalf of their family, that after Ramanatha Ayyar's death Sundaresa Ayyar and Viswanatha Ayyar, who were the only adult members of the family, carried on the business as before, that the business was a joint family business and all the assets of the family were liable for the firm's debts, and that there had been no partition amongst the sons of Narayana Ayyar, who had always continued as a joint undivided family. In answer to that report a clerk of Meenakshi Ammal put in an affidavit to the following effect : Narayana Ayyar had not only three sons, namely, Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, but also another son, his eldest son, Krishnaswami Ayyar : Narayana Ayyar started business in 1895 as his own separate and exclusive business; about 1909 he took his three younger sons, Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, as partners and carried on the business under the style of ""C.K. Narayana Ayyar & Sons"" : Narayana Ayyar : retired in 1912, and that partnership was then dissolved. : Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar carried on business as partners under the same style and executed a deed of partnership on the 26th May, 1913 : Krishnaswami Ayyar never had any interest in the business of his father nor in the business of his father and his brothers nor in the business of his brothers: on the death of Ramanatha Ayyar in 1924 the partnership of the three brothers was dissolved : Ramanatha Ayyar as co-owner with his

brothers Sundaresa Ayyar and Viswanatha Ayyar had a third share in the property bought by the three partner-brothers out of the profits of their

business; on his death Subrahmanya Ayyar, his minor son, succeeded to that share as co-owner and also had a third share in the property

afterwards bought by Sundaresa Ayyar and Viswanatha Ayyar out of the profits of their business, the accounts, of Ramanatha Ayyar's share never

having been made up. Before this motion came on for hearing before Stone., J. in September, 1931, the minor Subrahmanya Ayyar had died, and

first his mother, Meenakshi Animal, and on her death his sister, Neelambal Animal, had been brought on record as his legal representative.

2. It is an odd feature of this case that the existence of Narayana Ayyar's eldest son, Krishnaswami Ayyar, was never mentioned in the Official

Assignee's report to the Court which represented Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar as the only sons of Narayana

Ayyar. That Krishnaswami Ayyar was the eldest son of Narayana Ayyar and was alive at the date of the Official Assignee's report and is now

alive is not disputed. Stone, J. was naturally very surprised at the defective and misleading character of the Official Assignee's report in this

respect, and I must say I share his surprise. The omission of the Official Assignee to mention Krishnaswami Ayyar by amending his report or

bringing Krishnaswami Ayyar's existence to the notice of the Court in some other way is the more remarkable when we are told that the Official

Assignee's solicitors took a proof of Krishnaswami Ayyar's evidence a year and a half before the motion came on for hearing. If I may say so with

respect, there are one or two passages in Stone, J.'s judgment which I find a little difficult to follow; but I think the learned Judge was obviously

embarrassed by the way the case was put before him, and I agree with him that this case, involving some elaborate and rather difficult questions,

was one which should not have been dealt with on motion. The learned Judge says he himself would not have dealt with it on motion if he had had

the facts properly stated to him by the Official Assignee in the first instance. However, when the case came on for hearing, what appears to have

been contended for the Official Assignee before the learned Judge was that Krishnaswami Ayyar was indeed a son of Narayana Ayyar and his

eldest son and had been a member of an undivided family with his father and his three younger brothers, but that Krishnaswami Ayyar had divided

from his brothers in 1915, after the death of Narayana Ayyar in 1914, and that from the date of that partition Ramanatha Ayyar, Sundaresa Ayyar

and Viswanatha Ayyar and their sons formed a complete joint family; and it was in respect of that complete joint family, cut short, as alleged, by

the separation of Krishnaswami Ayyar from it, that the Official Assignee pressed for the declaration he had prayed for. Stone, J. found as a fact

that Krishnaswami Ayyar was never divided from his brothers but that at the time when the motion was heard he was still an undivided member of

the joint family with his surviving brothers, Sundaresa Ayyar, Viswanatha Ayyar and Ramanatha Ayyar's minor son, Subrahmanya Ayyar, and

further and consequently that there never had been a joint family consisting only of Sundaresa Ayyar, Viswanatha Ayyar and Ramanatha Ayyar's

son, Subrahmanya Ayyar, as alleged by the Official Assignee, and therefore the declaration for which the Official Assignee prayed could not be

made. The learned Judge therefore dismissed the application of the Official Assignee, and against that dismissal this appeal has been preferred.

3. It has been contended before us by Mr. Varadachari for the Official Assignee that, even if, as found, Ramanatha Ayyar, Sundaresa Ayyar and

Viswanatha Ayyar by themselves never formed a complete undivided family without their brother Krishnaswami Ayyar, nevertheless they could

form among themselves, to the exclusion of Krishnaswami Ayyar, a joint family firm, and that therefore, assuming that Stone, J.'s finding that the

complete joint family, which still existed at the time of the hearing, included Krishnaswami Ayyar is correct, yet the business conducted by his three

younger brothers under the style of "C.K. Narayana Ayyar & Sons" may have been a joint family business as alleged by the Official Assignee. The

theory put forward is that a joint family business need not necessarily be the business of a whole joint family or a whole branch of a joint family, but

it may be the business of some group of members of a joint family or members of a branch of a joint family less than the whole joint family or the

whole branch. I am unable to agree with that contention. As I understand the matter, a Hindu joint family firm is a special form of partnership, the

members of which must be either the whole of a joint family or the whole of a branch of a joint family. The members concerned in such a joint

family firm, including the minor members, have certain rights and liabilities by virtue of their membership of the joint family or of the branch. Those

rights cannot be conferred nor liabilities imposed by contract, subject to the possible exception that, if a joint family consists of adult members only

or a branch consists of adult members only, then a joint family firm may be started by the members of that joint family or branch with the consent,

express or implied, of all of them. But how could some only of the members of a joint family or a branch of a joint family create, for themselves and

their sons and grandsons and great-grandsons alone to the exclusion of other members of their joint family or branch, a joint family firm in which

their future sons and grandsons and great-grandsons would have an interest by birth and that interest would always be liable for the debts of the

firm? If we examine the matter, I think it will be seen that the characteristics of a Hindu joint family firm are the effects of a joint family with its

peculiar constitution trading as a unit, a joint body of a particular kind, and, as every one knows, such a joint family cannot be created by contract.

There are plenty of cases to show that all the members of a joint family or some of the members of a joint family may trade together and put the

profits of their trade or property acquired with those profits into the common stock of their joint family so as to make it joint family property.

Rampershad Tewarry v. Sheochurn Doss (1866) 10 M.I.A. 490, which has been referred to, appears to me to be one of those cases. But that is

very different from what is suggested by Mr. Varadachari here. He has been able to show, what is indeed unquestionable now, that some only of

the members of a joint family may hold property in joint tenancy with rights of survivorship. That was decided in the case of daughter's sons, who

are members of a joint family, succeeding to their maternal grandfather's property in 7 CWN 1 (Privy Council) ; and this Court; has held in

Vythinatha Aiyar v. Yeggia Narayana Aiyar ILR (1903) 27 Mad. 382 that daughter's sons in those circumstances would hold such property not

only in joint tenancy but with the incident of joint family property, that their sons would acquire an interest in it by birth. But to show that some

members of a joint family can succeed to property which has the characteristics of joint family property to the exclusion of other undivided

members of their own family is very different from showing that some members of a joint family can create among themselves a joint family firm

with all its legal incidents. Mr. Varadachari has also referred to Sham Narain v. Court of Wards (1873) 20 W.R. 197, a decision of the Calcutta

High Court in 1873. In that case some property had been given by a Raja to two out of three undivided brothers for services rendered. The

learned Judges found that those two brothers had so held the property as to make, it their joint property with right of survivorship, but not the joint

property of all their brothers. That was not, it will be seen, a case of inheritance; but the learned Judges held that those incidents were impressed

upon the property by the way the two brothers dealt with it. With great respect I find it difficult to follow the reasoning of the learned Judges in that

case. They appear to proceed on the ground that the three brothers might legally have divided among themselves and so have no longer been a

joint family: then two of them might have re-united and so formed among themselves a joint family: and into the common stock of that smaller joint

family so formed they might have thrown this property acquired by gift from the Raja. With great respect I cannot see how those possibilities lead

to the conclusion at which the learned Judges arrived in the case. In *Sudarsanam Maistri v. Narasimhulu Maistri* ILR (1901) 25 Mad. 149 : 11

M.L.J. 353 Bhashyam Aiyangar, J. expressed dissent from that case; and, if it were necessary for the purposes of the present case, I may say that

I should with great respect follow that learned Judge in his dissent. But that Calcutta case again is not sufficient for Mr. Varadachari's purpose.

Even if it were possible for two members of an undivided family themselves to deal with property so acquired in such a way as to impress upon it

the incidents of joint family property for themselves and their descendants alone to the exclusion of other members of the undivided family, that

would not show that some members of a joint family or some of the members of a branch of a family for themselves and their descendants alone

could create a joint family firm. There is no case, it is admitted, in which it has been so decided; and in my opinion we must reject the contention

that Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar could have created a joint family business to the exclusion of Krishnaswami

Ayyar while they were members of a joint undivided family with Krishnaswami Ayyar.

4. But, as I have mentioned, what was contended for the Official Assignee before Stone, J. was that the business of "'C.K. Narayana Ayyar &

Sons"' after the death of Narayana Ayyar was the joint family business of the whole undivided family of his four sons, including Krishnaswami

Ayyar, but that in 1915 Krishnaswami Ayyar separated himself by division from that family and the remaining brothers remained a complete joint

family among themselves enjoying without legal obstacle a joint family business. Now there is no question that until 1915 Krishnaswami Ayyar was

a member of an undivided family with his brothers. Quite apart from the oral evidence there is the statement of Ramanatha Ayyar in some land

acquisition proceedings in 1914, Ex. C. If, as is contended for the Official Assignee, the business conducted by the three younger brothers was a

joint family business in those circumstances, Krishnaswami Ayyar must have had an interest in it until he divided from his brothers. The story told

by Viswanatha Ayyar and Krishnaswami Ayyar himself as witnesses in this case is that in 1915 after their father's death a suit was brought against

the four brothers on a mortgage-deed executed by Narayana Ayyar and the three younger brothers. Krishnaswami Ayyar, being under the

impression that his father's debts were greater than his assets, put in a written statement in that suit, by which he claims to have divided himself

from his family. It is very unfortunate that that written statement has not been produced nor any copy of it. All we have is Krishnaswami Ayyar's

account of what he recollects he said in that statement. I am not quite clear whether Stone, J. intended to admit Krishnaswami Ayyar's oral

evidence about the contents of that statement as evidence in the case. But, assuming that he did so, what does that evidence amount to? This is the

record of it:

Q. - What was your defence?

A. - I remember to have written in the written statement, I do not claim any share in my father's properties and I shall not be liable for this

mortgage debt". That is the one sentence I wrote.

Court. Q. - "My father's properties" is rather an ambiguous expression?

A. - I referred to the two houses and the lands.

5. Now on the theory put before us for the Official Assignee in this part of the case the joint family property at that time consisted, not only of the

two houses and the land, but of the joint family business also. In this written statement, as Krishnaswami Ayyar recollects and represents it, there

was no mention whatever of the family business, and according to Viswanatha Ayyar by the date of that written statement the family business was

progressing considerably. I think it is clearly impossible for anybody reasonably to maintain that, if Krishnaswami Ayyar's written statement was in those words, which he has related, it should be treated as an unequivocal statement of intention to divide from the joint family. Apart from this supposed declaration of intention, which I think we must wave aside as quite useless, the evidence is that Krishnaswami Ayyar got very little from the profits of his brothers' business after 1915, though, as admitted, at one time that business was making very large profits. According to the evidence all he got was some marriage expenses and the cost of certain ceremonies. But there is no evidence that he was ever excluded from participation in the joint family properly by his brothers; and there is no evidence that on any other occasion than that of the written statement of which he tells us in 1915 he did anything which could amount to renunciation of his rights in the joint family. On the contrary it appears that he continued to conduct the family ceremonies as if he were a member of an undivided family with his brothers. This is why perhaps Stone, J. notes in his judgment that Mr. Grant, who appeared for the Official Assignee, urged or admitted that the general effect of Krishnaswami Ayyar's evidence in the case was that he "at all times was and still is an undivided member of the joint family" of himself and his brothers.

6. Apart from the evidence of Krishnaswami Ayyar and Viswanatha Ayyar there is some documentary evidence, which has been pressed upon us as going some way to show that Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar were after 1915 the only adult members of the joint family, as if Krishnaswami Ayyar had been divided from them. There is evidence that some third parties in suits and otherwise, described the three brothers as members of a joint family. There is an affidavit of documents in C.S. No. 877 of 1921 of this Court, put in by Sundaresa Ayyar and Viswanatha Ayyar, in which they describe themselves and Ramanatha Ayyar as "carrying on business in partnership as a joint family business".

With regard to that it may be noted that they did not say explicitly that there were no other members of the joint family. More important than that is

Ex. D, a letter addressed to the Agent of the Imperial Bank at Cuddalore and signed by Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha

Ayyar on the 16th September 1922, in which they say that they and a minor son of Rar^a-natha Ayyar and a minor son of Sundaresa Ayyar are

trading for the benefit and interest of our joint family under the style of C.K. Narayana Ayyar & Sons." And there is a similar statement in Ex. D-

1, addressed to the Agent of the Imperial Bank at Cuddalore by Sundaresa Ayyar and Viswanatha Ayyar in August, 1926, on behalf of

themselves and the minor Subrahmanya Ayyar after the death of his father, Ramanatha Ayyar, in which they say "we are trading in joint family

partnership under the style of Messrs. C.K. Narayana Ayyar & Sons." Those two letters, Exs. D and D-1, certainly show that Krishnaswami

Ayyar's brothers thought fit to represent themselves to the Agent of the Bank on those occasions as carrying on a joint family business. And those

letters imply, I think, by their reference to the minor sons, who are mentioned, while Krishnaswami Ayyar is not mentioned, that there was no other

member who had an interest in what they call the joint family business. Then in 1920 there were two sale deeds, Exs. G and G-1, in favour of

Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar, in which they were described as undivided brothers. And in 1926 there was an

exchange deed, Ex. F, in which Sundaresa Ayyar and Viswanatha Ayyar were similarly described. In my opinion those documents are not

sufficient to show in the absence of any reasonable proof that Krishnaswami Ayyar was divided in 1915, as alleged, that he was ever excluded or

divided from the joint family of himself and his brothers. In my opinion there is no sufficient reason to differ from Stone, J.'s finding that

Krishnaswami Ayyar at the time of the hearing was still an undivided member of the family of himself and his brothers. And that is sufficient to

support the learned Judge's disposal of the case.

7. But the Respondent here contends, as she contended before Stone, J., that she can go further and show that the business conducted by

Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar was not on behalf of any joint family either a joint family consisting of them alone or a

joint family including them and their brother, Krishnaswami Ayyar. Stone, J., having found it necessary to dismiss the Official Assignee's

application because he could not make the declaration required in respect of a non-existent joint family, did not think it necessary to arrive at any

definite finding on this contention of the Respondent. But he did remark that the partnership deed produced, Ex. B, dated 26th May, 1913, was in

his opinion inconsistent with the theory that the business conducted by the three younger brothers was the business of a joint family including others

besides themselves and their descendants. It is contended before us for the Official Assignee that that document is not an ordinary deed of

partnership but is merely a document recording some arrangement to regulate the conduct of a joint family business. It is perhaps a meagre

document to take the place of a regular deed of partnership among ordinary partners. But I think Stone, J. is right in regarding it as a deed of

partnership, not as a document merely regulating the proceedings of a joint family firm including other adult members besides the executants. That

document sets out at first that it relates to a business to be jointly conducted by Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar. It

was executed in May, 1913, while Narayana Ayyar was still alive and while the members of the joint family to which those three brothers belonged

included, as has been found, Narayana Ayyar and Krishnaswami Ayyar. There is no mention of either of them in the document, no indication that

the document relates to any business in" which they were interested. Then it is described as a ""Kuttuviyabaram Chittu"" : there is no mention of

Kudumba-viyabarara"". The firm is referred to, not as a family firm, but as a ""company"". And without going into details I may say that paragraphs

1, 2, 7 and 8 appear to me to include language quite inappropriate to the proceedings of a joint family firm. Ex. B therefore is a strong piece of

evidence in support of the Respondent's case that the business conducted by Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar was not

a joint family business at all but was an ordinary partnership business, in which the three younger brothers were the partners. There are accounts in

this case in the possession of the Official Assignee; but neither side has produced them, and therefore we may infer that those accounts give no

indication whether the business was a joint family business or an ordinary partnership business. But there is evidence that in the three years 1921,

1922 and 1923 the firm used letter paper with a heading showing Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar as the partners of

the firm, which would be a very odd thing for a joint family firm to do. Then it is to be noticed that, after Ramanatha Ayyar died, when the two

remaining business brothers, Sundaresa Ayyar and Viswanatha Ayyar, bought property out of the profits of the business, they bought it, not in their

own names alone, but also in "" the name of Ramanatha Ayyar's son, Subrahmanya Ayyar, quite an unnecessary and inappropriate thing to do if

those were the profits of a joint family business. On the other hand there are the documents already mentioned, in which Ramanatha Ayyar,

Sundaresa Ayyar and Viswanatha Ayyar or some of them referred to their business as a joint family business, and in particular Exs. D and D-1.

Now it may be that in so referring to their business, being members of an undivided family, they were under some misapprehension and wrongly

described it. Perhaps it is more probable, as has been suggested for the Respondent, that they found it profitable in some way to represent their

business as a joint family business, though it was not so. It is stated by Viswanatha Ayyar in his evidence that, after they had made very large

profits in 1917 and 1918, they were taxed by the Income Tax Officer as if theirs was an ordinary partnership business: they appealed, urging that it

was a joint family business and so not liable to so much tax as super-tax : they succeeded in persuading the Income Tax Officer that their business

was a joint family business. Having once made that representation, whether it was true or false, they would have to continue to do so; and it may

very well have been profitable to do so in subsequent years. That may be the explanation of Exs. D and D-1. And it is to be noticed that

Krishnaswami Ayyar's conduct in never claiming any part of the profits of this business even in the height of its success, which might appear rather

strange if it was a joint family business, in which he had an interest, becomes very simple and intelligible, if the business was never a joint family

business at all but an ordinary partnership business of his younger brothers. In my opinion on the whole evidence the proper finding is that this

business was not a joint family business but was an ordinary partnership business of Ramanatha Ayyar, Sundaresa Ayyar and Viswanatha Ayyar.

8. At the conclusion of his argument Mr. Krishnaswami Aiyangar for the Respondent urged that the Official Assignee's application should have

been dismissed by Stone, J. as having abated because no proper legal representative of Subrahmanya Ayyar was brought on record within the

time allowed after Subrahmanya Ayyar's death. It appears that within the proper time an application was made by the Official Assignee,

apparently under Rule 5 of Order 22 of the Code, that a decision might be made who was the proper legal representative. There was no explicit

application under Rule 4 of Order 22 of the Code that any particular person should be brought on record as Subrahmanya Ayyar's legal

representative. But Waller, J., before whom the matter came, decided to treat the application put in under Rule 5 of Order 22 as one in substance

under Rule 4 of the Order, though it had a defect in form. Treating the application as one under Rule 4 of the Order - and I think Waller, J. was

quite at liberty so to treat it - it was in time, and there was no abatement of the Official Assignee's application.

9. In my opinion this appeal should be dismissed with costs.

Burn, J.

10. I agree.