

(1930) 05 MAD CK 0003
In the Madras High Court

T.S. Ramabhadra Odayar and Another	APPELLANT
Vs	
T.S. Gopalaswami Odayar and Others	RESPONDENT

Date of Decision : 01-05-1930

Acts Referred:

Citation : (1931) ILR (Mad) 269 : (1930) 32 LW 704 : (1930) 59 MLJ 782

Hon'ble Judges : Horace Owen Compton Beasley, C.J;Curgenven, J

Bench : Full Bench

Judgement

Horace Owen Compton Beasley, C.J.—These are three linked appeals, namely, Appeal No. 411 of 1925, Appeal No. 439 of 1925 and

Appeal No. 6 of 1926. Of these, Appeal No. 439 of 1925 was argued first as in that the main and the most important contentions between the

parties had be considered. I propose in my judgment to deal with all the three appeals together.

2. All these appeals arise out of O.S. No. 67 of 1919 Subsequently renumbered as O.S. No. 22 of 1924 in the Court of the Subordinate Judge of

Kumbakonam. That was a suit for partition. The parties to the suit were all members of an undivided Hindu family related to one another in the

manner set out in Schedule A to the plaint. This Hindu family was possessed of considerable Immovable property and in the partition suit the

plaintiff claimed a half share in the whole property. The plaintiff stands by himself representing one branch of the family. The genealogical table

(Schedule A) shows that all the parties to the suit trace their descent back to one Sepperumal Odayar; and in the judgment of my learned brother

Curgenven, J., the genealogical table Set out ante at p. 784 has been described in detail and therefore it is unnecessary for me to explain any

further how the parties stand in relationship to one another.

3. In the Court below a preliminary decree was passed by means of which the plaintiff was given one-fifth share, defendants 3, 4, 5, 7 and 8 one-

fifth share, the 6th defendant one-fifth share, the 9th defendant one-fifth share, and defendants 1 and 2 one-fifth share. The learned Subordinate

Judge gave a decree for an account and also directed that the accounting was to be upon the basis of an undivided family although he found that

the family had become divided in status by reason of a document, Exhibit A. This document has been the cause of all the trouble in the suit.

Various constructions have been placed upon it by the contending parties both here and in the Court below and these appeals depend entirely

upon what view we take of that document. In order that it can be better understood we have to go back to the year 1895. Exhibit A is dated the

25th November of that year and is described as a deed of partition. On that date there were alive Muthu Odayar who died in 1903,

Balasubramania Odayar who died since the suit was filed, Singaravelu Odayar who died in 1917, Somasundara Odayar, his son, who

subsequently died leaving a widow the 10th defendant, Sivaswami Odayar, who died in 1909 leaving a widow the 9th defendant, Gopalaswami

Odayar and Sivavadivelu Odayar, the grandson of Sinnu Odayar and the adopted son of Sendalangara Odayar who was himself the son of Sinnu

Odayar, the son of Sepperumal Odayar, the common ancestor. By this deed Balasubramania Odayar separated himself from the rest of the family

and under Clause 1 of the deed it was agreed that he should take one-fifth share of the whole property, the remaining four-fifths share being agreed

to be allotted in five equal shares to (1) Singaravelu Odayar and Somasundara Odayar (2) Sivaswami Odayar (3) Gopalaswami Odayar and

Vijiaraghunathan (4) Balaguruswami and Balakrishnaswami, and (5) Srvavadivciu, father of the plaintiff. In Exhibit A his adoption by

Sendalangaram is recognised and the learned Judge in the Court below has found that adoption proved. The consideration for this document is set

out in the preamble to it and is stated to be the fact that disputes might arise in the family in connection with the partition and heavy loss might be

sustained thereby, that Samu Odayar and his father Ramu Odayar (Nos. 4 and 11 in the genealogical table) had acquired properties by hard work

and brought the family to a very prosperous condition and the natural affection towards his heirs, namely, Singaravelu Odayar, Sivaswami Odayar,

Gopalaswami Odayar, Balaguruswami and Balakrishnaswami and also towards Balasubramania. Under Clause 6 of the document Muthu Odayar

gave away his share in the family properties as he had no heirs and was advanced in age; but there is a reservation that during his life-time he

should be at liberty to utilise a sum of Rs. 4,000 per annum out of the income from the four-fifths share of the properties (ascertained in Clause 1).

Another clause of importance is Clause 3 which provides that the sharers are to take the Immovable properties specified in List A and the

outstandings in List C and that Balasubramania the outgoing member is to take the Immovable properties specified in List B. Clause 6 must again

be referred to here as it is there provided that the sharers (as ascertained in Clause 1) are during the life-time of Muthu Odayar to live as members

of one family and that after him partition of the property is to be effected according to the shares given in Clause 1. Then comes Clause 8 which

reads as follows:

So long as the sharers other than Balasubramania Odayar of us remain joint without effecting a division according to the shares mentioned in

paragraph 1 hereof, the family shall be treated as an ordinary undivided Hindu family subject to the law of survivorship.

4. It is this clause that has given rise to the whole of the trouble. In the absence of such a clause it would be a very difficult task for the plaintiff to

contend that Ex. A did not effect a division in status between those members of the family who were parties to it, Balasubramania of course going

out altogether and having by the deed separated himself entirely from the family. The construction of Ex. A would then, in my view, have been quite

a simple matter and it would have been that the family agreed to divide in status according to certain shares but to live together until the death of

Muthu Odayar. The case would then, in my view, have been a plain sailing. But there is Clause 8 and this has enabled the Advocate-General on

behalf of the plaintiff to contend that there was no division in status created by Ex. A and that Ex. A must be ignored altogether and the family dealt

with in the partition suit as an undivided Hindu family subject to none of the provisions of Ex. A. This, he contends, entitles the plaintiff to a half

share of the family property upon a division. Alternatively he argues that Clause 8 is so inconsistent with the other clauses in the document that it

alone must be applied. On the other hand it is contended by Mr. Varadachari for the 1st defendant that, if Clause 8 is inconsistent with Clause 1,

then the former must be cut out and the parties governed by Clause 1. Mr. K.S. Krishnaswami Aiyangar for the 6th defendant contends that full

effect must be given to Ex. A, that its provisions are not inconsistent with one another and that both Clause 1 and Clause 8 can be taken together

and a meaning given to the document. In this contention he is supported by Mr. K.V. Krishnaswami Aiyar for the 14th respondent. The conflicting

contentions of the parties, therefore, may be briefly stated as follows: The plaintiff wishes to ignore Ex. A altogether and treat the family as an

undivided family and the defendants contend for the position of a division in status brought about by Ex. A and an agreement under it to live as if

the family were an undivided family but not really an undivided family and an agreement to divide by metes and bounds at a later date in

accordance with the shares as ascertained in Clause 1 of the document. Mr. Varadachari and Mr. K.S. Krishnaswami Aiyangar, however, do not

go the whole way together in that argument. The latter argues that Clause 8 is not repugnant in any sense and that what it means is that although the

family is a divided family it is to be treated as if it were an undivided family and as if the members of it at the time of the execution of the document

had agreed together to dispose each of their shares to the others in the event of their dying without male issue. Mr. Varadachari, on the other hand,

contends that there could be no such disposition in law 6r in fact and that Clause 8 itself is repugnant to the rest of the other clauses in the

document. The Advocate-General also contends that the evil of this clause is that it is an agreement to alter the ordinary rule of succession and,

therefore, is quite inconsistent with the position of a division in status which creates a tenancy-in-common because it is provided that the property is

to go by survivorship instead of by inheritance as it would do in the case of a tenancy-in-common. The learned Subordinate Judge having held that

under Clause 1 of Ex. A there was a disruption of the joint family and, therefore, a tenancy-in-common says that Clause 8 creates a coparcenary

with the rights of survivorship-, and where there is a disruption of the coparcenary the right of survivorship is gone and that a coparcenary is purely

a creature of law and cannot be created by the act of parties. He has, therefore, held that Clause 8 is wholly inconsistent with the scheme of

division set out in the previous paragraphs and has rejected Clause 8 on the ground that where there are two clauses in a deed which are wholly

inconsistent with and irreconcilable to each other the former prevails. He has further held that Clause 8 relating to the right of survivorship prevents

the devolution of property to female heirs and is void since it alters the line of succession allotted by the Hindu Law.

5. We have first of all to consider whether the claim to a half share in the property now put forward by the Advocate-General can possibly be

sustained. If a document is unambiguous in its terms, then little difficulty arises. So far as the terms of the document itself are concerned, it is

contended by the learned Advocate-General and Mr. Varadachari that it is impossible to hold that they are unambiguous; and we have been

addressed at great length for very many days as to the meaning or possible meaning or impossible meaning of its provisions. It is obvious that when

Clause 8 is contrasted with the other clauses, they are, without a consideration of the intention of the parties, irreconcilable. We have therefore to

see whether we can gather from this document what the intentions of the parties to it were coupled with their conduct subsequent to it as it is the

duty of the Court to give effect to a document if it possibly can. The Advocate-General invites us to reject the document altogether except as

bringing about the separation of Balasubramania from the rest of the family. But I am unable to agree with the suggestion put forward by him that all

that was intended by the parties to this document was by it merely to separate Balasubramania from the rest of the family. To begin with in the

preamble it is stated :

In consideration of the fact that disputes might arise in our family in connection with partition and heavy loss might be sustained thereby.

6. It cannot, in my view, have been intended by this merely to refer to disputes between Balasubramania and the other members of the family as it

seems to me obvious that it refers to possible disputes between all the members of the family on a partition. Then again in Clause 1 the remaining

four-fifth shares are divided up into five equal shares and allotted to groups 1 to 5. If the document was merely entered into for the purpose of

separating Balasubramania from the rest of the family, it was unnecessary to deal with any of the remaining four-fifths share by dividing them

equally into five shares. All that it was necessary to do was to give Balasubramania his one-fifth share and let him go out. Then under paragraph 6

Muthu Odayar gives up his share in the family having no heirs and being advanced in age; and there is the provision already referred to that the

other sharers are during his life-time to live as members of one family and after his death to effect a partition. The parties to the document must

have had some intention when they made that arrangement. Having ascertained the shares in Clause 1, in Clause 6 not only do they agree after

Muthu Odayar's death to effect a partition but to effect it according to the shares as ascertained in Clause 1. Then in Clause 8 a division according

to the shares mentioned in Clause 1 is referred to. Therefore, in my opinion, it is impossible to hold that the intention of the parties by this document

was merely to separate Balasubramania. The document must be given a meaning. There appear to be two possible alternatives, namely, that the

parties intended by this document to divide in status but to remain, although divided in status, as an undivided family and after Muthu Odayar's

death to effect a division by metes and bounds in accordance with the shares agreed upon by Clause 1, that they recognised that by executing Ex.

A they were dividing in status but wished to live together as one family until Muthu Odayar's death and that they decided that during that time and

until they did effect a partition by metes and bounds the rule as to the devolution of property in a Hindu undivided family should apply. The other

possible alternative is that they did not intend to divide themselves in status by Ex. A, that all they intended to do was to postpone a division until

some future date and that when they did divide the division was to be in accordance with Clause 1 of the document. But before the latter

alternative is considered, we have to consider whether the execution of Ex. A, quite irrespective of what the intentions of the parties might be, did

bring about a disruption of status and upon this point there are some cases which have to be considered. The first of these is Appovier's case--

Appovier v. Rama Subba Aiyar (1866) 11 M.I.A. 75 a decision of the Privy Council. There it was held that according to the true constitution of

an un-divided Hindu family no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that

he has a certain definite share. The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and each member has thenceforth a definite and certain share in the estate which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided. Where, therefore, a deed of partition was made and executed by the other members of an undivided family, dealing with and making actual partition of a portion of the joint estate but leaving the remainder to be divided at a future period in the same manner such deed was held to be a division of right operating as a conversion of the tenancy and a change of status in the family so far as the property specified (was concerned) changing as it were the joint tenancy thereof into a tenancy-in-common and by operation of law making the members of the previously undivided family a divided family in respect of such property. At page 89 Lord Westbury in delivering the judgment of the Judicial Committee states as follows:

Certain principles, or alleged rules of law, have been strongly contended for by the appellant One of them is that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be (hereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds. Their Lordships do not find that any such doctrine has been established ; and the argument appears to their Lordships to proceed upon an error in confounding (the division of title with the division of the subject to which the title is applied According to the true notion of an undivided family in Hindu Law no individual member of that family, whilst it remains undivided can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rents, a certain definite share

7. He then proceeds to say that the members of an undivided family can agree amongst themselves that the property shall be the subject of ownership in certain defined shares and this alters the character of undivided property, that joint enjoyment is taken away from it and the member has a right to claim to receive and enjoy it in severalty and that by such an agreement therefore the joint tenancy is converted into a tenancy-in-common. In *Balabux v. Rukhmabai* (1903) I.P. 30 T.A.130 : ILR C. 725 (P.C.) the Privy Council held that there is no presumption when one coparcener separates from the others that the latter remain united, that where it is necessary, in order to ascertain the share of the outgoing coparcener, to fix the shares which the others are or would be entitled to, the separation of one may be said to be the virtual separation of all and that an agreement amongst the remaining coparceners to remain united or to reunite must be proved like any other fact. There can be no question in this case of any agreement to reunite as there were minors in existence and such minority renders any such agreement impossible. The importance of this decision lies in its placing the burden upon those who maintain that there has been no division in status of displacing the presumption which this judgment holds arises. In a later case *Parbati v. Naunilal Singh* (1909) L.R. 36 T.A.71 : I.L.R.31 A 412 : 19 M.L.J. 517 (P.C.) another decision of the Privy Council, it was held that where one member of the family effects a separation of himself from the family and where the ascertainment of the shares of the remaining members of the family is merely incidental to that one member's separation the presumption is that the other members remain undivided. Both *Appovici*'s case and the case in 7 CWN 578 (Privy Council) were considered and the principles laid down in them followed but it was stated that the High Court had proceeded in an erroneous method in considering whether each document was by itself sufficient to rebut the prima facie presumption that as the family was joint before 1861 it continued to be joint, and omitting to take into account the cumulative effect of all the documents which taken together showed that all the transactions for many years could only be reconciled and made consistent on one hypothesis, namely, that the important document was a genuine document and the agreement in it embodied a real agreement. There, after the death of one of the members of the joint family in 1861 the other members mutually agreed that the joint property

should thenceforth be held and enjoyed by the various members of the family in certain defined shares which they specified in a petition to the

Collector to have their names entered to that effect in the official papers of the village This was done, the petition was filed and it was held that on

the evidence and in the circumstances of the case a partition of the property had been effected in 1861 and that the transactions and conduct of the

members of the family . with respect to the management of the property had been on the basis that it was held in separate shares from that time. In

a later case, namely, AIR 1925 49 (Privy Council) the Privy Council held that when a member of a joint family has separated, an agreement by the

remaining members to continue undivided may be inferred from the way in which their business is carried on after the separation. On page 257 it is

stated in the judgment:

In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should

be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the

members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and

on separation are entitled to partition the joint family property amongst themselves, is now well-established law.

8. Then a reference is made to Appovier's case and it proceeds:

But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had

separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a

separation would be.

9. The result seems to me to be that where the ascertainment of the shares of the remaining coparceners is merely incidental to the separation of

one of them, no presumption arises that the family hitherto undivided has become divided. The High Court judgment in this case is reported in

Palaniammal Vs. Muthuvenkatachala Maniagarar and Others, . On page 780 Kumaraswami Sastri, J., after reviewing a number of authorities upon

the question of whether the separation of one member ipso facto effects a separation between all the others, stated his opinion to be that where the

consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive

at the share of one coparcener without knowing how many coparceners there are and their shares) and the status of the others is unaffected by a

decree or division in favour of one member.

10. Syed Kasam v. Jorawar Singh (1922) L.R. 49 IndAp 358 : ILR 50 C. 84 : 43 M.L.J. 676 (P.C.) is another case to which we were referred.

There a member of a joint Hindu family governed by the Mitakshara claimed his share of the family property and the members of the family agreed

to appoint an arbitrator to partition the property among them and to accept his partition and it was argued that this agreement to appoint an

arbitrator effected a severance of the joint estate. This contention the Privy Council accepted and at page 92 Viscount Cave states as follows:

It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal

declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place, and the

commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree

11. But the facts of this case are very different to those in that case on account of Clause 8 of the present agreement. Whilst that remains, it seems

to me that it cannot be held that the ascertainment of the shares of the coparceners in the earlier clauses of it necessarily brings about a division in

status. It seems to me that in all the cases to which we were referred upon this point, upon the facts of them that a present intention to divide in

status was apparent. In this case, as I have already said, in the absence of Clause 8, such an intention is discoverable. But effect has to be given to

this agreement, and to Clause 8, unless it can be shown that whatever the intention of the parties to the agreement may have been, the

ascertainment of the shares of the remaining members of the family must in law operate as a division in status. No authority for this proposition has

been put before us and I am clearly of opinion that such a proposition as that cannot be supported by reference to any of the cases referred to.

One fact must not be overlooked and that is that Ex. A was drafted by a vakil and it is hardly likely that he would have drafted a document

intending in the earlier part of it to convert the estate into a tenancy-in-common and yet in the latter part of it to preserve the coparcenary. He

cannot have intended to disrupt the status of the family and yet to apply the principle of survivorship to it. This would, in my view, have created an

impossible position. What, therefore, was it that the parties intended? It was contended before us that the wishes of Muthu Odayar were intended

to be given effect to and they were that the family should remain an undivided family during his lifetime. He was an old man and willing to give up

his share in the family property to the others. I think that this contention is well founded and that in deference to Muthu Odayar's wishes the family

agreed to remain undivided during his lifetime and had no present intention at the date of the execution of Exhibit A to divide in status at all. Clearly

there had been disputes in the family. The adoption of Sivavadivelu was open to question and in Exhibit A that matter was set at rest. There were

also other matters which required adjustment and there is nothing unreasonable in supposing that when the parties came together for the purpose of

dividing themselves from Balasubramania, they took that opportunity of settling once and for all, all the matters then in dispute and likely to cause

disputes thereafter--indeed it is so stated in the document--that there never was any intention to become divided in status but that they agreed to a

future partition and that when the occasion for it should arise there should be no dispute as to the shares of the coparceners on such a partition. No

other view of the intention of the parties seems to me possible and I have no difficulty in thinking that such was the intention. That such was the

intention of the parties was nobody's case in the appeal but the comment to be made upon that is that all the parties to the appeal were trying to

get a larger share of the family property and that this case suited no one. The view that I have taken is strongly supported by the subsequent

conduct of the family. They continued to live as an undivided family throughout and it was not suggested that there was any documentary evidence

faintly suggesting a previous division in status except Exhibit VI (a), a letter addressed to the Chairman, Municipal Council, Kumbakonam, and

signed by Sivaswami Odayar. Certain voters took exception to the candidature of Sivaswami Odayar at the Municipal Elections because

Sivavadivelu was already a Municipal Councillor and the rules framed by Government allowed only one member of an undivided Hindu family to

be registered as a person qualified to be elected or to vote and it was therefore claimed that the nomination of Sivaswami Odayar should be

rejected and Ex. VI (a) represents Sivaswami Odayar's answer to this objection. Whilst setting out other answers the following answer is given:

Even admitting for the sake of argument that the rule referred to is capable of the interpretation put open it by the petitioners our family might for

the purpose of this objection be legally considered as a divided one under the terms of a registered document entered into among the members

thereof, dated the 25th November, 1895. Each member is therefore entitled to have his name registered separately provided he possesses the

requisite qualifications.

12. This answer is by no means definite. Certainly it does not unequivocally state that the family was a divided one; on the contrary it seems to

admit that it is not but ought for the purpose of the objection to be considered as such. I cannot take this answer as in any way indicating that the

family considered that a division had taken place by means of Ex. A. This is the only document which by any possible stretch of imagination can be

said to support the respondent's case. On the other hand there are a number of documents which indicate that the family remained undivided. In

Ex. D, a petition, dated 1904, Sivavadivelu is described by the 1st defendant as his undivided brother. Ex. KK is the written statement filed by

Singaravelu Odayar in O.S. No. 42 of 1908 in the Sub-Court, Kumbakonam, and in paragraph 4 of it it is stated:

Myself, the defendants 8 to 11 and the deceased Sivaswami Odayar are members of an undivided family

13. Sivaswami Odayar died in 1909 before this written statement was filed. Then again in paragraph 9 it is stated:

The said Sivaswami Odayar and ourselves were members of an Undivided family

14. This written statement was adopted by Gopalaswami Odayar, the 8th defendant in that suit, for himself and as guardian of the minor 11th

defendant and also by Balaguruswami Odayar and Balakrishna Odayar. Written statements in O.S. No. 132 of 1917 in the Court of the

Additional District Munsif of Tiruvarur were also filed of which Exhibit C-13 is an example and there also Gopalaswami Odayar stated that the

2nd defendant in that suit was his undivided brother. There are Other

documents, such as Exhibits CC, CC-1 and PP, which are quite incompatible with any other position than that of an undivided family.

15. Much was addressed to us in argument upon the meaning of the words in Clause (8) "the family shall be treated as an ordinary undivided

Hindu family." It was contended that the use of the word "treated" implied that the family was not actually an undivided family because "treated" is

to be read as "deemed" but although upon a strict construction of the word "deemed" it may possibly imply something different to actual, I do not

think that when the whole of the clause is read, it means anything else than an actual ordinary undivided Hindu family. The Vakil who was

responsible for drafting the document cannot have intended to say that a tenancy-in-common was nevertheless to "be deemed to be an undivided

Hindu family subject to the law of survivorship." I think that it is more probable that he had in mind the possible result of the earlier ascertainment of

the shares of the members of the family and that in Clause (8) he decided to make it clear that there had been no division in status by that

ascertainment and so emphasised the retention of the undivided status in order to remove any possible misconception. This is the conclusion I have

arrived at as to the construction of Exhibit A and, in my view, it cannot be argued that it is not binding upon the plaintiff. It is an agreement which, in

the absence of any authority to the contrary, can be validly entered into and was entered into by his father Sivavadivelu and was an agreement

between all the adult members of the family. There was certainly consideration for it in that it settled the dispute between the parties and recognised

the adoption of the plaintiff's father and in fact gave him a somewhat larger share than he would have got by reason of such adoption and

furthermore there was a relinquishment of Muthu Odayar's share. In view of this finding that there was no disruption in the family on the date of Ex.

A even in status and that the family remained undivided, it is unnecessary to deal with the arguments of counsel based upon a division in status

effected on the date which Exhibit A bears. On the question of upon what basis the accounts are to be taken, it follows from this decision that it

must be on the basis of an undivided family from 5th November, 1917 and following the form in *Sri Ranga Thathachariar v. Srinivasa*

Thathachariar ILR (1927) M. 866 : 53 M.L.J. 189 I have arrived at the same

conclusion upon this point as that of the learned Subordinate Judge

but of course for different reasons, because he found that Exhibit A did effect a division in status. I agree with the learned Subordinate Judge also

in rejecting the plaintiff's claim to past mesne profits in respect of Items C-5 and C-7 against" the 27th and 28th defendants as he has found that

they were not in adverse possession and I am not inclined to disagree with that finding. The result of this, therefore, is that the appeal must be

dismissed with costs. Two sets of costs to respondents. Defendants 1, 2 and 9 in one group and defendants 3, 4 and 6 in the other group.

(Defendant 28 does not ask for any costs.)

16. With regard to Appeal No. 411 of 1925, the only question in that was the construction to be placed upon Clause (8) of Exhibit A. That only

fell for discussion in the event of our holding that Ex. A effected a division in status and as we have held that it did not, this appeal is not capable of

further argument but is allowed to the extent indicated in the judgment of Curgenven, J. Costs of all parties to come out of the estate.

Curgenven, J.

17. These three appeals arise out of a suit for the partition of the joint property of a family of Odayars known as the Thannirkunnam family. This

property comprised the whole or portions of several villages in the Tanjore District, as well as moveables and outstandings, the whole amounting,

according to the plaint valuation, to some four and a half lakhs.

18. The following is the family genealogical table. [The table will be found set out in the statement of facts.]

19. The family lived in a condition of undisputed jointness until 1895, but not without disputes regarding certain matters which will be referred to

later. In that year all the adult members subscribed to a partition deed, Ex. A, and it is upon the construction of this document that the first two of

the three appeals have to be decided.

20. The questions to which the document Ex. A gives rise are, firstly, what does it mean, and, secondly, is it binding upon the signatories to it and

those claiming under them. Very long and elaborate arguments have been addressed to us upon the former of these two questions, the parties

ranging themselves into three main groups, each with its own construction to put forward. How these groups came to be formed, and in what

circumstances the document originated, need to be borne in mind in attempting to discover the intention underlying the deed.

21. The family, as the genealogical table shows, consisted in 1895 of three main branches, those of Sinnu, Subramania and Ramu Odayar. Sinnu's

branch depended for its existence upon the fact of the adoption of Sivavadivelu, a member of Ramu's branch, by Sinnu's son Sendalangara.

Subramania's branch was represented by two members, Balasubramania and Muthu. The third branch, that of Ramu, included a number of

persons, Ramu's son Samu having had five sons. All those defendants who belong to the family are representatives of this branch. Up to 1895, as

has been said, the family formed a single coparcenary, although being possessed of extensive property and engaged in various activities its

members may have exhibited some external marks of separateness. Some time before the date of Ex. A various disputes arose. One, it is said, had

reference to Sivavadivelu's adoption. Another was concerned with the nature of some of the property, whether it was self-acquired or joint.

Balasubramania, of the second branch, evinced a desire to get his share¹ divided, while Muthu, of the same branch, was strongly of opinion that

the whole family should remain joint. It was a question, therefore, whether to agree to his division, and if so, what share he should get. Some of

these circumstances will need to be considered again when the binding character of the document is inquired into. It is sufficient to say here that

Balasubramania had his way and split off from the remainder of the family; and this seems primarily to have afforded occasion for the deed. At the

same time there is no doubt that the opportunity was availed of to compose the other outstanding questions, and to settle once for all how upon a

general partition the property was to be allotted.

22. The document begins by calling itself a deed of partition between the signatories, a description which the cleavage with Balasubramania would

in itself justify, and adverts to the danger that disputes might arise in connection with partition and heavy loss be occasioned thereby. Grounds are

then found in the services to the family of Ramu Odayar and his son Samu Odayar for giving their branch special consideration. Accordingly, "the

partition arrangements we have come to amongst ourselves are as follows." Then follow nine clauses setting forth these arrangements. Of these, the

language of Clauses (1)(3)(6) and (8) must decide the construction to be placed upon the document. Clause (1) assigns to Balasubramania a one-

fifth share and provides as regards the remaining four-fifths that the division is to be into five equal shares--four to go to the four sub-branches of

the third branch, and one to Sivavadivelu. Clause (3) defines Balasubramania's share by means of a list, and collects the remaining property,

comprising the family property of the remaining members, into two other lists. Clause (6) recites that Muthu Odayar, out of natural affection for

Samu Odayar's heirs, and because they would otherwise get a smaller share, gives them his share in the family property, being himself without

heirs and advanced in years. In view of this, "the rest of us shall during the lifetime of Muthu Odayar live as members of one family. After Muthu

Odayar, partition shall be effected according to the shares laid down in Clause (1)." Clause (8) runs as follows:

So long as the sharers other than Balasubramania Odayar of us remain together without effecting a division by metes and bounds awarding to the

shares mentioned in Clause (1), the family shall be regarded as an ordinary undivided Hindu family subject to the law of survivorship.

23. The meaning of these clauses, as I have said, has been variously interpreted. The plaintiff, while very willing to avail himself of the document so

far as it confirms his father's adoption, contends that Clause (8) shows that the family remained joint and that the specification of shares in Clause

(1), being repugnant to the notion of a joint family, is invalid. He asks for a half share in the entire remaining property, including that resigned by

Muthu Odayar. A directly contrary view is pressed upon us on behalf of the 1st, 2nd and 9th defendants. One of Samu Odayar's sons,

Sivaswami, died subsequent to the execution of the document, leaving a widow, the 9th defendant. Of course if the family remained joint she will

only be entitled to maintenance. But if Ex. A created a severance of status, the question whether or not she is to take her husband's share will

depend upon whether, in spite of that circumstance, the rule of survivorship is to be applied under Clause (8). She, therefore, contends for the

virtual rejection of this clause. The 1st defendant is the sole surviving full brother of Sivaswami Odayar, and supports the widow in consideration of

his reversionary interest. The third group--descendants of Ayyathorai Odayar (defendants 3, 4, 5, 7 and 8) and Singaravelu's adopted son (6th

defendant)--contend that although Clause (1) may have effected a severance of status, yet it is possible to give legal effect to Clause (8) in such a manner as to apply what is, within certain limits, a rule of survivorship. The Principal Subordinate Judge has found in favour of the construction contended for by defendant's 1, 2 and 9. This has given rise on the one hand to an appeal by the plaintiff (A.S. No. 439) and on the other an appeal by defendants 3 to 8 (A.S. No. 411).

24. In approaching the construction of the document, no authority is needed for the principle that every endeavour should be made to ascertain from it, read as a whole, what was the expressed intention of the parties to it. Each part must, if possible, be reconciled to the remainder, because it must be presumed, unless and until such presumption appears to be forbidden by the language, that it was drafted to subserve a consistent purpose and course of action. Observation of this principle would seem to require that those constructions which would reject either Clause (1) or Clause (8) should, to begin with at least be put on one side; because it seems clear that the adoption of either must frustrate some part of the intention with which the settlement" was executed. There remain two interpretations to consider. The first supposes Clause (1) to have effected a division in status, while Clause (8) preserves the rule of survivorship. The second, which none of the parties finds it in his interest to support, but which may not be the less worth considering on that account, would construe Clause (1) as no more than an agreement into what shares the property should be divided after Muthu Odayar's death, and not as evidencing a resolve immediately to sever in status. The clause would then plainly be reconcilable with Clause (8).

25. Dealing with the merits of these two views, it may be conceded that, but for the existence of Clause (8), the natural view, and the view supported by authority, would be that a severance of status resulted from the declaration contained in Clause (1). So far as the partial partition of Balasubramania's share was concerned, all that was needed was to specify his one-fifth, and to leave the remaining members as an undivided family in possession of the remainder. Without doubt, therefore, a further intention is denoted by the, apportionment of the four-fifths remaining into five equal shares. It has been urged that, whether that intention was to divide

prospectively or immediately, the mere definition of shares in law converted the joint tenancy of a coparcenary into a tenancy-in-common ; because an essential incident of a coparcenary is that no member can predicate what his share would be upon a partition. Before considering the case-law upon this point, a few elementary considerations need to be stated. The members of a coparcenary own their property jointly, and the interest which each member has in it fluctuates with the number of other members, as some are born and some die. It fluctuates by operation of the rule of survivorship, and since that rule is a necessary incident of the status, so must be the liability to fluctuation. Hence abrogation of the rule, rendering the shares fixed, necessarily involves a disruption of the joint status. The members become tenants-in-common, each possessed of individual rights which they may dispose of as individual property. They have substituted the rule of inheritance for the rule of survivorship. But if they retain the rule of survivorship, it is not easy to understand how they can be said to have fixed their shares, because by the terms of their agreement those shares are still subject to the fluctuation produced by the rule operating upon them. Merely to specify, therefore, that on partition the property will be divided according to a certain method," and until then the members will remain joint, would not seem, on first principles, necessarily to precipitate a severance. A simple illustration of the distinction T seek to draw may be given. Suppose four brothers and a cousin (son of a deceased paternal uncle) compose a joint family. Upon a partition, the cousin would take half the property, the primary division being per stirpes, and the four brothers would each take one-quarter of the other half. Suppose, however, that these five members come to a settlement whereby they agree that, when a partition takes place, it is to be per capita throughout instead of per stirpes in the first instance, so that each member would obtain one-fifth, the family in the meanwhile to remain joint. There has been a substitution of one rule for another for the ascertainment of shares, but the shares are not thereby any the more or the less ascertained. Much less has any division of rights been effected. Yet that is very much what has occurred here. What the parties in effect said was, ""We will recognise Sivavadivelu's adoption, but when we come to divide we will ignore it, and count this member as though he occupied his natural place as a son of

Samu Odayar"" : though it may be a question how the rule of survivorship should be applied to such an arrangement. I do not think that there is any authority for the view that such an agreement necessarily causes a division of status. The dicta of Lord Westbury in *Appovier v. Rama Subba Aiyar* (1866) 11 M.I.A. 75 do not apply to such circumstances, because there the family members agreed that thenceforth the property should be subject to ownership in certain defined shares, so that there was a division of rights, although it was not followed up by an actual partition. In 7 CWN 578 (Privy Council) the members of a joint family executed an *ikrarnama*, and the question was whether it effected a division in status. Their Lordships experienced ""no difficulty in the construction of the *ikrarnama*, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several coparceners,"" and that they were thereby converted from joint tenants into tenants-in-common. In the present case, assuming the retention of the rule of survivorship, the conversion of the joint tenancy into a tenancy-in-common can scarcely have occurred. Another case in the same line of Privy Council decisions is (1909) L.R. 36 I.A. 71 (Privy Council) which related to an agreement by the members of a joint family that the family property should be thenceforth held and enjoyed by the various members of the family in certain defined shares. In deciding that the agreement produced a division in status their Lordships were, I think, more concerned with the construction of the documents evidencing the agreement than with their legal effect, once it was found that an immediate division into shares was intended. The use of the word ""thenceforth"" will be noted. Another and not dissimilar case is *Syed Kasam, v. Jorawar, Singh* (1922) L.R. 49 IndAp 358 : ILR 50 C. 84 : 43 M.L.J. 676 (P.C.) of some assistance here because of an observation that the agreement was ""quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship"". Only by holding that Clause (8) of the present agreement cannot operate, can the agreement itself be held to effect such a severance.

26. I think it will be found that in each of these cases a present intention to divide in status was discovered, and none of them is authority for the view that the parties cannot agree to certain principles of partition, to be applied in futuro without becoming tenants-in-common. This in my view

disposes of the contention that the family members here, irrespective of their own wishes, and irrespective of the terms upon which they proposed

to hold their property until Muthu Odayar's death, must be regarded as severed in status. Before going further, it will be convenient to consider

what their actual intention seems to have been. The document was drafted by a vakil, and although unfortunately it has given rise to this costly

litigation, it is not unreasonable to suppose that it was drafted with due regard to the principles of Hindu Law. It can hardly be supposed that any

one conversant with those principles would draw an instrument of so hybrid a character that in one place it divides status and makes the signatories

tenants-in-common, while in another it applies to their property so well understood an incident of the joint family status as the rule of survivorship.

It is not too much to say that this rule is the logical outcome of conditions wholly at variance with the incidents of a co-tenancy. If Mr. K.S.

Krishnaswami Aiyangar, in his endeavours to reconcile the two things, has convinced me of one thing it is the extreme difficulty of the task which

was set him. He had to admit that the survivorship principle could only be applied with modification; and Mr. Varadachariar found no difficulty in

suggesting problems and anomalies to which its application would give rise. Let us then see what the members of the family would seem to have

desired. One thing is clear--that very great deference was paid to the wishes of Muthu Odayar. He was the only surviving member of his

generation, and, as the document says, "'advanced in years'". His name stands first in the deed. He was to give up his share to the others, and, as

the evidence shows, he was most anxious that apart from Balasubramania's separation, which he deplored, the family should remain joint.

Doubtless some slur may attach to family members who dispute and divide. It was, therefore, provided that so long as he lived there should be no

further partition. I can see no reason to suppose that during his lifetime a division even of status was intended. After all, although such a severance

is a familiar enough legal conception in the Courts, the necessity for partition first by status and then by metes and bounds does not very commonly

arise in practice. Nor, again, if such was the intention, are the parties likely to have nullified its main legal effect by the addition of Clause (8).

Accordingly I cannot escape the conclusion that what they wanted was to remain joint until after Muthu Odayar's death while settling how the

property should then be divided. I have myself no difficulty in construing Ex. A as an expression of such an intention. It has been asked why, if no

immediate division was intended, the parties should have been at pains to declare in Clause (8) that ""the family shall be treated as (or "deemed to

be") an ordinary undivided Hindu family subject to the law of survivorship""; and stress has been laid on the word ""treated"" or ""deemed"" as

indicating a consciousness that the family was not in fact joint. No doubt the phrase ""deemed to be"" is commonly used in statutes to extend the

application of a provision of law to a class not otherwise amenable to it. But, as the learned Advocate-General observes, one cannot apply to a

modest document rules of construction that would be appropriate in the case of a statute. I think the reasonable view to take is that the draftsman,

having in mind such decisions on Appovier's case and realising that Clause (1) might imperil the joint status (a fear, as the sequel shows, not

unfounded), inserted Clause (8) as a precautionary measure. A case which bears some resemblance to this one was one decided by Krishnan and

Ramesam, JJ., in Venkatachala Filial v. Arunthavathachi (1922) 17 L.W. 755. The second of three brothers was adopted out of the family, the

other two remaining joint. All three entered into an agreement to put their property together and live as members of a joint family, and when a

division should take place to divide into three equal shares, subject to the operation of the law of survivorship. It fell to be decided whether the

agreement had occasioned a severance of status, and there, as here, it was argued that the deed ""as a matter of legal consequence, whatever the

parties might have intended, resulted in the severance of coparcenary""; but the learned judges observe that the document recited that no party to it

was to assert that any portion of the property belonged to him separately or exclusively, and provided for future born children to be made sharers.

It was further suggested that the fixing of the shares at one-third each was an indication that a division was intended, and 7 CWN 578 (Privy

Council) was cited in support of this contention. The answer to this, equally applicable I think to the present case, was that the definition of shares

amounted to nothing more than a mere statement as to what each person would be entitled to in case of a division if no brother were born.

27. I should be prepared to hold then that the document is not ambiguous of the intention to remain joint, and is not ambiguously expressed. But

conceding that there may be ambiguity, it is permissible to look at the subsequent conduct of the parties to ascertain if it favours the one view or the other.

28. A number of documents throw light upon this question. The earliest is a petition (Ex. D) filed in 1904 by the 1st defendant asking to be

appointed to the Negapatam Devasthanam Committee in the vacancy caused by the death of Sivavadivelu, whom he describes as his undivided

brother. Sivavadivelu was of course his natural brother though his cousin brother by adoption. Sivaswami Odayar, who was very largely

conducting the family affairs, died in 1909 and his death gave occasion for a number of applications in pending suits. Ex. KK is a written statement

filed by Singaravelu Odayar in a suit on a promissory-note in which he was impleaded after Sivaswami Odayar's death. The terms of this

statement throughout are only compatible with the existence of an undivided status. The present 1st defendant and the 3rd and 4th defendants

adopted this statement in Exs. KK-1 and KK-2. The C series of documents again are compatible only with joint family membership, as for

instance Ex. C-4, where the members of family of Sivaswami, claiming to be his coparceners, asked to be brought on for purposes of executing

the decree. The widow would of course have been the proper representative had the deceased man not been joint with the other family members.

Ex. PP is a promissory-note executed by Singaravelu Odayar in 1911 in renewal of a debt contracted by Sivaswami Odayar, whom he describes

as his undivided brother. Ex. CC is an application by Singaravelu Odayar to the Receiver of the Palace Estate at Tanjore to transfer to his

undivided younger brother Gopalaswami Odayar (1st defendant) the registry standing in his name of certain lands. The record shows that reference

was made to the head karnam who reported that the family was an undivided one. A statement of the same effect is contained in a letter, Ex. CC-

1, which the 1st defendant wrote to the Receiver in the same connection. In 1917, a few days before his death, Singaravelu Odayar on behalf of

himself, his adopted son and all the members of Ayyathorai's branch sent the remainder of the family a notice Ex. N that they should be held

thenceforward to be divided. The notice says:

Although yourselves and ourselves have been, till now, living as members of an

undivided family, as we think that we should become divided from you, we have become divided from now. You have no right to the properties belonging to our share In the same way, we have no right to the properties belonging to your share. We strictly inform you that henceforward there shall be between us only relationship by blood, but no interest with regard to property.

29. Whatever the circumstances in which this notice was issued it contains no allusion to the partition deed of 1895 and expressing as it does an unequivocal intention to become divided in status, it cannot easily be reconciled with the theory that an earlier division of this kind had already taken place. In fact, no further action seems to have been taken and this notice remained as much a dead letter as the suit partition deed itself, 1 have left to the last the only document which can in any manner be construed as suggesting a divided status. In 1899 Siva-swami Odayar offered himself as a candidate at a municipal election in Kumbakonam and Ex. VI is a protest addressed by a number of voters to the Chairman, objecting"" to his candidature on the ground that his brother Sivavadivelu was already a municipal councillor and that the rules precluded more than one member of an undivided Hindu family from sitting on the Council. Ex. VI-(a) is Sivaswami Odayar''s reply; His primary argument is that where in an undivided family the property is sufficient to qualify more than one individual for a seat, the rule referred to had no application. He then goes on to say that admitting that the rule is capable of the interpretation placed upon it by the petitioners, his family ""might for the purpose of this objection be legally considered as a divided one under the terms of a registered document entered into among the members thereof, dated the 25th November, 1895"". It seems clear to me from the terms of this letter that Sivaswami Odayar''s own view was that he was undivided from his brother and that he merely put forward the possible legal effect of the partition deed as a means of gaining his object. If he had indeed believed that it divided the status, his reply would surely have been in different terms. From a consideration of all the available documentary evidence therefore I think that no other conclusion is possible but that those members of the family whose views are ascertainable from these documents entertained the view that they were still undivided in status.

30. My conclusion then is that the family members intended to remain joint until Muthu Odayar's death, while entering into this agreement as to

what their shares should be thereafter. I have already expressed the view that an agreement of this nature does not necessarily disrupt the status.

Nor has any authority been shown for the position that the members of a joint family are incapable of entering into such an agreement. There is no

doubt that at the time of partition the members may by general agreement distribute the property otherwise than as Hindu Law provides, and there

seems no reason why such an agreement cannot be entered into beforehand. In the Privy Council case (1926) ILR 48 313 (Privy Council) two

brothers, while remaining"" joint, agreed that, if either died without male issue, his widow should take a life-interest in half the estate, thereby

abrogating the rule of survivorship. It was held that the agreement was valid because a co-sharer may with the consent of the remaining co-sharers

mortgage or charge the share to which he would be entitled upon a partition; and, on the same principle, he may deal otherwise with such a share.

If, therefore, all the family members enter into a settlement whereby some will, upon a partition, receive less than what under Hindu Law would be

their share, the latter cannot afterwards plead that they"" were legally incompetent so to agree. Nor, I think, can the plaintiff succeed in attacking the

agreement on the ground that, being without consideration, it is not binding upon him. It was entered into by his father, Sivavadivelu Odayar,

before he was born, and although Sivavadivelu lived until 1903 he never repudiated it. So far as the other signatories are concerned it settles the

question of his adoption, for which it seems there is extremely little independent evidence--a batch of four sale-deeds (see Exs. Z and Z-1) in

which this relationship is recited being the only documentary evidence (if indeed they are legal evidence at all) originating before Ex. A upon the

record. On the other hand, the evidence of the 1st and 3rd defendants as D.Ws. 18 and 13 shows that there were disputes within the family about

the adoption, and this is borne out by two other witnesses, D.Ws. 4 and 5. If Ex. A goes, therefore, the plaintiff's status, following Sivavadivelu's

status as an adopted son is at least in jeopardy, and as that would be fatal to the claim he makes to a half share in the property, he does not handle

this two-edged argument very confidently. It seems incontestable that Ex. A is binding for the sufficient reasons that it was an agreement between

all the adult members of the family, and that it put an end--for the time being at least--to the disputes between them. Besides the matter of the

plaintiff's father's adoption, there was the connected question of the share which Balasubramania Odayar was to take. If the adoption was to be

recognised he would get one-sixth of the whole, if not, one-fourth. A mean was struck, and he received one-fifth. It appears, too, that there was a

disagreement whether certain property was self-acquired by Ramu and Samu Odayar or joint family property, a question which would affect the

shares to be taken by each branch. Lastly, the settlement included Muthu Odayar's resignation of his own share, subject to the payment to him

annually of a sum of Rs. 4,000. Altogether, there can be no question, but that, just as where a number of creditors accept a composition, so in the

general give-and-take and composing of differences Ex. A as a family settlement is binding upon its signatories and those claiming under them.

31. The result of these findings will be that the undivided share of Sivaswami Odayar will pass by survivorship to the remaining members of his own

branch, vis. (1) the descendants of Ayyathorai, defendants 3 to 5, 7 and 8 (2) the 6th defendant as representing his adoptive father Singaravelu,

and (3) Gopala-swami and his son, defendants 1 and 2. Each of these will receive one-third of one-fifth share in addition to his or their own one-

fifth in all four-fifteenths each, this fraction being further sub-divided in the case of the first branch, equally between the 3rd and 4th defendants"

sub-branches. The decree of the Lower Court will be modified accordingly. The plaintiff, belonging to a different main branch from Sivaswami

Odayar's cannot benefit by his death, but will take the one-fifth already awarded him by the Lower Court. As regards the other orders to be

passed in A.S. Nos. 411 and 439, I agree to the terms of them as proposed by my Lord.