
(1970) 08 MAD CK 0007
In the Madras High Court
Case No : Second Appeal No. 1882 of 1966

Varadammal and Another	Vs	APPELLANT
Ambalal J. Vyas and Others		RESPONDENT

Date of Decision : 07-08-1970

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1971 Mad 371 : (1971) 84 LW 45 : (1971) 1 MLJ 65

Hon'ble Judges : Ismail, J

Bench : Single Bench

Judgement

1. The defendants 1 and 2 in O. S. 135 of 1961 on the file of the court of the Subordinate Judge, Salem, are the appellants before this court, and

they are mother and son. The third defendant I the suit is the husband of the first defendant and father of the second defendant. He was carrying on

business on behalf of the family consisting of himself and his minor son and in the course of the business, he had incurred considerable debts. I. P.

22 of 1955 was filed by one of his creditors on 29-3-1955. before the Sub. Court, Salem for adjudging the third defendant as insolvent. Similarly,

I. P. 27 of 1955 was filed before the same court on 22-4-1955, by another creditor for adjudging the third defendant as insolvent. In order to

avert an adjudication in the said insolvency proceedings, the third defendants compromised with his creditors and executed Ex. A-19 on 24-9-

1956, being a composition trust deed in favour of all his creditors constituting the plaintiffs in the suit, who are respondents 1 to 3 herein and

defendants 4 and 5. who are respondents 5 and 6 herein, as the trustees authorising them to sell the suit properties and discharge the debts. I view

of the execution of this composition trust deed, the insolvency petitions were

terminated by a joint endorsement on 5-10-1956 and the petitions were dismissed on 6-10-1956.

2. As against these proceedings, there were certain other parallel proceedings that went on. The first defendant and the second defendant,

represented by the first defendant, represented by the first defendant,. filed a suit in forma pauperis for maintenance, past and future for the first

defendant and for partition and separate possession of his share of the family properties for the second defendant and for a charge on the third

defendant's share of the family properties for the maintenance to be awarded in favour of the first defendant. Prior to this, a petition to sue in forma

pauperis was filed on 19-1-1955. The said petition was returned on 25-1-1955, for curing certain defects. However, the first defendant did not

represent the petition. But subsequently it was represented on 9-11-1955, with an application to excuse the delay. The first defendant's counsel

has got back the pauper petition from the court on 12-2-1955, but did not present it till 9-11-1955. The petition to excuse the delay was opposed

by the third defendant and ultimately it was dismissed on 14-8-1956. Thereafter, defendants 1 and 2 filed a fresh original petition, which was

numbered as O. S. 32 of 1957 on 7-9-1956. In that suit the present third defendant remained ex parte, and the learned Subordinate Judge, Salem,

passed a preliminary decree for partition and subsequently a final decree in favour of the second defendant and for maintenance in favour of the

first defendant and created a charge over the share of the third defendant for the said maintenance of the first defendant. item 1 of the present suit

properties was allotted to the share of the second defendant and a charge was created over Items 2 to 4 which were allotted to the share of the

third defendant for the maintenance of the first defendant. In execution of this partition decree, the second defendant obtained possession of the

property which is said to have been taken possession of by respondents 1 to 3 and 5 and 6 herein, pursuant to the composition trust deed

executed by the third defendant-4th respondent herein. The first respondent and one Krishna Chettiar obstructed the delivery of possession of

Item 1 to the Second defendant and the court by removing the obstruction passed the order of delivery in R. E. A. 15 of 1960 in R. E. P. 221 of

1959 in O. S. 32 of 1957 on the file of the Sub. Court, Salem. It is, thereafter,

respondents 1 to 3 herein representing the body of creditors instituted the present suit, namely, O. S. 135 of 1961 on the file of the court of the Subordinate Judge, Salem, for declaration of title to all the four items of properties in the plaint schedule and for possession of Item 1 of the properties, after setting aside the order in R. E. A. 15 of 1960 in O. S. 32 of 1957 on the file of the court of the Subordinate Judge, Salem. Their case was that the whole proceedings in O. S. 32 of 1957 were collusive and fraudulent; brought about by defendants 1 to 3 clandestinely and they are null and void. In view of the position, the rights which the creditors obtained under Ex. A-19, have not been in any way affected by those proceedings and therefore they are entitled to have delivery of possession of Item 1 and to have their title declared to all the four items of the suit properties. The case of defendants 1 and 2 was that the proceedings in O. S. 32 of 1957 were validly and bona fide instituted and the composition deed was executed during the pendency of that suit and therefore it is affected by the doctrine of lis pendens. The further case put forward on behalf of the second defendant was that on the institution of O. S. 32 of 1957 on the file of the Court of the Subordinate Judge, Salem, there was a severance in Status between the father and son and thereafter the father had no right to alienate the joint family properties and therefore Ex. A-10 is not binding on the second defendant. The learned Principal Subordinate Judge, Salem, came to the conclusion that all the debts in respect of which the composition trust deed was executed are family debts incurred by the third defendant as manager of the joint family and they are binding on the second defendant. he also came to the conclusion that O. S. 32 of 1957 on the file of the Court of the Subordinate Judge, Salem, was nothing but a collusive proceeding and therefore the decree passed therein was a fraudulent and collusive one, and consequently the alienation made by the third defendant by way of Ex. A-19 in favour of his creditors was not hit by the doctrine of lis pendens. With regard to the claim put forward on behalf of the second defendant that on the institution of O. S. 32 of 1957 on the file of the Sub. Court, Salem, there was a severance in status brought about between the third defendant and the second defendant and therefore the father, the third defendant, had no power to alienate the joint family

properties so as to bind the son, the second defendant, the learned Subordinate Judge, relied upon the judgment of this court in Gubbala

Suryanarayana and Another Vs. Gadiyapu Ganesulu and Another, and concluded that the properties have passed out of the family by the

execution of the composition trust deed, Ex. A-19, by the father, manager, before the preliminary decree in the partition suit. O. S. 32 of 1957, on

the file of the Sub. Court, Salem, and the debts of the third defendant being antecedent and binding on defendants 1 and 2 and the second

defendant being liable under the doctrine of pious obligation, the alienation of the entire properties is valid and binding on them. On the basis of

these conclusions, the learned Subordinate Judge on 14-2-1964, decreed the suit of respondents 1 to 3 herein. Against this judgment and decree

of the learned Subordinate Judge, defendants 1 and 3 herein preferred an appeal to the District Judge, Salem, who by his judgment and decree

dated 12-7-1965 dismissed the appeal and confirmed the judgment of the trial court. Since there is not much of a discussion in the judgment of the

learned District Judge and he had more or less adopted the judgment of the trial court, it is unnecessary to say anything further with regard to the

grounds on which the learned District Judge dismissed the appeal preferred by the appellants herein. Hence the present second appeal by

defendants 1 and 2.

3. Both for the purpose of Section 52 of the Transfer of Property Act and for the purpose of bringing about a severance in joint status as between

the coparceners, the presentation of the original petition for permission to sue in forma pauperis, which was subsequently numbered as O. S. 32 of

1957 on the file of the Sub. Court, Salem, has the same effect as the institution of the suit; and with reference to O. S. 32 of 1957 on the file of the

Sub. Court, Salem, it is the presentation of the original petition that is referred to as the institution of the suit itself in the rest of the judgment.

4. With reference to the facts set out above, two different and independent questions arise and the courts below have not borne this in mind. One

question relates to the binding nature of Ex. A-19 on the second defendant in the suit. The second question related to the effect of the charge

created on the properties that were allotted to the share of the third defendant for the maintenance of the first defendant on the composition trust

deed, with reference to which alone, the doctrine of lis pendens can be applied. The question of the proceedings in O. S. 32 of 1957 on the file of the Sub. Court, Salem, being collusive will have relevance only with regard to the doctrine of lis pendens, as provided for in Section 52 of the Transfer of Property Act and it may not have any relevance with regard to the claim of severance of joint status put forward on behalf of the second defendant. Even in this context, the courts below have loosely used the expression "collusive and fraudulent" without bearing the correct connotations of those expressions and the distinction between the two I mind. This distinction between fraudulent and collusive transactions has been set out very clearly by the Supreme Court, in Nagubai Ammal and Others Vs. B. Shama Rao and Others, . The Supreme court observed:

There is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. "collusive in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of judicial tribunal for some sinister purpose". (Wharton's Law Lexicon 14th Ed. p. 212). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue but that the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with the view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham in a fraudulent suit it is real and earnest.

Thus there being a vital and important distinction between the two, we shall have to examine whether the courts below in this case have come to a correct conclusion that the proceedings in O. S. 32 of 1957 on the file of the Sub. Court, Salem, were collusive and fraudulent. As far as the applicability of Section 52 of the Transfer of Property Act is concerned, that section uses the word "collusive" and does not use the word, "fraudulent" obviously because fraud vitiates even the most solemn transaction. In this particular case, the doctrine of lie pendens as enunciated in

Section 52 of the Transfer of Property Act will have reference only to the claim of maintenance put forward by the first defendant for and obtained

in respect thereof over her husband's share of the properties. The courts below have elaborately referred to the case set up by the first defendant

in the plaint in O. s. 32 of 1957 on the file of the Sub. Court, Salem, and after examining the same with reference to the evidence given by her in

the present suit, came to the conclusion that those averments were put forward by the first defendant and the charge which she had prayed for and

obtained in respect thereof over her husband's share of the properties. The courts below have elaborately referred to the case set up by the first,

defendant in the plaint in O. S. 32 of 1957 on the file of the Sub. Court, Salem, and after examining the same with reference to the evidence given

by her in the present suit, came to the conclusion that those averments were put forward merely for the purpose of that suit. This is what the

learned Subordinate Judge has recorded:

Thus the prevaricating answer in her evidence go to show that the allegations were made only for the purpose of a suit, and it could not be

accepted. There is no independent corroborative evidence to prove the alleged cruelty said to have been inflicted by the third defendant on her.

The allegations were made only for the purpose of getting a decree for maintenance and for partition. the third defendant did not contest the suit at

all.

Apart from the fact that the finding of collusive character of the suit, O. S. No. 32 of 1957, on the file of the Sub. Court, Salem, not being

sustainable, in view of what the Supreme Court has stated as to what would constitute a "collusive proceeding." there is one other clinching

circumstance, which the courts below missed to take note of. One of the grounds on which the first defendant claimed maintenance was that the

third defendant was suffering from a virulent form of leprosy. This aspect was not at all referred to in the judgment of the courts below in the present

case. On the other hand, respondents 1 to 3 herein, in their plaint in the very present action, have themselves stated that the third defendant was

suffering from a virulent form of leprosy. If that be so, the first defendant was obviously entitled to separate residence and maintenance, first under

the provisions contained in the Hindu women's Right to separate Maintenance

and Residence Act, Act 19 of 1946 now repealed, and then under the Hindu Adoptions and Maintenance Act, 1956. consequently, on the very admission of respondents 1 to 3 herein that the third defendant was suffering for a virulent form of leprosy, it was certainly not open to them to put forward any contention that the suit for maintenance and the decree and the charge which defendants 1 and 2 obtained in O. S. 32 of 1957 on the file of the Sub. court could be said to be collusive. On the admission of respondents 1 to 3 herein, the first defendant was clearly entitled to separate residence and maintenance, and therefore, her claim for maintenance, in O. S. No. 32 of 1957 cannot be said not to be a fictitious one and it may be that the third defendant herein remained ex parte, only because he did not have any defence to that claim in law.

5. A Bench of this Court in *Lakshmiddevamma v. Subba Rao*, AIR 1936 Mad 84 has held that a claim for maintenance coupled with a prayer for a declaration of charge on specific Immovable properties falls within the terms of Section 52. Transfer of Property Act, so as to attract the doctrine of *lis pendens*. However, an attempt was made to make a distinction between a Hindu widow claiming maintenance against the estate of the family in the hands of her deceased husband's coparceners and a contention was put forward that the principle referred to above will apply only to the case of a widow's claim for maintenance against the coparceners of her deceased husband but not to a wife's claim for maintenance against her husband. That contention was negatived by this court in *Nidamanuri Subbayya v. Nidamanuri Ramalakshmi*, 1951 MLJ 143. In that case

Balakrishna Ayyar, J., observed:--

Looking at the matter independently of all authority. I find it difficult to see why so far as Section 52 of the Transfer of Property Act is concerned, the circumstance whether the plaintiff is a wife or a widow should make any difference. If the suit is by the wife it will be open to her to proceed both personally against the husband and also against any property that he may own. If the suit is by the widow, the personal liability of the husband having become extinguished by reason of his death, she will be compelled to limit her reliefs to the property in which he had an interest and which subsequently passed into the hands of his coparceners. Why the circumstance of the husband being alive should take away the right of the wife to

proceed against the property in his hands is difficult to see. Section 52 of the Transfer of Property Act is concerned only with the claims made

against the property, and the provisions made therein are independent of and unaffected by any other claim which the plaintiff might be in a position

to make against the defendant personally.

Thus, it will be seen that Ex. A-19 having been executed on 24-9-1956, during the pendency of O. s. No. 32 of 1957 on the file of the Sub.

Court, Salem, which was instituted on 7-9-1956, the doctrine of lis pendens clearly applies to the present case and the composition trust deed

executed by the third defendant will be subject to the charge created by the court in favour of the first defendant over Items 2 to 4. This is sufficient

to dispose of the question regarding the right of the first defendant to maintenance and the charge created in her favour over Items 2 to 4 of the suit

properties in the decree in a O. S. No. 32 of 1957 on the file of the Sub. Court, Salem.

6. As far as the second defendant's claim for partition is concerned. I am unable to see how any question of fraud or collusion can possibly come

into the picture at all. The case of the second defendant that Ex. A-19 is not binding on him, because it was executed after severance of status has

taken place between him and the third defendant has nothing whatever to do with any question of lis pendens or Section 52 of the Transfer of

Property Act. On the admitted position that Ex. A-19 was executed only during the pendency of O. S. No. 32 of 1957 on the file of the Sub.

Court, Salem, the only question for consideration is whether the third defendant, on the date of Ex. A-19, was competent to execute the said

document so as to bind the interest of the second defendant as well. In other words, if severance in status between the second defendant as well. In

other words, if severance in status between the second defendant and the third defendant had taken place on the date of the institution of the said

suit, but it took place only on the date of the passing of the preliminary decree, then equally it is clear that Ex. A-19 having been executed prior to

the passing of the preliminary decree, the third defendant was competent to represent the second defendant also with reference to the alienation of

the family properties under Ex. A-19 for the discharge of the family debt. This question arises only because of the general rule that in the case of an

adult coparcener the institution of the suit for partition itself brings about severance of joint status, while in the case if a minor coparcener

represented by next friend, the court can pass a decree only if it is satisfied that the partition is in the interests of the minor and if it comes to the

conclusion that the partition is not in the interests of the minor, the court is bound to dismiss the suit for partition. In the case of an adult coparcener,

the possibility of the court coming to a conclusion whether the partition is in the interests of the coparcener or not does not arise and therefore there

is no question of the court, referred to already, namely Gubbala Suryanarayana and Another Vs. Gadiyapu Ganesulu and Another, . Whatever

doubt there might have been that in the case of a suit instituted by a minor coparcener represented by the next friend for partition as against the

father, whether the severance in status took place on the date of the institution of the suit itself or only on the date of the passing of the preliminary

decree, that doubt has been now cleared by the decisions of the Supreme Court.

7. The Supreme Court in *Kakumanu Peda Subbayya and Another Vs. Kakumanu Akkamma and Another*, , stated as follows:--

Hindu law makes no distinction between a major coparcener and a minor coparcener, so far as their rights to joint properties are concerned. A

minor is, equally with a major, entitled to be suitably maintained out of the family properties, and at partition, his rights are precisely those of a

major. Consistently with this position, it has long been settled that a suit for partition on behalf of a minor coparcener is maintainable in the same

manner as one filed by an adult coparcener, with this difference that when the plaintiff is a minor the court has to be satisfied that the action has

been instituted for his benefit. Vide the authorities cited in *Thavva Rangasayi and Others Vs. Thavva Nagarathnamma*, . The course of the law may

be said, thus far, to have had smooth run. But then came the decision in *Girija Bai v. Sadashiv Dhundiraj*, 43 1st App 151 AIR 1916 PC 104

which finally established that a division in status takes place when there is an unambiguous declaration by a coparcener of his intention to separate

and that the very institution of a suit for partition constituted the expression of such an intention. The question then arose how far this principle could

be applied, when the suit for partition was instituted not by a major but by a minor acting through his next friend. The view was expressed that as

the minor had under the law, no volition of his own, the rule in question had no application to him. It was not, however, suggested that for the reason no suit for partition could be maintained on behalf of a minor, for such a stand would be contrary to the law as laid down in a series of decisions and must, if accepted, expose the estate of the minor to the perils of waste and spoliation by coparceners acting adversely to him. But what was said was that when a court decides that a partition is for the benefit of a minor, there is a division brought about by such decision and not otherwise. It would follow from this that if a minor dies before the court decided the question of benefit he would have died an undivided coparcener of his family and his heirs could not continue the action.

Having thus stated the rival positions, the Supreme Court concluded as follows:

If, under the law, it is competent to a person other than the father or mother of a minor to act on his behalf, and enter into a partition out of court

so as to bind him, is there any reason why that person should not be competent when he finds that the interests of the minor would best be served

by a division and that the adult coparceners are not willing to effect a partition, to file a suit for that purpose on behalf of the minor, and why if the

court finds that the action is beneficial to the minor, the institution of the suit should not be held to be a proper declaration on behalf of the minor to

become divided so as to cause a severance in status? In our judgment, when the law permits a person interested in a minor to act on his behalf, any

declaration to become divided made by him on behalf of the minor, must be held to result in severance in status, subject only to the court deciding

whether it is beneficial to the minor; and a suit instituted on his behalf if found to be beneficial, must be held to bring about a division in status.

Having made this observation, the Supreme Court referred, with approval to the observations of Ramesam, J., in *Thavva Rangasayi and Others*

Vs. Thavva Nagarathnamma, . Finally the Supreme Court recorded:

When, therefore, the court decides that the suit has been instituted for the benefit of the minor and decrees partition, it does so not by virtue of any

rule, special or peculiar to Hindu Law but in the exercise of a jurisdiction which is inherent in it and which extends over all minors. The true effect of

a decision of a court that the action beneficial to the minor is not to create in the minor *proprio vigore* a right which he did not possess before but to

recognise the right which had accrued to him, when the person acting on his behalf instituted the action. Thus, what brings about the severance in

status is the action of the next friend in instituting the suit, the next friend in instituting the suit, the decree of the court merely rendering it effective by

deciding that what the next friend has done is for the benefit of the minor.

8. The Supreme Court re-affirmed this view in *Lakkireddi Chinna Venkata Reddi Vs. Lakkireddi Lakshmama*, .

9. In *P.M. Ramaswamy Chettiar Vs. Raja Kuppa Chetti and Others*, , the guardian of a minor coparcener in a joint Hindu family gave a notice

demanding partition. In spite of this notice, the manager of the family alienated some family properties. In a suit for possession by the alienee the

plea of severance of joint family status was accepted by the court and the volition exercised by the guardian on behalf of the minor was approved.

in appeal it was contended that the suit being one for possession the court had no jurisdiction to adjudicate upon the question of existence of a

division in status and that unless the declaration of intention to divide was followed up by a suit for partition, that could not be given effect to. A

Bench of this court rejected this contention and held that when such a notice itself would operate as severance in status, once the court found that

the severance in status was beneficial and the court can decide the same in whatever manner the question came before the court and it was not as if

that question could be considered only in a suit for partition, because the severance of status is different from actual division of the properties by

metes and bounds and allotment of shares to different coparceners. This is what this court stated--

Without effecting an actual partition, a major coparcener has a right by an unilateral declaration on his part to effect a division in status in the family

so far as he is concerned. This right is incident to the right by birth which he has in the family properties. A major coparcener would also have a

similar right. By the very nature of it that right cannot be exercised in the same manner by him as by a major coparcener because a minor cannot be

held to have a volition of his own. Therefore a guardian or next friend acting on his behalf is allowed to exercise a volition on behalf of the minor

subject to this condition, namely, that such exercise of volition should be approved of by the court. Neither the rule nor its reason indicates that the

court should be one where a partition suit is pending.

Thus, it clear that once a notice demanding partition on behalf of a minor has been given or a suit demanding partition has been instituted on behalf

of a minor and the court comes to the conclusion that the partition is in the interests of and beneficial to the minor, severance takes place not from

the decision of the court, but from the date of the expression of the intention in the first case and from the date of the institution of the suit in the

second case. In the present case, since the court ultimately decreed the suit for partition instituted by the second defendant represented by his

mother, the first defendant, severance in status between the second defendant and the third defendant must be deemed to have taken place on the

date of the institution of the suit itself. If so, the subsequent execution of Ex. A-19, during the pendency of the said suit, will not bind the interests of

the second defendant. It is settled law that the right of a kartha of a Hindu undivided family to make an alienation of the family properties even for

the discharge of the family debts so as to bind the interests of the other coparceners subsists only so long as the family continues to be joint in

status and once the severance in status has taken place, the right of the kartha to effect an alienation so as to bind the interests of the other

coparceners comes to an end.

10. In *Krishnaswami Konan v. Ramaswami Iyer*, I.L.R.(1899)Mad 519, a Bench of this court stated--

The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is that

the father, under the Hindu Law, is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time

the property is seized it remains the undivided estate of the father and the son. If the estate were divided the father could not sell what does not fall

to him in the division. Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even

though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would

be otherwise, but no such case is made out here.

So also, in *Rathna Naidu Vs. P.R. Aiyachariar and Others*, another Bench of this court held that it is not open to a Hindu father to deal with the

property of his divided son so as to bind the latter even though it be in respect of an antecedent debt.

11. In *Official Assignee Vs. Ramachandra Aiyar and Others*, , the question again came up for consideration before this court. After referring to the

relevant decisions on the point, Ramesam, J., pointed out--

All these decisions necessarily imply that the right of the father to sell was dependent on the property continuing to be joint ancestral property upto

the date of the sale.

Again, the same learned Judge observed:

I am, therefore, of opinion that the first contention for the Official Assignee fails; and once there is a division in status as by a suit for partition, the

father's right to sell is at an end.

12. In *K.R. Subramania Aiyar and Others Vs. Sabapathi Aiyar and Another*, , Srinivasa Ayyangar J. stated--

On a partition of the family property there is a disruption of the family and the managership of the father ceases and with the managership being

lost, the power is also lost of the father to effect an alienation of the family property not only for purposes of family necessity but also for his own

antecedent debts.

In AIR 1936 277 (Privy Council) , the Privy Council had to consider the scope of sub-section (2) of Section 52 of the Presidency Towns

Insolvency Act. In that context, the Privy Council pointed out--

Turning to the first contention of the appellants, it is clear that Sri Kishen Das, as father of the two appellants, had the power, so long as it

remained undivided, to sell or mortgage the joint family property, including the interest of the appellants, for payment of his own debts, provided

such debts were antecedent and was not incurred for immoral or illegal purposes.

Again, the Judicial Committee observed--

The father's power of sale for his debts exists only so long as the joint family property is undivided, and the capacity of the Official Assignee must

be similarly limited.

13. The Supreme Court in *Pannalal and Another Vs. Mst. Naraini and Others*, had to consider this question elaborately and after having stated

that it is well-settled that the pious liability of the son to pay the debts of his

father exists whether the father is alive or dead, and therefore it is open to the father, during his lifetime, to effect a transfer of any joint family property including the interests of his sons in the same to pay off an antecedent debt not incurred for family necessity or benefit provided it is not tainted with immorality and it is equally open to the creditor to obtain a decree against the father and in execution of the same put up to sale not merely the father's but also the son's interest in the joint estate, the

Supreme Court observed:

All of them, however, have reference to the period when the estate remains joint and there is existence of coparcenership between the father and the son. There is no question that so long as the family remains undivided, the father is entitled to alienate, for satisfying his own personal debts not tainted with immorality the whole of the ancestral estate. A creditor is also entitled to proceed against the entire estate for recovery of a debt taken by the father. The position is somewhat altered when there is a disruption of the joint family by a partition between the father and the sons.

In view of all these decisions, the position has been summarised in Mulla's Hindu Law, 13th Edn, at page 342, as follows:

The father has no power to alienate his son's share after a partition between him and the son, although the alienation may be in respect of a debt which was contracted before partition.

Thus, the position is clear that once severance in status has taken place between the third defendant and the second defendant by the institution of

O. S. No. 32 of 1957 on the file of the Sub. Court, Salem, which was ultimately decreed, the third defendant had no power to alienate the

ancestral properties so as to bind the second defendant herein even though the debts in respect of which the third defendant executed of which the

third defendant executed the composition trust deed, Ex. A-19, were binding on the second defendant, because it is one thing to say that the debts

incurred by the kartha of a joint family for the purpose of the family are binding on the coparceners or the debts incurred by the father, not tainted

with illegality or immorality, are binding on his sons, and it is entirely another thing to say that the kartha of a Hindu joint family or the father is

entitled to alienate the joint family properties so as to bind the other coparceners or the sons as the case may be even after severance in status

between them. Notwithstanding the disruption of the joint status, the debts may be binding on the other coparceners or the sons and the creditors

may have appropriate remedies for realisation of their debts. But the right to alienate the property so as to bind the interests of the other

coparceners or the sons comes to an end with the disruption of the joint status. As far as the present case is concerned, I have already referred to

the conclusion arrived at by the trial court that O. S. No. 32 of 1957 on the file of the Sub. Court, Salem, was a fraudulent and collusive suit. No

doubt, the courts below have given certain reasons for coming to the conclusion that the grounds put forward by the first defendant for claiming

maintenance were not proved by her evidence in the present case. But nowhere in the judgment of the trial court, there is any independent

conclusion arrived at, namely, that the suit for partition on behalf of the second defendant as such was fraudulent. The fact that there were debts in

existence will not in any way make the suit for partition a fraudulent one; nor the fact that the third defendant remained ex parte in that suit will

make the decree passed therein ineffective or a fraudulent one. It should not be forgotten that in O. S. No. 32 of 1957 on the file of the Sub.

Court, Salem, the Court, after examining the first defendant in the present suit, came to the conclusion that the partition was beneficial to the

minor's interests and only after satisfying itself to such effect passed the decree for partition. Equally it should not be forgotten that the next friend

of the minor in that case was the mother of the minor himself. In Mayne's Hindu Law and Usage, 11th Edn, at page 556, this is what has been

stated:

Where a mother sues as the next friend of a minor for partition, it is difficult to see how her right to act on his behalf can ordinarily be disputed and

the question whether the suit is for the benefit of the minor or not can fairly arise only where a next friend who is not the mother or a coparcener in

the family sues for partition purporting to act on behalf of the minor.

14. Therefore, prima facie, the suit instituted by the first defendant as the next friend of the second defendant for partition cannot be said to be one

not for the benefit of the minor as such. Again, whether such a suit claiming partition on behalf of the second defendant was a bona fide one or not

also cannot possibly arise. In *S. Thirumalamuthu Adaviar Vs. Subramania*

Adaviar by Court guardian S. Rajarama Aiyar, Advocate, High Court and Others, , Varadachariar J. stated-

The question of the bona fides or mala fides of the partition has been referred to in some of the decisions for another reason, namely, the

suggestion sometimes made that if the partition was bona fide, in the sense that sufficient provision has been made therein even for the discharge of

the debts of the father, the shares allotted to the sons at such partition ought not to be held liable at all in any kind of proceedings for the

prepartition debts of the father. Whether that proposition is well founded or not, that appears to have been the reason for drawing the distinction in

some of the cases between bona fide partitions and fraudulent partitions. Except in cases where the mala fide character of the partition is such as to

lead the court to come to the conclusion that the partition was not intended to be operative at all, I am unable to see how the mala fide character

bears on the question of the creditor's rights to attach the sons' share in execution of a decree obtained against the father alone.

15. The right to demand partition is an incidence of right by birth which a coparcener acquires in the joint family property. Hence there can be no

answer to the demand for partition made by a coparcener. Relying on the decision of the Privy Council in 43 Ind App 151 AIR 1916 PC 104, the

legal position has been stated in Mayne's Hindu Law and Usage, 11th Edn, at page 550 as follows:

Separation in status, with all the legal consequences resulting therefrom, is quite distinct from de facto division into specific shares of the property

held jointly. The former is a matter of individual decision, and is effected by the unequivocal expression of a desire on the part of any one member

to sever himself from the joint family and to enjoy his hitherto undefined and unspecified share separately from the others, without being subject to

the obligations which arise from the joint status. The latter is the natural resultant from his decision, the division and separation of his share, which

may be arrived at either by private agreement of the parties or, on failure of that, by intervention of the court. Once the decision has been

unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he is admittedly entitled, is

unimpeachable; neither the co-sharers can question it, nor can the court

examine his conscience to find out whether his reasons for separation are well founded or sufficient. The court has simply to give effect to his right to have share allocated separately from the others.

Can the position be different, simply because the coparcener filing suit for partition happens to be a minor? I am of the opinion that the only point of difference which arises between an adult coparcener filing a suit for partition and a minor coparcener filing a suit for partition is that in the case of the latter, the decision of the court that the partition will be for the benefit of the minor-plaintiff, a coparcener, is necessary. Once such a decision has been given, there is absolutely no difference in regard to the consequences between the two cases. In this particular case, such a decision has been given in O. S. No. 32 of 1957 on the file of the Sub. Court, Salem, and hence there had been an effective disruption of joint status between the second defendant and the third defendant on the institution of that suit.

16. Admittedly in the plaint in O. S. No. 32 of 1957 on the file of the Sub. Court, Salem, the debts due by the family were not mentioned and the creditors were not made parties and a provision for payment of those debts had not been made. But, that in my opinion, cannot lead to the conclusion that the partition sought for was fraudulent in the sense that it was not intended to be operative at all, or as explained by the Supreme Court in Nagubai Ammal and Others Vs. B. Shama Rao and Others, . I have already referred to the fact that the courts below have come to the conclusion that the debts incurred in the course of the carrying on of the business, in respect of which Ex. A-19 was executed, were all family debts binding on the second defendant, and that finding has not been assailed. In view of this, the liability of the second defendant's share allotted at the partition in O. S. No. 32 of 1957 on the file of the Sub. Court, Salem, subsisted, notwithstanding the legal consequence that once severance in joint status had taken place, the third defendant had no right to alienate the joint family properties so as to bind the second defendant's interests in the joint family properties.

17. Under these circumstances, the judgment and decree of the courts below are set aside and the second appeal is allowed. In the place of the judgments and decrees of the courts below, it is declared that the respondents herein, that is, plaintiffs 1 to 3 and defendants 4 and 5 representing

the creditors of the third defendant have no title to Item 1 of the suit properties and therefore they are not entitled to recover possession thereof

from the second defendant and with regard to Items 2 to 4 of the suit properties, the title of the plaintiffs 1 to 3 and defendants 4 and 5

representing the creditors of the third defendant is declared, subject to the charge for maintenance in favour of the first defendant created over

them under the decree in O. S. No. 32 of 1957 on the file of the Sub. Court, Salem, since the said items were allotted to the third defendant in the

said partition suit and certainly the alienation effected by the third defendant under Ex. A-19 is binding on his share of the joint family properties.

The suit of respondents 1 to 3 herein will stand dismissed in other respects. The parties will bear their respective costs throughout.

18. The appellants herein had preferred the appeals before the lower appellate court as well as before this court in forma pauperis. Taking all the

circumstances into consideration, I direct the second appellant to pay the court-fee due to the Government both on the memorandum of the first

appeal before the lower appellate court and on the memorandum of the second appeal before this court and the said court-fee will be a charge on

Item 1 of the suit properties.

19. No leave.

20. Appeal allowed.