

rights claimed by the plaintiffs in that case were more extensive than those which are prejudicially affected by the decrees in these cases. This is a point which we must leave to the Lower Appellate Court to determine.

The decrees of the Lower Appellate Court must therefore be set aside and the appeals remanded to the Lower Appellate Court for rehearing and disposal on their merits. The plaintiffs—respondents will pay the defendants—appellants their costs in this Court. The costs of Government in this Court will be provided for in the final decrees. The Court-fee paid on the present appeals will be refunded to the appellants.

N. R.

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## APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice  
Venkatasubba Rao.*

1923,  
March 21.

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RAMASAMI AIYAR AND OTHERS (DEFENDANTS),  
APPELLANTS,

v.

A. S. VENKATARAMA AYYAR (PLAINTIFF), RESPONDENT.\*

*Hindu Law—Coparcener—Alienation of an item of joint family property without necessity—Suit by surviving coparcener against alienee—Right of alienee to enforce partition in such suit—Whether a separate suit by alienee necessary—Property sold less in value than share of alienee in all the family property—Right of alienee to be allotted such item from his alienor's share—Equity—Right of other members.*

Where a member of a joint Hindu family sued to recover a certain item of family property alienated by another member on the ground that the alienation was not binding on him, and it appeared that the plaintiff was the only surviving coparcener and that the value of the property alienated was less than that

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of the alienor's share in the entire family properties at the time of the alienation.

*Held*, that the alienee need not be directed to institute a separate suit to work out his rights by a partition, but was entitled in the coparcener's suit as a defendant to get a decree for partition, and claim to be allotted the item purchased by him in respect of his vendor's share, if that was consistent with the rights of the other coparceners; and that, if the value of the item did not exceed the value of the alienor's share in the entire family property at the time of the alienation, the alienee was entitled to retain the entire property sold to him.

*Ramkishore Kedarnath v. Jainarayan Ramrakhpal* (1913) I.L.R., 40 Cal., 956 (P.C.) relied on.

APPEAL against the decree of K. S. GOPALARATNAM AYYAR, the Additional Subordinate Judge of Tanjore, in Original Suit No. 11 of 1920 in the file of the said Court (Original Suit No. 47 of 1918 on the file of the Sub-Court of Kumbakōnam).

The plaintiff was the son of one Sambasiva Ayyar who died in May 1901 in the lifetime of his adoptive father Sivarama Ayyar who died in February 1903. The plaintiff sued to set aside a sale-deed executed by his paternal grandfather in favour of the first defendant on 29th June 1901; he impeached the sale on the ground that it was not binding on the family as it was not supported by necessity, and prayed for recovery of the entire property, or, if the sale was held to be valid to the extent of the alienor's share, for partition and recovery of his half share in the property sold to the first defendant. It appeared that the plaintiff's father had died at the time of the alienation, but that the plaintiff had been born in 1898 before the alienation. The first defendant and the other defendants who were his sons, contended, inter alia, that the sale was binding on the plaintiff, and that the property alienated represented in value less than the half share in the entire family property to which the alienor was entitled and

that consequently the plaintiff's suit should be dismissed. The Subordinate Judge held that the sale was valid to the extent of the alienor's share, that the suit for partial partition at the instance of a coparcener was maintainable, and that the plaintiff was entitled to a decree for partition and delivery of his half share in the property sold with mesne profits from the date of sale, and he accordingly passed a preliminary decree for partition. Against this decree the defendants preferred this appeal.

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*A. Krishnaswami Ayyar* for the appellants.

*K. Bashyam Ayyangar* for respondents.

### JUDGMENT.

PHILLIPS, J.—In this case the plaintiff is the son of one Sambasiva Ayyar, the adopted son of one Sivarama Ayyar, and he sues to recover possession of certain properties, sold by his grandfather Sivarama Ayyar on the 29th of June 1901 to the first defendant who is the father of defendants 2 to 4 on the ground that the sale was not effected for any necessity and is not binding on him. The plaintiff's father and grandfather are now both dead and, therefore the plaintiff claims to recover the whole of the suit properties.

The Subordinate Judge has found that there was no necessity for the sale and that it is, therefore, not binding on the plaintiff's share and he has given a decree to the plaintiff for a division of the property into two parts and for recovery of possession by the plaintiff of one half with mesne profits from the date of sale. The defendants now appeal and state that the decree is wrong and that the plaintiff's suit should have been dismissed on the ground that the first defendant acquired a right by the sale in his alienor's share of the family property and that he is in equity entitled to recover property not greater in value than his alienor's

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share, and that he is also entitled to ask for partition of the family property, and to have the specific item assigned to his alienor's share, if that is consistent with the rights of other coparceners.

It is not disputed that an alienee from an undivided coparcener has a right to sue for partition of the family property and to recover his alienor's share, in the case of a sale of an undivided share that share itself, and in the case of sale of a specific item of property an equitable right to have that property assigned, if possible, to his alienor's share. This principle was laid down in *Aiyāgari Venkata Ramayya v. Aiyāgari Ramayya*(1) and was followed in *Chinnu Pillai v. Kalimuthu Chetti*(2) where it was further held that the share of the alienor which passes to the alienee is the share to which the former was entitled at the date of the alienation. This latter ruling disposes of the respondent's contention that the first defendant has lost all right to the property on the death of Sivarama Ayyar. It is thus quite clear on all the authorities that the first defendant is entitled to a partition of the family property and to have the plaint property assigned to Sivarama Ayyar's share if that can equitably be done, and can bring a suit for that purpose.

It is then argued for the respondent that relief cannot be given to the defendants in this suit and that they must be left to work out their rights in a subsequent suit, and reliance is placed on several cases cited beginning with *Decndyal Lal v. Jugdeep Narain Singh*(3). In that case it was held by the Privy Council that the purchaser of the right, title and interest of one co-sharer in joint ancestral estate at a sale in execution acquired merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

(1) (1902) I.L.R., 25 Mad., 690 (F.B.). (2) (1912) I.L.R., 35 Mad., 47 (F.B.).  
(3) (1878) I.L.R., 3 Calc., 198 (P.C.).

In a subsequent case, *Hardi Narain Sahu v. Ruder Perakash Misser*(1), the same proposition was enunciated, but the Privy Council refused to interfere with the decree of the High Court ordering a partition and allotting a share to the purchaser, but observed that the decree ought to have been for the recovery of the whole property by the other coparcener with a declaration of the rights of the purchaser. In neither of these cases was the equity of the purchaser to stand in his vendor's shoes with which we are now concerned fully discussed. There have also been observations in several Madras cases that the right of the purchaser is only a right to obtain, by a suit for partition, the share to which his alienor was entitled, vide *Kota Balabidra Patro v. Khetra Doss*(2) to which one of us was a party; *Manjaya v. Shammuga*(3) and *Maharaja of Bobbili v. Venkataramanjulu Naidu*(4) and also a very recent case *Subba Goundan v. Krishnamashari*(5). It is only in the last case, however, that the question really arose as to whether the purchaser was to be driven to a suit for partition or whether relief could be given to him when defending a suit by another coparcener. In this case the Privy Council ruling in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(6) was interpreted as meaning that the Privy Council, while raising the point, expressed themselves unwilling to decide it. In *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*(6) the suit was instituted by members of a Hindu joint family to set aside an alienation in favour of the first respondent who claimed to be adopted into the family and it was held that as between the father Kedarnath and the alienee Jainarayan

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(1) (1884) I.L.R., 10 Calc., 626 (P.C.). (2) (1916) 31 M.L.J., 275.  
 (3) (1915) I.L.R., 38 Mad., 684. (4) (1916) I.L.R., 39 Mad., 265.  
 (5) (1922) I.L.R., 45 Mad., 449. (6) (1913) I.L.R., 40 Calc., 966 (P.C.).

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“the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to the former upon a partition; and that the Court, if that position were established would itself at Jainarayan’s instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact.”

That this pronouncement does relate to the competency of a Court to give a decree for partition in such a suit is, I think, clear from the succeeding passage, according to which the suit is remanded for trial,

“with a declaration that it is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath’s interests in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath.”

This latter statement seems to me to lay down quite clearly that the Court to which the suit was remanded was competent to order partition and to give decree accordingly and that the statement in the previous paragraph that their Lordships “express no opinion as to its validity either in law or fact” refers merely to the question of how much of his case Jainarayan would be able to establish when it formed the subject-matter of inquiry, and this is the view taken by the learned Chief Justice in *Beeri Ammal v. Radhakrishna Aiyar*(1). In this latter case the suit was by a member of a family for general partition, and it was held that the alienee from one of the coparceners was entitled, if otherwise equitable, to retain property alienated to him as the share of his alienor. No doubt in many cases it would not be easy to enforce the alienee’s equitable right in a

suit brought by one of the coparceners to recover the property, because it would be necessary to add all the coparceners to the suit and ascertain the amount of family property available for division, etc., and consequently it would often be simpler to refer the alienee to a separate suit, but that is not to say that, when the circumstances are favourable, the alienee must, of necessity, be driven to another suit. The principle originally laid down in *Deendyal Lal v. Jugdeep Narain Singh*(1) is that the purchaser has the right to compel partition and it was held that he was entitled to take proceedings to have his alienor's share ascertained by partition. This being the principle, where such share can be ascertained without driving the parties to a separate suit, it should be done in order to avoid multiplicity of litigation. The observations referred to above that the alienee has only a right to sue must be read with reference to the facts of the cases concerned, for, if an equity exists in the alienee and it can be enforced without a separate suit, there seems to me to be no reason for restricting that equity to a mere right to sue, a limitation which cannot be supported on equitable principles. As I read *Ramlkishore Kedarnath v. Jainarayan Ramrachhpal*(2) that case is authority for the proposition that, in a suit by a coparcener for recovery of the property or for partition, the alienee is entitled to claim partition if it can conveniently be done. In the present case the plaintiff is the only surviving member of his family and at the time of the alienation to the first defendant the plaintiff's grandfather was entitled to one half share in the family property, he having only one son. The family property at that time was a great deal more than double the amount sold to the first defendant, for by that sale about

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(1) (1878) I.L.R., 3 Cal., 198 (P.C.).

(2) (1913) I.L.R., 40 Cal., 966 (P.C.).

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two velis were sold at a time when the family properties amounted to something like 13 velis of land. There is no necessity in the present case to implead any other coparceners for they do not exist, and the partition, so far as the plaint property is concerned can be effected without any trouble at all. Sivarama Ayyar was entitled to property at least equal in value to the property alienated and there is no reason why it should not be allotted to his share, and consequently to the first defendant.

The plaintiff has also claimed mesne profits but he would not be entitled to such except from the date of the plaint. The sale was by a manager of the family and, as such is not *prima facie*, void, but only voidable at the instance of other members of the family. Vide *Hanuman Kamat v. Hanuman Mandur*(1) also *Subba Goundan v. Krishnamachari*(2). The plaintiff is therefore not entitled to any mesne profits until the date of plaint and, as it has been held that the defendants are entitled to retain possession of the property it follows that he is not entitled to any mesne profits. The appeal is allowed and plaintiff's suit dismissed with costs throughout. The memorandum of objections is also dismissed.

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VENKATASUBBA RAO, J.—I agree.

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(1) (1892) I.L.R., 19 Cal., 123 (P.C.).

(2) (1922) I.L.R., 45 Mad., 449.