

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

SARASWATAMMA (SECOND DEFENDANT), APPELLANT,

1922
October 11.

v.

PADDAYYA AND THREE OTHERS (PLAINTIFF, FIRST,
THIRD AND FOURTH DEFENDANTS), RESPONDENTS.*

Indian Registration Act (XVI of 1908), ss. 17 and 49—Unregistered deed of partition—Admissibility in evidence to prove division in status.

A deed of partition between some members of a joint Hindu family which divides by metes and bounds the family lands worth more than Rs. 100 but which is inadmissible in evidence to prove a partition on account of want of registration is still admissible as evidence to prove an intention amongst all the members to become divided in status.

Per Cur.—A deed which effects between the members of such a family merely a division in status is admissible in evidence to prove such division, though unregistered, as it does not directly affect immoveable property but only creates a change of status from which rights may indirectly arise in such property as a legal incident. *Girja Bai v. Sadshiv Dhundiraj*, (1916) I.L.R., 43 Calc., 1031 (P.C.), and *Varada Pillai v. Jeevarathnammal*, (1920) I.L.R., 43 Mad., 244 (P.C.), applied. *Pothi Naicken v. Nagamma Naicker*, (1916) 30 M.L.J., 62, and *Ayyakutti Mankondan v. Periasawmi Koundan*, (1916) 30 M.L.J., 404, not followed.

APPEAL against the order of C. V. VISWANATHA SASTRIYAR, District Judge of Kistna, in Appeal Suit No. 7 of 1920, filed against the decree of K. SAMBASIVA RAO NAYUDU, Subordinate Judge of Bezwada, in Original Suit No. 3 of 1918.

The facts are given in the judgment of VENKATASUBBA RAO, J.

O. V. Anantakrishna Ayyar for A. Krishnaswami Ayyar (with V. Suryanarayana) for appellant.—There

* Civil Miscellaneous Appeal No. 422 of 1921.

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was a division in status between all the members of the family. Exhibit V is admissible as a piece of evidence to prove a division in status. Exhibit V by itself may be useless to prove an actual division amongst all the members of the family but it is certainly an expression of the intention of some of them to separate themselves in interest. If such intention is communicated to others it effects a division in status. A document which merely effects a division in status does not directly affect immoveable property and does not therefore require registration, *Ramalinga Amari v. Narayana Annavi*(1), *Girja Bai v. Sadashiv Dhundiraj*(2), *Suraj Narain v. Iqbal Narain*(3), *Kawal Nain v. Budh Singh*(4), *Amritrao v. Mukundrao*(5) and *Natesa Iyer v. Subramania Iyer*(6). Merely because the indirect legal consequence of the document according to Hindu Law will be to affect immoveable property the document does not become compulsorily registrable; *Subrahmaniam Aiyar v. Savitri Ammal*(7), and SPENCER, J.'s view in *Ayyakutti Mankondan v. Periasawmi Koundan*(8). The views in *Pothi Naicker v. Naganna Naicker*(9) and *Ayyakutti Mankondan v. Periasawmi Koundan*(8) are no longer good law. Exhibit V is admissible to prove the subsequent character of the possession, *Varada Pillai v. Jeevarathnammal*(10).

P. Narayanamurti for respondent.—Exhibit V is inadmissible in evidence. I rely on *Ayyakutti Mankondan v. Periasawmi Koundan*(8) and *Pothi Naicker v. Naganna Naicker*(9), which are Full Bench judgments not yet dissented from in any later case. They clearly show that

(1) (1922) I.L.R., 45 Mad., 489 (P.C.).

(2) (.916) I.L.R., 43 Cal., 1031 (P.C)

(3) (1913) I.L.R., 35 All., 80 (P.C.). (4) (1917) I.L.R., 39 All., 496 (P.C.)

(5) (1921) 13 L.W., 112 (P.C.). (6) (1918) 28 M.L.T., 307.

(7) (1909) 19 M.L.J., 228.

(8) (1918) 30 M.L.J., 404.

(9) (1916) 30 M.L.J., 62.

(10) (1920) I.L.R., 43 Mad., 244 (P.C.).

even a document which creates a division in status requires registration if it affects immoveable property. Section 17 of the Registration Act requires registration of documents which not merely *create* rights in land but also of those which *affect* rights in land. The direct and express result of such a document is to put an end to joint tenancy and to create newly a tenancy in common in the lands. One other result is to destroy the right of survivorship.

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JUDGMENT.

VENKATASUBBA RAO, J.—The Temporary Subordinate Judge held that Exhibit V was admissible in evidence and the District Judge disagreed with him and refused to admit it, on the ground that it was unregistered. The material question to be decided in this appeal is, whether there was a division between the plaintiff, the first defendant and the second defendant's husband and whether the document above referred to can be admitted in evidence. The facts necessary for the decision of this question may be very briefly stated.

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The first defendant and the deceased husband of the second defendant were brothers, being the sons of the plaintiff. The suit is for partition. The second defendant contends that a partition was effected during the lifetime of her husband and that Exhibit V embodies the terms thereof, that under it, of the 12 acres of land which the family possessed, each son obtained about 5 acres and odd, and the plaintiff, the father, was allotted for his maintenance one acre and 50 cents. It may be stated that the plaintiff ignoring this arrangement claims in the suit a moiety of the property; but there is an alternative prayer in the plaint to the effect that he may be allotted one-third of the property in the event of the Court

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holding that there was a partition in the lifetime of the second defendant's husband. The Subordinate Judge, holding that there was a completed partition, dismissed the plaintiff's suit, and the District Judge, having decided that the partition was effected only between the two brothers and that the plaintiff was not a party to it and was not bound thereby and therefore that the plaintiff was entitled to a half share, reversed the decree of the Subordinate Judge and remanded the suit for disposal on the other issues framed in the case.

It must be stated at the outset that Exhibit V, the deed of partition relied on by the second defendant, was executed only by the first defendant and the deceased husband of the second defendant and that it was not registered.

The question whether the plaintiff was a consenting party to the division is a question of fact, and Mr. Anantakrishna Ayyar on behalf of the second defendant (appellant) argued that, though this finding of fact is binding upon him, it is open to him to contend that there was a division in status between the members of the family and that the District Judge acted erroneously in refusing to admit Exhibit V for the purpose of showing that there was such severance.

The Subordinate Judge observes as follows in regard to Exhibit V :

"The plaintiff and the first defendant objected to its admissibility on the ground that it required registration. I overruled the objections, because the second defendant was tendering the document to prove the status of the family but not the title of any particular sharer to any particular item."

The District Judge, while holding that there was no actual division, fails to consider the question whether there was a division of status. In this, I think, he was clearly wrong. It has been held that, to effect a

severance of rights, an actual division by metes and bounds is not necessary. A deed which is ineffectual to effect a *de facto* actual division of the subject matter may operate to effect a separation in interest and in right. In *Appovier v. Rama Subba Aiyar*(1), their Lordships of the Privy Council had to consider the effect of a deed of partition executed by all the members of an undivided Hindu family which spoke of a division having been agreed upon to be thereafter made, and the contention that the deed was ineffectual to convert the undivided property into divided property until it had been followed up by an actual partition by metes and bounds, was rejected by their Lordships. Mr. Anantakrishna Ayyar on behalf of the second appellant, argued that Exhibit V effected in any event a division of right and that the document was admissible in evidence to prove such a division. The question then arises, is a document which operates to convert a change in the status of the family and effects a division of right, when it is unregistered, admissible in evidence? Mr. Narayanamurti on behalf of the respondent strongly relied on *Ayyakutti Mankondan v. Periasawmi Koundan*(2), and *Pothi Naicker v. Naganna Naicker*(3). Both were Letters Patent Appeals and three learned Judges decided each of them, and the judgments are entitled to great weight. It was held in both the cases that a document merely effecting a division of status required registration, and if it was not registered, it was inadmissible in evidence. But the authority of these rulings is considerably weakened by the fact that in *Natesa Iyer v. Subramania Iyer*(4), AYLING and SESHAGIRI AYYAR, JJ. (it will be noticed that

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(1) (1866) 11 M.I.A., 75.

(2) (1916) 30 M.L.J., 404.

(3) (1918) 30 M.L.J., 62.

(4) (1918) 23 M.L.T., 307.

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the latter took part in both the Letters Patent Appeals) observed at page 309 as follows :—

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“ In this view it is unnecessary to consider how far the decisions of this Court in *Pothi Naicken v. Naganna Naicker*(1), and *Ayyakutti Mankondan v. Periasawmi Koundan*(2), are reconcilable with the pronouncement of the Judicial Committee in *Girja Bai v. Sadashiv Dhundiraj*(3).”

✓ In *Subrahmaniam Aiyar v. Savitri Ammal*(4), SANKARAN NAYAR, J., held that a document effecting merely a division in status did not require registration and in *Ayyakutti Mankondan v. Periasawmi Koundan*(2), SPENCER, J., adopted the same view and referred with approval to *Subrahmaniam Aiyar v. Savitri Ammal*(4). ✓ SADASIVA AYYAR, J., took a different view and the difference of opinion between the two learned Judges led to the Letters Patent Appeal. In *Pothi Naicken v. Naganna Naicker*(1), SANKARAN NAYAR and OLDFIELD, JJ., differed, the former adhering to the view already expressed by him, and this difference of opinion led to the other Letters Patent Appeal. Speaking for myself, with great respect, I am inclined to agree with SANKARAN NAYAR, J., and SPENCER, J., for, in the words of SANKARAN NAYAR, J., the alteration in the nature of the estate is an incident attached by Hindu Law to the divided status of the members of a Hindu family. ✓ A document merely creating a separation in status does not itself create any interest in immoveable property. ✓ Such an interest is created not by virtue of the instrument but by the operation of the rules of the Hindu Law. ✓ Were it necessary to decide this question, we might refer it to the decision of a Full Bench, but it seems to me that for the determination of this case, the question as presented to us in the argument does not arise.

(1) (1916) 30 M.L.J., 62.

(3) (1916) I.L.R., 43 Calc., 1031 (P.C.).

(2) 1916) 30 M.L.J., 404.

(4) (1909) 19 M.L.J., 228.

It has been repeatedly pointed out that an agreement between all the coparceners is not essential to the disruption of the joint status; and that separation so far as the separating member is concerned, is a matter of individual volition. A very clear exposition of this principle is contained in the judgment of their Lordships of the Privy Council in *Girja Bai v. Sadashiv Dhundiraj*(1). Their Lordships observe :

“Some of the Courts in India have supposed Lord WESTBURY’s expressions in *Appovier v. Rama Subba Aiyar*(2) to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view.”

Then it is pointed out that the intention to separate may be evidenced in different ways, either by explicit declaration or by conduct, and if it is an inference derivable therefrom, it will be for the Court to determine whether the conduct or declaration was unequivocal and explicit. To the same effect was the law laid down in *Suraj Narain v. Iqbal Narain*(3).

“What may amount to a separation,” their Lordships say, “or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in common must depend on the facts of each case. A definite and unambiguous indication by one member of an intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect, the intention must be unequivocal and clearly expressed.”

These and similar observations make it perfectly clear that an inference of intention may be derived either from declaration or from conduct. For effecting a division in status in addition to conduct or declarations, the intention must be unequivocally and clearly expressed to the other members of the family. For ascertaining whether a deed amounts to such conduct or contains

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(1) (1916) I.L.R., 43 Cal., 1031 (P.C.). (2) (1866) 11 M.I.A., 75.

(3) (1913) I.L.R., 35 All., 80 (P.C.) at 87.

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evidence of it, or contains declarations of intention, I fail to see why it should not be looked at, although it may refer to immoveable property, and is not registered. Coupled with declaration or conduct, there must be a communication of intention to the other members, then alone a division in status would result. A document, therefore, which merely contains a declaration or affords evidence of conduct, does not of itself create a division in status, and I find no difficulty in holding that Exhibit V, which, as I already pointed out, is not an agreement between all the members of the family, and does not therefore as such, operate to create a division in status, is admissible in evidence for the purpose of proving the declaration or the conduct of the executants.

It was argued in *Natesa Iyer v. Subramania Ayer*(1), already referred to, that an unregistered document was inadmissible to evidence a unilateral declaration and the argument was rejected, the learned Judges observing,

“We are not able to hold therefore that the documents cannot be looked into to ascertain the intention of the executants.”

Section 49 (c) of the Registration Act enacts

“No document required by section 17 to be registered shall be received as evidence of any transaction affecting such property.”

The document containing a declaration or which affords evidence of conduct is not tendered as evidence of a transaction but only in evidence, in other words, the section makes inadmissible a document which records a transaction affecting immoveable property. It does not mean that no single piece of evidence affecting immoveable property can be admitted, if the evidence is contained in a writing which is not registered. For instance, if the question to be decided is whether a gift of

a property is real or benami and if a letter written by the donor to the donee is sought to be put in evidence, it cannot be ruled out on the ground that it affects immoveable property. ✓ What is prohibited by the section is receiving a document as evidence of a transaction, not merely receiving it in evidence, that is, as a piece of evidence having a bearing on the question to be ultimately decided. ✓

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Then there is another aspect of the question to be considered. It is said that the document itself refers to immoveable property and we cannot therefore look at it for any purpose whatsoever. This argument appears to me wholly untenable in view of the decision of the Privy Council in *Varada Pillai v. Jeevarathnammal*(1), where their Lordships holding that the recitals in certain petitions could not be used as evidence of a gift, still held that the petitions could nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the donee.

Now turning to Exhibit V it affords clear evidence of conduct from which an intention to divide on the part of the executants is deducible and the declarations in it also lead to the same inference. Lakshminarayana, the first defendant, and Sitaramayya, the deceased husband of the second defendant, who are the executants, begin by describing the document as a "list of shares of division." Lands are first divided, then the residential house. The debts are said to amount to Rs. 1,060-14-10. They are divided and the document contains the statement, "Both of us have agreed to the said shares and effect settlement without any dispute whatever." The treasure box and cart are also divided and the document contains the further recital, "Out of the hayricks, the northern

(1) (1920) I.L.R., 43 Mad., 244 (P.C.).

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side of the hayrick has fallen to Lakshminarayana's share and the southern side to Sitaramayya's share." All the co-parceners not being parties to this document, it did not effect an immediate division in status, but the document is the clearest possible indication of the intention of the executants to remain divided.

We have been referred to some evidence that this intention has been communicated to the plaintiff, but the question was not definitely before the minds of the parties and it seems to me that the proper order to make would be to direct an additional issue to be raised; "Whether there was a division in status between the members of the joint family during the life-time of second defendant's husband" and to allow the parties to adduce evidence in regard to this issue. It is scarcely necessary to add that to effect a division in status a document is not necessary and evidence may be given of acts of parties or declarations independent of any document. As the attention of the Subordinate Judge was not directly called to this question, there being no issue upon the point, and as the District Judge has altogether failed to consider it, I think the course suggested would be the proper course to follow. The order of the District Judge remanding the suit for disposal will stand, but the Court of the First Instance will be directed to frame an additional issue in the terms already mentioned and to try it.

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SPENCER, J.—I agree with my learned brother both as to the admissibility of Exhibit V to prove division of status and as to the order proposed by him to be made for an additional issue to be framed.

I adhere to the opinion which I expressed in *Ayyakutti-Mankondan v. Periasawmi Koundan*(1), following what SANKARAN NAYAR, J., said in *Subramania Aiyar v. Savitri*

Ammal(1), that even an unregistered document can be used as evidence of an intention on the part of members of an undivided family to become divided in status. I am glad to find that my learned brother agrees with the opinion which I then gave and that there have been several later pronouncements of great weight which tend to show that my view was correct.

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I have the highest respect for the opinion of SADASIVA AYYAR, J., but I think he stretched too widely the meaning of the verb "affect" in section 49 of the Registration Act. All sorts of transactions may remotely affect immoveable property. Section 49 of the Registration Act has to be read in the light of section 17 of the same Act and section 91 of the Evidence Act. If this is done, the word "affect" will be seen to be only a compendious term for expressing the longer phrase of "purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent to." ✓ Thus applications for the mutation of names in the Government registers or agreements to become divided in status may be said to "affect" in an indirect sense immoveable property, but they do not of themselves purport to pass any right to immoveable property and so do not require to be registered. The decision of the Privy Council in *Varada Pillai v. Jeevarathnammal*(2) has made this clear as regards the former kind of documents. On the same principle I think that documents which are instruments of partition, as defined in section 2 (15) of the Stamp Act, that is, instruments whereby co-owners of any property divide or agree to divide such property in severalty, are required by section 17 of the Indian Registration Act to be registered when the property to be divided is immoveable

(1) (1909) 19 M.L.J., 228.

(2) (1920) I.L.R., 43 Mad., 244 (P.C.).

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property over Rs. 100, in value, and if they are not so registered they cannot by reason of section 49 be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving division of status among the parties to the documents. When so used they do not "affect" immovable property nor is the division of status a "transaction affecting immovable property" in the sense intended by the Act to be given to the word "affect." Documents that do not fall under the above description are not required to be registered at all and are admissible in evidence without registration. All costs hitherto incurred to be costs in the cause.

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*Before Sir Walter Sabis Schwabe, Kt., K.C., Chief Justice
and Mr. Justice Wallace.*

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THE SECRETARY, BOARD OF REVENUE
(INCOME-TAX), MADRAS, REFERRING OFFICER

v.

THE MADRAS EXPORT COMPANY (ASSEESSEE).*

Ss. (1) 3 (1) (5) and 33 of Indian Income-tax Act (VII of 1918)—Firm in France buying goods in India through agent but selling them for profit in France—Profit not taxable under the Act.

As the agent of a firm situated in Paris, A bought raw skins in Madras and exported them to Paris where the firm sold them for profit.

Held, that as the profits accrued solely in France they were not taxable in British India.

* Referred Case No. 4 of 1922.