putting an intolerable strain upon the word "registered" and one which the draftsman of this statute could not possibly be thought to have contemplated. Of course the decision amounts to this, and we find ourselves unfortunately in disagreement with it even on the minor point, that the relation constituted between the shareholder and the company is a contractual relation—we do not even go so far as that as we wish to limit ourselves carefully—if "contractual" is taken to mean, contractual in the sense contemplated by articles 115 and 116 of the Limitation Act. We therefore are of opinion that *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty*(1) is incorrectly decided and we think we ought to say so.

The reply to the question submitted to us is that in our opinion article 120 is the article that applies.

KRISHNAN, J.—I agree.

BEASLEY, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Ramesam.

SOURI MUTHU AND OTHERS (PLAINTIFFS AND DEFENDANTS 3 AND 4), APPELLANTS,

1925, July 25.

v.

PAVADAI PACHIA PILLAI AND ANOTHER (1ST AND 2ND DEFENDANTS), RESPONDENTS.*

Hindu Law—Alienation by a co-parcener of a joint Hindu family of specific items of family property—Suit by non-alienating co-parcener for partition of his share in the alienated property—Unconditional decree for partition—

(1) (1919) I.L.R., 42 Mad., 38. * Second Appeal No. 1704 of 1923.

SOURI MUTHU v. PACHIA PILLAI.

Subsequent suit by alienee for general partition—Res judicata —*Allotment of properties—Items decreed to co-parceners in former suit, whether liable to be allotted to the alienee—Right of alienee to other items of family property to be allotted to alienor and be awarded to alienee in substitution.*

Where a co-parcener in a joint Hindu family alienated certain specific items of the joint family property, and the non-alienating co-parcener sued the alienee and others and obtained an unconditional decree for partition and delivery of his share in the alienated properties alone, and subsequent to the decree the alienee instituted a suit for a general partition of all the family properties including the items awarded to the co-parcener in the previous suit and prayed that the whole of the items sold to him might be allotted to his vendor's share and awarded to him in respect of his purchase, and, if that could not be done, such other properties as might be allotted to his vendor's share might be awarded to him in substitution for the items sold to him,

Held, that the decision in the former suit was *res judicata*, that the properties decreed to the co-parcener in the previous suit became the separate property of the co-parcener and were not liable to be allotted to the alienee in respect of his purchase, and that consequently the first prayer in the present suit could not be granted; *Subba Goundan* v. *Krishnamachari* (1922) I.L.R., 45 Mad., 449, distinguished; *Davud Beevi Ammal* v. *Radhakrishna Aiyar* (1923) 44 M.L.J., 309, dissented from;

that the alienee was entitled to recover the properties that might be allotted to his alienor's share in the other properties of the family in substitution for the properties purchased by him. *Ramakishore Kedarnath* v. *Jainarain Ramrachhpal*, (1913) I.L.R., 40 Calc., 966 (P.C.), explained; *Hanmandas Ramdayal* v. *Valabhdas*, (1919) I.L.R., 43 Bom., 17, distinguished.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, District Judge of North Arcot, in A.S. No. 316 of 1921, preferred against the decree of A. SUNDARESA SASTRI, the District Munsif of Tiruvannāmalai, in O.S. No. 388 of 1920.

The material facts appear from the judgment. The plaintiffs, who were sons of an alienee from the father of the first defendant, sued for a general partition of the family properties, after a previous suit for partial partition, instituted by the son of

his alienor, had been brought and an unconditional decree for partial partition of the alienated properties had been passed in favour of the co-parcener-plaintiff. The District Munsif decreed in favour of the plaintiffs awarding the items sold to their father. The District Judge reversed the decree and dismissed the suit. The plaintiffs preferred this second appeal.

K. Sankara Sastri for appellants.—The suit is not barred as *res judicata*. The suit is maintainable, as the former suit was only for partial partition of the items sold, which was maintainable. See *Iburamsa Rowthan* v. *Theruvenkatasami Naick*(1), *Venkatachella Pillay* v. *Chinnaiya Mudaliar*(2).

The non-alienating co-parcener, who recovers his share in the alienated property, should submit his share recovered to the claim of the alienee in his general suit for partition; see *Subba Goundan* v. *Krishnamachari*(3), *Davud Beevi Ammal* v. *Radhakrishna Aiyar*(4), *Hanmandas Ramdayal* v. *Valabhdas* (5). In any event the entire suit ought not to have been dismissed. The alienee is entitled to have the items in the unalienated properties that might fall to his alienor's share, to be allotted to the alienee in substitution of the items bought by him.

N. Chandrasekhara Ayyar, for respondent, was not called upon the first point as to items decreed in the previous suit; and on the second point as to partition of unalienated properties, he had no objection.

The JUDGMENT of the Court was delivered by

RAMESAM, J.

RAMESAM, J.—The facts out of which this second appeal arises are not in dispute. One Subbaraya Pillai, father of first defendant, died in 1918. He sold the properties mentioned in the plaint Schedule No. I to the first plaintiff's father Roger, on the 27th February 1905, the properties mentioned in Schedule No. II to 4th defendant on 22nd May 1902 and the properties in Schedule No. III to the predecessors-in-title of the present third defendant on 21st May 1901. The properties

(1) (1911) I.L.R., 34 Mad., 269 (F.B.). (2) (1870) 5 M.H.C.R., 166.
(3) (1922) I.L.R., 45 Mad., 449. (4) (1923) 44 M.L.J., 309.
(5) (1919) I.L.R., 43 Bom., 17.

SOURI MUTHU v. PACHIA PILLAI.

R. MESAM, J.

mentioned in Schedule No. IV were not disposed of by him. The present first defendant alleging that the sales mentioned above, made by his father, were not binding on him, sued for partition and recovery of his share in O.S. No. 416 of 1916. He obtained a decree. That suit came up to the High Court in Second Appeal, and the decree in favour of the plaintiff was confirmed with some variations which are not now material. After the termination of the said litigation the present plaintiffs, the sons of the alienee of the properties in Schedule I, have now sued for a general partition of the properties of Subbaraya. They allege that the properties left undisposed of by him were enough to be allotted to the share which the present first defendant is entitled to. They pray in the first instance that the whole of the properties sold to them may be allotted to the father's share and through the father to themselves, and in the alternative they pray for the allotment of other properties as substitute, if the Court holds that the properties sold to them and mentioned in Schedule I cannot be allotted to them. The District Munsif agreeing with the plaintiffs' contention gave a decree for the properties sold to them. On appeal the District Judge reversed the decree and dismissed the plaintiffs' suit, on the ground that the suit as framed is not maintainable. He was of opinion that a suit for general partition by a stranger purchasing specific items of property from one of the members of a joint family should be filed before a suit by a non-alienating co-parcener for partition of the alienated item is filed, and decreed, and would not be maintainable after the partial partition was decreed. In the result he dismissed the plaintiffs' suit. The plaintiffs appeal.

In second appeal the plaintiffs have urged their right to both the alternative prayers. The right of a

purchaser to file a suit for general partition, and to work out his rights and equities either by having the properties sold to him allotted to the share of the alienor, or by getting other properties in substitution is not in dispute before us, and has been conceded on both sides. Vide *Aiyyagiri Venkataramayya* v. *Aiyyagiri Ramayya*(1). The right of a non-alienating co-parcener to file a suit for partial partition and get a decree for his share is equally settled, and must now be taken as established law. Vide *Venkatachella Pillay* v. *Chinnayya Mudaliar*(2), *Subramanya Chettiyar* v. *Padmanabha Chettiyar*(3), and *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*(4). We must start from the basis that these decisions were correctly decided. If in a suit for partial partition the purchaser does not defend the suit on the ground of his equity, or if his plea is disallowed, the decree must be regarded as final. It is true as pointed out in *Ramakishore Kedarnath* v. *Jainarayan Ramrachhpal*(5) that it is competent for the Court to make the whole or any part of the relief granted in such a suit to the non-alienating co-parcener conditional on his assenting to the results of a suit for general partition. In the present case no such equities were urged in the former second appeal. What was argued was that the purchaser was entitled to insist on the son suing for a general partition, not that he himself was entitled to sue for a general partition, and get the property allotted to his share, and that the decree in that suit should be made conditional on the result of such a suit. Thus we have got the fact in this case that in the former suit no condition was added to the decree. In *Hanmandas Ramdayal* v. *Valabhdas*(6) BATCHELOR and KEMP, JJ.,

(1) (1902) I.L.R., 25 Mad., 690 (F.B.). (2) (1870) 5 M.H.C.R., 166.
(3) (1896) I.L.R., 19 Mad., 267. (4) (1911) I.L.R., 34 Mad., 269 (F.B.).
(5) (1913) I.L.R., 40 Calc., 966 (P.C.). (6) (1919) I.L.R., 43 Bom., 17.

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RAMESAM, J.

added a reservation staying execution of the decree and giving three months to the defendant to file a suit for general partition. It practically amounted to making the decree conditional. The question that now arises is, what is the effect of the unconditional decree in the former suit? We think that so far as the particular property is concerned the former suit is final and makes the matter *res judicata* and the plaintiffs are not entitled to their first prayer. The result of the decree in the former suit is that the plaintiff in that suit gets his share as his separate property, and does not hold it as joint family property. The learned vakil for the appellants relies on two decisions. The first decision he relies on is *Subba Goundan* v. *Krishnamachari*(1). In that case a non-alienating co-parcener sued not for partial partition but for possession of the property alienated, on the ground that the sale was void. His suit was decreed. It was held that a suit for general partition by the purchaser was afterwards maintainable. It was pointed out by the learned Judges that it was not in the power of the defendant in the prior suit to convert the suit for possession into a suit for general partition. In so far as the suit for general partition beyond the specific properties sold is concerned, these observations are undoubtedly in favour of the appellants. But this case cannot be regarded as authority in their favour so far as the first prayer is concerned. The first suit in that case was a suit for possession and when the non-alienating co-parcener got a decree for the properties, it must be taken that he obtained possession of the properties on behalf of the joint family; it cannot be said that he obtained it as his separate property. In the appeal before us the first suit was a suit for partial

(1) (1922) I.L.R., 45 Mad., 449.

partition and as we already observed the first defendant obtained the property as his separate property. The second case relied on by the learned vakil for the appellants is *Davud Beevi Ammal* v. *Radhakrishna Aiyar*(1). The observations of WALLACE, J., particularly are in their favour. These observations seem to be *obiter dicta*; for on the facts of that case the observations were not necessary. The suit for partial partition by the son was pending at the time when the suit for general partition was taken for consideration and decreed. WALLACE, J., seems to have been of opinion that, where a non-alienating co-parcener obtained a decree in a suit for partial partition, he obtains the property as joint family property. This is indirectly to say that the decision in *Venkatachella Pillay* v. *Chinnaiya Mudaliar*(2) and other cases allowing a suit for partial partition are erroneously decided. There is no purpose in a decree for partition if the only object of it is merely to get rid of the sale and not to divide the property by metes and bounds. So long as such a suit is permissible and the decree directs division of the property by metes and bounds, the result of the decree must be that the co-parcener gets his share as separate property. And as there is no condition or reservation attached to the former decree as was pointed out in *Ramakishore Kedarnath* v. *Jainarayan Ramrachhapal*(3) or as was done in *Hanmandas Ramdayal* v. *Valabhadas*(4), that decree is final and cannot be re-opened in another suit. It seems to us therefore the matter is *res judicata* so far as the property sold is concerned and the first part of the appellants' contention must therefore be disallowed.

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(1) (1923) 44 M.L.J., 309.
(2) (1870) 5 M.H.C.R., 166.
(3) (1913) I.L.R., 40 Calc., 966 (P.C.).
(4) (1919) I.L.R., 43 Bom., 17.

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Coming to the second prayer, it is obvious that all the authorities and the trend of the previous disoussion go to show that the suit is maintainable. It was not in the plaintiff's power to ask for a general partition in the former suit as was pointed out in *Subba Goundan* v. *Krishnamachari*(1). The learned vakil for the respondents does not support the District Judge's judgment on this point. The result is that the second appeal must be allowed and the case remanded for disposal according to law in the light of the above observations. Appellants will have refund of their court fee on the appeal memorandum. We may say that we agree with the District Judge in thinking that the position of third and fourth defendants is the same as that of the plaintiffs and they will be given a similar decree in this case. In the second appeal each party will bear his own costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Visvanatha Sastri.

1925, September 24.

MAHALINGA NAIKER (PLAINTIFF), APPELLANT,

v.

VELLAYYA NAIKER AND ANOTHER (DEFENDENTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), *ss.* 131, 189 *and* 192, *cl.* 2 *—Civil Procedure Code (Act V of* 1908), *O. XXI, rr.* 89, 92 (1) *—Sale under Chapter VI of the Estates Land Act—Application to set aside sale, preferred under sec.* 131 *of the Act, dismissed—Subsequent suit in a Civil Court to set aside the sale*

(1) (1922) I.L.R., 45 Mad., 449.

* Second Appeal No. 73 of 1923.