APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

1926, February 5.

KANDASAMY UDAYAN (FIRST DEFENDANT-APPELLANT), APPELLANT,

v.

VELAYUTHA UDAYAN (PLAINTIFF-RESPONDENT), RESPONDENT.*

Hindu Law—Alienation by a co-parcener—Suit by another co-parcener to recover property alienated or his share therein —Right of alienee as defendant to demand a general partition in that suit—Proper course for alienee, to institute a separate suit for general partition—Decree in co-parcener's suit, whether res judicata *as to share of co-parcener in a suit by vendee for general partition—Form of decree to be given in co-parcener's suit.*

In a suit instituted by a co-parcener of a joint Hindu family against a vendee for setting aside an alienation of a certain item of family property by another co-parcener and recovering his share in it, it is not competent to the court to direct a general partition of all the family properties at the instance of the alienee-defendant.

Subba Goundan v. *Krishnamachari*, (1922) I.L.R., 45 Mad., 449, followed. *Ramasami Aiyar* v. *Venkatarama Ayar*, (1923) I.L.R., 46 Mad., 815, explained.

A decree in the suit of a co-parcener to have his share of the alienated property partitioned between him and the alienee, is not *res judicata* in a subsequent suit by the alience for general partition, including the share in the property decreed to the co-parcener by the previous decree.

Sourimuthu v. *Pavadai Pachia Pillai*, (1925) 49 M.L.J., 679, dissented from.

When a suit is instituted by a co-parcener to recover his share in the alienated property, the proper course to be followed

* Letters Patent Appeal No. 49 of 1925.

by the alienee is to institute a separate suit for general partition so that the two suits may be tried together and the Court may be in a position to consider whether the property alienated to him should be allotted to the alienor's share or not.

Form of the decree in a suit by a co-parcener to recover his share in property alienated by another co-parcener, considered.

Hanmandas Ramdayal v. *Valabhdas*, (1919) I.L.R., 43 Bom., 17, followed.

APPEAL under clause 15 of the Letters Patent against the judgment of ODGERS, J., in Second Appeal No. 1700 of 1923.

The material facts appear from the judgment.

T. M. Krishnaswami Ayyar for appellant.

C. Krishnama Achari for respondent.

The JUDGMENT of the Court was delivered by DEVADOSS, J.—The plaintiff sued for a declaration that a certain alienation made by his father was not binding on him and prayed for possession of the property alienated and in the alternative that if the sale was good to the extent of his father's share, his share of the property should be delivered to him. The District Munsif held that the sale was a nominal transaction and that it was not binding upon the plaintiff and decreed the suit. On appeal the District Judge held that sale was good to the extent of the father's share and decreed the plaintiff's share to him.

In Second Appeal it was contended that the alienee should be allotted the property alienated to him as there was other property belonging to the family which could satisfy the claim of the plaintiff. Mr. Justice ODGERS who heard the Second Appeal declined to uphold the contention and dismissed the Second Appeal. The alienee's representatives have preferred this Letters Patent Appeal.

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It is contended before us by Mr. T. M. Krishnaswami Ayyar for the appellant that the family property is more than sufficient to meet the claim of the plaintiff and that the alienee should not be deprived of the plaint property which is a house. It is urged that the appellants have an equity in their favour and that they should not be driven to a separate suit when the equities could be worked out in this case. The District Judge found that it would be unfair to allow the alienee to retain the property as the rest of the property which would devolve on the son consists entirely of outstanding debts which might or might not be good. The alienee, neither in his written statement nor in his evidence before the lower Court, placed before the Court sufficient materials which would enable it to ascertain whether the plaintiff's share could be met out of the other properties belonging to him and his father. In the written statement he did not care to put forward an alternative case that, in case the plaintiff was able to succeed to the extent of his share, he should be allowed to retain the property sold to him as the family property was sufficient to meet the plaintiff's claim and the plaintiff would not be prejudiced by his being allowed to retain the property sold to him. Without an opportunity for the plaintiff to show that the property of the family is not sufficient to meet his claim and in the absence of evidence as to whether the plaintiff has got another house which is fit for his occupation and that he would not be prejudiced by allowing the alienee to retain the house sold to him, the Court would not be justified in granting relief to the alienee in the manner asked for by him, even if such relief could be granted in this suit.

Is it competent for the Court in a suit by a co-parcener for setting aside an alienation of a certain item of family property to grant relief which it could grant on

a general partition? Mr. Krishnaswami Ayyar relies strongly upon *Ramasami Aiyar* v. *Venkatarama Ayyar*(1), as supporting his contention. In that case Mr. Justice PHILLIPS and Mr. Justice VENKATASUBBA RAO 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 co-parcener'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 co-parceners."

It was held in *Subba Goundan* v. *Krishnamachari*(2) by Mr. Justice KUMARASWAMI SASTRI and one of us, that, in a suit instituted by the co-parceners of a joint Hindu family to set aside a sale of ancestral immovable property by their father or manager of the family on the ground that the sale was not for family necessity and to recover possession of the property from the vendees,

"the latter were not entitled as defendants to insist in this suit on the plaintiffs submitting to a partition either of the items sold or of the entire family property so as to give the vendees their alienor's share in the properties sold to them, that the vendees were entitled in this suit to a decree declaring that they are entitled to the share of their alienor but that they should be left to work out their rights by a separate suit for partition."

A careful perusal of the judgment in 46 Mad., 815, would show that there is no real conflict between it and the decision in 45 Mad., 449, though the observation of Mr. Justice PHILLIPS at page 821 may appear to be so.

"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."

He also observes

"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

(1) (1923) I.L.R., 46 Mad., 815. (2) (1922) I.L.R., 45 Mad., 449.

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co-parceners to recover the property, because it would be necessary to add all the co-parceners to the suit and ascertain the amount of family property available for division, etc."

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If the Court is prepared to convert a suit for declaration that certain alienation by a member of a joint Hindu family is not binding on the plaintiff into a suit for general partition at the instance of the alienee defendant then the suit becomes a suit for general partition. The decision in 46 Mad., 815, applies to cases where all the facts are before the Court which would enable it to allow an alienee to retain the property and such a suit is practically a suit for partition. What was held in 45 Mad., 449, was that there must be a separate suit for partition; for in a suit where one item of property is sought to be recovered on the ground that the alienation of it is not binding on the plaintiff, the whole family should not be driven to be parties to a suit for partition. The proper course for the alienee would be to sue for partition and ask the Court to allot to his alienor the specific property conveyed to him and if the Court finds that the interests of the other co-parceners would not be prejudiced by allotting to the alienating co-parcener the specific property alienated by him, the Court may allow the alienee to retain the property. We adhere to the view expressed in 45 Mad., 449, and as pointed out in that case at page 464,

"Having regard to the provisions of the Civil Procedure Code which do not allow any wide rights of counter-claim, it is difficult to see how a suit by the plaintiff for possession and mesne profits can be converted at the instance of the defendants into one for a general partition which would involve the presence of other parties and an enquiry into the debts and liabilities of the family. If the claim of the defendants is to be treated as a cross suit and if the written statement is to be stamped as a plaint in such cross suit claiming a general partition, there is no reason why the defendants should not file their own suit for a general partition and work out any decree which they may

obtain in the decree in the suit by the co-parceners. There is no special advantage in the defendant's doing in their written statement what they could easily do in a plaint filed by them. It is open to them, as soon as a co-parcener files a suit for possession, to file a suit for partition, and where proper grounds exist the Court would try the suits together so as to afford relief to all parties. On the point of view of hardship we think that the hardship would be greater if a simple suit for possession which the co-parcener is in law entitled to file in cases of invalid alienations is converted into an elaborate enquiry as to a general partition of the family."

In *Davud Beevi Ammal* v. *Radhakrishna Aiyar*(1), it was held

"that a purchaser from one member of a joint Hindu family of property, which that member has no right to sell, it being joint property, can enforce the sale only by partition of the entire family property ; and if, in such partition, the properties sold can with due regard to the interests of the other sharers, to the debts due by the family, and to an equitable allocation of the various items of the family property to the shares of the several co-parceners, be wholly allotted to the vendor's share, the purchaser will be entitled to the whole of the property which the vendor professed to convey to him."

It is urged by Mr. Krishnaswami Ayyar that a separate suit would be barred by the principle of *res judicata* and therefore the Court should consider in this suit whether the alienee could be allowed to retain the property sold to him. In *Sourimuthu* v. *Pavadai Pachia Pillai*(2), Mr. Justice PHILLIPS and Mr. Justice RAMESAM held that if a decree is obtained by a member of a joint Hindu family against an alienee for his share of the property alienated on the ground that the alienation was not binding on him, in a subsequent suit by the alienee for a general partition and for the allotment of the alienated property to the share of the alienating co-parcener, the property allotted to the plaintiff in the previous suit could not be allotted again to the alienating

(1) (1923) 44 M.L.J., 309. (2) (1925) 49 M.L.J., 679.

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co-parcener's share and therefore the second suit is barred by *res judicata*. With very great respect to the learned Judges we are unable to agree with the view taken by them in that case. When a co-parcener brings a suit for declaration that an alienation by another co-parcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share, if it finds that the alienation is not binding on the plaintiff. But his share does not become absolutely his, for the alienating co-parcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it. The matter is not different when the alienee himself brings a suit for a general partition and prays to be allowed to retain the property which was sold to him. When a member of a joint Hindu family sues to set aside an alienation made by another co-parcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family. All that is objected to is the alienation of the particular item and if that alienation of the particular item is not binding on the family it is not binding on the alienor's share as well and the property is recovered for the benefit of the family. The alienor, so long as he is a member of the joint family, has his right to partition subsisting and in a suit by him he can ask that the property alienated by him may be allotted to his share and if the Court on a consideration of all the circumstances in the case thinks that it would be equitable to allot to him that property it might do so, for the plaintiff in the suit for setting aside the alienation cannot set up the plea of *res judicata* against any relief being granted. If the principle of *res judicata* would not avail against the alienating co-parcener, it is difficult to see how it could

avail against the alienee who stands only in the shoes of the alienating co-parcener. To hold that a suit by an alienee for partition is barred by *res judicata* by reason of a previous suit in which the alienation was held binding only to the extent of the alienor's share, would be to leave no option to the Court but to convert every suit for setting aside an alienation into a suit for general partition. Would it be equitable to enforce a general partition in a suit to set aside an alienation when the property alienated bears an insignificant proportion to the property owned by the family ? It is neither reasonable nor expedient that a suit to set aside an alienation of a certain item of property should be converted into a suit for general partition at the instance of a vendee who bought the property knowing perfectly well his vendor was not exclusively entitled to the property and that even in a general partition, that property might not be allotted to his share.

We therefore hold that a suit by the vendee would not be barred by the decree in the suit of a co-parcener to have his share of the alienated property partitioned between him and the alienee.

The proper course for the alienee would be, as pointed out by us in 45 Mad., 449, when the alienation of a particular item of property is challenged by a member of the joint Hindu family, to bring a suit for general partition so that the suit might be tried along with the suit for setting aside the alienation and if the alienee is able to show that the alienation is binding on the whole family then he succeeds in both the suits and if the alienation is not binding on the plaintiff's share but is only binding on the alienor's share, then in the suit for general partition brought by him the Court would be in a position to consider whether the property alienated to him should be allotted to the alienor's share or not.

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If both the suits are tried together, there would not be any difficulty at all, and in this case in order to obviate any possible plea of *res judicata* which might be raised on the strength of the decision in 49 M.L.J., 679, we would pass a decree as was done in *Hanmandas Ramdayal* v. *Valabhadas* (1). In that case a minor brought a suit against his father and decree-holders as well as auction-purchasers for a declaration that the plaintiff's half share in the two properties sold did not pass to the auction-purchasers and for possession of his half share on equitable partition. He obtained a declaration that his share was not bound. It was held that his interests did not pass to the purchasers at the Court-sale. The learned Judges upheld the decree of the lower Court and stayed the execution of the decree for three months directing that if during that period of three months the present appellant filed a suit for partition against the plaintiff the stay of the present decree should last until the disposal of the appellant's suit for partition but if such a suit for partition be not brought within three months allowed then this appeal to be dismissed with costs. We think such a direction should be given in this case.

We therefore dismiss the Letters Patent Appeal with costs and direct that the execution of the decree in plaintiff's favour be stayed for three months and if before the expiry of that period the appellant brings a general suit for partition then the stay would continue till the disposal of the suit for partition but if no such suit for partition is brought then the stay of execution will stand cancelled.

K.R.

(1) (1919) I.L.R., 43 Bom., 17.