KUPPAN CHETTIAR v. MASA GOUNDAN.

upon in order to defeat the claims of creditors, nevertheless, provided that it is a genuine partition, division of status takes place, and the power of the father to sell the shares of the sons is brought to an end. If that be so, there can be no possibility of the decree-holder pursuing the shares of the sons in execution of the decree obtained against the father alone.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice King.

1937, January 7.

KOTIKELAPUDI VENKATARAMAYYA (PLAINTIFF), APPELLANT,

v.

DIGAVALLI SESHAMMA *alias* SEETHAMMA AND FIFTEEN OTHERS (DEFENDANTS 1 TO 16), RESPONDENTS.*

Hindu Law—Joint family—Member of—Property held by—Joint family property or self-acquisition of that member—Onus of proof—Shifting of—Condition—Indian Evidence Act (I of 1872), sec. 32, cl. 7—Hindu joint family—Deceased member of—Property held by—Self-acquisition of that member, if—Evidence as to—Will by deceased member—Recitals in—Admissibility in evidence of.

A party alleging that property held by an individual member of a joint Hindu family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. It is only after that is shown that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

---

* Appeal No. 132 of 1931.

Sankaranarayana v. *Tangaratna*, A.I.R. 1930 Mad. 662, and *Satchidanandam* v. *Subbarazu*, 1930 M.W.N. 1016, followed.

Narayana Rao v. *Venkatakrishna Rao*, (1914) 27 M.L.J. 677, and *Dwarkaprasad* v. *Jamnadas*, (1910) 13 Bom. L.R. 133, referred to.

Karsondas Dharamsey v. *Gangabai*, (1908) I.L.R. 32 Bom. 479, 492, considered.

On an issue as to whether properties held by a deceased member of a joint Hindu family were his self-acquisitions or joint family properties,

held that statements of facts contained in the deceased's will tending to show that the properties were his self-acquisitions were admissible in evidence under section 32, clause 7, of the Indian Evidence Act, although, in view of the fact that the statements were self-serving, they would justify scrutiny in the light of the other evidence in the case.

Nallasiva Mudaliar v. *Ravan Bibi*, 1921 M.W.N. 560, *Nagammal* v. *Sankarappa Naidu*, (1930) I.L.R. 54 Mad. 576, *Appasami Pillai* v. *Ramu Tevar*, (1931) 61 M.L.J. 887, *Hurronath Mullick* v. *Nittanund Mullick*, (1873) 10 Ben. L.R. 263, and *Satchidanandam* v. *Subbarazu*, 1930 M.W.N. 1016, referred to.

Tottempudi Venkataratnam v. *Tottempudi Seshamma*, (1903) I.L.R. 27 Mad. 228, distinguished.

Nalam Pattabhirama Rao v. *Narayanamoorthy*, (1921) 15 L.W. 404 (P.C.), explained.

APPEAL against the decree of the Court of the Subordinate Judge of Kurnool in Original Suit No. 3 of 1928.

N. A. Krishna Ayyar and *W. Kothandaramayya* for appellant.

P. Satyanarayana Rao for respondents 1 to 4.

Other respondents were unrepresented.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—The appellant instituted the suit on the footing that he had become entitled to the suit properties by the rule of survivorship on the death of his uncle, one

VENKATA-RAMAYYA v. SESHAMMA.

VARADA-CHARIAR J.

Subbarayudu, in July 1919. Subbarayudu left a will, Exhibit XVIII dated 12th July 1913, and defendants 1 to 6 claim as legatees under that will. Questions were raised in the lower Court as to the genuineness of this will and, after elaborate trial, the learned Subordinate Judge found that the will was genuine; but, as the plaintiff's claim by survivorship, if well-founded, would by itself suffice to defeat the operation of the will even if it were true, his learned Counsel here did not attack the lower Court's finding on the question of the genuineness of the will and confined his arguments to the plaintiff's claim under the rule of survivorship.

The question argued before us is substantially that raised by the fourth issue in the case. The latter part of that issue related to a contention that, even if the suit properties were in any sense and to any extent the self-acquired properties of Subbarayudu, he had thrown them into the common stock and thereby made them joint properties. This aspect of the matter has not been pressed before us. On behalf of the appellant, Mr. Kothandaramayya's main argument was that at a time when the plaintiff was only an infant, Subbarayudu must on the death of the plaintiff's father have come into possession not merely of the five acres of ancestral lands admittedly belonging to the family in their native village but also of a substantial sum of cash which must have formed a nucleus for Subbarayudu's subsequent earnings. In the lower Court, an argument seems to have been advanced to the effect that even the income from the family lands in the village could have been

substantial, but the learned Subordinate Judge has found that the lands did not yield anything more than a few rupees in those days and even these few rupees were not shown to have come into the hands of Subbarayudu at any time, as he was serving as a public servant in a place far away from his native village. This part of the lower Court's finding has not been challenged before us either.

The story sought to be developed on the plaintiff's side in the course of the evidence was that about the time of the plaintiff's father's death, i.e., in 1876, some amount, put by one witness at about Rs. 1,600 and by another witness at about Rs. 5,000, stood in deposit in the plaintiff's father's name with a merchant of Cocanada known as Chinna Gopalam and that some years after the plaintiff's father's death this amount was withdrawn by Subbarayudu.

[His Lordship discussed the evidence bearing upon the point, concurred with the Court below in finding against the truth of that story and proceeded :—]

It was next argued as a matter of law that it was for the defendants to prove positively that the amount that stood to Subbarayudu's credit with Chinna Gopalam in 1884 was his separate property and did not constitute joint family property. Reliance was placed in this connection upon the statement in Sir Mulla's Hindu Law, section 233, to the effect that where it is proved or admitted as to a Hindu family that it possesses joint property, the presumption of law is that *all* the property of which it is possessed is joint and that, if any member claims any portion of the

VENKATA-RAMAYYA v. SESHAMMA.

VARADA-CHARIAR J.

property as his separate property, the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property. There are no doubt observations of this tenor in some of the reported cases, but with all respect we think that this is too broad a statement of the presumption. In a line of cases in this Court beginning with *Narayana Rao* v. *Venkatakrishna Rao*(1), it has been recognised that the presumption has to be stated with some further limitations and qualifications. Many of the cases bearing upon that point have been referred to in the judgment of ANANTAKRISHNA AYYAR J. in *Sankaranarayana* v. *Tangaratna*(2) where the learned Judge points out that a party alleging that property held by an individual member of a joint family is family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. The learned Judge takes care to add that it is only after this is shown that the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. To the cases cited in this judgment we may also add *Satchidanandam* v. *Subbarazu*(3). An observation of BEAMAN J. in *Karsondas Dharamsey* v. *Gangabai*(4) would seem to sound the other way, but the learned Judge himself stated the proposition in more guarded terms in *Dwarkaprasad* v. *Jamnadas*(5). We notice that none of the later

(1) (1914) 27 M.L.J. 677.
(2) A.I.R. 1930 Mad. 662.
(3) 1930 M.W.N. 1016.
(4) (1908) I.L.R. 32 Bom. 479, 492.
(5) (1910) 13 Bom. L.R. 133.

Madras cases has been referred to in Sir D. F. Mulla's book in this context. As we have already pointed out, no serious attempt has been made to show that Subbarayudu's deposit with Chinna Gopalam in 1884 or any of the subsequent acquisitions of Subbarayudu could have reasonably come out of the ancestral lands.

Reference was next made to certain entries in the accounts of P.W. 16's family relating to some Savings Bank deposit in the plaintiff's name of a sum of Rs. 600 and odd and a story was built with reference thereto that it represented certain moneys given for the plaintiff's benefit into the hands of Subbarayudu by the plaintiff's aunt, the moneys having come into her hands partly from her father and partly from presents given to the plaintiff at the time of his Upanayanam. We are not impressed with the evidence relating to this part of the story.

[His Lordship considered the evidence bearing upon the point and proceeded:—]

The conduct of the plaintiff seems to us to be a matter of some significance in this case, not merely at that particular time in connection with the particular item but with reference to the case generally. Even if it should be assumed that the plaintiff is entitled to invoke some presumption of Hindu law in his favour, the weight of such presumption and the nature of evidence required to rebut the same will vary according to the circumstances of each case; and the stale nature of the plaintiff's claim must certainly count against him. This suit has been filed just on the last day of the expiry of the twelve years' period

VENKATA-RAMAYYA v. SESHAMMA.

VARADA-CHARIAR J.

after Subbarayudu's death. The fact that the plaintiff is suing as a pauper is a double-edged circumstance. Poverty may no doubt be a justifiable explanation in certain circumstances, but suing as a pauper equally suggests that this is a mere speculative suit which the provisions of the law relating to pauper suits sometimes encourage. The conduct of the plaintiff during Subbarayudu's lifetime is of even greater significance. If during the best part of Subbarayudu's lifetime, he had treated the plaintiff as one having any legal rights to the properties in his possession, the plaintiff might well claim that there was no occasion for him to go to a Court of law. But the plaintiff's evidence makes it clear that Subbarayudu never countenanced any such claim. For many years, the plaintiff was admittedly out of favour with Subbarayudu. On more than one occasion he applied to Subbarayudu in very submissive terms for help and Subbarayudu did not accede to his request. It is therefore not the case of a person who had been treated as a coparcener but of one whose claims have never been recognised. In those circumstances, even if the plaintiff could invoke any presumptions in his favour, it will be too much to expect from Subbarayudu's representatives any more positive evidence than they have found it possible to produce in this case. The learned Subordinate Judge also points out that by reason of the plaintiff's delay in instituting this suit for so many years even after Subbarayudu's death, many other persons who could have given useful evidence on points material to the case have also died.

We may refer in this connection to the objection, taken on behalf of the appellant, to the use made by the lower Court of the statements contained in Subbarayudu's will. Relying upon the judgment of SUNDARAM CHETTI J. in *Satchidanandam* v. *Subbarazu*(1), the learned Subordinate Judge has treated certain statements in Subbarayudu's will as relevant evidence. Before us, Mr. Kothandaramayya has questioned this view and he relied in support of this argument upon the observations in *Tottempudi Venkataratnam* v. *Tottempudi Seshamma*(2). SUNDARAM CHETTI J. was prepared to go so far as to think that the observation in *Tottempudi Venkataratnam* v. *Tottempudi Seshamma*(2) as to the inadmissibility of such statements should not be regarded as good law after the judgment of the Privy Council in *Virayya* v. *Adenna*(3). We do not think it necessary to go so far as that. Statements of *facts* in a will like that of Subbarayudu must come under clause 7 of section 32 of the Indian Evidence Act, but in this view they will be admissible only if they are statements of a relevant fact and are contained in documents relating to a transaction mentioned in section 13, clause (*a*). The observation in *Tottempudi Venkataratnam* v. *Tottempudi Seshamma*(2) is distinguishable, as the statements then in question could hardly be described as statements of *fact*. The will there in question contained a bald statement that three-fourths of the properties dealt with thereby were the self-acquired properties of the testator. As pointed out in the judgment, it was fairly clear from the

(1) 1930 M.W.N. 1016. (2) (1903) I.L.R. 27 Mad. 228.
(3) (1929) 58 M.L.J. 245 (P.C.).

VENKATA-RAMAYYA v. SESHAMMA.

VARADA-CHARIAR J.

evidence that the testator had acquired the properties by developing his original ancestral properties. The learned Judges accordingly observe that it was merely a statement of the *belief* of the testator, honest though it might be, that the property thus acquired by him was his self-acquired property. The judgment of the lower Court, as stated in the report of that case, emphasises the distinction recognised in *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*(1) between a statement relating to a relevant fact and a statement in respect of a fact in issue, for the purpose of admissibility under section 32, clause 7. Whether the learned Judges meant to adopt that distinction or they were of opinion that the statement in the will then in question was not a statement of fact but merely a statement of opinion, it is not easy to say, because their observations upon this point are contained in a single sentence. But either of those grounds would suffice to distinguish that case from one like the present. We may also add that, as early as in *Nallasiva Mudaliar* v. *Ravan Bibi*(2), statements similar to those now in question contained in a mortgage deed were held admissible under section 32, clause 7; *see* also *Nagammal* v. *Sankarappa Naidu*(3), *Appasami Pillai* v. *Ramu Tevar*(4) and *Hurronath Mullick* v. *Nittanund Mullick*(5). Mr. Kothandaramayya drew our attention to an observation of the Privy Council in *Nalam Pattabhirama Rao* v. *Narayanamoorthy*(6) where their Lordships treated a

(1) (1890) I.L.R. 15 Bom. 565.
(2) 1921 M.W.N. 560.
(3) (1930) I.L.R. 54 Mad. 576.
(4) (1931) 61 M.L.J. 887.
(5) (1873) 10 Ben. L.R. 263.
(6) (1921) 15 L.W. 404 (P.C.).

statement in a will as irrelevant. No reference is made in that judgment to section 32 apparently because the statement there could not be said to have been made in documents of the kind described in clause 7, i.e., a document relating to a transaction falling under section 13, clause (*a*). We are accordingly of opinion that statements of *facts* contained in Subbarayudu's will were rightly held by the lower Court to be admissible in evidence. Statements of that kind will of course justify scrutiny in the light of the other evidence in the case because they are self-serving ; but that is different from saying that they are inadmissible in evidence.

In the present case, the facts established by the evidence on the one side or the other substantially go to corroborate the truth of the statements in the will. We may therefore safely accept those statements so far as they go as substantially correct, though Mr. Kothandaramayya is right in saying that those statements throw no light upon the character of the deposit made by Subbarayudu with Chinna Gopalam.

An argument was faintly suggested that Subbarayudu was educated at the expense of his paternal uncle Sriramulu and that that circumstance was sufficient to attract the operation of the rule relating to the partibility even of gains made by learning thus acquired. There is very little proof of Subbarayudu having been educated at Sriramulu's expense. We do not think Exhibits A and B serve to establish that fact. On the other hand, even apart from the recitals in the will, there is a substantial volume of positive evidence that Subbarayudu was educated by his

VENKATA-RAMAYYA v. SESHAMMA. — VARADA-CHARIAR J.

paternal aunt's husband. Even assuming for the sake of argument that he received help from Sriramulu, it would not be of much use to the plaintiff's case because the evidence is more in favour of the view that Sriramulu was a divided uncle, though it does not clearly appear when he became divided. Again, on the plaintiff's own showing, Sriramulu was having a lucrative practice as a Vakil and if Subbarayudu had really been educated out of Sriramulu's earnings as a Vakil, that would not suffice to impress Subbarayudu's earnings with the character of joint property. In this view it is unnecessary to consider Mr. Kothandaramayya's argument as to whether Subbarayudu's education was an education of a "special" kind or not within the meaning of the rule of Hindu law.

The appeal accordingly fails and is dismissed with costs. The appellant will pay the court-fee payable to Government on the memorandum of appeal.

A.S.V.