## APPELLATE CIVIL.

*Before Mr. Justice Varadachariar and Mr. Justice Burn.*

1936, December 14.

KM. KR KM. KUPPAN CHETTIAR AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

*v.*

MASA GOUNDAN AND FOUR OTHERS (DEFENDANTS 2 TO 5 AND FIRST DEFENDANT), RESPONDENTS.*

*Hindu Law—Father—Money decree against—Attachment in execution of—Property liable for—Partition between father and his sons previous to money decree—Property allotted to sons' shares at—Property allotted at, for maintenance of wife and marriage of daughter with remainder over to sons—Liability to attachment of—Partition a genuine partition.*

A partition between a Hindu and his sons which is a genuine partition, a real transaction and not a mere sham, puts an end to the joint family and to the power of the father to sell his sons' shares for his debts. Property allotted to the shares of the sons at such a partition is not therefore liable to be attached in execution of a money decree obtained subsequently against the father alone.

*Sat Narain* v. *Sri Kishen Das*, (1936) I.L.R. 17 Lah. 644 (P.C.), and *In re Balusami Ayyar*, (1928) I.L.R. 51 Mad. 417 (F.B.), followed.

A Hindu has no power of disposing of property allotted, at a genuine partition of the entire joint family property between himself and his sons, for the maintenance of his wife and the marriage of his daughters with a provision that the property so allotted to them should be divided after their lifetime by the sons. Such property is not therefore liable to be proceeded against in execution of a money decree obtained subsequently against the father alone.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 8 of 1932 (Appeal Suit No. 297 of 1931,

* Second Appeal No. 1120 of 1932.

District Court) preferred against the decree of the Court of the District Munsif of Gobichettipalayam in Original Suit No. 66 of 1929.

*R. Gopalaswami Ayyangar* for appellants.

*B. Somayya* and *D. R. Krishna Rao* for respondents 1 to 4.

Fifth respondent not represented.

JUDGMENT.



VARADACHARIAR J.—This second appeal arises out of a suit instituted by the legal representatives of a decree-holder to get a claim order set aside.

The father of the plaintiffs obtained a money decree against the first defendant on 17th September 1926 on three promissory notes executed by the first defendant, Exhibits D, D-1 and D-2. Between the dates of Exhibits D and D-1 a partition arrangement was entered into between the first defendant and his sons, defendants 2 to 4; (*vide* Exhibit V dated 13th October 1925). It is alleged that the plaintiffs' father was not aware of this partition and so happened to make further advances to the first defendant under Exhibits D-1 and D-2 in the course of November and December 1925. The suit, Original Suit No. 1400 of 1926, was instituted for the recovery of money due under these three promissory notes but the first defendant alone was impleaded as defendant thereto and a decree was obtained in due course. When the plaintiffs proceeded to attach certain properties in execution of this money decree, defendants 2 to 5 came forward with a claim petition and prayed that the properties which had fallen to their shares under Exhibit V should be

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released from attachment. As the properties were accordingly released the plaintiffs filed this suit to obtain a declaration that they are entitled to attach the properties which defendants 2 to 5 claimed to have fallen to them in the partition.

The question for determination is whether, in spite of the partition evidenced by Exhibit V, the shares taken by defendants 2 to 5 are liable to be proceeded against in execution of the money decree obtained against the father alone. I have dealt with this question at some length in a judgment recently delivered by me, *Thirumalamuthu Adaviar* v. *Subramania Adaviar*(1), and I do not propose to repeat what has been said there. I shall only add that the case for the decree-holder was much stronger in that second appeal than in the present instance, because in that case I proceeded on the footing that the partition was entered into with a view to defeat the creditor.

Whatever may be the rights under the Hindu law of a father's creditor to secure satisfaction of the debts due by the father from the sons' shares in the joint family, the question arising for determination in this second appeal has to be decided with reference to the language of section 60 of the Civil Procedure Code. In order that properties may be liable to attachment in execution, it must be shown that they either belong to the judgment-debtor or that the judgment-debtor has a disposing power over the properties or their profits, which power he may exercise for his own benefit.

It is well settled, and the proposition has now been placed beyond doubt by the observations of

(1) (1937) 1 M.L.J. 243.

their Lordships of the Judicial Committee in *Sat Narain* v. *Sri Kishen Das*(1), that the father's power of sale for his debts exists only so long as the joint family remains undivided. Their reference with approval to the decision of this Court in *In re Balusami Ayyar*(2) shows that even a division in status will suffice to put an end to this power. It would therefore follow that after a division in status the father's creditor cannot, any more than the Official Assignee, claim that the property is saleable by the father and therefore attachable by himself. That the position is different as regards the creditor's remedy by independent suit against the sons has been recognised by the judgment of a Full Bench of this Court in *Subramania Ayyar* v. *Sabapathy Aiyar*(3). Having regard to this well understood distinction between the creditor's remedy in execution and the creditor's remedy by a separate suit, we are, with due respect, unable to follow the observations which were cited to us from certain decisions of the other High Courts which either ignore this distinction or proceed on a basis different from the Full Bench decision in *Subramania Ayyar* v. *Sabapathy Aiyar*(3) and hold that after a *bona fide* partition the father's creditor will not even have a right of suit against the sons.

In the above view, it seems to me unnecessary to consider how far the contention on the one side or the other as to whether the partition in this case can be described as *bona fide* within the meaning

(1) (1936) I.L.R. 17 Lah. 644 (P.C.). (2) (1928) I.L.R. 51 Mad. 417 (F.B.).
(3) (1927) I.L.R. 51 Mad. 361 (F.B.).

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of the authorities is tenable. In my judgment in *Thirumalamuthu Adaviar* v. *Subramania Adaviar*(1) I have endeavoured to show that the expression "*bona fide* partition" has been used by different learned Judges in different senses. If, as recognized by their Lordships of the Judicial Committee in the recent case of *Sat Narain* v. *Sri Kishen Das*(2), the father's power to sell is at an end once there is a genuine partition, it does not seem to me material for the purpose of execution proceedings to consider whether the partition is *bona fide* or not, in the sense that it has made sufficient provision for the discharge of the father's debts. Their Lordships, no doubt, recognize that in a suit for partition it is proper that the Court should make provision for the discharge of the father's debts and that the remaining property alone should form the subject-matter of division between the coparceners. But it nevertheless seems to me too much to say that, except in cases where the father's debts are specifically referred to and provided for in a partition deed, the partition deed cannot be regarded as a *bona fide* partition arrangement. In the present case, the finding of the lower appellate Court is not merely that the partition was not nominal but that the plaintiffs had not shown that the share allotted to the first defendant was not enough for the discharge of his debts subsisting at the time of the partition and for his maintenance. There are, no doubt, *dicta* in some of the cases which go so far as to lay down that, unless the partition not merely makes provision for the discharge of the existing debts but allots in addition a share to the

(1) (1937) 1 M.L.J. 243. (2) (1936) I.L.R. 17 Lah. 644 (P.C.).

father equal to the shares allotted to the sons, it should not be regarded as a *bona fide* partition. As at present advised, I am unable to concur in that view. But, having regard to the limited scope of the question to be determined in this second appeal, it seems to me unnecessary to express any final opinion on that question.

Some of the cases in the other High Courts draw a distinction between a partition which takes place after the money decree had been obtained against the father and a partition which takes place before the money decree. In that connection, I may point out that in the present case the partition took place nearly a year before the passing of the decree in the money suit and that the suit comprised claims under two promissory notes in respect of which moneys were advanced only after the partition. It is only the claim under Exhibit D, a promissory note for Rs. 500, that had accrued due before the partition. It does not seem to be material whether the plaintiffs' father was or was not aware of the partition. Both the Courts have found that there was no particular attempt to keep the partition concealed from the creditors and we find that the partition deed was presented for registration the very next day after execution.

I am not sure if it is possible to split up a decree like the one obtained by the plaintiffs' father in this case and give the decree-holder a right of execution against the sons' shares in respect of so much of it as may represent the claim under Exhibit D which alone was a pre-partition debt. But that question also is immaterial in the view I have taken. The lower appellate Court

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was, in my opinion, right in dismissing the plaintiffs' suit.

A further point was raised before us that, at least in respect of the properties comprised in the D schedule to the partition deed, the plaintiffs must be entitled to execute the decree obtained by their father. I am unable to accede to this contention. It has, no doubt, been held that the claim which a wife has under the Hindu law for maintenance against her husband cannot take precedence over the claims of his creditors, and the same principle has been applied to a widow's claim for maintenance against her husband's estate. But that is not exactly the position here. I am not satisfied that the learned Counsel for the appellant was correct in the contention that, even when a partition takes place in a joint Hindu family, the Hindu law does not permit of a provision being made by allotment of property for the maintenance of the wife and for the marriage of the daughters as long as the father is alive. The wife has, no doubt, a personal claim for maintenance against her husband independently of the possession of any property, but that does not exclude the liability of the coparcenary property to provide for her maintenance, at any rate when the whole family property is made the subject of a partition between the father and the sons. In the present case, the allotment has been made not merely for the benefit of the wife and the daughters but also with a further provision that the properties so allotted to them should be divided after their lifetime by the sons. Applying the test involved in the language of section 60 of the Civil Procedure Code, it is impossible to hold that

the father any longer continued to have the power of disposing of the property that was allotted to his wife and daughters with remainder over to his sons.

Mr. Gopalaswami Ayyangar finally asks that the suit may at least be permitted to be treated as a suit to recover money from the sons in respect of the claim due under the promissory note Exhibit D. We regret we are unable to accede even to this prayer. It will be wholly changing the nature of the suit, and *prima facie* the suit has been instituted more than three years after the date of Exhibit D. We do not feel that we are justified in allowing the change of the basis of the claim without further information clearly available from the record that the money claim would not be barred by limitation.

The result is that the second appeal fails and is dismissed with costs.

BURN J.

BURN J.—I agree that the second appeal must be dismissed with costs, and I have very little to add. The finding is clear in this case that the partition was a genuine partition, a real transaction and not a mere sham. And that being so, it is clear that it put an end to the joint family in which the first defendant was the father. The motive which was behind this partition is, I think, irrelevant. It follows from the decision in the case of *In re Balusami Ayyar*(1) (in which it was clear that the partition suit was filed on behalf of the minor sons in order to defeat the claim of the Official Assignee who wished to exercise the father's power of disposal of his minor sons' shares) that, even if a partition is entered

(1) (1928) I.L.R. 51 Mad. 417 (F.B.).

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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.

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## 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.

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* Appeal No. 132 of 1931.