PRIVY COUNCIL

Rajangam Ayyar

Vs.

Rajangam Ayyar

P. C. Appeal No. 113 of 1921
(Lords Dunedin, CJ, Phillimore, CJ Sir John Edge, Mr. Ameer Ali and Mr. Justice Duff. JJ.)

31.7.1922

JUDGMENT

Lords Dunedin CJ.

1.This appeal arises out of a suit brought by the plaintiff, Subramania Ayyar, since deceased, in the Court of the Subordinate Judge at Tinnevely, in the Madras Presidency on the 21st December, 1915, under the following circumstances.

2. Subramania Ayyar, with his brother Krishna Ayyar, who died before the institution of the suit, formed a joint and undivided Hindu family subject to the Mitakshara law. They possessed considerable immoveable properties both within the Travancore State and in British Territories. The landed properties belonging to them in British India are situated in the Tinnevelly district.

3. In 1915 they decided to separate and make an amicable division of the properties belonging to them both immoveable and moveable. By a yadast, or memorandum of agreement, dated the 7th January, 1915, which is marked as Ex(Ay) in these proceedings, they agreed to divide their properties both in Travancore and in British Territories according to certain specified shares.

4. Later, on the 1st February of the same year, effect was given to this agreement in respect of the properties in Travancore under which Krishna Ayyar, as the elder brother, obtained, under the designation of jesthabhagam, a larger share than would have come to him otherwise. This document was registered in Travancore, and effect appears to have been given to it in respect of the properties situated in that State. No division, however, was made of the properties in Tinnevelly or separate possession

delivered to the parties of their respective shares. Krishna Ayyar having died in the meantime, his son, the present defendant, evaded the fulfillment of the agreement embodied in Ex. (Ay); and accordingly Subramania brought the present suit for its enforcement.

5. In the plaint the relief asked for is a decree for partition by metes and bounds, and a direction to the defendant to execute a conveyance of the properties that should fall to the share of the plaintiff in terms of the agreement.

6. The defendant in his written statement raised three objections to the suit ; firstly, that the agreement (Ay) had been obtained by Subramanian from his father under undue influence; secondly, that a large portion of the properties in which the plaintiff claimed a share was his father's self-acquisition and did not form part of the ancestral estate : and thirdly, that the agreement not having been registered in British India, could not be admitted in evidence, and no suit for specific performance could be based on it.

7. The District Judge held that the defendant had failed to prove his allegation of undue influence to invalidate the agreement on which the plaintiff relied. He also held that the defendant having admitted that there was a nucleus of ancestral property, it lay upon him to establish that the properties which he claimed exclusively, were acquired by his father, and this onus he had wholly failed to discharge.

8. With regard to the non-registration of the agreement the District Judge said as follows :-

> "I do not think that the fact, that the yeast (Ex. Ay) and the document of partition (Ex. Az) referred to in paragraph 8 of the plaint were not registered in British India, precludes their admission in evidence."

9. And, relying upon a decision of the High Court of Madras, he held that "if a present right is created, the instrument, though unregistered, is admissible in evidence in a suit for specific performance, and I hold that they are admissible in evidence in this suit." He accordingly made a decree in favor of the plaintiff, declaring in the first place that the properties claimed by the plaintiff had fallen to his share, and directing that the defendant should put the plaintiff in possession of the property detailed in Schs. 1, 4 and 6 of the plaint and half of certain other properties, after dividing by metes and bounds. He made certain other directions on the same basis.

10. On appeal to the High Court the learned Judges held, in agreement with the first

Court, that the defendant had utterly failed to prove that the memorandum had been obtained by undue influence, but they also held that the agreement Ex. Ay, not having been registered in British India, was not admissible in evidence. Having regard, however, to the facts of the case and the admitted jointness of the parties until 1915, they directed a general partition in equal shares of the properties both in British India and the Travancore State.

11. The effect of the High Court's decision on the latter point is that it upsets the completed settlement embodied in Ex. Az, which was duly executed and registered in the Travancore State, and which appears to have been carried into effect, the defendant or his father having got possession of the properties which fell to his share.

12. With regard to the properties in Tinnevelly, the High Court considered, in agreement with the District Judge, that the defendant having admitted an ancestral nucleus, it lay upon him to prove that the properties which he claimed were self-acquired.

13. The defendant, on appeal, contends that the High Court was not justified in turning a suit for specific performance of an agreement which, not having been registered, could not be given in evidence, into a suit for general partition, and that accordingly the present claim should be dismissed. He also contends that the High Court was wrong in decreeing a partition of the properties in the Travancore district.

14. In their Lordships' judgment the High Court, in upsetting the division of the Travancore properties appears to have proceeded upon a misapprehension.

15. The yadast, as its name implies was a memorandum regarding the cessor of jointness, which amounted to a declaration that from that time forth the parties. became entitled to the possession and enjoyment of their properties in separate shares ; and it provided for the execution of a further deed effectuating the partition. It says:-

> "A partition deed in terms hereof shall be executed and registered in the office of the Sub-Registrar of this place, as also at Tinnevelly, as early as possible; that until then this shall itself be in force."

16. It then goes on to give a larger share to Krishna Ayyar, as the elder brother. In accordance with the provisions of the agreement, a formal deed of partition (Az) was executed and registered in Travancore relating to the Travancore properties. It was entered into between two persons sui juris fully competent to enter into the transaction. It is difficult to perceive how that transaction can be upset in a suit which

relates to properties in Tinnevelly, and asks for a partition of those properties alone. Subramania, no doubt, in his plaint had said that he would bring a suit in the Travancore Court to set aside the division effected by Az, and it is possible that that statement led the defendant to throw every possible obstacle in the way of the plaintiff to get the relief he asked for. But it furnishes no ground in their Lordships' opinion, to upset a completed transaction. The present suit must consequently be confined to the joint family properties situated in Tinnevelly.

17. It has been contended that this is a suit for the specific performance of an unregistered contract ; and that the High Court dealt with it as one for general partition.

18. As regards the non-registration of the agreement, it is to be observed that Section 17 of the Indian Registration Act, 1877, makes the registration of certain classes of documents compulsory. Among others:-

> (b)"non-testamentary instruments which purport to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property.

19. From this, Proviso V to Sub-Section 2 excepts the following:-

> "any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed create, declare, assign, limit or extinguish any such right, title or interest."

20. Ex. Ay is not a document by itself creating, assigning, limiting, or extinguishing any right or interest in immoveable property ; it merely creates a right to obtain another document which will, when executed, create a right in the person claiming the relief, and on that ground their Lordships think Ex. Ay did not require registration, and accordingly is admissible in evidence, so far as it goes.

21. The learned Judges of the High Court were, however, perfectly right in the view that the onus was on the defendant to establish that the properties he claimed as the self-acquired properties of his father, Krishna Ayyar, bore that character.

22. The defendant examined a number of witnesses on commission, apparently in support of his statement, but the depositions of these witnesses do not appear to have

been put in evidence, and the list attached to the District Judge's judgment, after mentioning the exhibits filed on the plaintiff's behalf and giving the names of his witnesses, contains the following entries :-

"Defendant's exhibits... nil Defendants' witnesses... nil."

23. Their Lordships are, therefore, of opinion that the decree of the High Court should be varied by confining the decree for partition to the properties held by the parties in the Tinnevelly district ; that save and except this variation the appeal should be dismissed. The case will go back to the High Court for remission to the District Judge in order that he may appoint a Commissioner to make the division of the properties by metes and bounds in equal shares and to allot to the plaintiff his half-share of the whole of the joint family properties situated in Tinnevelly ; that in case, owing to any circumstances, equal division cannot be made of any particular property to one party or the other, the difference should be arranged for by the Commissioner, subject to the decision of the District Judge.

24. As the suit was one substantially for partition, their Lordships think that the parties should bear throughout the proceedings their costs, save and except that the defendant should pay to the plaintiff his half-share of the Court fees. Their Lordships will, therefore, humbly advise His Majesty accordingly.

Case remanded.