Kalwa Devadattam and Two Others

Vs

The Union of India and Others

Civil Appeals Nos. 641 and 642 of 1961

(A. K. Sarkar, M Hidayatullah, J. C Shah JJ)

19.04.1963

JUDGMENT

SHAH J. –

Nagappa son of Pullanna resident of Nandyal carried on business in yarn, drugs and forward contracts. He acquired in that business a considerable estate which was treated by him as property of the joint family of himself and his sons. Nagappa and his sons were assessed by the Income-tax authorities to pay income-tax and supper-tax in the status of a Hindu undivided family as set out in the following table :-

#Year of Year of Date of Income-tax andaccount ending. assessment. order. super-tax assessed.---------- ---------- ------- ----------24-3-44 1944-45 25-2-48 Rs. 51,116-7-014-3-45 1945-46 25-2-48 Rs. 21,452-1-0 2-4-46 1946-47 31-3-48 Rs. 21,012-13-0##

Besides this amount of income-tax and super-tax he was assessed to pay penalty and excess profits tax aggregating to Rs. 26,602/-. The total amount of tax due for the three years of assessment 1944-45, 1945-46 and 1946-47 aggregated to Rs. 1,23,233/5/-. Nagappa did not pay the tax. The revenue authorities of the Province of Madras, at the instance of the Income-tax Department attached 51 items of immovable property as belonging to the joint family of Nagappa and his sons and put up the same for sale under the Madras Revenue Recovery Act II of 1864. Out of these 38 items were sold and were purchased by certain persons.

Kalwa Devadattam, Kalwa Devarayulu and Kalwa Nandi Sankarappa (sons of Nagappa) - hereinafter called collectively 'the plaintiffs' - through their mother acting as their next friend commenced suit No. 52 of 1950 in the Court of the Subordinate Judge, Kurnool, against the Union of India, the revenue authorities of the State of Madras, the purchasers of the properties at the auction, and Nagappa, claiming a decree declaring that the assessment orders made by the Income-tax officer, Kurnool, for the years 1944-45, 1945-46 and 1946-47 were unenforceable against 51 items of property of the plaintiffs described in the schedule and sale of their property by the revenue authorities was "without jurisdiction, void and illegal", and an order restraining the Union of India and the authorities of the State of Madras from selling the "scheduled properties" or confirming the sale already held or that may be held after the institution of the suit. It was the case of the plaintiffs that items 46 to 51 did not at any time belong to the joint family, having been acquired by them with funds provided by their maternal grandmother Seshamma, and that the remaining items of property were not liable to be attached and sold since these had been allotted to them on a partition of the joint family estate before the order of assessment was made by the Income-tax authorities.

The suit was resisted by the Union of India and also by the purchasers on diverse grounds. The Union contended, inter alia that the plaintiffs were not entitled to question the correctness of the assessment of tax in a Civil Court because the jurisdiction of the Court in that behalf was excluded by s. 67 of the Indian Income-tax Act, that the plaintiffs were in any event precluded from setting up the plea of a partition between them and Nagappa was a defence to the enforcement of liability for payment of tax in view of the provisions of s. 25A(3), that the partition was sham and not intended to be operative and that items 46 to 51 were not the separate estate of the plaintiffs as contended by them. The purchasers (who were impleaded as defendants 5 to 28) contended that there was no invalidity in the proceedings for assessment of tax and that they having purchased those properties for the full amounts for which they were sold, sales in their favour though not confirmed were binding upon the plaintiffs.

Suit No. 52 of 1950 was tried with another suit being suit No. 54 of 1949 of the same Court in which also the validity of the partition dated March 14, 1947 fell to be determined, between the sons of Nagappa and the firm of Kumaji Sare Mal who were creditors under a money decree against Nagappa. The facts which gave rise to that suit are these : Kumaji Sare Mal filed suit No. 7 of 1944 in the Court of the Subordinate Judge, Anantpur, against Nagappa for a decree for Rs. 10,022-10-6 due at the foot of certain transactions in yarn. This suit was dismissed by the Trial Court on the ground that the contracts for the supply of yarn were wagering contracts, but in Appeal No. 174 of 1945 the High Court of Madras decreed the suit on March 5, 1947 holding that the contracts giving rise to the liability though speculative were not of a wagering Character. The High Court passed a decree for Rs. 10,000/- with interest at 6 per cent from the date of suit and costs. This decree was soon followed by the execution of the deed of partition dated March 14, 1947, between Nagappa and the plaintiffs, by which the joint family estate valued approximately at Rs. 1,25,000/- was divided into four shares. To Nagappa was allotted under that partition property of the value of Rs. 31,150/- and he stood liable to satisfy debts of the value of Rs. 12,236/4/9. In execution of the decree in suit No. 7 of 1944 Kumaji Sare Mal attached some of the properties that fell to the share of the plaintiffs under the deed of partition dated March 14, 1947. Objections to the attachment preferred under 0.21 r. 58 Code of Civil Procedure by the plaintiffs were dismissed by the executing Court on July 12, 1948. The plaintiffs then filed suit No. 54 of 1949 for a decree setting aside the summary order passed in the execution proceeding, claiming that the debt incurred by Nagappa being avyavaharika, the plaintiffs were not liable to satisfy the debt, and that the firm of Kumaji Sare Mal was incompetent to bring to sale in execution of the decree obtained against Nagappa in his individual capacity, the interest of the plaintiffs in the joint family property after the joint family status was severed and the properties of the family were partitioned. Common evidence was recorded in the two suits.

The Trial Judge held that the properties items 1 to 45 belonged in the relevant years of assessment to the joint family of Nagappa and his sons, and in the absence of an order recording partition under s. 25A(1) of the Indian Income-tax Act, the Income-tax Officer was bound to assess the undivided family even after partition on the footing that the family still continued to be joint. He further held that by virtue of s. 67 of the Indian Income-tax Act, no action questioning the assessment could be entertained by the Courts, and that there was no irregularity in the proceedings for sale. But the Court held that on March 14, 1947 division of property of the undivided family was in fact made between Nagappa and the plaintiffs : that the partition was effected with the object of defeating the claims of the creditors including the Income-tax authorities, but it was nevertheless partition which was intended to be operative. The Court further held that items 46 to 51 were not proved by the defendants to be the joint family property of the plaintiffs and Nagappa. In suit No. 54 of 1949 the learned Judge held following Schwebo K. S. R. M. Firm through Partner Govindan, alias

Ramanathan Chettiar v. Subbiah alias Shanmugham Chettiar (I.L.R. (1945) Mad. 138.), that after a partition between the members of the joint Hindu family the sons' share in the joint family property cannot be proceeded against in execution so as to enforce the pious obligation of the sons to satisfy their father's debts under a decree passed against the father alone. The learned Judge accordingly decreed suit No. 54 of 1949 holding that the only remedy of the firm Kumaji Sare Mal was to proceed by a suit to enforce the pious obligation of the plaintiffs to discharge the pre-partition debts.

The plaintiffs appealed against the decree in suit No. 52 of 1950 to the High Court of Madras and the Union filed cross-objections to the decree appealed from. Firm Kumaji Sare Mal also appealed against the decree dismissing their suit No. 54 of 1949. The High Court of Andhra Pradesh to which the appeals stood transferred for hearing under the States Reorganisation Act 1956 held agreeing with the Trial Court that a suit to set aside the assessment of income-tax was not maintainable against the Union, and that in any event in the absence of an order under s. 25A(1) of the Indian Income-tax Act, recording a partition, the Income-tax authorities were bound to assess tax on the Hindu undivided family as if that status continued. The High Court also held that the partition set up by the plaintiffs was a transaction which was nominal and sham, and that the evidence established that items 46 to 51 were purchased with the aid of joint family funds and not with funds supplied by Seshamma and therefore all the properties items 1 to 51 were liable to satisfy the tax liability of the joint family. The High Court also held that the firm Kumaji Sare Mal was entitled to recover the debt due to them in execution proceeding, there being no real partition between Nagappa and the plaintiffs prior to the date of attachment. The High Court accordingly dismissed both the suits.

We will reserve for separate consideration the common question which arose in these two appeals, namely, whether the partition by the deed dated March 14, 1947 between Nagappa and his sons the plaintiffs was a sham transaction. Even on the footing that the partition was real and intended to be operative, suit No. 52 of 1950 filed by the plaintiffs against the Union was bound to fail for more reasons than one. For the assessment year 1943-44 the Hindu undivided family of Nagappa and his sons was assessed to income-tax. In the years 1944-45, 1945-46 and 1946-47 the family was also assessed to pay income-tax, super-tax and excess profits tax, as set out hereinbefore. Nagappa maintained his accounts according to the Telugu year, and the last year of account corresponding to the assessment year 1946-47 ended on April 2, 1946. Under the Indian Income Tax Act liability to pay income-tax arises on the accrual of the income, and not from the computation made by the Taxing authorities in the course of assessment proceedings : it arises at a point of time not later than the close of the year of account. As pointed out by the Judicial Committee of the Privy Council in Wallace Brothers and Co. Ltd. v. The Commissioner of Income-tax, Bombay City and Bombay Suburban District ((1948) L.R. 75 I.A. 86.) :

> "The general nature of the charging section is clear. First, the charge for tax at the rate fixed for the year of assessment is a charge in respect of the income of the 'previous year,' not a charge in respect of the income of the year of assessment as measured by the income of the previous year. X X X X
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> Second the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year though quantification of the amount payable is postponed."

Liability of the Hindu undivided family of Nagappa and his sons therefore arose not later than the

close of each account year and account period for which the tax was assessed and it is not the case of the plaintiffs that the family estate was partitioned before the liability of the undivided family to pay tax arose. There is no dispute in the suit filed by the plaintiffs against the Union that the business carried on by Nagappa was the business of the joint family. It is on the footing that the business carried on by Nagappa was of the joint family, and the income earned in the conduct of the business and the property was joint family income that the plaintiffs have filed this suit. Under s. 25A of the Income-tax Act, if at the date when the liability to pay tax arose there was in existence a joint family which has subsequently disrupted, the tax will still be assessed on the joint family. The machinery for recovery of the tax however differs according as an order recording partition is made or not made. If the Income-tax Officer is satisfied on a claim made by member of the family that the joint family property has, since the close of the year of account been partitioned among the various members of groups of members in definite portions, he must record an order to that effect and thereupon notwithstanding anything contained in sub-s. (1) of s. 14 of the Act each member or group of members is liable in addition to any income-tax for which he is separately liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it. But even after this apportionment of liability for the tax assessed on the total income of the joint family, the members of the family or groups thereof remain jointly and severally liable for the tax assessed on the total income received by the family as such. If no order is recorded under sub-s. (1) of s. 25A, by virtue of sub-s. (3) the family shall be deemed, for the purposes of the Act, to continue to remain a Hindu undivided family. Section 25A merely sets up machinery for avoiding difficulties encountered in levying and collecting tax, where since the income was received the property of the joint family has been partitioned in definite portions, while at the same time affirming the liability of such members or group of members, jointly and severally to satisfy the total tax in respect of the income of the family as such. The section seeks to remove the bar imposed by s. 14(1) against recovery of tax from an individual member of a joint Hindu family in respect of any sum which he receives as a member of the family, and to ensure recovery of tax due, notwithstanding partition. The incidence of tax, but not the quantum is readjusted to altered conditions.

The Judicial Committee of Privy Council in Sardar Bahadur Sir Sunder Singh Majithia v. Commissioner of Income-tax, United and Central Provinces ((1942) L.R. 69 I.A. 119.) analysed the scheme of s. 25 A as follows :-

> 'Section 25A is directed to the difficulty which arose when an undivided family had received income in the year of account but was no longer in existence as such at the time of assessment. The difficulty was the more acute by reason of the provision - an important principle of the Act - contained in s. 14(1) : "The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."
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> "Section 25A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family - in effect as tenants in common. Section 25A provides that if it be found that the family property has been partitioned in definite portions, assessment may be

> made, notwithstanding s. 14(1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax."

In the present case no order under s. 25A(1) was recorded. It is true that Nagappa had made before the Income-tax Officer on January 19, 1948 the following statement :

> "I am at present living singly. My sons divided from me about ten months back. There is a document to this effect. The document was registered. My sons are as follows" :

After recounting the names of his three sons and their respective ages, he proceeded to state :

> "The guardian to these minor children is my wife. I divided my family properties between myself and my children. The properties belonged to our joint family. The business also belonged to my joint family."

It may be assumed that by this statement within the meaning of s. 25A it was claimed "by or on behalf of any member of a Hindu family hitherto assessed as undivided" that a partition had taken place among the members of his family and that the Income-tax Officer was bound to make an inquiry contemplated by s. 25A. But no inquiry was in fact made and no order was recorded by the Income-tax Officer about the partition : by virtue of sub-s. (3) the Hindu family originally assessed as undivided had to be deemed for the purposes of the Act, to continue to be a Hindu undivided family. If by the assessment of the family on the footing that it continued to remain undivided, Nagappa or his sons were aggrieved their remedy was to take an appropriate appeal under s. 30 of the Indian Income-tax Act and not a suit challenging the assessment. The method of assessment and the procedure to be followed in that behalf are statutory, and any error or irregularity in the assessment may be rectified in the manner provided by the statute alone, for s. 67 of the Indian Income-tax Act bars a suit in any Civil Court to set aside or modify any assessment made under the Act. The Income-tax Officer made the assessment of tax under the Act : granting that he committed an error in making the assessment without holding an inquiry into the partition alleged by Nagappa, the error could be rectified by resort to the machinery provided under the Act and not by a suit in a Civil Court. In Commissioner of Income-tax, West Punjab, North-West Frontier and Delhi Provinces, Lahore v. Tribune Trust, Lahore ((1947) L.R. 74 I.A. 306, 316.), the Judicial Committee observed :

> "X X X X the only remedies open to the tax-payer, whether in regard to appeal against assessment or to claim for refund are to be found within the four corners of the Act. This view of his rights harmonises with the provisions of s. 67, x x x that no suit shall be brought in any Civil Court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced."

The suit filed by the plaintiffs against the Union must therefore fail on three independent grounds, each of which is sufficient to non-suit them.

> (1) The suit which was in substance one for setting aside an assessment was in law not maintainable because of s. 67 of the Indian Income-tax Act;
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> (2) That in the absence of an order under s. 25A(1) assessment of the Hindu joint

family was properly made; and

(3) Even if an order recording partition was made the liability of the plaintiffs to pay income-tax assessed on the family could still be enforced against them jointly and severally under s. 25A(2) proviso.

The plea of irregularity in holding the sale proceedings set up in the Trial Court was negatived by the Trial Court as well as the High Court, and has not been convassed before this Court.

About the title of the plaintiffs to items 46 to 51 in the schedule annexed to the plaint, the High Court disagreed with the Trial Court. These properties were purchased in the names of two of the three plaintiffs by the sale deed Ext. A-230 dated March 15, 1944. The consideration of the sale deed was Rs. 23,500/- of which Rs. 5,019/- had been paid in advance in four instalments before March 15, 1944, and the balance of Rs. 18,481/- was paid before the Sub-Registrar to the vendors who conveyed the properties to Devadattam and Devarayulu two of the three plaintiffs acting by their mother Narayanamma as their guardian. The properties having been purchased in the names of the two plaintiffs the burden prima facie lay upon the Taxing authorities to establish that the sale deed was taken for and on behalf of the joint family or with the aid of joint family funds. Evidence was led by both the sides to support their respective versions. The Trial Court held that the plaintiffs' case that their grandmother Seshamma provided the consideration was not proved, but there was also no evidence to show that the consideration was provided by the joint family, and as the burden of proof lay upon the Union, their case must fail. The High Court however held that the burden which lay upon the Union to prove that the properties were purchased out of the joint family funds was duly discharged. The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties.

But in support of the case that Seshamma had provided the consideration three witnesses P.W. 4, P.W. 5, and P.W. 8 were examined. Seshamma had died a few months before evidence was recorded in the suit. That evidence was found by the Trial Court as well as the High Court to be discrepant and in essential particulars so improbable that it could not be relied upon. P.W. 4 Narayanamma - plaintiffs' mother - deposed that the properties had been purchased for the plaintiffs by her mother Seshamma "with the money given to Seshamma" by her husband. This money according to Narayanamma was given to Nagappa and Nagappa paid it to the vendors in the presence of the Sub-Registrar. But this story stands wholly discredited by her admission that Seshamma's husband and his brothers were joint in business and estate till the former's death. Again there is on the record a statement made by Seshamma, before the Income-tax authorities, wherein she had stated that when her husband died, she might have had with her about Rs. 4,000/- to Rs. 5,000/- which she gave to her daughter. Nagappa was questioned in regard to this statement and he suggested that the statement was obtained by coercion from Seshamma by the Income-tax authorities. The story that Seshamma owned a large amount of cash, is not supported by any documentary evidence and it is difficult to believe that a trading family would not have invested the amount, if it was in truth devised to Seshamma by her husband. In cross-examination Narayanamma altered her version. She stated that Seshamma's uncle had left everything to her as he had no children or family but he did not execute any document in favour of Seshamma and that at the time of his death he stated orally that Seshamma should take all the properties and that Seshamma and her brother knew about what

she received from her paternal uncle. P.W. 5 Venkatsami who was originally a clerk of Nagappa, said that he was acting as a clerk in the employment of Narayanamma. He swore that he had seen Seshamma giving Rs. 6,000/- to Narayanamma about four years ago and that a month later Seshamma brought Rs. 3,000/- and gave them to Narayanamma and that about ten days thereafter Seshamma brought Rs. 12,000/- and gave them to Nagappa and Narayanamma. He admitted that Seshamma had no immovable property other than a house which she had bequeathed to her daughter under a will. The witness did not know how Seshamma got the amount. He, however, stated somewhat inconsistently under cross-examination that on the date of registration of Ext. A-230 Seshamma had asked her daughter 'Narayanamma to bring the money.' On that day the key of the iron safe was with Narayanamma and that Narayanamma brought some cash which was counted and paid over to the vendors. Both the Courts found that this witness was unreliable and a bare reading of his recorded testimony confirms that view. Nagappa said that Seshamma had paid the consideration for the sale-deed, but in cross-examination he made diverse statements which threw doubt upon the truth of that story. He was interested in devising ways and means for saving the properties for the benefit of his sons. It was he who had instigated and had prosecuted the suits. His bare statement that the consideration for the sale-deed was advanced by Seshamma not supported by any documentary evidence is unreliable, especially having regard to the statement which Seshamma had made before the Income-tax authorities. It must therefore be held that the Courts below were right in holding that the plaintiffs have failed to establish that the properties conveyed by the sale-deed were purchased with the funds supplied by Seshamma. It is common ground that the plaintiffs had no other source of income. As admitted by Nagappa and his clerk Venkatsami, Nagappa made large profits in his business, and Rs. 18,481/- out of the consideration payable under Ext. A-230 were actually paid to the vendors by Nagappa. There were before the Court two versions - one by the plaintiffs who alleged that the consideration for the sale-deed was supplied by Seshamma. That version, for reasons already stated, cannot be accepted. On the other hand there is the version that the funds belonged to the joint family of which Nagappa was the Manager and that Nagappa paid the consideration. No documentary evidence in support of either version is forthcoming : even Nagappa's accounts have not been produced. But if the moneys were actually paid by Nagappa and the story about Seshamma having provided the amount be disbelieved, it would be a legitimate inference consistent with probability that Nagappa had for purchasing the property provided the funds out of the joint family earnings. It appears that Kumaji Sare Mal who are the respondents in Appeal No. 642 of 1961 had in the suit filed by them in 1942 obtained an order for attachment before judgment over the immovable property of the joint family in the hands of Nagappa. This attachment before judgment was outstanding at the date of the sale-deed Ext. A-230. This order for attachment before judgment was vacated when the suit was dismissed by the Trial Court on August 31, 1944. This circumstance in the context of the other evidence strongly supports the contention of the Union that with a view to protect the properties from his creditors Nagappa thought of purchasing the properties in the names of his sons the plaintiffs and the consideration was advanced by him. The High Court was therefore right in holding that the properties items 46 to 51 were of the joint family and liable to be attached and sold in enforcement of the liability for payment of income-tax. Civil Appeal No. 641 of 1961 must therefore fail.

We may now deal with the questions which fall to be determined in Civil Appeal No. 642 of 1961 - one of the questions being common in Appeals Nos. 641 and 642 of 1961. Suit No. 7 of 1944 was filed by the firm Kumaji Sare Mal for damages for breach of contract. That suit was decreed by the High Court on March 5, 1947. Within nine days thereafter the deed of partition came into existence. The plaintiffs contended that the debts due by Nagappa to Kumaji Sare Mal being immoral or avyavharika their share in the properties was not liable to be sold. In any event, they contended, the

shares allotted to them under the deed of partition were not liable to be attached and sold in execution proceeding in enforcement of the decree against their father Nagappa, and the remedy of the creditor even if the debts were not avyavharika was to file a suit to enforce the pious obligation of the plaintiffs and not in execution of the decree obtained against Nagappa alone. The creditors contended that the deed of partition was a sham transaction and therefore they were entitled to proceed in execution. Alternatively, it was contended that even if the deed of partition did not evidence a sham transaction, it was open to them as holders of a decree obtained before the partition to enforce the pious obligation of the plaintiffs to discharge the debts of their father in execution of the decree, and it was not necessary for them to file a separate suit. On the question as to the proper procedure for enforcement of the liability of a Hindu son to discharge the debts of his father which are not avyavharika, where since the passing of the decree on the debt against the father there has been a partition between the father and son, there has arisen difference of opinion. The Madras High Court in Schwebo K. S. R. M. Firm v. Subbiah (I.L.R. (1945) Mad. 138.), held that the son's share in the property cannot be proceeded against in execution, as the division of status brought about by the partition will stand, notwithstanding the avoidance of the partition as a fraudulent transfer. This was reaffirmed in a Full Bench judgment of the Madras High Court in Katragadda China Ramayya v. Chiruvella Venkanraju (A.I.R. (1954) Mad. 864.), where the Court held :-

> "A son under the Hindu law is undoubtedly liable for the pre-partition debts of the father which are not immoral or illegal. If a decree, however, is obtained against the father alone, and there is a partition of the family properties, in execution of such a decree, the son's share cannot be seized by the creditor as by reason of the partition the disposing power of the father possessed by him over the son's share under the pious obligation of the son to discharge the father's debts can no longer be exercised. With the partition, the power comes to an end. The liability thereafter can be enforced only in a suit. After partition, the son's share can no longer be treated as property over which the father had a disposing power within the meaning of s. 60 Civil P.C."

On the other hand the Bombay High Court has held in Ganpatrao Vishwanathappa v. Bhimrao Sahibrao (I.L.R. (1950) Bom. 414.), that a decree obtained against the Hindu father may after partition be executed against the son's interest by impleading the son as a party to the executing proceeding against the father. There is no clear expression of opinion by this Court on this question, though in S. M. Jakati v. S. M. Borkar ((1959) S.C.R. 1384.), this Court has held that the liability of a Hindu son to discharge the debts of his father which are not tainted with immorality or illegality is founded in the pious obligation of the son which continues to exist in the life time and even after the death of the father and which does not come to an end as a result of partition of the joint family property : all that results from partition is that the right of the father to make an alienation comes to an end. In that case the property of the family was sold in execution of a money decree against the father and the sons sued to set aside the sale in so far as is affected their interest in the property and for a decree for possession of their share. The Court held that it was not proved that the liability which was incurred by the father was illegal or immoral and the sale of the joint family property including the share of the sons for satisfying the debts was valid notwithstanding the severance of the joint family status effected before the sale was held through Court. We do not think it necessary to express our opinion on the question whether the remedy of the creditor is to file a separate suit to enforce the pious obligation of a Hindu son to discharge the debts of his father, where since the decree against the father on a debt there has been a severance of the joint family status, or whether he can proceed to execute the decree against the son's interest in the property, after impleading him as a party to the execution proceeding, for we are definitely of the opinion that the High Court was

right in holding that that partition was a sham transaction which was not intended to be operative.

On March 14, 1947 the deed of partition was executed and registered. The object of this partition it is alleged was to protect the interest of his minor sons against their father who was acting to the detriment of his sons and was not even living with the family. The High Court relied upon a large number of circumstances in support of its view that the partition was nominal. The deed was executed within a week after the decree was passed by the High Court in Kumaji Sare Mal's suit. Nagappa had acquired an extensive property which was on acquisition treated as joint family property and there was nothing to show that Nagappa was ill-disposed towards his sons or was actuated by any desire to harm their interest. The real purpose of the partition was to save as much property as possible and to preserve it for his children. The deed of partition showed apparently an equal distribution of property valued at Rs. 1,24,600/- into four shares each of the value of Rs. 31,150/- but the properties allotted to the share of Nagappa were in reality not worth that amount. Nagappa had also to discharge a debt for Rs. 12,236/4/9 for which he was rendered liable under the deed and that debt could not be satisfied out of the property allotted to him. Again immediately after the deed of partition, Nagappa settled upon his wife Narayanamma a major fraction of that share and sold away one of the houses. The intention of Nagappa to make it appear to the Income-tax Department that no useful purpose would be served by taking coercive steps as the property allotted to him and remaining after disposal of a good part of it as indicated above was wholly insufficient to meet the demands of the Department, is indeed clear. It was Nagappa who had instigated and prosecuted the suits. Narayanamma was an illiterate and ignorant woman, who knew nothing about Nagappa's transactions, and dealings. She did not even know what property had fallen to the share of her sons. Admissions made by her disclose that she did not manage the property though apparently she was treated as the guardian of her sons in the partition deed. The story that Nagappa was living with a mistress, and was not looking after the education and welfare of his minor sons does not appear to be supported by any reliable evidence. The eldest son was at the date of the alleged partition 14 years of age, and the youngest was three years old, and in the absence of any serious cause for differences between Nagappa and Narayanamma, partition of the estate could not have been thought of. Witness Singari Seshanna D.W. 1 has deposed that Nagappa, his wife and children were living together in the family house even at the date of the suit and that Nagappa was collecting rents from all the houses. This statement does not appear to have been challenged in cross-examination. P.W. 5 Venkatsami the clerk of Narayanamma, who claimed to be looking after management of the properties on behalf of Narayanamma, admitted that he could not say which of the houses were leased and to whom; he was unable to give any particulars with regard to some of the houses. This ignorance on the part of the alleged manager lends support to the testimony of Singari Seshanna D.W. 1 that it was Nagappa who remained in management of the property, and that the family lived together and in fact there was no disruption of the joint family. It is true that many documents were produced to show that the properties were entered in the names of the sons after the deed of partition. It also appears that taxes were paid separately in respect of the houses to the local Municipality and receipts were issued in the names of persons in whose names they stood in the municipal records. But these receipts do not show the names of the persons by whom the amounts acknowledged in the receipts were paid. The High Court has believed the evidence of Singari Seshanna D.W. 1 that it was Nagappa who continued to remain in management. It is true that the plaintiffs have led evidence of two witnesses P.W. 6 and P.W. 7 who have deposed that they had assisted in making the partition. The deed of partition was undoubtedly executed and was registered, but the mere execution of the deed is not decisive of the question whether it was intended to be effective. The circumstances disclosed by the evidence clearly show that there was no reason for arriving at a partition. Counsel for the plaintiffs practically conceded that fact, and submitted

that Nagappa's desire to defeat his creditors, and to save the property for his sons, was the real cause for bringing the deed of partition into existence. Counsel claimed however that Nagappa had adopted the expedient of affecting a partition with the object of putting the property out of the reach of his creditors, and the genuineness of that partition should not be permitted to be blurred by the unmeritorious object of Nagappa. But the continued management of the property by Nagappa since the partition, and the interest shown by him in prosecuting the suits do clearly support the inference that the deed of partition was a nominal transaction which was never intended to be acted upon and was not given effect to. If it be held that the partition was a sham transaction the plaintiffs' suit for setting aside the summary order passed in execution proceeding on the application filed by the plaintiffs for setting aside the attachment must fail. The Appeal No. 642 of 1961 must therefore also fail.

Both the appeals are therefore dismissed with costs.

Appeals dismissed

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