

ANDHRA PRADESH HIGH COURT

R. Ramaprasada Rao

Vs.

R. Subbara-Maiah

Second Appeal No. 1412 of 1953. A.S. No. 192 of 1949

(K. Subba Rao, C.J. and Md. Ahmed Ansari, J.)

27.06.1957

JUDGMENT

K. Subba Rao C.J.

1. This Second Appeal raises a question of law, namely, whether the Court has power dehors the provisions of the Partition Act, 1893, (hereinafter referred to as the Act) to direct the sale of a joint family property and divide the proceeds between the members thereof.

2. The suit out of which this appeal arises was filed by the appellant in the court of the Subordinate Judge, Rajahmundry, for partition of the plaint schedule property comprising of a house and a small adjoining site measuring 450 sq. yards. The plaintiff and the 1st defendant are both medical practitioners. The plaintiff has been practising his profession at Achanta since 1925 and the 1st defendant set up practice in the suit house at Rajahmundry in 1929. Both the courts found that the property, in its very nature, was not partible and was not capable of convenient or easy division. Whereas the learned Subordinate Judge directed the auctioning of the house between the plaintiff and the 1st defendant, the learned District Judge held that the auction should not be confined only to the parties to the suit. The plaintiff has preferred the above appeal against that direction.

3. Learned Counsel for the appellant contends that, as neither of the parties requested the court to sell the house within the meaning of section 2 of the Act, the Court had no jurisdiction to sell it but should have divided it into two parts and on the assumption that the court had such jurisdiction to sell it, it should have confined the auction to the brothers. Learned Counsel for the respondent on the other hand argues that the court has power dehors the provisions of the Act to direct the sale of the property in such a way as to get the best price in a case where the property cannot be equitably and conveniently divided between the parties and divide the proceeds between them and this power is not confined to an auction between the members of the family but, if the circumstances demand, it may be thrown open to the public.

4. Before we consider the question of law raised, we must discountenance the attempt made by the learned Counsel to reopen the concurrent findings of the courts below to the effect that the

property was not capable of convenient or easy division. The finding is one of fact and there are no permissible grounds to reopen it. We accept the finding.

5. Adverting to the question of law raised, before we consider the scope of the provisions of the Act, it would be advantageous at the outset to notice the law on the question as disclosed in the Hindu Law texts and the decided cases of the various High Courts. The following views are found in the Hindu Law-texts :

Manu IX. 219.

A dress, a vehicle, ornaments, cooked food, water and female slaves, property destined for pious uses and sacrifices, and a pasture ground, they declare to be indivisible.

Mitakshara. I. iv. 21.

Water, or a reservoir of it, as a well or the like, not being divisible must not be distributed by means of the value; but it is to be used by the coheirs by turns.

Mitakshara. I. iv. 25.

The common way or road of ingress and egress to and from the house, garden or the like is also indivisible.

Brihaspathi as stated by Smritichandrika VII, 41.

Those by whom clothes and the like articles have been declared indivisible have not decided properly. The wealth of the rich depends on clothes and ornaments. Such wealth when withheld from partition will yield no profit; but neither can it be allotted to a single co-parcener. Therefore, it has to be divided with some skill or else it would be useless. Clothes and ornaments are divided by distributing the proceeds after selling them; a written bond concerning a debt is divided after recovering the sum lent; prepared food is divided by an exchange of an equal amount of unprepared food. The water of a well or pool shall be drawn according to need. Fields and embankments shall be divided according to their several shares.

Katyayana cited in Smritichandrika, VII 47.

Whatever is visible in the shape of house, fields and quadrupeds shall be divided.

6. In some cases, where joint enjoyment or enjoyment by turns is not possible it also empowers the sale of some of the items and distribution of the proceeds between the members of the family.

7. The decided cases have followed the same pattern. The earliest one cited at the Bar is *Rajcoomaree Dasse v. Gopal Chunder Rose*¹, The decree directed partition of a family-dwelling house with its appurtenances, including a poojah dalan and court-yard adjoining it. The amin, to whom the duty of partitioning the property was entrusted at the request of two of the three coparceners did not partition the poojah dalan and the court-yard. The court below in spite of the objection of the third coparcener directed that the property should remain undivided. One of the Judges, White, J. held that, having regard to the form of the decree, it was not open to the court executing it to order that any part of the property should remain joint except

¹ ILR 3 Cal 514

with the sanction of the coparceners who are parties to the suit. On that basis, he directed that the said two items be valued, that if any one or two of the coparceners wished to retain the same

separately or jointly as part of his or their share, the proportionate share of its value be paid to the remaining coparcener or coparceners and that, if none of the three coparceners agreed to take the same as part or parts of their share, the said items also should be divided between the coparceners. The other learned Judge in concurring with the said order made it clear that he would prefer to base his order not on the ground that the courts below were precluded by the decree from dealing with the property in the mode in which they have done but upon the ground that the order, which he passed, was more equitable. This decision was given before the passing of the Partition Act. Both the learned Judges recognised the power of the court to keep one of the items, which could not be conveniently divided, joint, notwithstanding the fact that one member of the family insisted on its partition by metes and bounds, though one of the Judges in view of the express terms of the preliminary decree directing such a partition was inclined to hold that, in view of the said direction, it is not permissible to do so. The court also recognized that in a case where there are many items to be divided, one of the items, which cannot conveniently be divided, can be allotted to one of the sharers and the sharer to whom it is allotted can be made to compensate the other sharers in money value.

8. The next decision is *Ashanullah v. Kali Kinker*², In that case, the disputed properties consisted of nine houses. The plaintiff, who had a two-third share brought a suit for partition. The lower appellate court held that as the plaintiff wanted partition, compensation might be paid to him. But the High Court set aside the finding and remanded the case for dividing properties. Field, J., observed that where the effect of partition would do to destroy the intrinsic value of the whole property, or, of the shares, the Court would pay to the plaintiff compensation for his share. Though the observations of Field, J. were in the nature of obiter, they involved the principle that where partition into metes and bounds would destroy the intrinsic value of the property, the court could, instead of directing division of the same, award the compensation to one of the members of the family.

9. The aforesaid two decisions illustrate the power of a court to keep a particular item of property joint or to allot the same to one and pay compensation to the other under two contingencies; (i) a joint item cannot conveniently and equitably be divided such as a Poojah Dalan and (ii) where the partition will destroy the intrinsic value of the whole property. Both the decisions were made before the passing of the Act.

10. We shall now consider the cases that were decided after the passing of the Partition Act. Where the nature of the property jointly owned by the plaintiff and the defendant was such that a division of it amongst them cannot reasonably or conveniently be made, the Calcutta High Court in *Debendra Nath v. Haridas*³, held that the proper course was to direct the sale of the property amongst the co-sharers and it should be given to that share-holder who offers to pay the highest price above the valuation made by the Court. The Court also rejected the plea that, as the plaintiff was in possession at the time of the institution of the suit, the defendant should be

² ILR 10 Cal 675

³ 15 Cal W. N. 552

compelled to transfer his share to the plaintiff. At page 554, the learned Judges made the following observations : "It is an elementary principle that in cases of partition where several persons are co-owners or co-sharers of immovable property, partition should be effected between them by giving to each his share in specie as far as practicable. The right of each sharer is to his slice of the property, not merely its money value."

11. After noticing that the parties had not chosen to follow the procedure laid down in the Partition Act, the learned Judge proceeded to state :

"In the case before us, both the parties are agreed that the nature of the property is such that a division thereof amongst all the share-holders cannot reasonably or conveniently be made. The proper course, therefore, to follow, is to direct a sale of the property among the co-sharers; and it should be given to that share-holder who offers to pay the highest price above the valuation made by the court. The defendant cannot, in our opinion, be compelled to transfer his share at a valuation to the plaintiff merely because the latter happened to have possession of the property at the time when they commenced the present action." This decision is an authority for the position that a court, under certain circumstances, can de hors the provisions of the Partition Act direct a sale of the property between the members of the family. Incidentally, it also negatives the contention that whenever a party is in possession at the time of the suit, he should have the option to purchase the share of the other sharer at a valuation fixed by the court. In *Basupta Kumar Ghose v. Moti Lal Ghosh*.⁴ another Division Bench of the Calcutta High Court ruled that, when it was inconvenient to divide a property, that property must be left in the possession of the person in occupation and the other person, who cannot conveniently get actual possession, compensated for it.

Though, on the facts presented in that case, the property was left to the person in possession and the other sharer was compensated for it, this decision also recognised the power of the court to make an equitable partition between the members of the family so as to give one the property and the other compensation in money. This is authority for the proposition that in a partition action, it is not an invariable rule that the property should be divided in specie and that under certain circumstances partition can be effected in such a way that one of the members would get the property and the other compensated for it.

12. The Allahabad High Court in *Ram Prasad v. Mt. Mukandi*⁵, also exercised their power outside the provisions of the Act in giving certain directions in a partition action. There, the plaintiff was a transferee of 2/3 share in a house and the defendant of 1/3 share. The suit was filed for partition of the house and the courts found that the house was small and was incapable of partition. The courts also held that the provisions of section 3 of the Partition Act applied and that the defendants were entitled to get the whole house at the valuation arrived at by the court. The High Court set aside the decree of the lower appellate court and remanded the case to the

⁴11 Ind Cas 370 (Cal)

⁵ AIR 1929 All 443

court of first instance in order that the court might proceed to hold the sale of the property amongst the co-sharers. In doing so, learned Judges made the following observations at page 444 :

"In the present case the request made by the plaintiff, who is a two-third sharer is that a sale may be held and that whoever among the co-sharers offers the highest bid may be given the property.....In our opinion, the Partition Act must be construed strictly as

the provisions of the Act especially Section 3 excludes the right of the majority shareholder to acquire the property, the subject of partition, at the option of the minority shareholder."

13. This decision also lays down that a court has power to direct a sale of an item of property not capable of partition outside the provisions of the Partition Act, though, having regard to the circumstances of the case, the sale was directed to be held between the members of the family.

14. In *Mohit Krishna v. Pranab Chandra*⁶, the subject matter of the partition was incapable of partition. The plaintiff first asked that the Commissioner might be empowered to award compensation to the parties in making their respective shares equal. Subsequently, he prayed that the defendant's share might be sold to him and, at a later stage, he asked that the property might be sold to that co-sharer who should offer to pay the highest price. The learned Judge Ghose, J., found that the request made was not within the meaning of Section 2 of the Act. But apart from the provisions of the Act, the learned Judge held having regard to the facts of that case, that the proper course was to direct the sale of the property to the party who should offer to pay the highest price above the valuation of the court. This is another instance where the court's power to direct a sale apart from the provisions of the Act was recognised, though in that particular case, it was limited to the parties to the suit.

15. In *Subbamma v. Veerayya*⁷, Venkata Subba Rao, J., construed the provisions of the Act and expressed the opinion that, in view of the fact that its provisions operated in favor of the smaller shareholder at the instance of the larger one, these provisions should be strictly construed by the courts. Incidentally at p. 554 (of Mad LJ) , the learned Judge made the following observations :

"It is well to bear in mind in this connection that independent of the Partition Act, the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition."

The learned Judge drew support for this view from the decision of 11 Ind Cas 370 (Cal) .

16. In *Athappa Chettiar v. Somasundaram Chettiar*⁸, the head note reads :

"Unless there is an application under Section 2 or 4 of the Indian Partition Act, the Court has no jurisdiction to impose a forced sale upon the members of the family."

⁶ AIR 1930 Cal 616

⁸1944-1 Mad LJ 296 : (AIR 1944 Mad 428

⁷61 Mad LJ 552

This head-note was obviously extracted from the following passage at p. 297 (of Mad LJ) :

"Next, let it be assumed for the purposes of argument that there was no application under Section 2 or 4 of the Act, then it is clear from the contents of the Commissioner's report that the court had no jurisdiction to impose a forced sale upon the members of the family. Although the learned Subordinate Judge came to the conclusion on 13-8-1941, in I. A. No. 562 of 1938 that items 3 and 4 were incapable of equitable division, there is the

report of the Commissioner dated 21-10-1940, that he had divided the house property into six equal parts, the details of his division being contained in his report accompanied by a detailed plan. The house is, therefore, capable of physical division and all that the plaintiffs were entitled to was possession of one share according to lots to be cast. If the members of the family wished to buy out the plaintiffs share, it was for them to apply under section 2 or 4 of the Partition Act and for the learned Subordinate Judge to proceed accordingly."

17. These observations indicate that the finding in that case was that the property was capable of equitable physical division, and, therefore, the learned Judge held that, apart from the Act, the court's duty was to divide the property in specie and not to sell it. This decision does not, in our opinion, support the head-note above.

18. Mack, J. in *Kalakkathankandi Chathan v. Parambath Cheeru*⁹, a case to which the provisions of section 2 applied, directed the sale of the property giving liberty to the sharers, if they desired, to bid.

19. Finally there is a considered judgment of a Division Bench of the Calcutta High Court on the question raised before us in *Nitya Gopal v. Pran Krishna*¹⁰, Das and Cuha Ray, JJ., definitely ruled that the court had no power apart from the provisions of the Act to direct a sale of the properties, the subject matter of a partition suit. After considering the English Law and also the relevant Indian decisions, the learned Judges concluded their discussion thus at p. 896 :

"The result of the above discussion in my opinion is that there is no current of authority which would establish that in a suit for partition the court possesses a power to direct a sale apart from the Partition Act. In my opinion, in the absence of clear authority which binds us, it is open to us to come to a conclusion based on the terms of the Act looked at from the historical perspective. In my opinion the effect of the Partition Act cannot be whittled down by chawing upon some undefined and uncertain inherent powers in court to direct a sale in lieu of partition where the invitation of the parties to the court is merely to make a partition between the co-sharers inter se. The power of the Court to direct a sale in a suit for partition must be held to be limited to the cases provided for within Partition Act." With great respect to the learned

⁹1949-1 Mad LJ 622

¹⁰ AIR 1952 Cal 893

Judges, we find it difficult to agree with the aforesaid observations.

20. The court in directing a sale and dividing the proceeds between the sharers, does nothing more than carry out its duty to divide the properties equitably between the members of the family. Where in a particular contingency, a property is indivisible, or, by the partition, it loses its inherent worth, or, it cannot be equitably divided between the members, the court for the purpose of equitable distribution sells the said property, so that the proceeds which represent the property can be divided between the members. The power of sale for realizing the proceeds is inherent in

the process of partition and is only exercised in aid of partition.

21. Let us now consider whether the exercise of such a power is inconsistent with the provisions of the Partition Act. The material provisions of the Partition Act might be read at this stage :
Section 2 : Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that, by reason of the nature of the property to which the suit relates or of the number of share-holders therein or of any other special circumstances, a division of the property cannot reasonably or conveniently be made and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such share-holders individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds. Section 3 :

(1) If in any case in which the Court is requested under the last foregoing section to direct a sale, any other share-holder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such share-holder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more share-holders severally apply for leave to buy as provided in subsection (1) the court shall order a sale of the share to the shareholder who offers to pay the highest price above the valuation made by the court.

Section 6 :

(2) On any such sale any of the share-holders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase money or any part thereof, instead of paying the same, as to the court may seem reasonable.

Section 9 :

In any suit for partition the court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

22. The conspectus of the aforesaid sections indicates a machinery for the sale of the joint family property under specified conditions. Section 2 can be invoked only at the request of any shareholder interested individually or collectively to the extent of one moiety or upwards. Even on such a request the court is not bound to order the sale unless the other conditions specified therein are satisfied. When such an application is made and the court decides that the item should be sold, the other sharer or sharers, who invariably own a comparatively smaller share than the sharers who made that request, have the option to apply for buying at the valuation fixed by the Court the share or shares of the persons who made the request. The combined effect of the two provisions is that a minor sharer has an obvious advantage over the major sharer and if both of them collude or prove recalcitrant, they can create a deadlock by preventing the court from selling the property which cannot be conveniently partitioned or is not capable of being partitioned. The anomalies in the working of these provisions is brought out forcibly by Venkata Subba Rao, J. in 61 Mad LJ 552 at p. 554 ; (AIR 1932 Madras 15 at p. 17) (G) thus :

"Mr. Justice Courts Trotter refers to the Practical inconvenience, almost the absurdity of the results' following from such a rule. In *Ramaprasad v. Mukandi*¹¹, the learned Judges rightly point out that the effect of this section is to favour the smaller shareholder at the expense of the larger. The fact of a person owning a large share is by this section made a disability and he is precluded from offering to buy the interest of the party owning the smaller share The courts naturally whenever possible, strove to avoid this result." The question is whether the Act is intended to exhaust the power of the Court to direct the sale of the property where, for one reason or other, the said property cannot be divided by metes and bounds. As we have already stated, the exercise of the power of the court to direct the sale of a property which cannot be divided in specie is inherent in the process of partition. The Partition Act, for the first time, conferred a right on a larger sharer to request the court to sell the property subject to the correlative right of the smaller sharer to insist upon the larger share being sold to him at the valuation fixed by the court.

The Act was designed only to meet a particular contingency and did not, in any way, affect the power of the court to make an equitable distribution of the properties. Before the Act, the Court could refuse to sell the property, even if the conditions laid down in Section 3 were fully satisfied. The Court, instead of selling the property, could have allotted the property not capable of equitable division to one of the sharers whether he is a smaller or larger sharer, and direct compensation to be paid to the other. But, after the Act, if the conditions laid down therein are satisfied, the court has no option but to direct the sale. Therefore, the power of the court to sell the property under the different circumstances is consistent with the right of the party to insist upon a sale under specified conditions. When the right under section 2 or 3 is exercised, the court cannot exercise its power in derogation of the right. On the other hand, if the provisions of the Act are construed to be exhaustive of the powers of the court to sell a property, the court would be powerless to make an equitable distribution of the properties when one or other of the properties could not be equitably partitioned or all the parties colluding together could create a dead-lock. The act which was intended to protect the smaller sharers in the family, should not be so read as to obstruct and retard the process of the partition itself. We, therefore, hold that the Partition Act is not inconsistent with the general power of the court to sell any item of property for its equitable distribution.

¹¹116 Ind Cas 851 : AIR 1929 All 443

23. From the aforesaid discussion of the Hindu Law texts, the case-law and provisions of the Partition Act, the law on the subject may be stated thus : Partition is a legal process by which joint title and possession of co-owners of the entire joint property is converted into separate title and possession of each of the co-owners in respect of specific item or items. The joint property is divided in specie and each one of the erst-while joint owners is put in possession of specific extent of property, which is allotted to his share. But many contingencies may be visualised when in practice the division by metes and bounds of every item of joint family property is not possible. A joint family or joint owners may be possessed of innumerable items of different extents, value, quality and nature. In dividing the properties among the various co-owners, it may not always be possible to divide every item into distinct shares. A property will have to be allotted to one of the sharers and the other has to be compensated with money. This is technically called owelty. Sometimes, the property to be divided may consist of only one item, which cannot conveniently and equitably be divided between the members in which case the Court may allot

that item to one co-sharer and direct him to pay the value of the share of the other sharer in money. A court may also be confronted with a situation, namely, that the item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth, in such a case, that item is allotted to one and compensation in money value is given to the other and if such a course is not possible it is sold outright and the sale proceeds divided between the joint owners. All the aforesaid and similar other methods are adopted by courts in making an equitable partition of the joint properties either with the consent of the parties or where such consent is not forthcoming, in exercise of its own discretion. Whatever method is adopted, it is only to implement the process of equitable partition. It would well-nigh be impossible for a court to effectuate a partition on an equitable basis, if it should be held that it is under a legal obligation to divide every item of the joint property in specie. Where properties are susceptible of such division, the court adopts it. Where it is not, it adopts one or other of the alternative methods narrated above. The provisions of the Partition Act do not, in, any way, entrench upon the undoubted power of the court to effectuate a partition between co-owners in one or other of the methods suggested above. Before the Act, a party had no right to insist upon the court to follow a particular course in the process of partition or to insist upon purchasing the share of the other co-owner under certain circumstances.

24. Under the Act, a right is conferred upon the sharer or sharers, if certain conditions are complied with, to request the court to sell the property and a correlative right conferred upon a smaller sharer to insist upon purchasing the former's share or sharers at a value fixed by the court. Except to this extent and that provided by the other provisions of the Act, the power of the court to partition the properties equitably by any of the methods detailed above or similar other is not, in any way, affected by the provisions of the Act.

25. If so, the question is whether, in the present case, the court had power to direct the sale of the suit property in public auction without confining it to the parties to the suit. The lower court found that the house is not capable of convenient or easy division. Neither of the parties applied to the Court under Section 2 of the Act to sell the property. Each of them wanted the property for himself after paying compensation to the other.

The learned Judge, having regard to the circumstances of the case, came to the conclusion that it would be more beneficial to all the sharers if the suit house was sold in public auction wherein strangers should also be allowed to bid. As we have held that the Court has power to give such a direction, we are not justified in Second Appeal to interfere with its direction.

26. The Second Appeal, therefore, fails and is dismissed with costs. The memorandum of objections is dismissed, but without costs.
Appeal and memo of objections dismissed.