Privy Council Appeal No. 15 *of* 1921.

Merla Venkanna and another - - - - - *Appellants*

v.

Merla Agasthiah and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1922.

Present at the Hearing:
LORD PHILLIMORE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.
LORD SALVESEN.

[*Delivered by* LORD PHILLIMORE.]

This is a family dispute arising in this manner. There were five brothers, sons of one Venkanna. The first plaintiff is the son of one of these brothers, and the second plaintiff is his son. The original first defendant, now dead, was one of the five brothers. The second defendant was a brother of the first plaintiff, adopted by the second defendant as his son. The first plaintiff's father and the first defendant married sisters, so these two families are brought into very close relation.

The five brothers originally formed a joint Hindu family. There were divisions in 1861 and in 1885; and in 1900 the representatives of the other three brothers brought a suit against the first plaintiff, as representing his deceased father's interests and the first defendant and members of the other branches, claiming that the division of the estate was incomplete, and that the two lines of the first plaintiff and the first defendant were keeping as their own what was, as they said, joint family property. This claim was resisted by the first plaintiff and the first defendant, who alleged that the separation had been complete, and that all that they possessed was the separate property of one or other of them. In the course of this suit the first plaintiff made a deposition, in which he carried this contention very far, and with a view of showing how complete the separation had been, said that not only had the two separated from the three, but the two had separated *inter se*. And this evidence has, as will appear later, been used against him in the present suit.

However this may be, the suit brought by the representatives of the three against the two was, under the influence of mediators, compromised. Their Lordships have not been put into possession of all the details of the compromise, nor is it necessary; but it would appear that the three succeeded to this extent that they recovered a portion of the lands which the two held. The consent decree made in pursuance of the compromise gave these lands to the three, and went on not merely to divide the lands and money as between the three and the two, but further to divide them as between the two.

From this time forward there was no question of the two being members of one joint Hindu family; and though, in the course of the present suit, this position may have been at times suggested on behalf of the plaintiffs, their real case rests, if it can be supported, upon other grounds. From the date of the compromise on the 5th day of March, 1902, the line of the plaintiffs and the line of the defendants must be treated as for legal purposes distinct.

Notwithstanding this these two families or lines continued to maintain intimate relations, their lands were jointly cultivated, and they lived and messed together as if they formed parts of a joint Hindu family. They were landowners and moneylenders. For the purposes of their business the principal member was the representative of the elder generation, the first defendant. The father of the first plaintiff died during his minority, and his mother thenceforward represented him during his minority. No doubt after his majority the first plaintiff took up much of the business which his mother had undertaken. But he and his mother remained under the leadership of the first defendant.

The mother seems to have lived till 1913; and as her sister also lived on till about 1909, it seems probable that the two women kept the families from drifting apart. It should be noted that the High Court made a mistake in stating that the wife of the first defendant died before the adoption of the second defendant. She lived on for many years.

The date of the razinama embodying the compromise, and of the consent decree thereupon was the 5th March, 1902, and some little time afterwards a certain amount of estrangement began to grow up between the two lines.

The first plaintiff, who is described as a studious man devoted to the study of Sanscrit, says that he took little notice of or part in business affairs, and this is to a certain extent correct; but as his son, the second plaintiff, grew up, he apparently became active and desirous of taking his share in the business, though he was at a disadvantage as being in so junior a position in relation to his great-uncle and uncle on the other line.

One of the matters in dispute in the suit is the age of this second plaintiff. It is suggested by counsel for the defendants that he was born in 1887; on behalf of the plaintiffs his birth would be put in 1890. It was probably somewhere between these two dates, and he probably began to assert himself after he had

had some training in the business, about, or soon after, the time that he came of age.

Be this as it may, by the beginning of 1909 matters had come to a crisis, and the first defendant is found writing on the 14th March in that year to one of the debtors on joint account that several family disputes had arisen, and on the 12th March to another debtor that his people were now effecting a division. Certain arrangements were made about this period between the two lines, but in the view of the plaintiffs they were not sufficient to give them their share of the various properties and loans in which they were jointly interested, and on the 22nd April, 1910, this suit was brought. By it the plaintiffs claimed a partition of certain immovable property and milch cattle, their half of the paddy grown on the two estates which were in joint cultivation, and an account in respect of moneylending transactions. No question now arises as to the immovables or the cattle, or upon moneylending transactions generally. The disputes are limited to a claim for the proceeds of the paddy, and the half of a loan of Rs. 260,000 lent to a lady, called Chellayamma, who was a large landed proprietor.

In respect of these two matters the Subordinate Judge, by his preliminary decree dated the 27th November, 1915, found the defendants accountable; and by his final decree of the 27th December, the half-share of the sum payable in respect of the paddy was fixed at Rs. 10,040; and the plaintiffs, after receiving credit in respect of the Chellayamma matter, and a half-share of the paddy, and being debited the expenses of the marriage of the second plaintiff and his sister, and the amount of a mortgage executed by the zemindar of Polavaram, were found entitled to a net sum of Rs. 77,682.

An appeal was brought from the preliminary decree to the High Court of Madras, when the learned Judges reversed the decision of the Subordinate Judge and dismissed the suit; and it is from this dismissal that the present appeal is brought.

Though it would appear as if the appeal was from the preliminary decree only, and therefore that what may have passed subsequently in the suit had no bearing on the appeal, nevertheless the final decree and the proceedings leading up to it formed part of the record presented to the High Court at Madras, and have been brought before their Lordships, and they are not without a bearing of some importance upon the present appeal.

Unfortunately the Subordinate Judge who took the evidence was not the Judge who heard the arguments and decided the case. Their Lordships have not therefore the advantages of knowing the opinion formed of the witnesses by the Judge of first instance, except in so far as remarks were noted at the end of the depositions by the Judge who took them; and the matter being all on paper, the High Court may be said to have had as good an opportunity of judging of the materials as the Judge of first instance. It results, however, that their Lordships are also much in the same position. They have, however, the benefit of

the very long and carefully reasoned judgment of the Subordinate Judge, and of the opinion of the High Court upon it—an opinion which, it is to be regretted, is somewhat brief and gives the impression of being rather superficial.

In this condition of the record, and there being oral evidence both ways, both sides have naturally laid stress upon probability and the inferences to be drawn from mutually accepted facts. For the defendants stress is laid upon the statements made by the first plaintiff in the previous suit to the effect that while his mother had acted for him during his minority, he had afterwards himself taken control of his own affairs ; his insistence upon the entire separation between him and his uncle ; and several documents which show that he was to some extent, at any rate, carrying on a separate business, making loans and purchases of land ; and lastly, the complete division and settling up in 1902. It was suggested that the plaintiffs' case must be that whereas the first plaintiff had been doing his own business till 1900 or 1902, he, without reason and just as his son was beginning to grow up and be likely to help him, surrendered or remitted the conduct of the business to his uncle and brother, and that no reason was shown for this conduct.

On the other hand, counsel for the plaintiffs relied upon the facts that the estates were jointly cultivated ; that commensality was clearly proved, though the defendants at one time seemed to deny it ; that at the time of the compromise with the other three branches of the family the defendants entered jointly with the first plaintiff into an obligation to the other three lines ; that the first defendant was the one representative of his generation ; that, having regard to Indian social customs, the family would act as one in business matters through their natural head, the elder man ; that as it turned out that the paddy when harvested was not divided in specie but sold by the first defendant, he would naturally be left to invest the net proceeds in moneylending or land buying on behalf of all interested ; and attention was called to the important statements made in letters both to the Rajah of Polavaram and to the lady called Chellayamma, in which the first defendant professed to act on behalf of himself and those whom he called " my boys," spoke of disputes arising between those for whom he acted and himself, and talked of a division of interest as a thing about to happen. Stress was also laid on his dealings with the official of the revenue with regard to income tax, which he unquestionably paid for all upon one assessment till the disputes arose, and where again he stated that there was to be a division of interest and requested future separate assessment.

Bearing these considerations in mind, their Lordships will approach the question of the specific items, division of which is now claimed by the plaintiffs and resisted by the defendants.

The first matter concerns the mortgage given by Chellayamma. This lady had effected previous loans with the family, which were

consolidated in a mortgage dated the 21st January, 1902, and expressed to be made in favour of the second defendant and the second plaintiff, the sum secured being Rs. 225,154. On the 28th October, 1904, by which time the debt had been swollen by the addition of interest to Rs. 236,502, Rs. 66,502 were paid off, the money to make this payment having been lent to Chellayamma by the Court of Wards, acting on behalf of some estate under its charge, and the first mortgage was cancelled ; while for the balance a new mortgage, dated the following day, was given to the same nominal parties.

The first question is what happened to this sum of Rs. 66,502. It should be stated that at the foot of the first mortgage, where the discharge of it is entered, the whole sum of Rs. 236,502 is said to have been paid by cheques. That the Court of Wards would give a cheque was what was to be expected. That the process of effecting a fresh loan for the balance might have been carried out by a cheque or cheques is possible, but there is no trace of the defendants having a bank on which they had a drawing account, and indications presently to be mentioned point the other way. However, as there is no dispute about the sum re-lent, this matter is immaterial. That the Court of Wards would pay by cheque is a matter of some importance. It is probable that all four persons were present when this transaction took place, but the two who give most details are the second defendant and the second plaintiff. According to the story of the second defendant the money was received in cash, and was there and then divided between the two lines, plaintiffs on one side and defendants on the other, in the lady's house, in the haveli. He carried his own and his father's share to his village and lent it out in small sums. He was specially challenged as to whether there had not been a deposit of the money at the bank, and whether he had not withdrawn Rs. 36,000 odd on the same day, but he denied it.

The first plaintiff says that he might have been present at one or two of the payments made by Chellayamma to the first defendant, but he could not give any details of such payments because he never cared to know such details when the first defendant was attending to all their affairs.

The first defendant, who was a very old man when he was examined, had no particular recollection of the transaction, but made a general statement to the effect that the Chellayamma business concerned the plaintiffs and the second defendant and not himself ; that he could not recollect any of the details, and did not know what the others did with the balance. Later on in his examination he said that the first plaintiff and the second defendant each received a half.

The story of the second plaintiff, who was at that time between 14 and 17, is that he and the second defendant were sent in with the money to the bank at Cocanada ; that it was not convenient that the others should go, as they wished to attend

to the cultivations. His account was that Rs. 46,000 out of the amount paid by the Court of Wards was deposited in the bank in his name, and that he afterwards drew back the whole and handed it to the second defendant. He said that the amount was in deposit in the bank for two months or so; that the money was taken charge of by the second defendant; that he did not even touch it; and he knew that some part of it was lent out at once in one mortgage for Rs. 10,000 and another for Rs. 1,000.

Both these witnesses gave evidence before the bank documents had been produced. When these came to be produced they showed what had really happened. There is first of all a deposit receipt showing that Rs. 66,502 was received from the second plaintiff on the 28th October, 1904, and deposited for his credit in a suspense account. Of this sum Rs. 36,502 was drawn out the next day, leaving a balance of Rs. 30,000, for which there is an undated receipt on the same paper signed by the second plaintiff. There is then a debit slip debiting the suspense account with the Rs. 36,502 signed by the second plaintiff, and also signed by the second defendant and a third person as witnesses. Finally, on the 2nd December, there is a second debit slip for Rs. 30,000 signed by the second plaintiff alone. There was an opportunity of recalling both the witnesses after these papers had been produced, and the second plaintiff was recalled and accepted the facts that the bank documents showed. He was not cross-examined. The second defendant was not recalled. It is clear to their Lordships, as it was to the Subordinate Judge, that the second defendant had told an untrue story with regard to this matter and told it with a motive.

The judgment of the High Court fails to show that the learned Judges appreciated the importance of this point. They comment on the fact that the second plaintiff understated his age, and say that it is incredible that the first plaintiff did not make enquiries. With regard to the second defendant they merely say that his account was that he had nothing to do with the deposit or withdrawal, without apparently seeing that he must have had to do with the withdrawal of Rs. 36,502, and therefore must have known of the deposit.

The case therefore made that the money was divided in the haveli fails. It was taken to the bank and deposited in the name of the second plaintiff, with the knowledge of the second defendant, who came next day with his young nephew, and signed as one of the witnesses the receipt on the debit slip for the sum withdrawn. If the second defendant had told a true story it would have been possible to suppose that though more than an equal share was drawn out for the second defendant, still the plaintiffs were left in possession of Rs. 30,000 towards their half. But his story, being untrue, and the story of the second plaintiff being substantially true, erroneous no doubt in respect of the sum actually paid in and in apparently making one withdrawal at the end of two months, instead of a withdrawal of more than half next day and the balance at the end of two months—their Lordships think that his

evidence must be accepted. His name was treated as a convenient one in which to put the money, because his elders might be engaged in the cultivations. He was so young that he did what he was told, and their Lordships take it that the whole sum came under the control of the defendants, and was from time to time invested by the first or second defendant in investments which either were intended to be, or ought to have been, on joint behalf, and that this sum is one for which the defendants must account.

One observation should be added. The second plaintiff made, as has been said, an erroneous statement as to the amount of the deposit. He said it was Rs. 46,000. This apparently gave the second defendant, who was examined after him, a chance. He said in substance, " The deposit of Rs. 46,000 must have been made up as follows: The plaintiffs took their Rs. 33,251. They had Rs. 8,000, as I know, coming to them from another source; that is getting on to the Rs. 46,000," with the suggestion that the balance must have been made up of other separate monies of the plaintiffs. When he made these statements he either had forgotten that he had signed that receipt or he hoped that it would never see the light.

Now as to the reduced sum secured by the second mortgage. This was paid off in nine instalments. The first five certainly, and probably the sixth, which is for a small sum, though the High Court thinks only the five, were received on joint account. The last three, which occurred after the dispute, were immediately arranged for, so as to keep the accounts equal between the parties, and no question arises as to them. Here again the plaintiffs' case is that the defendants had control of the money, and were supposed to take it and re-invest it on joint behalf; and the defendants' case is that on each occasion the money was received in cash, and divided between the two parties there and then.

Now the second mortgage had a curious clause :—

> " It is agreed that you should accept payment of the said entire debt in whole or in part, whenever we please. In case of disagreement between you we shall divide it into two equal halves and pay each his respective half-share of the amount and obtain receipts."

There are no written receipts; none apparently were given for these various payments, though they were in large sums. The only documentary record is in the books of the mortgagor. These contain entries in which each payment is said to be in respect of a loan from, or a mortgage deed and promissory note executed in favour of, Merla Viranna—that is, the first defendant (now dead). When a later stage is reached, and the parties are approaching a division, the language is changed and the payment is said to be made in respect of money due under a mortgage to Merla Agastihah and Merla Venkanna, the second defendant and the second plaintiff, in whose names as nominees the mortgage stood.

The man of business of Chellayamma was examined, and he described the payment of the first instalment which was Rs. 50,000. The first and second defendant, the second plaintiff and some others came to Pitapur in a cart; he could not fix any particular person as the payee, but they all received the money and carried it away in a cart. He could not say whether the second plaintiff was present at any of the later payments; and, as will be noted, he has entered them as paid to the first defendant. The first plaintiff says, as already stated, that he might have been present at one or two of the payments made by Chellayamma to the first defendant, but he could not give any details of such payments, because he never cared to know such details when the first defendant was attending to all their affairs. He may have somewhat exaggerated his devotion to study and his unworldliness, but there seems no doubt that he was a man who did not care for business, and preferred to have it done for him so that he might devote himself to his favourite pursuits. It should perhaps here be stated that when the first defendant had his dealings with the revenue officer he produced certain accounts. At his examination in this suit he was asked for these accounts, but they were never produced.

Upon the whole their Lordships think that the Subordinate Judge was right in saying that the proper presumption from these facts was that these instalments got under the control of the first defendant, either directly or through the second defendant, and that he had to account for them.

The other item is the proceeds of the paddy. If the case had been, as at one time it seemed probable it would be, that these proceeds after payment of wages and expenses in kind were divided in kind between the two lines, each of which might have occupied two of the four godowns in which the paddy could be stored, it might have been difficult for the plaintiffs, particularly after the deposition of the first plaintiff in the previous suit, to have proved a case. But it now being agreed that the paddy was not divided in specie, but was sold by the first defendant, it seems to their Lordships that he had to discharge himself in respect of it. They are fortified in this conclusion by the falsity of the case set up in respect of the Chellayamma mortgage. So, in respect of both matters, they prefer the judgment of the Subordinate Judge.

Their Lordships have the less difficulty in accepting this judgment in preference to that of the High Court because their attention has been drawn to a certain number of misapprehensions or failures of appreciation on important points which are to be discovered in the judgment of the High Court. For instance, the learned Judges have not noticed the point that when the second plaintiff and his sister were married, a large sum, Rs. 10,000, was disbursed by the first defendant for the expenses of these marriages. It was suggested on behalf of the defendants that this was a present from a generous uncle. But to their Lordships, as to the Subordinate Judge, it seems much more

natural to suppose that it was a disbursement by the virtual karta of the two families out of the common funds. Moreover, when the accounts were taken for the purposes of the final decree these expenses were actually debited to the plaintiffs. The High Court make no allusion to the income tax business, nor to the absence of the accounts then produced, nor to the presumptions to be derived from the entries in the books kept for Chellayamma by her man of business, nor to the false case set up by the defendants in respect of the loans to the Rajah of Polavaram, a complicated transaction which was worked out for them in minute detail by the Subordinate Judge.

There remains a further defence founded on Article 62 of Schedule I of the Limitations Act. The Subordinate Judge rejected this defence, thinking that the matter was governed by Article 89; the High Court found it unnecessary to decide upon it, but were inclined to think that it was governed by Article 62 rather than by Article 89. In their Lordships' judgment it is not necessary to determine which of the two articles applies. If it was, they would agree with the Subordinate Judge. But the plea of limitation would in any case only cover some of the earlier items, and inasmuch as there are cross debits which the plaintiffs have to discharge, and which they could attribute to the earlier items, the matter becomes unimportant.

Upon the whole their Lordships will humbly recommend that this appeal should be allowed; that the judgment of the Subordinate Judge should be restored; and that the appellants should have the costs of this appeal and in the Courts below.

In the Privy Council.

MERLA VENKANNA AND ANOTHER

v.

MERLA AGASTHIAH AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

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