

Privy Council Appeal No. 145 of 1927.

Sennimalai Goundan and another - - - - - *Appellants*

v.

Sellappa Goundan 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 14TH DECEMBER, 1928.

Present at the Hearing :

VISCOUNT SUMNER.

LORD WARRINGTON OF CLYFFE.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

This is an appeal from a decree of the High Court at Madras reversing a decree of Mr. R. W. Davies, I.C.S., Additional Subordinate Judge of Coimbatore, in a suit brought by the plaintiff in February, 1919, to reopen a partition made by his grandfather and his four sons, one of whom, Karuppa, was the plaintiff's father, in the year 1905, at a time when the plaintiff, who was Karuppa's son by his first wife, was about four years old. At that time Karuppa had separated from the plaintiff's mother and had married a second wife, and the plaintiff's case is that this partition was effected by all the adult members of the family with the deliberate object of defrauding him of his share in the properties which ought to have fallen to his father and himself at the partition. Paragraph 7 of the plaint states: "that the said Karuppa and his father and brothers with the intention of defrauding the plaintiff of his legitimate share in the family properties and benefiting themselves . . . entered into a fraudulent and collusive partition."

The Subordinate Judge found that the plaintiff's case was proved and decreed the suit. On appeal the case came before the learned Chief Justice and Mr. Justice Viswanatha Sastri, who

delivered the judgment of the Court. The learned Judges were of opinion that the plaintiff had altogether failed to make out the alleged fraud and consequently allowed the appeal and varied the decree of the lower Court by decreeing a partition between the plaintiff and his brother, the ninth defendant, of their admittedly joint properties.

As observed by the learned Judge, a case of this kind must be established by very clear and satisfactory evidence.

At the root of the case is the question whether the share allotted to the plaintiff's father was really inferior in value to that which was allotted to his brothers, because if it was not the basis of the plaintiff's whole case fails. As is observed in the appellate judgment, the Subordinate Judge has found this issue in favour of the plaintiff on very unsatisfactory and unsubstantial grounds. He has compared the acreage of the land allotted to the different shares and has decided that the partition must have been unequal because the acreage allotted to Karuppa is less than what was allotted to the other brothers. As is pointed out by the Appellate Court, mere acreage is not a satisfactory test of value, as so much depends upon the productivity of the lands allotted to each share. The force of this observation is much strengthened by a statement compiled by Sir George Lowndes, who appeared for the respondents, of the assessments on each share as shown in the partition deed.

The assessment on the lands allotted to Sellappa, the first defendant, amounted to Rs. 106-6-6. The assessment on the lands allotted to Karuppa, the plaintiff's father, amounted to Rs. 89-10-10. The assessments on the two shares allotted to the fifth and seventh defendants amounted to Rs. 172-3-2, making for each of them an assessment of Rs. 86-9-7, in addition to which they each received Rs. 1,500 in cash.

At the first sight, on these figures the share allotted to Kurappa seems smaller than that allotted to the other brothers, but the case assumes a very different aspect, when it is observed that of the Rs. 89-10-10, Rs. 23-10-6 is not the full assessment, but only a favourable quit-rent payable to Government on the *inam* lands in question. It does not appear what proportion exactly of the assessment the *inamdār* was required to pay over to Government by way of quit-rent and what proportion he was entitled to retain for himself; but in any case there can be little doubt that by adding the full assessment of this *inam* land to the assessment on the other lands which fell to Karuppa's share, it would have more than equalled in value the shares allotted to his brothers.

The Subordinate Judge next referred to the fact that, during the hearing of the case, the first defendant, Sellappa Goundan, the plaintiff's uncle, to whom one of the shares was allotted at partition, offered to exchange his share with the plaintiff's, and that the fifth and seventh defendants, who were also the plaintiff's uncles, and to whom one share had been allotted in common, also offered to exchange half of their share with him, alleging that the share that fell to the plaintiff's father

was by 10 per cent. more valuable than theirs. The Subordinate Judge states that they afterwards backed out of this offer and infers from this that the shares were not really of equal value. In their Lordships' opinion, this inference is not justified. It appears from the note made at the time that, when the defendants made this offer and the plaintiff accepted it, the Court then stated that the matter was closed so far as A, B and C schedule lands were concerned—that is to say, the lands allotted at partition, but intimated that the suit was to go on against the defendants in possession of E, F and G schedules—E schedule being the lands which it is said were really allotted to Karuppa, as well as the lands in B schedule, but were put *benami* in the names of his second wife Nachakkal. It appears to their Lordships that the defendants may well have understood that the exchange which they offered was to be in settlement of the suit, and that no inference is to be raised against them, because they withdrew their offer when they found that the Subordinate Judge required the case to go on as to whether E schedule properties were really conveyed to Nachakkal *benami* for her husband, the plaintiff's father.

The learned Subordinate Judge also found that if the lands in E schedule had been allotted to Karuppa, as well as the lands in B schedule, his share would have been somewhat in excess of those allotted to his brothers, but that, owing to other circumstances, would have been approximately fair. This method of comparing acreage, as already pointed out, is extremely fallacious.

It was argued that the plaintiff was not in a position to prove his case because the defendants had failed to produce their documents: but when the defendants produced them at a late stage of the case the plaintiff, as observed by the learned Judge, instead of utilising them as he might have done, successfully resisted the defendant's application to file them. Apart from this, there is really no substance in this contention, because the only documents likely to be of much use were the sale deeds showing the sums for which many of the lands included in the schedule had been purchased, and the plaintiff could easily have obtained copies of these documents from the registration office and have exhibited them as secondary evidence in the usual way when the defendants had failed to produce the originals.

In this state of the evidence their Lordships agree with the High Court that the plaintiff has altogether failed to show that on partition a smaller share was allotted to Karuppa than to his brothers, and if he has not proved that his father Karuppa's share was inferior to that of his brothers, he has, of course, also failed to prove that the inferior share was allotted to Karuppa for the purpose of defrauding the plaintiff.

The story that the plaintiff's grandfather, who was dividing nearly all his property, ancestral or self-acquired, between four

sons, and his four sons themselves all joined in entering into a conspiracy for the purpose of injuring this child of four years because his mother had quarrelled with her husband Karuppa, who was one of the four brothers, is in itself highly improbable; and as the whole basis of the plaintiff's case fails, it is only necessary to refer very briefly to the evidence as to the means by which the alleged fraud was effected and part of the property which falls to Karuppa put *benami* in the names of other persons.

In the first place, it is said that contemporaneously with the partition deed the lands in E schedule which, it is said, formed part of Karuppa's share, were conveyed to Karuppa's second wife, Nachakkal, by the sale deed (Exhibit D) of the 7th July, 1905. The sale deed recited that the vendor, Sennimalai Goundan (the plaintiff's grandfather) had conveyed to Nachakkal "the under-mentioned properties for Rs. 1,000 towards the amount to be paid to Vellai Goundan and Subbe Goundan in pursuance of the deed of partition effected among my four sons." Under the partition deed, as already mentioned, these two sons were to receive Rs. 3,000 in addition to the land allotted to them, and these properties are said to have been sold by the grandfather for the purpose of raising Rs. 1,000 for this purpose. They were described in the deed as having been acquired by Sennimalai and in his enjoyment. If they were his self-acquired property he was not bound to bring them into partition and was entitled to do with them as he liked. It is not disputed that Nachakkal, who was the only daughter of a wealthy lady, was well in a position to find Rs. 1,000 for the purchase money if she desired to do so. Apart from proof that the share allotted to Karuppa was less than that allotted to his brothers, this transaction affords no evidence whatever of the fraud which the plaintiff seeks to establish.

It is true that Nachakkal has come forward to give evidence that the transaction was a bogus one and that she never paid the consideration for the sale, but she admitted execution before the Registrar after the document had been explained to her and her story that she was ignorant of the nature of the transaction cannot be accepted. Further, in this very case she filed a written statement on behalf of her son, the ninth defendant, the plaintiff's half brother, in which she adopted the written statement of some of the other defendants, denying that there was any truth in the case set up by the plaintiff; and, as observed in the judgment of the High Court, it is clear that in her evidence she went back on her written statement at the instance of her son, the ninth defendant, who found it to his interest to join with the plaintiff in attacking the sale deed (Exhibit L), referred to below, by which she had parted not only with some of the properties conveyed to her by Exhibit D, but also with the whole of the *stridhanan* properties she had inherited from her mother.

It was also alleged by the plaintiff that, in further prosecution of this fraudulent scheme on the 27th September, 1905, Nachakkal re-conveyed to Sennimalai, the plaintiff's grandfather, for Rs. 400

part of the property which had been conveyed to her under Exhibit D, and it was suggested that the properties so re-conveyed were possessed and enjoyed by Karuppa. The evidence, however, shows that, on Sennimalai's death, Karuppa only claimed and only took his one-fourth share of these properties, leaving the remaining three-fourths to be taken by his brothers, which shows that Nachakkal's conveyance to him was not, as suggested *benami* for Karuppa. The evidence is that this particular property has enormously increased in value since the partition owing to its being planted with cocoa-nut trees, and is now worth Rs. 30,000, and the learned Judges are probably right in surmising that the plaintiff was induced to bring the present suit with the object of getting the whole of this increment for his branch.

Reliance is also placed on a trust deed executed by Karuppa on the 2nd October, 1909, not long before his death, by which he conveyed all his properties to his brother Vellai Goundan and his kinsman Rangaswami Goundan on trust to manage them during the minority of his two sons, the present plaintiff and Nachakkal's son, the ninth defendant, and to make over their shares to them as soon as they obtained majority. Some point was made of the fact that he provides for a payment of Rs. 60 a year out of certain lands to Nachakkal and her son, whereas he makes no provision for his first wife and the plaintiff. There is no force in this contention, as it appears that a similar provision was made for the plaintiff's mother when she separated from her husband before the partition.

Lastly, reliance was placed on Exhibit L, a sale deed of 25th June, 1911, by which Nachakkal conveyed to Rangaswami Goundan, one of the trustees of the deed last mentioned, the remaining properties which had been conveyed to her in the first instance by Sennimalai under Exhibit D, and in addition to all the *stridhanam* properties which she had inherited from her mother. The price was Rs. 5,000, Rs. 4,000 of which was to be for the discharge of a promissory note which it was said she had executed on the 21st March, 1908, for Rs. 3,000 in favour of Subbai Goundan, the seventh defendant. The promissory note has not been produced, and it is not shown how it was that she came to execute it or the subsequent sale deed. The fact that Rangaswami Goundan, the vendee, was not called by the defendants has been the subject of comment, but it has been suggested in explanation that he was unwilling to go into the box because this sale deed, in so far as it deals with Nachakkal's *stridhanam* properties, is being attacked by her son, the ninth defendant, in another suit. Whatever may have been the real nature of this transaction, it cannot help the plaintiff in this suit in the absence of satisfactory evidence that his branch of the family was allotted an unequal share at the partition which he is seeking to re-open.

For these reasons, in their Lordships' opinion, the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

SENNIMALAI GOUNDAN AND ANOTHER

vs.

SELLAPPA GOUNDAN AND OTHERS.

DELIVERED BY SIR JOHN WALLIS.

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