Privy Council Appeal No. 124 *of* 1927.

K. L. S. V. E. Annamalai Chetty - - - - - *Appellant*

v.

K. L. S. V. E. Subramanian Chetty 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 9TH NOVEMBER, 1928.

Present at the Hearing:

LORD BUCKMASTER.
LORD SHAW.
LORD BLANESBURGH.
SIR JOHN WALLIS.

[*Delivered by* LORD BUCKMASTER.]

The appellant claims that he, his brother the first respondent, and his brothers' two minor sons who are the second and third respondents, together form a joint and undivided family governed by the *Mitakshara* law as administered in Madras, and consequently that a half share of a dwelling house and certain other property in the possession of the first respondent are joint estate. That the family is a joint family and that it still remains undivided is not in dispute; the real question is whether there exists any joint property in which the appellant would be entitled to share. The appellant and the first respondent are the sons of one Vairavan Chetty, who is stated in the evidence to have died in 1883, but is found by the Court to have died in 1886; the statement in the evidence may be a misprint, or it may be a misunderstanding—1886 appears to have been accepted as the date of his death. Apart from the two brothers the father left him surviving a widow and two daughters, but the only property which it is

established that he possessed was a share or interest in a house along with his brother, and certain funds in respect of which the first respondent received Rs. 1129.1.6 on the 6th March, 1899, and Rs. 580.11 on the 18th June, 1905. Beyond this and some vague reference about jewellery belonging to the widow, there is no evidence that he left any property at all. The first respondent was born in 1873 and was a lad of 13 years when his father died. The appellant was a mere child. In 1887 by a document which settled a dispute as to the division of the house, Rs. 220 was fixed as the price of the share of the father and this sum is stated in the award to have been paid to the first respondent. In 1888 a site for a new house was bought for Rs. 300 and upon it in 1890 a house was built, and was further enlarged in 1905. The house is now of considerable value and it is one of the items in which the appellant claims a half share. The appellant's brother appears from the earliest time to have engaged actively in business on behalf of money lenders, and ultimately became a partner in some money-lending firm. The appellant originally claimed a share in the money so earned upon the ground that the business had been implemented from a nucleus of joint family estate. It is sufficient to say that, apart from the fact that the initials of the firm's name under which the first respondent trades is V. E. S. P. L., which is alleged to be a combination of V. E., denoting the father of the parties and S. P. L. the firm of N. A. S. P. L., there is no evidence whatever to warrant this claim, and their Lordships agree with the High Court in thinking these letters are an unsafe guide. A member of a joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate. That part of the claim therefore wholly fails.

So also in their Lordships' opinion does the claim in respect of the two sums of 1,129 and 580 rupees. The account furnished, showing expenditure of moneys approximately equivalent to these sums after their receipt, is sufficient at this lapse of time to discharge the respondent from any further obligation in respect thereof. The real difficulty is with regard to the house. Of direct evidence that its site was acquired or its structure built out of joint estate there is absolutely none. This is not surprising; the transaction took place forty years ago when the appellant was a mere child, and there seems no contemporary witness who had knowledge of the facts. It is, of course, true that the amount received for the share of the original family house is very near to the sum used for the purchase of the new site, and it is likely also that a sum available out of joint estate would have been used for this purpose. Beyond this it is impossible to go.

Now the family appears to have had no money and their needs must have been urgent for the widow had herself and three little children to look after apart from the respondent. It is just

as reasonable to suppose that the money was required and used for present necessities as that it was kept for twelve months and then with some slight addition used to purchase a new site. The matter is, however, complicated by further considerations; the new site is said to have been bought in the name of the first respondent. This is indeed accepted by the appellant, though the proper evidence of the fact is not forthcoming and it is difficult to see where the respondent acquired the money to enable him to make such purchase for himself. The account he gives is a striking one. He says that from 1885 to 1888 he had been away serving as an apprentice, and at the end received 500 rupees as a present out of which he purchased the site. The learned Subordinate Judge thought that his evidence was unsatisfactory and their Lordships necessarily attach much weight to such an opinion, but one of the reasons for doubting his evidence appears to their Lordships to be slender. The learned Judge says :—

> "The first defendant says he paid Rs. 300 out of this amount for effecting purchase of the site. He has undoubtedly given unsatisfactory evidence in regard to this matter. He would at one time state he brought all the Rs. 500 home from foreign parts when he returned and another time assert that he had deposited part of this amount (400 rupees) in S.S.A. firm and had drawn upon it for purchase moneys by means of a hundi from here. As the plaintiff's Vakil put it, this hundi is important evidence for showing from whom moneys were drawn and why the same was required, and one would expect that, after moneys paid out, the hundi will have been reclaimed and secured as part of the title-deeds appertaining to the site purchased."

It seems quite possible that a man might say he had brought home 500 rupees when in fact 400 were owing to him from a responsible firm, and the consideration that the *hundi* by means of which this sum was drawn was not produced does not seem convincing since it was not the *hundi* by which the purchase money was paid, but it was the means by which the respondent was put in funds to pay the price. Even if it were originally kept the effect of its non-production is weakened in effect by the lapse of time. The statement that it is incredible that the respondent was in service for three years before 1888 is more difficult, but in 1886 he appears to have been regarded as capable of giving a receipt for money, and in 1888 a conveyance is made in his name; their Lordships are strengthened in thinking that the early maturity of boys in that district does not cause the story to be as incredible as it would be here, since it is indeed accepted by a learned judge having such intimate knowledge of native customs as Mr. Justice Ramesam. In these circumstances their Lordships would greatly hesitate before asserting against his experience their view of what it would be possible or probable for a boy to do in Rangoon. It may be added that the learned Subordinate Judge finds support for his doubt as to the respondents' evidence in the evidence of Annamalai Chetty, and if his evidence were accepted it would afford strong ground for disbelief

in the respondents' tale, but the learned Subordinate Judge concludes his examination of this matter with the following statement :—

> " While I am not prepared to place much faith upon the evidence of P.W. 1, Annamalai, I still do think that first defendant's story of his present of Rs. 500 during a period of apprenticeship is quite unlikely."

Unlikely it may well be, but their Lordships can find no sufficient material to enable them to differ from the High Court in holding it to be true.

If in fact the site was purchased by the first respondent out of his own moneys the rest of the matter becomes reasonably plain, because although there is evidence that the maternal grandfather furnished some of the material and that through him payments of the building were made, yet there is no evidence whatever to displace the defendant's tale that he in fact provided the money, nor having regard to his application to his business is there any reason to doubt that he could have obtained the funds. That the house was occupied by his mother until her death, his sisters until their marriages, and the appellant until he was outcast, is consistent with either view, and is certainly not critical against the respondent. The burden of proving in an action for partition of joint family property that any particular item of property is joint, primarily rests upon the plaintiff. Circumstances may readily cause the onus to be discharged, but in this case their Lordships think that this has not been done and that in the face of direct evidence accepted by the High Court they are not at liberty to speculate as to alternative possibilities. They must accordingly hold that the appellant has failed.

It only needs to be added that in 1905 the appellant sought to mortgage his share of the house. His right to do so was challenged and the mortgage money was returned. Following on that in 1906 he says : " Let the housework also go on, I have no idea at all to live therein," and in 1915 the defendant makes a public notice that the appellant had no power whatever to deal with the house, and it is not till 1919 that these proceedings were commenced. Although time cannot run against a claim to partition joint family estate unless there has been definite exclusion, yet the fact that in 1905 when his right to mortgage was challenged the appellant took no steps, strongly suggests that at that time when evidence might have been more readily available he had no great faith in the value of his claim. It is this that their Lordships think was meant in the High Court by the statement that the claim was stale. For these reasons they think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

K. L. S. V. E. ANNAMALAI CHETTY

v.

K. L. S. V. E. SUBRAMANIAN CHETTY AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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