Supreme Court of India
Ratnam Chettiar & Ors vs S. M. Kuppuswami Chettiar & Ors on 18 September, 1975
Equivalent citations: 1976 AIR, 1 1976 SCR (1) 863
Author: S M Fazalali
Bench: Fazalali, Syed Murtaza

PETITIONER:
RATNAM CHETTIAR & ORS.

Vs.

RESPONDENT:
S. M. KUPPUSWAMI CHETTIAR & ORS.

DATE OF JUDGMENT18/09/1975

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
KRISHNAIYER, V.R.

CITATION:
1976 AIR 1 1976 SCR (1) 863
1976 SCC (1) 214
CITATOR INFO :
F 1979 SC1436 (3,7)

ACT:
Hindu Law-Partition-When may by reopened-Minor coparceners -When partition binding on them.

HEADNOTE:
(1) A partition effected between the members of an Hindu Undivided Family by their own volition and with their consent cannot be reopened unless it is shown that it was obtained by fraud, coercion, misrepresentation or undue influence. In such a case. the Court should require strict proof of facts, because, an act inter vivos cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu Undivided Family which consists of minor coparceners it is binding on the minors also, if it is done in good faith and in a bona fide manner keeping into account the interests of the minors.

(3) But if the partition is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can be reopened after any length of time. In such a case, it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the

partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and movable properties, but the two transactions are distinct and separable, or have taken place at different times, if it is found that only one of these transactions is unjust and unfair, it is open to the court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair. [873D-874B]

In 1940, two brothers, defendants 1 and 5 partitioned their movable and immovable properties by two separate transactions. At that time defendant S had two sons who were minors. They and their minor brothers filed a suit in 1952 for cancellation of the partition and for re-opening it on the ground that the partition was unjust and unfair and had the effect of depriving the minors of their legal shares in the properties. The trial court passed a preliminary decree for re-partition of the movable properties as it was ex-facie unjust and unfair and directed appointment of the Commissioner to go into the valuation of the assets sought to be partitioned while holding that the partition of immovable properties was neither unjust nor unfair. In appeal, the High Court agreed with the findings of the trial court but set aside the direction of the trial court for the appointment of Commissioner; quantified the value of the disparity in the share of the plaintiffs and passed a decree to the extent of 2/5th share of Rs. 17.700. In appeal to this court, passing a decree for a sum of Rs. 46,500/- with future interest in modification of the High Court's decree,
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HELD: (1) The division of immovable properties was just fair and equal. The properties were not actually valued according to the market rate and only a notional valuation had been given in the partition deed; but, in view of the detailed examination by the two courts of the facts regarding capitalised value of the properties allotted to the two brothers, it could not be said that the partition of the immovable properties was either unfair or unjust. This court will not interfere with concurrent findings of the fact given by the courts below in the absence of any extraordinary or special reasons. [868E-F; 869B-C]

2(a) But a perusal of the schedules to the partition deed relating to movable properties shows an ex-facie disparity of about Rs. 10,000. [874B]

(b) Further, the evidence disclosed that a sum of Rs. 55.000 with defend ant 1, was agreed upon between the brothers to be divided later, but this
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amount was not included in the partition deed. Assuming that defendant 5 had not taken any objection, since the amount was very large, his Silence or his acquiescence in allowing his elder brother to swallow the amount was not a prudent

act and has caused serious detriment to the interests of the minors which he had to protect because. he and his minor sons were member of an Hindu Undivided Family. [870H-871B]

(c) Taking these two sums into account and calculating the plaintiff's share in 1940 and adding interest thereon till date of decree, the plaintiffs would be entitled to Rs. 46,500. [874D-E]

(d) The High Court was right in holding that it would not be in the interest of the minors or. Of justice to order the appointment of a Commissioner for re-opening the entire partition when the shares of the plaintiffs are easily ascertainable in terms of money and can be quantified. [874C-D]

Bishunodeo Narain and v. Seogeni Rai and Jagernath. [1961] S.C.R. 548. 556, followed. -

Devarain and ors. v. Janaki Ammal and Ors. C.A. No. 2298 of 1066 dated r March 20, 1967, Lal Bahadur Singh v. Sispal Singh and ors. T.L.R. 14 All 498; Chanvira 'Pa' v. Da 'Na' 'Va' & ors. I.L.R. 19 Bom. 593 and Maruti v. Rama I.L.R. 21 Bom. 333. referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 685 Form the Judgment and order dated the 22nd November, 1963 of the Madras High Court in Appeal Nos 329 and 468 of F. S. Nariman, A. Subba Rao, R. V. Pillai and P. Ramaswami, for the appellants.

M. Natesan, P. S. Srisailam and M. S. Narasimhan, for L.rs. Of respondent no. 1 and respondents 2 and 3.

The Judgment of the Court was delivered by . FAZAL ALI, J.-This is the plaintiffs' appeal against the Judgment of the High Court of Madras dated November 22, 1963 by certificate. The appeal arises out of a partition suit filed by plaintiffs Nos. 1 to 4 for concellation of partition made between the father of the plaintiffs who is defendant No. 5 and defendant No. 1 the elder brother of defendant No. 5. It appears that as far back as May l, 1940 the two brothers, namely S. M. Kuppuswami Chettiar defendant No. 1 and S. M. Ranganatham Chettiar defendant No. S, who were originally members of Undivided Hindu Family partitioned their shares by virtue of a registered partition deed dated May 10, 1940. At the time when the partition was made plaintiffs Nos. 2 to 4 were minors and defendant No. 3 was also a minor. Under the partition deed both immovable and movable properties were divided between the two brothers voluntarily through the aid and assistance of D.W. 3 K. Narayanswami who was the family auditor of defendant No. 1 and was his friend and adviser. The partition deed with respect to the immovable properties is Ext. B-l which appears at pp. 243-248 of the Paper Book. Under the partition deed two Lists were prepared itemising the properties which were to go to the two brothers. The list of properties is contained in Ext. B-115 of the Paper Book. As regards the movable properties it appears that the partition had taken place a month earlier i.e. On April 12, 1940 and the partition deed is Ext. B-3, which consists of two Schedules-Schedule A and

Schedule B-movables mentioned in Sch. A were allotted to the defendant No. 1 and those contained in Sch, were allotted to the share of defendant No. 5.

The plaintiffs' case was that the two brothers who were members or the Undivided Hindu Family along with the plaintiffs and other minor coparaceners betrayed the interests of the minors and the division made between them was both unjust and unfair and had the effect of depriving the minors of their legal shares in the properties the lion's share having fallen to the lot of elder brother defendant No. 1 S. M. Kuppuswami Chettiar hereinafter referred to as 'S.M.K.'. The plaintiffs? father who is defendant No. 5 being a person of weak intellect did not care to protect the interests of the minors and he accordingly accepted any share that was allotted to him without any objection. Defendant No. 5 S. M. Ranganathan Chettiar would be hereinafter referred to as 'S.M.R.' Plaintiffs also alleged that the partition was secured by practising fraud and undue influence and by suppressing large assets belonging to the family which were taken by defendant No. I by taking advantage of the weakness of the plaintiffs' father.

We might mention at the outset that Mr. F. S. Nariman the learned counsel for the appellants did not at all press the plea of fraud and undue influence taken by the plaintiffs before the Trial Court and confined his arguments only to the allegation that the partition offered between the two brothers S.M.K. and S.M.R. was on the very face of it unjust and unfair and detrimental to the interests of the minors. The plaintiffs also laid claim to a sum of Rs. 10,000/- from the cash deposit which is said to have been given to the mother of defendants 1 & 5 but this claim was not pressed before us ill the course of the arguments. Other minor claims which were also made before the Trial Court were not pressed before us.

The suit was resisted by defendant No. 1 S.M.K. and his major sons defendants 1 and 4 and a minor son defendant 3 who however attained majority during the pendency of the suit before the Trial Court. We might also mention here that plaintiffs Nos. 2 to 4 sons of S.M.R. were also minors at the time when the suit was filed but plaintiff No. 2 attained majority on October 3, 1958 just about a month and a half before the judgment in the suit was delivered by the Subordinate Jude, Coimbatore. The defendants stoutly denied the allegations made by the plaintiffs and averred that there was absolutely no disparity in the division of the properties, that no fraud' or undue influence had been practised, that the properties were divided between defendants I and 5 with the explicit consent of defendant No. 5 and that the division of the properties would show that the partition was neither unjust nor unfair, both parties having taken equal shares in the immovable and movable properties. A number of other pleas was also raised by the defendants, but it is not necessary for us to deal with them in view of the points pressed before us by the learned counsel for the appellants.

The Trial Court framed as many as 18 issues and after considering the oral and documentary evidence produced before it held that so far as the partition of the immovable properties was concerned which was done by sparate document and was clearly severable from the partition of the movable properties, the partition was neither unjust nor unfair so as to entitle the minors to re-open the partition after a long period. The learned Trial Judge, however, was of the opinion that so far as the partition of movable properties was concerned it was ex facie unjust and unfair and the plea of the plaintiffs for re-opening the same must succeed. The Trial Court accordingly passed a

preliminary decree for re-partition of the movable properties and directed the appointment of a Commissioner to go into the valuation of the assets sought to be re-partitioned.

Both the plaintiffs and the defendants filed separate appeals before the High Court of Madras. The plaintiffs filed an appeal before the high Court against that part of the decree which dismissed their suit for re-opening the partition of the immovable properties., while the defendants filed an appeal against the decree of the Trial Court directing reopening of the partition of movable properties and thus decreeing the plaintiffs' suit to that extent. The High Court decided both the appeals by one common Judgment dated November 22, 1963 and by upholding the findings of the learned Subordinate Judge, Coimbator, the High Court made a slight variation in the decree by setting aside the directions of the Subordinate Judge for the appointment of a Commissioner and by quantifying the value of the disparity in the share of the plaintiffs the High Court passed a decree to the extent of 2/5th share of Rs. 17,700/. The plaintiffs alone have filed the present appeal against the judgment and decree of the High Court after obtaining a certificate from that Court.

Before going into the merits of the case, it may be necessary to mention a few unique aspects of the present case. It would appear from the findings arrived at by the two courts that defendant No. 1 was undoubtedly an honest man and defendant No. S the younger brother appears to be an idealist-a person to whom the value and prestige of the family was a consideration much above mundane monetary matters. Secondly, the partition between the two brothers was voluntarily made about 35 years ago and the father of the plaintiffs had most willingly and with good grace accepted the partition and the shares that were allotted to him. Thirdly, since a very long time had elapsed since the partition took place, it would be well nigh impossible for any court to determine the value of the assets, some of which might have disappeared, others may be shrouded in mystery, and for determining the rest the necessary data may not be available. It appears to us to be too late in the day in 1975 to appoint a Commissioner in order to go into a situation which existed-in 1940 and the to pass a decree which may result in a fresh spate of litigation for another decade. It was possibly this consideration which weighed with the High Court in quantifying the amount of the share of the plaintiffs which they had suffered under the division of the assets. Finally, the plaintiff's father defendant No. 5 was a shrewd business and after his elder brother had suffered from some illness, he was carrying on the business of the family a few years in before the partition. Both the parties were assisted by an Auditor Mr. K. Narayanswami in effecting the partition by metes and bounds. In these circumstances, therefore, there could be no question of practising any fraud or undue influence as alleged by the plaintiffs and if the partition was unjust or unfair to the minors it was merely because defendant No. 5 made an error of Judgment with respect to some properties. Lastly, we have not been able to find any material to justify the conclusion of the High Court that the difference in the allotment of the shares to the plaintiffs would be 2/5th of Rs. 17,700/-.We shall deal with this point a little later and show that the difference is much more.

Mr. Nariman learned counsel for the appellants submitted two points before us. In the first place, he assailed the partition of the immovable properties on the ground that no valuation of the properties was fixed according to the market value and that the plaintiffs were not given any share in the agricultural properties. As regards the movable properties it was argued that the division was wholly unjust and unfair because the lion's share was taken by defendant No. 1 and the choice made by

defendant No. S the father of the plaintiffs was neither wise nor prudent and was extremely detrimental to the interests of the plaintiffs. As an instance of the unfairness of the partition Mr. Nariman pointed out that a comparison of Schedules A and of Ext. B-3 would show that defendant No. 1 was allotted movable properties worth Rs. 1,10,274-2-6, whereas defendant No. 5 was given properties worth Rs. 90,142-4-0 there being a difference of about Rs, 20,000/odd. He also pointed out that shares of Lakshmi Textile Mills were allotted to defendant No. 1 which were extremely valuable and gave very rich dividends, where as defendant No. S was allotted the shares of Lakshmi Sugar Mills which was one of the sick Mills running at a loss whose dividends were insignificant. We shall consider this contention raised by counsel for the appellants a little later.

The learned counsel appearing for the respondents Mr. Natesan, however, submitted that the present suit is frivolous and has been filed only with a view to harass the defendants and to re-open a partition which was both just and equitable and which was entered by both the brothers with their eyes open and with the aid of their financial expert. Learned counsel for the respondents, further submitted that there is no reliable evidence to show that there was any cash deposits of Rs. 65,000- as mentioned in Sch. B, and if there was one it would have been divided on the spot instead of being postponed to a future date. Similarly it was submitted that so far as the shares are concerned they were chosen by defendant No. S himself and their valuation was equal.

As regards the immovable properties we find ourselves in complete agreement with the arguments of the learned counsel for the respondents that the partition of these properties was fair and just and there is no material on the record to show that the partition worked in any way injustice or was detrimental in any way to the interests of the minors; In this collection we might try to illustrate our point from the findings of the Trial Court regarding the valuation of the immovable properties divided between the two; brothers. The partition of immovable properties Ext. B- 1 which appears at pp. 243 to 248 of the Paper Book consists of to Schedules A & B. The Trial Court has, after careful consideration of the evidence, very scientifically itemised the properties allotted to each of the brothers and the value of those properties. For A instance, item 1 of Sch. allotted to defendant No. 1 is a tank-fed nanja land is Kurichi village measuring 3.80 acres and has been valued at Rs. 4,000/-. Item 2 is a similar land in village Kurichi which is self- cultivated and has been valued at Rs. 7000/-. Thus [he total value of items 1 and 2 of Sch. A comes to Rs. 11,000/-. As against this defendant No. 5 was allotted item 2 of Sch. which on the basis of capitalised value at the rate of Rs. 601/- per month has been fixed at Rs. 14,000/-. Items 1 & 2 of Sch. A are the only agricultural properties possessed by the family and the Trial Court has rightly pointed out that whereas defendant No. 1 took the agricultural properties, defendant No. 5 got urban properties not only of the same value but of a higher value. Similarly item No. 3 of Sch. A allotted to defendant No. 1 is a house in the Big Bazaar Street and has been valued at Rs. 16,50/-. As against this the family house in the Oppanakkara Street has been allotted to defendant No. 5 whose value is much more than item No. 3 of Sch. A. The capitalised value of the family house in the oppanakkara Street on the basis of rental of Rs. 700/- per month would come to near about Rs. 96,000 . Item 4 of Sch. A is a house and site in Ramanathapuram and has been valued at Rs. 7,000/- because it was purchased in 1938 for a sum of Rs. 5,650/- vide Ext. B-139 dated March 6, 1938. The learned Subordinate Judge has roughly put the valuation of the said house and site at Rs. 7,000/- in 194(). As against this item 3 allotted to defendant No. 5 is a shop building in the Big Bazaar Street carrying a rental of Rs. 300/- per month

at the time of the partition whose capitalised value would be Rs. 7,000/-. Item No. 5 of Sch. A which was allotted to defendant No. 1 has been valued at Rs. 2,300/- representing the purchase price of the property mentioned in Exts. B-140 to B-142. As against this item 4 of Sch. which has been allotted to defendant No. 5 was purchased for a sum of Rs. 2,100/-. It would thus appear that the division of immovable properties is just, fair and equal. It is true that the properties were not actually valued according to the market rate and that a notional valuation had been given in the partition deed. But in view of the detailed examination by the two Courts of the fact regarding capitalised value of the properties allotted to the two brothers it cannot be said that the partition of immovable properties was either unfair or unjust or in any way detrimental to the interests of the minors. After considering the evidence., the Trial Court found as follows:

> "It is thus found from the available evidence that there was no unfairness or inequality in the partition of the immovable properties effected under Exhibit B-1 and that no ground exists for reopening that partition."

The High Court upheld the findings of the Trial Court in these words:

> "Thus in regard to the division of the immovable proper ties it is not possible for us to say that there was unfairness or fraud or irregularity in the allotment of the properties between the brothers. The scheme of the division of the immovable properties seems to us to be fair and we cannot say that the plaintiffs' father (5th defendant) acted against the interests of his sons or that the 1st defendant took any advantage of his position as the eldest member of the family and allotted to himself the best among the properties available for division. We there fore confirm the finding of the learned Subordinate Judge that the partition of the immovable properties effected under Exhibit B-1 is binding on the plaintiffs and that the plaintiffs are not entitled to reopen the partition."

It is a well-settled practice of this Court not to interfere with a con current finding of fact given by the two Courts below in the absence of any extra-ordinary or special reasons. In the instant case we hold that the finding of the l High Court as well as of the Trial Count based on a full and complete consideration of the evidence both oral and documentary and an elaborate and meticulous discussion of all the surrounding circumstances. We, therefore do not feel inclined to interfere with this concurrent finding of fact which is hereby affirmed.

We might state that the objection regarding the properties not having been properly valued falls to the ground when we find that instead of notional value mentioned in the partition deed which is Rs. 12,517-13-0 for defendant No. l and Rs. 12,000/- for defendant No. S the capitalised value of the items allotted to the two brothers either on the basis of their purchase price or on the basis of the rent fetched by them is almost equal. The first contention regarding the partition of immovable properties raised by the learned counsel for the appellants being unfair and unjust must therefore be overruled.

We now come to the question of the division of movable proper ties. In this connection our attention was drawn by Mr. Nariman to Ext. E-3 which is to be read along with the pencil note of K. Narayana swami D.W. 3, who was the auditor of Defendant No. 1 himself. Exhibit B-3 is the partition deed of movable properties consisting of shares, deposits, promotes, mortgage deeds and cash, particulars of which are given in Schs. A & B. Movable properties mentioned in Sch. A were allotted to defendant No. 1 and those mentioned in Sch. B, were allotted to defendant No. 5 father of the plaintiffs. It will appear from a plain examination of the two schedules that whereas defendant No. 1 admittedly got properties worth Rs. 1,10,274-2-6 defendant No. 5 got properties only worth Rs. 90,142-4-0 there being a clear disparity of Rs. 10,000/- because the share of each of the two defendants would be Rs. 1,00,2081-. On the defendant No. 1's own documents, therefore? it is clear that a loss of Rs. 10,000/- was caused to defendant No. 5 in the year 1940 and the share of the plaintiffs in this loss would be 2/5th i.e. about Rs. 4,000/- which would swell into a large amount if we add interest for all these 35 years. That apart the learned counsel for the appellants has submitted that the document Ext. B-3 deliberately omits to mention a sum of Rs. 65,000/- which was a cash deposit alleged to have been kept in the safe and out of which Rs. 10,000/- were agreed to be given to the mother of the two brothers and the rest, viz. Rs. 55,000/- were to b divided between the two brothers, each defendant getting Rs. 27,500/-. This is undoubtedly proved by Ext. A-2 where these figures are clearly mentioned. Entry No. l of Ext. A-2 runs thus:

	Total	Settlement	S. M. K.	S. M. R.	
(1)	(2)	(3)	(4)	(5)	(6)
Thanichontham					
			65,000	55,000	27,500
27,500					
Belonging exclusively-					

*Scored out in pencil.

This cash amount of Rs. 65,000/- is denied by defendant No. 1 and it is said that this amount might have been hidden money which never came to the share of the parties. D.W. 3 K. Narayanaswami has positively admitted in his evidence that he had made this entry in his on hand-writing but he scored out this entry as the amount was not available. Both the Suborclinate Judge, Coimbatore and the High Court have accepted the explanation given by D.W. 3 Narayanaswami although the explanation appears to us to be prima facie false and unconvincing. Even assuming that this entry was made due to some mistake and had to be scored out, we cannot believe that a person of the expert knowledge and status of D.W. 3 Narayanaswami Iyer the Auditor would forget to make a corresponding correction in the total amount which is given below the statement of account signed by him. If the amount of Rs. 65,000/- was scored out, then the total would be Rs. 200116/- in-Ext. A-2, but the total shown in pencil in Ext. A-2 is Rs 2,65,116/- which completely demolishes the case of defendant No 1 and the explanation given by D.W. 3 that the entry was made due to some mistake. The Courts below have however, relied on a number of circumstances which are purely of a speculative nature, in order to hold that the plaintiffs have not been able to prove the existence of the cash amount of Rs.65,000/-. One of the circumstances was that according to the evidence of defendant No. 5 the amount of Rs. 65,000/- was taken out from the safe and counted in the presence of defendants 1 and 5 and yet defendant No. 5 did not care to divide it at that time into two equal parts, nor did he insist on the same. Defendant No. S has, however, given an explanation that

as his elder brother wanted that this money should be divided later he did not want to join issue on the subject and trusted his elder brother. A perusal of the evidence of defendant No. 5 clearly shows that he is an extremely emotional sort of a person who believes in the respect of the family above all consideration. It is., therefore, not unlikely that defendant No. 5 quietly accepted the advice of his elder brother to divide the amount later on. It was however argued by the learned counsel for the respondents that defendant No. 5 was a shrewd business-man having managed the family affairs for quite some time and if such a huge amount was concealed from him by his elder brother he would have undoubtely raised objection at any time before the suit. This conduct of defendant No. 5 cannot, however, put the plaintiffs out of court. He had decided to abide by the advice of his elder brother and if he thought that his elder brother did not want to divide the amount of Rs. 65,000/- he kept quiet which is quite in consonance with the character of this man as revealed in his evidence and the circumstances of the case. Assuming however that defendant No. 5 did not take any objection, as the amount was very huge the silence of defendant No. 5 or even his acquiescence in allowing his elder brother to swallow this amount was not a prudent act and has caused serious detriment to the interests of the minors which he had to protect, because the minors at that time were members of the Hindu Undivided Family. In view of these circumstances, therefore, we are satisfied that the plaintiffs' case regarding the deliberate suppression of the cash amount of Rs. 65,000/- has been proved and if this amount would have been available to defendant No. 5, then the plaintiffs would have got 2/5th share of Rs. 55,000/-, (Rs. 10,000/- reserved for the mother) viz. Rs. 27,500/-, as far back as 1940. The argument of Mr. Nariman on this point is, therefore, well-founded and must prevail.

The only other point that was stressed before us by the learned counsel for the appellants was that the Trial Court was right in ordering the appointment of a Commissioner for going into the assets of the movable properties, particularly the question of the shares of the Lakshmi Mills. We are, however, unable to agree with this argument. Mr. Natesan learned counsel for the respondents has drawn our attention to some important documents to show that the shares were equaly divided between defendants Nos. 1 and 5 and were actually chosen by defendant No. 5 with his eyes open. Exhibit B-153 which is a share market report dated April 5, 1940 shows that the paid up value of each share of Lakshmi Sugar Mills was Rs. 50 but the current price of the share at that time was Rs. 41/8/- i.e. it was Rs. 8/8/- below the paid-up value and the dividend paid on the share was only Rs. 9/- yearly. It was, therefore, suggested by counsel for the respondents that defendant No. 5 was given the choice to take the shares of the Lakshmi Mills or the Lakshmi Sugar Mills and in view of the low market rate of the Lakshmi chose to take the shares of the Lakshmi Sugar Mills to the extent of Rs. 10,000/. In lieu of the shares of other Mills defendant No. 5 took a cash amount of Rs. 13,000/- as would appear from Ext. B-3. It is true that the shares of Lakshmi Textile Mills went up enormously a few years later in view of the international war situation in the continent but defendant No. 5 could not have foreseen such a contingency and if he had made the choice which he thought would be beneficial to the interests of the minors his conduct would have been at best an error of judgment which would not be sufficient to reopen the choice made by him.

Mr Nariman, however, strenuously relied on the evidence of D.W. 3 Narayanaswami Auditor which was to the effect that he expressed great surprise when defendant No. 5 chose the shares of Lakshmi Sugar Mills and in his opinion that was his foolish act. This is, however, a matter of opinion but the

fact remains that the market report of the Lakshmi Mills was not encouraging and therefore there was some justification for defendant No. 5 for not opting for the shares of the Lakshmi Mills. In these circumstances we hold that so far as the shares of the various Mills were concerned there was no unjust or unequal distribution between the parties. This item of movable properties, therefore, was correctly divided between the parties.

Learned counsel for the respondents submitted that taking a broad view of the whole case the Court should hold that it was not a case of unfair or unjust partition, because both defendant Nos. 1 and 5 were persons who had shrewd business experience and had voluntarily accepted the partition of the properties which was by and large equal. The learned counsel relied on the decision of this Court in Devarajan and Ors. v. Janaki Ammal and Ors(1) where this Court observed as follows:

> "Generally speaking, a partition once effected is final and cannot be reopened on the ground of mere inequality of shares, though it can be reopened in case of fraud or mistake or subsequent recovery of family property: [see Moro Vishvanath v. Ganesh Vithal (1873) 10 Bom. H.C.R. 444]. Further an allotment bona fide made in the course of a partition by common consent of the coparceners is not open to attack when the shares are not absolutely equal, or are not strictly in accordance with those settled by law. It is true that minors are permitted in law to reopen a partition on proof that the partition has been unfair and unjust to them. Even so, so long as there is no fraud, unfair dealing or over-reaching by one member as against another, Hindu law requries that a bona fide partition made on the basis of the common consent of coparceners must be respected and is irrevocable:"

It was submitted that the evidence and circumstances of the case clearly show that there was no inequality of shares and the plea of fraud or mistake has not been accepted by the courts and that on the whole the partition was bond fide. It is true that if this was the position the ratio of the decision in Devarajan's case (supra) would undoubtedly apply to this case. But this Court had taken care to point out in these very observations which are underlined by us that this rule did not apply to the minors who are undoubtedly permitted in law to reopen the partition once it is proved that the partition was unfair or unjust to them. In view of the concurrent finding of fact of the two Courts below that the partition of movable properties, excepting those with respect to the shares, was unfair and unjust, even according to the decision mentioned above the partition with respect to the movable properties has to be reopened.

Moreover in an earlier decision of this Court in Bishundeo Narain and Anr. v. Seogeni Rai and Jagernath it was observed:

> "It is well established that a minor can sue for partition and obtain a decree if his next friend can show that that is for the minor's benefit. It is also beyond dispute that an adult coparcener can enforce a partition by suit even when there are minors. Even without a suit, there can be a partition between members of a joint family when one of the members is a minor. In the case of such lastly mentioned partitions, where a minor can never be able to consent to the same in law, if a minor on attaining

> majority is able to show that the division was unfair and unjust, the Court will certainly set it aside."

In our opinion the present case falls within the ratio laid down by the decision cited above.

Apart from that there are numerous authorities which have sonsistently held that where a partition is unjust and unfair and detrimental to the interests of the minors the partition would be reopened irrespective of the question of bona fides. In Lal Bahadur Singh v. Sispal Singh and Ors.(1) it was observed that even though the ground of fraud and mistake failed, the partition which affected the interests of the minor could be reopened. Similarly in Chanvira 'Pa' v. Da 'Na' 'Va' & Ors.(2) a Division Bench of the Bombay High Court held that a partition will be binding on the minors only if it was just and legal, but if it was made and finalised there being no means of testing the validity of the assets the partition was not final. The same view was taken in Maruti v. Rama(3) Thus on a consideration of the authorities discussed above and the law on the subject, the following propositions emerge:

> (1) A partition effected between the members of the Hindu Undivided Family by their own volition and with their consent cannot be reopened, unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the Court should require a strict proof of facts because an act inter vivos cannot be lightly set aside.
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> (2) When the partition is effected between the members of the Hindu Undivided Family which consists of minor coparceners it is bindig on the minors also if it is done in good faith and in bona fide manner keeping into account the interests of the minors.
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> (3) Where, however a partition effected between the members of the Hindu Undivided Family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened whatever the length of time when the partition took place. In such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.
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> (4) Where there is a partition of immovable and movable properties but the two transactions are distinct and separable or have taken place at different times. If it is found that only one of these transactions is unjust and unfair it is open to the Court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair.

The facts of the present case, in our opinion, fall squarely within propositions Nos. (3) and (4) indicated above.

In the instant case we find from a perusal of the two schedules 'A' and 'B' of Ext. B-3 that there has been ex facie a disparity of about Rs. 10,000/- to which must be added Rs. 27,500/- which we have discussed above. Thus the total disparity comes to Rs. 37,500/- and the share of the minor plaintiffs would be 2/5th which comes to Rs. 15,000/-. This amount of Rs. 15,000/- should have been available to the minor plaintiffs as far back as 1940 when the partition was made and they have been deprived of that amount ever since. We find that in the peculiar facts and circumstances of the case as already stated it will not be in the interests of the minors nor conducive in the interests of justice to order the appointment of a Commissioner for reopening the entire partition when the shares of the minor plaintiffs are easily ascertainable in terms of money and can be quantified. In these circumstances we think the best course is to determine the money value of the share of the plaintiffs and to pass a decree for the same which will protect the minors from protracted litigation which might follow the passing of a preliminary decree. This was the approach made by the High Court but we do not agree with the amount quantified by it. If we add interest at the rate of 6% per annum as prayed for in the plaint on the amount of Rs. 15,000/-,the interest calculated at this rate for 35 years from 1940 to 1975 would come to Rs. 31500/-. Thus the total amount payable to the plaintiffs comes to Rs. 46,500/- .

We, therefore, allow the appeal in part and modify the decree of the High Court to the extent that there will be a decree for a sum of Rs. 46,500/- in favour of the plaintiffs/appellants which represents their share of the movable properties of which they were deprived of. The plaintiffs would be entitled to future interest at the rate of 6% per annum till payment. In the circumstances of the case, there will be no order as to costs. This course, in our opinion, safeguards the interests of the minors to give them their just due and to protect them from a protracted and fruitless litigation.

V.P.S. Appeal partly allowed.