Andhra High Court
Katragadda China Anjaneyulu And ... vs Kattragadda China Ramayya And ... on 10 August, 1964
Equivalent citations: AIR 1965 AP 177, 1965 (1) AnWR 159
Author: C Reddy
Bench: P C Reddy, M Pershad, C Sastry, Narasimham, G R Ekbote
JUDGMENT Chandra Reddy, C.J.

(1) The decision of this appeal mainly turns on the interpretation of the document marked as Ex. A. 1 in the case and the consequences that flow from it.

(2) The facts which are not in dispute and which have a material bearing on this enquiry may be shortly narrated. One Katragadda Chinna Ramiah, who figures as the first defendant in this litigation, his son, Nageswara Rao and the latter's only son, Pedda Anjaneyulu constituted at the relevant time an undivided Hindu family governed by the Mitakshara school of Law. Negeswara Rao was an improvident person incurring debts indiscriminately and in respect of which his creditors were pressing him. To avoid involving himself in greater difficulties on his account, he executed a document religuishing his interest in the joint family properties in favour of his father and son. It is convenient to read here the operative portion of the document. It recites :

"I have for the benefit of you the members of our joint family and the male issue that may be born to me hereafter, relinquished the entire right, title and interest possessed by me in the moveable and immovable properties as well as assets and liabilities of our joint family, and executed and delivered this release deed in your favour creating in your favour all absolute right, title, possession and interest. I have hereby reliquished the right, title and interest possessed by me in the entire movable and immovable properties as well as the assets and liabilities properties as well as the assets and liabilities of our family. The male issue that may be born to us hereafter shall, according to Hindu law, enjoy the same with all absolute rights of gift, transfer, exchange and sale, bearing all the liabilities in respect thereof."

(3) It is thus seen that Nageswara Rao is clear and unequivocal terms had renounced his interest in the joint family properties in favour of the persons mentioned there.

(4) Sometime later, a creditor of Nageswara Rao laid an action on the foot of promissory note in the Court of the District Munsif, Tenali, adding his son and father as defendants 2 and 3 respectively. In that suit defendants 2 and 3 were ultimately exonerated but a decree was passed against Nageswara Rao personally. In execution of that decree the decree-holder proceeded against the family properties. The father and son of Nageswara Rao i.e., Chinna Ramaiah and Pedda Anjaneyulu, intervened with claims on the objection that that these properties were not liable to be proceeded against. The executing court, while releasing the halfshare of Chinna Ramaiah, sustained the attachment as regards the half share of Pedda Anjaneyuly being of opinion that the prepartition debts of the father could be recovered from the properties that fell to the share of the son. Family, when the matter reached the High Court of Madras, the appeal of Pedda Anjaneyulu was accepted. It was ruled by the Full Bench of that Court to which the matter was referred on account of the conflict of the judicial opinion, that the decree obtained against the father alone could not be enforced

against the properties allotted to the share of his son at the family partition. It is worthy of note that the High Court as also the Court below proceeded on the assumption that the relinquishment had resulted in the partition of the joint family properties. The importance of this assumption will appear presently. Mention of this litigation has to be made though it has no immediate relevancy in this enquiry, as it impinges on one of the arguments advanced here.

(5) To resume the narrative, Pedda Anjaneyuly died on 12-10-1949 and this made Chinna Ramaiah the sole surviving co-parcener. A few years later, a creditor of the family obtained decrees against Chinna Ramaiah and in execution thereof attached item 4 of the plaint A schedule and a portion of the B schedule properties. At that juncture, an after-born son of Nageswara Rao filed a petition under Order 21, rule 58 C. P. C. to raise properties. The claim was disallowed except as respects a portion of one of the items attached. Thereafter, these properties were brought to sale and were purchased by third parties.

(6) The first plaintiff then commenced this litigation for partition of the plaint A and B schedule properties into two equal shares and for separate possession of his half share as also to set aside the claim order in E. A. No. 441 of 1955 making his grandfather, the decree-holder and the auction-purchaser as defendants 1 to 5. It was recited inter alia in the plaint that the plaintiffs' father became addicted to vices and was incurring debts therefor, that he was induced by the well-wishers of the family to release his interest in the joint family properties in favour of his father, Chinna Ramaiah, Pedda Anjeneyuly and the children to be born to him in future, that, subsequently. Chinna Ramaiah started a new accused speculative business for which he was contracting debts, that on the advice of Nageswara Rao who by then had reformed himself and who felt that it was no longer beneficial to Pedda Anjaneyulu to live jointly with his grand-father the properties were agreed to be divided into two shares, those set out in Schedule A being allotted to Chinna Ramaiah and the B schedule properties to Pedda Anjaneyulu that the debts incurred by Chinna Ramaiah were not binding on the family and that, on the death of Pedda Anjaneyulu, the plaintiff, who was in his mother's womb, became entitled to the properties that fell to the share of his brother, or, in the alternative, for a half share in the plaint A and B schedule properties. This claim for a half share also rested on the hypotheses that Ex. A-1 was to operate in favour of the releasee's sons to be born in future also.

(7) The 1st defendant offered no opposition to this action. He was willing to have the properties partitioned as prayed for allotting items 1 to 3 of the plaint a schedule and the eastern half of item 4 of the A schedule to the first plaintiff's share and the western half of item 4 of the A schedule and the B schedule property to himself.

(8) The suit was contested by defendants 2, 3 and 5. It is not necessary to set our all the defences. Suffice it to refer to the plea that as the first plaintiff was born only on 29-7-1950, he had not acquired any interest in the properties to which the first defendant became solely entitled on the death of Pedda Anjaneyulu by virtue of the relinquishment deed dated 2-10-1946 and that the order on the claim petition was correct. In addition they denied the partition agreement.

(9) After the filing of the suit, another son was born to Nageswara Rao and he came on record as the second plaintiff.

(10) The trial court dismissed the suit holding that the partition agreement set up in the plaint was not true, that the first plaintiff was not in his mother's womb at the time of the death of Pedda Anjaneyulu and so was not entitled to the benefits of the relinquishment and that he could not claim a fresh partition of the properties.

(11) The other findings of the Court need not be referred to, as nothing turns on them in the view of the effect of Ex. A. 1.

(12) The aggrieved plaintiffs have brought this appeal against the decree and judgment. The matter was first heard by a Division Bench of this Court consisting of two of us (Manohar Pershad and Chandrasekhara Sastry JJ.) The findings of the court below that the first plaintiff was not conceived by his mother by the time of the death of Pedda Anjaneyulu and that the alleged partition agreement dated 14-12-1947 was not true were not challenged before them. However, the conclusion of the trial Court was assailed on the ground that Ex. A 1 evidenced a partition effected between Nageswara Rao, his father and his then only son at which no share was assigned to Nageswara Rao and this enabled his after-born sons to re-open that partition and get their rightful share in the ancestral estate and that even on the basis of the relinquishment which was in favour of the male issues to be born to the releasor they could obtain the relief.

(13) The learned Judge of the Division Bench thought that the determination of the appeal involved several important questions of law which require an authoritative pronouncement and hence referred the appeal to a Full Bench.

(14) When the appeal came up for arguments before three of us (Hon. Chief Justice, Manohar Pershad and Narasimham, JJ). It was urged by Sri Kesava Rao, learned counsel for the appellants that in the earlier litigation alluded to above, a Full Bench of the Madras High Court had construed the release as having the effect of partition which adjudication operates as res judicata, the consequence of which is to invest the subsequently born plaintiffs with a right to claim a redistribution of the family estate since the father had not received his due share therein. As the plea of res judicata was not put forward in the plaint or did not form the subject of any issue and not even debated either in the trial court or before the Division Bench, we indicated that we were not inclined to permit that point to be raised at that stage. We will deal with it fully in its proper context. The learned counsel then fell back upon the argument that, in any event, the prior determination by a Full Bench of the Madras High Court amounted to a Judicial precedent which is binding upon us. As the correctness of that decision was challenged and with justification, we were impelled to direct this matter to be placed before a larger Bench.

(15) Before us, Sri Kesava Rao once again presented the point based upon section 11 C. P. C. We are not persuaded that any special circumstances exist in this case which justify the appellants being permitted to raise that plea at this stage. To invoke the doctrine of res judicata, the ingredients contemplated by section 11 C. P. C. should be satisfied. The court has to see whether the elements

that constitutes res judicata are present in a given case, which means an investigation into the facts bearing upon the several aspects, contemplated by that section. It is not a pure question of law which could be debated at any stage. Prima facie, the present case is excluded from the operation of the principle embodied in Section 11 C. P. C. because the Court which tried the former suit is incompetent to take cognizance of the present action. The former suit which had given rise to the proceedings in execution of its decree was instituted in the District Munsif's Court as the claim involved was within its pecuniary jurisdiction. The present suit which is valued at Rs. 28,000/- could not have been taken cognizance of by the District Munsif. Further, it is difficult to posit that the requirements as to parties or their representatives in-interest or as to the issues involved in both the suits are fulfilled. Moreover the condition as to the matter having been heard and finally decided either actually or constructively cannot be said to have been fulfilled. It cannot also be ignored that neither the pleadings nor the judgment in that matter was exhibited in this case. That being the real position, the appellants cannot be permitted to urge that objection now for the first time.

(16) We are supported in our stand by the pronouncement of Privy Council in Jagadish Chandra Deo v. Gour Har Mahato, AIR 1936 PC 258 which contains the dictum that the plea of res judicata which was not properly raised by the pleadings or in the issues could not be made use of by the party calling in aid at a later stage. Observed their Lordships of the Judicial Committee in that case :

"It seems to their Lordships that the High Court was right in this view, because it was necessary for the appellant, if he were going to make use of the judgment in the suit of 1900 as res judicata to identify the subjects in dispute in the present case with the subjects which in that case were held to belong to the Rajah and not to the tenants."

(17) Sri Kesava Rao cited us another ruling of the Privy Council Shivaraj Gopalji v. Ayyissa Bi, AIR 1949 PC 302 as favouring his submission that the defence of res judicata could be raised even that the defence of res judicata could be raised even in the appellate stage. That pronouncement has no analogy here, since there it was inter alia claimed by the opposite side that the matter was res judicata between the parties. But that plea was not pressed and the trial court observed that even otherwise it was not a valid one. But in an appeal against the decree of the trial court, this defence was revived and it found acceptance with the Division Bench of the Madras High Court which set aside the judgment of the trial court. When the matter finally reached the Privy Council , their Lordships did not dissent from this view of the High Court, since it was a plea in law and was open to the parties to raise it in the lower Court.

(18) The other rulings to which our attention was drawn are not in point and need not be referred to here.

(19) That aside ex facie the conditions as to the competence of the court which disposed of the prior matter to try the present suit is unfulfilled. The other reasons to keep the present suit out of the pale of that section have already been enumerated.

(20) For all these reasons, we hold that the argument founded on Section 11, C. P. C. is unavailable to the appellants.

(21) But still there remains the controversy relating to the effect of that determination. Even if the decision in the prior proceedings does not operate as res judicata, the interpretation of a material document will amount to a judicial precedent. The rule enunciated by the Supreme Court in Sahu Madho Das v. Mukand Ram, 1955 SCJ 417 : ((S) AIR 1955 SC 481) vouches that proposition. The Supreme Court ruled that although the respondent was a party to that litigation and for that reason the decision did not bind him, it should be regarded as a judicial precedent about the construction of the relevant document. Basing himself upon this observation, Sri Kesava Rao submitted that Ex. A. 1 had the effect of dividing the family properties and as the father had not retained a share to himself, it was open to the after-begotten son to have the partition re-opened and to obtain a share for himself.

(22) A reference to the judgment in Chinna Ramaiah v. Venkanraju, relied on by the appellants shows that there was no discussion on the question as to the consequences of the relinquishment evidenced by Ex. A. 1 As already stated, the question referred to the Full Bench was whether a decree against a father alone obtained after partition in respect of the pre-partition debts could be executed against the property that fell to the share of his son on partition. this question no doubt involved an assumption that a division of the joint family had taken place as a result of the release. A subsidiary question that presented itself was whether the renouncer had evinced any interest to separate himself from the family. While answering it in the affirmative, the learned Judge observed that Nageswara Rao had separated himself from the other members of the family, as otherwise the purpose of the document itself would be defeated. Nowhere has it been remarked in the judgment that this renunciation had resulted in the disruption of the joint family.

(23) But the judgment was rendered on the footing that this relinquishment contained in Ex. A. 1 had brought about a family partition. The remarks, which disclose that assumption was made, are as contained at p. 181 of the report (Mad LJ) : (at p. 867 of AIR) and they follows :

"I hold that after partition the decree obtained against the first defendant on the promissory note could not be executed against the properties allotted to the second defendant in the partition effected in the family,"(the reference to the first and second defendants being no Nageswara Rao and Pedda Anjaneyulu respectively.) Again it is stated at p. 184 (of Mad LJ) : (at p. 869 of AIR) of the report :

"I therefore hold that the exoneration of the sons in the suit would not make any difference in the application of the principle, namely, that a decree against the father could not be executed after partition against the properties allotted to the sons' shares."

(24) It is thus seen that foundation for his judgment is the notion that a partition was effected under Ex. A. 1. It is worthy of not in this context that the order of reference to the Full Bench as also the court below made the same assumption.

(25) The question that requires an answer here is whether that assumption is correct and whether Ex. A. 1 has the effect that is attributed to it by the appellants, i.e., whether it could be treated as a deed of partition. We feel that the relinquishment of a share by one of the co-parceners. In favour of

the other members does not alter the status of the joint family. The releasor alone separates himself from the family while others continue as members of an undivided family. Mitakshara treated the estate of co-parceners as held is entirely without recognition of share and defined partition as the adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate. The relinquishment by a co-parcener does not require either the adjustment of diverse rights of the division of wealth in definite portions. It only results in the extinction of his rights in the family properties and his separation from the family. That being so, it cannot be predicted that a relinquishment of his interest by one of the co-parceners in the family estate is tantamount to a partition of the joint family wealth. To put it differently a partition of the family properties involves definement of shares, whereas a release by a member of an undivided family does not require the ascertainment of shares of each of the members though the releasor separates himself. The separation of one member, who renounced his share, does not necessitate a distribution of the joint family property in definite portions. His renunciation merely extinguishes his interest in the estate but does not in any way effect the status of the remaining members quoad the family property.

(26) There is abundant authority for this proposition. In Venkatapathi Raju v. Venkatanarasimha Raju, ILR (1937) Mad 1 at p. 7 : (AIR 1936 PC 264 at p. 267) a member of a Hindu undivided family governed by the Mitakshara law severed his connection with the family, relinquishing his interest therein and went away to another village wherein he settled permanently. After his departure he and his descendants had nothing to do with the joint family. The question arose in a litigation, started by the descendants of one of his brothers, whether the separation of that members of the family. Answering it in the negative, their Lordships of the Privy Council stated thus :-

"It is stated rule that when the members of a family bold the family estate in defined shares, they cannot be held to be joint in estate. But no definement of shares need take place when the separating member does not receive any share in the estate but renounces his interest therein. His renunciation merely extinguishes his interest in the estate, but does not affect the status of the remaining members quoad the family property and they continue to be coparceners as before. The only effect of renunciation is to reduce the number of the persons to whom shares would be allotted, if, and when, a division of the estate takes place."

(27) This principle is adopted by the Supreme Court in Rukhmabai v. Llakminarayan, , speaking for the Court, Subba Rao, J. observed :

"A member need not receive any share in the joint estate but may renounce his interest therein; his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property."

(28) To a like effect are the judgments of the several High Courts, but it is not necessary to cite them here in view of these authoritative pronouncements.

(29) It is plain both on the texts and on decided cases that the departure of one member giving up his interest in the family does not alter the status of the joint family. The others continue to be members of the joint family. If that were the legal position, after the separation of Nageswara Rao,

Chinna Ramaiah and Pedda Anjaneyulu continued to be members of the joint family with the rights of survivorship inter security. On properties had vested in Chinna Ramaiah. It should be borne in mind that at that time even the first plaintiff was not en ventre sa mere.

(30) Now, have the plaintiffs, begotten after the renunciation by their father of his interest in the family property and the death of their brother, acquired any interest in the estate to which their grandfather became entitled by suvivorship? The answer depends upon the precise position of the plaintiffs. It has to be mentioned, at the risk of repetition that Nageswara Rao separated himself from the family and thereafter he had no further share in the property. He could no longer be regarded as a member of the coparcenary. If so, the son begotten after his separation could not claim the status of a co-parcener with the remaining members of the undivided family. He could only be a coparcener with his father, but he could not be added to the original coparcenary, since the necessary nexus for this namely, the membership of his father in the original joint family, is absent. The moment the father got himself separated, that relationship gets snapped and a sons who is not conceived by then cannot be incorporated into the original joint family. An after-born son acquires an interest by birth in the family property only if he is a member of that family and there is ancestral property. The position with regard to the original family is that the share of the deceased coparcener will pass by survivorship to the remaining coparceners. Of course, the position is different is regard to a posthumous son, since he is considered as born for purposes of devolution of property and for certain other purposes under Hindu Law and he cannot be divested by his father of rights which vest in him. This favoured position cannot be accorded to an after begotten son. The rule that such a male issue loses his claim seems to be in consonance with the principle relating to alienations by a father who has no sons either in existence or in embryo. But it should be understood, that we are not equating the relinquishment to an alienation which it is not. It only affords an analogy.

(31) The impact of release of the father on the after-born sons of the renouncer is summed up in Mayne's Hindu Law (Eleventh edition) in these words at page 556 :

"The separation of a co-parcener may be effected by renunciation of his interest in the family property. Yajnavalkya says : "The separate of one, who is able to support himself and is not desirous of partition may be compelled by giving him some trifle." The Mistakshara adds : The male issues of a co-parcener who renounces also lose their claim. But this can apply only to after-born sons unless at the time of renunciation his sons and grandsons are adults and consent to it."

(32) This principle is recognised in Shivaji Rao v. Vasantrao, ILR 33 Bom 267 which bears a close resemblance to the present case. The facts of that case were that one Madhavarao Kashinath who became involved in debts, relinquished his interest in the family properties in favour of his father. At that time, he had a son by name Vasantharao Madhavarao. He filed a suit for partition of certain of certain joint and ancestral properties which was ultimately decreed in the view that the release enured for the benefit of the family and the coparcenary and that consequently Vasantha Rao Madhava Rao was entitled to a share. Subsequently a son was born to Madhavarao Kashinath. He filed a suit claiming a share in the moiety of the ancestral property to which Vasantharao Madhavarao was declared entitled. It was decided by Knight, J. that the plaintiff could not participate in the property as he lost all claim to the ancestral property by reason of his father

separating himself after relinquishing his interest. In the opinion of the learned Judge, there was no known rule or principle which would entitle such a son to claim a share from the co-parcenary and there was no warrant for the extension of the principle that sons with whom the father had made a partition shall give a share to the after-begotten son to the case of relinquishment by the father.

(33) It was argued by Sri Kesava Rao that the Bombay High Court had struck a different note in this regard in a latter case Mahalingayya v. Sangayya, AIR 1943 Bom 397. According to Sri Kesava Rao, this ruling bears out the proposition advanced by him that the plaintiff in the joint family property, although the surviving brother of the renouncer had become entitled to the whole of the property by survivorship and that this decision was based upon the concept that the co-parcenary would not come to an end till the death of the last surviving co-parcener.

(34) A scrutiny of the facts of that case would show that the first plaintiff was not the adopted son of the releasor but that of his brother and that, in fact, what was relinquished was only the management of the property and thus there was no extinction of the interest of that brother. It would thus appear that the family was throughout undivided, there being no separation of any member of the family. Since the undivided state of the family and its legal character as a corporate body was not disturbed and since the adoption of the plaintiff' therein related back to the death of his adoptive father (the Plaintiff), he was held to be entitled to be put into possession of his adoptive father's share in the family estate. The ratio decidendi of that ruling does not govern a case like this.

(35) In this position Krishna v. Sami, ILR 9 Mad 64 (FB) Athilinga v. Ramaswami, AIR 1945 Mad 28 and Chengama Nayudu v. Munisami Nayudu, ILR 20 Mad 75 called in aid by the learned counsel for the appellants and which contain the principle that if a father effects a partition of the family property amongst his sons without retaining any share for himself and after-begotten son could sue for opening up the partition and for re-distribution of the paternal wealth, do not govern a case like this, since the renunciation by the father had resulted only in separating himself from the family and not in the disruption of the joint family. Those cases bear only on a division of the joint family properties by the father amongst his sons, without himself taking a share. We will have occasion to deal with these cases in another context.

(36) We will not proceed to consider the argument that in any event the relinquishment enures for the benefit of the plaintiffs also because in Ex. A. 1 it was specifically recited that it was to operate in favour of not only his father and the existing son but the sons to be born to him in future. It is maintained that having regard to the terms of section 20 of the Transfer of Property Act, such a provision takes effect on the birth of the sons not existing at the time of the release.

(37) We do not think that we can assent to this argument. Section 20 contemplates the creation of an interest on a Transfer of Property ; if there is a Transfer of Property with an interest created in favour of an unborn son, it would vest in him on his birth. It is now well-settled that the relinquishment of an interest in immovable property is not a transfer of property as defined in the Transfer of Property Act as it is only an effacement or extinction of the interest of the releasor. It has only the effect of reducing the number of members that will be entitled to participate in the estate. If Section 20 is out of the way, the provision in Ex. A. 1 referred to above is ineffective so far as the

plaintiffs are concerned, as a release in favour of persons not in existence confers no benefit in law on the after-begotten sons. Therefore, the plaintiffs do not stand to gain by that term and it cannot sustain their claim to a share in the suit properties.

(38) We shall now endeavour to show that even if the relinquishment by Nageswara Rao has resulted in the disruption of the joint family as suggested by the appellants it does not advance their position. It is now convenient to discuss the scope of rule stated in ILR 9 Mad 64 (FB) and that line of cases. In ILR 9 Mad 64 (FB), the question in dispute related to the right of the sons of a disqualified person, who was deaf and dumb, to claim a share with their uncles in the property of their grandfather in the life-time of their disqualified father even though they were born after the death of their grand-father. In the course of the judgment, the Full Bench of the Madras High Court consisting of five Judges upheld the right of the plaintiffs to make such a claim. In the course of the judgment, Turner C. J. referred to the analogy existing between the right of a disqualified person to inherit when he was cured of his malady and the right of a person born after partition. After referring to several of the texts dealing with the rights of after-born sons, the learned Chief Justice summed up the position in these words :

"The son born after partition may be a son begotten and born after partition in his father's lifetime. he may be a son begotten before partition and born after it in his father's lifetime. He may be a son begotten before partition and born after it when the partition has been made after the father's death.

The common feature in all three cases is that he takes a share in the wealth. In the first case he takes the share of his parents and acquisitions made after partition, or, if his father has reserved no share, he may call upon his brothers to make up a share, he may call upon his brothers to make up a share to him. In the second and third cases he takes a share made up out of the shares of his brothers. In no case is he excluded altogether although the estate may have vested.

(39) It is to be seen that this case did not involve any question as to the binding character of any partition already made. However, the learned Judge, while equating the position of a disqualified persons to inherit after the cure of the malady to that of a son after partition, stated the law on the topic in those terms.

(40) This point arose directly in a later Madras case in ILR 20 Mad 75. There, while dividing the joint family properties amongst his sons, the father did not retain to himself any share. In an action laid by a son who was begotten subsequently, the High Court allowed his claim to a share from the separated brothers not only in the property divided but also in the accumulation made with the help of the divided property .

(41) To the same effect is the judgment of another Division Bench of the Court. In AIR 1945 Mad 28 it was held that a son born after partition was entitled to have the partition reopened and to obtain for himself a share equal to that of his brothers in a case where the father while dividing the family property amongst his sons kept no share for himself.

(42) Our attention was not drawn to any ruling which has taken a contrary opinion. On the other hand, they were noticed with approval while in some others these were distinguished.

(43) The basis of this principle seems to be the concept that a father should not effect a division of the ancestral wealth so long as the mother has not past the stage of child bearing. Some of the writers of Hindu Jurisprudence regard such an action by the father which deprives his afterborn sons of their due share in the family wealth as illegal. Colebrooke in Volume 2 of the Hindu Law at page 268 summarised the position thus :

"Hence while the father's right subsists, his choice alone determines the time for making a partition of his own acquired wealth ; but, in the case of property inherited from ancestors, it is also requisite that the mother be past child-bearing ; and, with this reserve, the father, or (according to another opinion) he , or his son, may choose the time ; partition of both sorts of property may be made, when the father's right terminates by his demise natural or civil. These are three periods for making a partition, according to Jimutavahana and the rest. But Vijnyaneswara observes : "hence, while the mother is capable of bearing more sons, and the father is still attached to wordly matters partition of wealth which was inherited from the grandfather may take place by the choice of his sons, even against his will. He considers the phrase, "when the mother is too aged to bear more sons", as relating to wealth acquired by the father himself."

(44) It is for this reason that the text-writers like Vishnu and Yajinyawalkya accorded a special position to the sons born after partition, though they were not en ventre sa mere. The text of Vishnu favours allotting a share of a son with whom the father had made a partition to another son born after it. In the same trend of thought is the text of Yajinyawalkya :

"Yajinavalkya after declaring that a father may make a partition in his lifetime, and under some circumstances unequally, and that brothers after the father's death must make an equal partition, notices the case of the son born after partition : "When (after) the sons, & C., have separated, a son is born of a wife of the same class, he becomes a partaker of a share, or his allotment should be made out of the visible estate corrected for profit or loss" - Yajinavalkya II S. 123.

(45)This reflects an anxiety on the part of the authors of these texts to protect the unborn sons who otherwise might be left destitute. It is not out of place to mention here that there are equally authoritative texts which lay down that an after-born son would receive only the share allotted to the father and could not re-open the division of the family estate that had already taken place. As put by Mayne in his treatise on Hindu Law "Mistakashara reconciled the conflict by saying that the latter texts lay down the general rule while the former is limited to the case of a son who was in mother's womb." Be that as it may, it is now well-settled as a result of judicial decisions which embody the opinion of some of the commentators, the foremost of which is ILR 9 Mad 64 (F. B) that even a son conceived after a partition arrangement could challenge a partition effected by his father amongst his sons if he had not retained a share for himself.

(46) But it is to be observed that these texts restrict this right to the case of a division of the joint family property by a father amongst his sons and do not cover cases of partition between the father,

his brothers and father. The texts of Vishnu and Yajinavalkya which have been extracted above been out this proposition.

(47) The following passages from ILR 9 Mad 64 (F.B.) are apposite in this context :

"The rule of the Mitakshara, the Smriti Chandrika, and the Saraswati Vilasa, that a son begotten after partition has no property in the separated shares of the brothers is the legitimate sequence of the rule that property is acquired by a son only in property, whether ancestral or self-acquired, of which at the time of his birth his father is the owner. There is some reason for recognising the inchoate right of the begotten, the obligation to provide for the unbegotton, though recognised as moral, has legal given to it in no other instance in Hindu law.

An argument that the share obtained by partition may be divested in part by the appearance of a co-heir, whose right was not anticipated at the time of partition, may, however, be deduced from the rule respecting the absent co-parcener and his descendants. This rule, the author of the Saraswati Vilasa considers analogous to the rule respecting the son born after partition - Saraswati Vilasa, 240.

Again, at p. 75, the learned Judge add :

"If the father leave nothing but debts, the son begotten after partition is not bound to pay those debts without receiving a share from those formerly separated, which seems to imply that, formerly separated, which seems to imply that, under such circumstances, a share should be given to him. But he also declares the right of a son born immediately after a partition of a mother or step-mother or brother's wife, whose pregnancy was uncertain, and he cites the text quoted by the author of the Mitakshara, and from when the learned Judges of the Calcutta Court inferred reference was made to the case of the sons begotten after partition. Quoting this text : "When the sons have been separated, one who is afterwards born of a woman equal in class shares the distribution; the commentator proceeds 'the partition is to be thus effected. Something is to be contributed by all the brothers or others (who had previously shared) until the posthumous son's share is equal to their own'. And he concludes with a text of Vishnu, 'Sons with whom the father had made a partition should give a share to the sons born after partition."

(48) The passages indicate that this right is limited only to the case of partition by the father amongst his sons without retaining for himself a share. Further, all the reported cases seem relate only to such a division. No case which has applied this rule to a general partition taking place amongst the branches of the family or even to a case like the present, has been cited to us. We are not persuaded that there is any jurisdiction for extending that rule to a case other than that of division by a father amongst his sons.

(49) This view of ours is vouched by the decisions of the Calcutta and the Bombay High Courts in Kusum Kumari Dasi v. Dasarathi Sinha, AIR 1921 Cal 487 and ILR 33 Bom 267. In the former of the above-cited cases, Mookerjee, J. who delivered the opinion of the Division Bench, observed :

"The application of this principle is expressly limited to the case of a partition between father and son is not extended to a son born to a separated co-parcener other than the father of the family after partition."

(50) To a like effect is the second of the cases, AIR 1921 Cal 487 seems to have relied on the dictum contained in ILR 33 Bom 267.

(51) The same principle is expressed in Mayne's Hindu law (Eleventh edition) p. 522 in the following words :

"But the application of this principle is expressly limited to the case of partition between father and sons, and there is no warrant for its extension to a son, and there is no warrant for its extension to a son born to a separated co-parcener, other than the father of the family, after partition."

(52) It follows that even on the footing that the transaction evidenced by Ex. A-1 operates as a partition, the plaintiffs will not be entitled to the relief of opening up the partition, so as to prejudice the rights of respondents 2 to 5.

(53) In this view of the matter, it is unnecessary to go into other matters, such as the finality of the orders in the claim proceedings, the binding nature of debts incurred by the first defendant for his trade in the event of a re-distribution of the family estate taking place at the instance of the plaintiffs. In fact, no attempt was made before us to debate those points, having regard to our views on the nature of the transaction covered by Ex. A-1 and the results arising therefrom.

(54) In the result, the appeal fails and is disallowed and the suit is dismissed with costs throughout as against defendants 2 and 3 and 5.

(55) Appeal dismissed.