A

PADMARAJA AND ORS.

v.

DHANAVATHI AND ORS.

April 27, 1972

[K. S. HEGDE AND A. N. GROVER, JJ.]

B

Madras Aliyasantana Act (9 of 1949) s. 36(6)—Scope of—Award decree—When evidences partition—If award decrees come within s. 36(6).

Differences having arisen among members of a family governed by the Aliyasantana Law, all the major members of the family except one referred the disputes to arbitration. As per the authority given to the arbitrators the arbitrators had to decide the disputes in accordance with
C the Aliyasantana Law of inheritance, according to which, partition was impermissible except with the consent of all the adult members of the family. The arbitrators were not required to divide the *Kutumba* properties on *Kavaru* basis; but the arbitrators divided the properties between the two *Kavarus*, which were then in existence in the family, in order to avoid disputes and to fix the responsibility for income and loss. There was an award decree in terms of the award.

D Thereafter, the members of one *Kavaru* filed a suit for partition under s. 35 of the Madras Aliyasantana Act, 1949, and the appellants and some other members of the other *Kavaru*, contended that the *Kutumba* had been partitioned by the award decree or, that the arrangement thereunder was a deemed partition under s. 36(6) of the Act.

The trial court dismissed the suit, but the High Court, in appeal, held that the award decree did not evidence partition, and that it was not
E covered by s. 36(6) as it was an award decree and not a mere award.

Dismissing the appeal to this Court,

HELD: (1) When the Act came into force, in addition to joint living by the members of the *Kutumba*, three types of arrangements were in existence in various *Kutumbas*, namely, (a) When the senior most member of the family (Yejman) or (Yejmanthi) made maintenance
F allotments which were purely temporary in character, (b) a permanent arrangement for maintenance, and (c) partition with the consent of all adult members. In the case of a permanent arrangement for maintenance it was usually done on *Kavaru* basis, the jointness of the family was kept intact, but arrangement was made for separate living and separate management of *Kutumba* properties on a permanent basis which could not be disturbed without the consent of all the adult members of the *Kutumba*. Such of these permanent arrangements which came within the scope of
G s. 36(6) are deemed to be partitions despite the fact that under those arrangements the jointness of the *Kutumba* was kept intact. [386A-F]

(2) The conditions to be satisfied before a document can be considered as coming within the scope of s. 36(6) are:

(a) there is a registered family settlement or *award*;

(b) all the major members of the *Kutumba* are parties to it;

H (c) the whole of the *kutumba* properties have been or were intended to have been distributed; and

(d) the distribution is among all the *Kavarus* of the *Kutumba* for the separate and absolute enjoyment in perpetuity. [387 A-D]

Gummanna Shetty v. *Nagaveniamma*, [1967] 3 S.C.R. 932, followed. A

(3) In the present case, the award decree did not evidence a partition; because it contained clauses inconsistent with an out and out partition.

The award decree recited that 'proper arrangements were made for the maintenance of the *Kutumba without disrupting its oneness*'; that both *Kavarus* should together conduct auspicious functions; and the members of one of the *Kavarus* were asked to show accounts to the senior-most member who continued to be the *yejman* of thee *entire kutumba*. B [388G-H]

Ammalu Amma v. *Vasu Menon*, A.I.R. 1944 Mad. 108, approved.

(4) Award decrees have to be considered as awards for purposes of s. 36(6). [391B-C]

(a) The principle underlying s. 36(6) is not to disturb the finality C of arrangements made. If that were so, such permanency should be available in a larger measure to an award decree, for otherwise, parties could enforce partition ignoring award decrees while they would be bound by awards. [390G-H]

(b) After the coming into force of the Arbitration Act, 1940, all awards had to be compulsorily made decrees of courts if they were to have force. The Aliyasantana Act came into force in 1949 and the Legislature would not have denied to the awards passed after 1940 (in terms D of which decrees would have been passed) the benefit of s. 36(6) of the Aliyasantana Act. The Legislature, by using the expression 'award' intended to include both awards simpliciter as well as awards which had been made decrees of Courts. [391A-B]

Parameshwari Hengsu v. *Venkappa Shetty and ors.*, (1961) Mys. L.J. 686 on the interpretation if s. 36(6), overruled. E

(5)(a) But the second condition for the application of the section is not satisfied in the present case, as one of the major members of the *Kutumba* was not a party to the award. [392D]

(b) Even though he acquiesced in the arrangements made under the award decree he would not be a party to the arrangement. Before the arrangement can be deemed to be a partition under s. 36(6), all the conditions should be fully satisfied, and substantial compliance is not sufficient, since, it is a case of a deemed partition and not an actual partition. F [392E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 999 of 1966.

Appeal by Special Leave from the judgment and order dated July 7, 1965 of the Mysore High Court in Regular Appeal No. 37 G of 1958.

K. N. Bhat, for the appellants.

Rameshwar Nath and *Swaranjit Ahuja*, for the respondents Nos. 1 to 6.

The Judgment of the Court was delivered by H

Hegde J. This is an appeal by special leave. Defendants 34 and 35 in the suit are the appellants. The suit from which this

A appeal arises is a suit for partition under the Madras Aliyasantana Act, 1949 (Madras Act IX of 1949) (which will hereinafter be referred to as the Act).

The two questions that arise for decision in this appeal are: (1) whether under the award decree Exh. A-2, the kutumba (family) B of the plaintiffs and the defendants stood partitioned and (2) if the answer to the first question is in the negative whether the said award decree comes within the scope of s. 36(6) of the Act.

The plaintiffs and the defendants were governed by the aliyasantana law of inheritance. It is a matriarchal system of law. One Pammadi was the prepositor of the family. She had two C daughters by name Pammakke and Dejappe and three sons *viz.* Kanthu Hegde, Monu Hegde and Manjappa Hegde. After the death of Pammadi, differences arose in the family. Hence all the major members of the family excepting one Brahamiah referred those disputes to the arbitration of four arbitrators by means of a mutchallika dated December 14, 1886. By the time this mut- D challika was executed, two of the sons of Pamnadi, Kanthu Hegde and Monu Hegde had died. At that time, in the kutumba there were only two santhathi kavaru *viz.* Pammakke and Dejappe and one nissanthathi kavaru namely Manjappa Hegde in existence (reference to santhathi kavaru and nissanthathi kavaru is as defined in the Act). The arbitrators divided the kutumba properties into two parts; one part was allotted to the share of Pammakkes Kavaru E and the other part to Dejappes Kavaru and Manjappa Hegde. Manjappa Hegde was clubbed alongwith the kavaru of Dejappe (reference to kavaru is as defined in the Act). On June 14, 1953, all the members of the kavaru of Pammakke brought a suit for partition of the suit properties under s. 35 of the Act. The appellants and some other members of the kavaru of Dejappe resisted the F suit mainly on the ground that the kutumba had been partitioned under Ex. A-2. They contended that the said document either evidences a partition or at any rate the arrangement made thereunder is a deemed partition coming within the scope of s. 36(6) of the Act. The trial court came to the conclusion that under the Award in question the kutumba properties were partitioned. Al- G ternatively it held that Ex. A-2 is covered by s. 36(6). In appeal a Division Bench of the High Court of Mysore reversed the judgment and decree of the trial court. It held that Ex. A-2 does not evidence a partition. It further came to the conclusion that the same is not covered by s. 36(6) as Ex. A-2 was an award decree and not a mere award. Dissatisfied with the judgment of the High Court, defendants 34 and 35 have brought this appeal.

H The findings of the High Court as regards the true nature of Ex. A-2 were challenged before us on behalf of the appellants by Mr. K. N. Bhatt. Before proceeding to consider the contentions

of the parties, it is necessary to refer, in brief, to the customary aliyasantana law. Under that law inheritance is traced through the female line. Under that law, as interpreted by courts partition was impermissible except with the consent of all the adult members of the family. The senior most member of the family be it a male or a female was a Yejman or Yejmanthi of the family. With the passage of time, the members of the aliyasantana kutumbas increased and kutumbas became unwieldy and joint living became intolerable. In order to mitigate these difficulties, three types of arrangements came to be made in those kutumbas. By and large the Yejman or Yejmanthi of the family made maintenance allotments (maintenance under the aliyasantana is a mode of participation in the family properties). This type of arrangement was purely temporary in character. It was open to the Yejman or Yejmanthi to resume the properties allotted for maintenance to the junior members and make alternative arrangements for their maintenance. Another type of arrangement that came to be made was permanent arrangement for maintenance. This was ordinarily done on kavaru basis. Under this arrangement, jointness of the family was kept intact but arrangement was made for separate living and separate management of kutumba properties on a permanent basis. Such arrangements ordinarily were not capable of being disturbed except with the consent of all the adult members of the kutumba. Lastly there are few cases of partition with the consent or concurrence of all the adult members of the kutumba. Hence when the Act came into force in addition to joint living by the members of kutumbas, aforementioned types of arrangements were in existence in various kutumbas. Under s. 35 of the Act power was given to kavarus, santhathi or nissanthathi to claim partition but those permanent arrangements which came within the scope of s. 36(6) were deemed to be partitions despite the fact that under those arrangements the jointness of the kutumba was kept intact. In *Gummanna Shetty and ors.* v. *Nagaveniamma*(1), this Court while dealing with an arrangement in a aliyasantana family entered into in the year 1900 observed :

> "In 1900, when this deed was executed, one or more members of a joint family governed by the Aliyasanthana law of inheritance had no right to claim partition of the joint family properties but by a family arrangement entered into with the consent of all its members, the properties could be divided and separately enjoyed. In such families, an arrangement for separate possession and enjoyment without actual disruption of the family was common. An arrangement for separate enjoyment did

(1) [1967] 3 S.C.R. 932.

A not effect a disruption of the family, unless it completely extinguished the community of interest in the family properties."

Analysing the scope of s. 36(6), this Court, approving the decision of the Madras High Court in *Kaveri* v. *Gonga Ratna*(1) B held that the following conditions should be satisfied before a document can be considered as coming within the scope of s. 36(6) :

1. there is a registered family settlement or award;

2. all the major members of the kutumba are parties to it;

C 3. the whole of the kutumba properties have been or were intended or purport to have been distributed under it; and

4. the distribution is among all the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity.

D

There is no difficulty about temporary arrangements for maintenance. These arrangements could not come in the way of effecting partition in a kutumba. Similarly if the jointness of the kutumba had been disrupted, there is no question of claiming any partition as there is no kutumba in existence. The application E of s. 36(6) arises only when the case does not fall either under the first category or the second. In construing karars (agreements) evidencing permanent arrangements, we must bear in mind the ordinary principles of construction of documents. The first is that the whole document must be read and construed. The court must have regard to the declared object of the document which is often contained in the preamble but the title given to a document is F not conclusive. It is observed in Mr. Sundara Ayyar's Malabar Law that "arrangements for maintenance will not ordinarily be viewed as permanent arrangements though it is not impossible that there should be such arrangements. Divisions for enjoyment short of partition that are sometimes entered into are of this character."

G The characteristics of such documents were considered exhaustively by Somayya, J. in *Ammalu Amma* v. *Vasu Menon*(2). Therein the learned judge observed :

"No doubt it may not be common but if on a reading of the entire document, there are clauses which are entirely inconsistent with an out and out partition, the H Courts are bound to construe the document as a maintenance arrangement even though it is stated to be a permanent arrangement."

(1) [1956] 1, M.L.J. 98.

(2) A.I.R. (31) 1944 Mad. 108.

Bearing in mind the principles enunciated by a long chain of decisions, we shall first examine whether Ex. A-2 can be considered as a document affecting partition. In considering that question we have to primarily see whether in Ex. A-2, there are clauses which are entirely inconsistent with an out and out partition. A

Ex. A-2 came to be rendered on the strength of a mutchallika executed by most of the members of the kutumba in favour of three arbitrators on December 14, 1886, for slip 2 because of the dispute that had arisen in the family about the enjoyment of the kutumba properties. It is also clear from that mutchallika that some members of the family had serious complaints against the Yejman of the family, Adu Hegde. The mutchallika authorised the arbitrators to decide the disputes that had arisen "in accordance with our "Aliyasanthana Kattu", in a manner which you deem fit". 'Aliyasantana kattu' i.e. Aliyasantana law of inheritance did not provide, as mentioned earlier, for compulsory partition. The arbitrators undoubtedly came to the conclusion that it was difficult for the large family to live together. It is also clear from the award that the parties had agreed to "enjoy kutumba properties by living separately". They had also agreed for the separation (vingada) of the kutumba properties. As per the authority given to the arbitrators, the arbitrators were not required to divide kutumba properties on kavaru basis. They could have put together some members of one kavaru with some members of another Kavaru. But the arbitrators thought "that if the members of two Kavarus are mixed together, in future the properties would be spent, on account of mutual disputes existing between them, and that unless the responsibility of income and loss in the Kavaru is pinned on the Kavaru having more members, to some extent, all the members will not bestow labour properly." B C D E

That was the reason why they divided the properties primarily between two kavarus. It is true that the arbitrators divided the family debts into two parts and each kavaru was asked to discharge the then existing debts from out of the income of the properties that were allotted to its shares. But at the same time Adu Hegde continued to be the Yejman of the entire kutumba. Members of each kavaru were prohibited from incurring debts on behalf of the kutumba. Further till the existing debts were discharged, the members of Pammakke kavaru were asked to "show accounts in respect of their income and expenditure" to Adu Hegde. Exh. A-2 further says that "the members of the kutumba should live in different houses, by bestowing labour and without quarrelling with each other as proper arrangements were made for the maintenance of the kutumba without disrupting its oneness". From this clause it is clear that the kutumba was not disrupted. The document further provides "both the Kavarus should together F G H

A conduct "Havyas Kavyas" and auspicious functions". The foregoing clauses clearly show that Ex. A-2 did not disrupt the kutumba though undoubtedly it made provision for the separate living of the Kavarus, and for the separate enjoyment of the properties allotted to them. For these reasons we are in agreement with the High Court that Ex. A-2, does not evidence a partition. The terms B of Ex. A-2 are not similar to those that came up for consideration before the Madras High Court in *Appa and ors.* v. *Kachai Bayyan Kutti and ors.*(1) or those that came up for decision by that High Court in *Mudara and ors.* v. *Muthu Hengsu*(2). Each document has to be construed on its own terms. Terms of any two documents rarely, if at all are identical. Hence the construction placed on a particular document can hardly govern the construc- C tion of another document. There is no dispute as regards the principles governing the construction of documents.

This takes us to the question whether Ex. A-2 is covered by s. 36(6). That section reads :

> "A registered family settlement (by whatever name called) or an award, to which all the major members of D a kutumba are parties and under which the whole of the kutumba properties have been or were intended to be distributed, or purport to have been distributed, among all the kavarus of the kutumba for their separate and absolute enjoyment in perpetuity, shall be deemed to be a partition of the kutumba properties notwithstanding E any terms to the contrary in such settlement or award."

Evidently the legislature wanted to deem certain deeds under which perpetual arrangement had been made in the past for the maintenance of all the kavarus of a kutumba as partitions. The requirements of s. 36(6) have been laid down by this Court as seen earlier in *Gummann Shetty's* case (supra). Therefore all F that we have to see is whether the tests laid down by this Court in that decision are satisfied. The High Court having come to the conclusion that the first test was not satisfied rejected the contention of the plaintiffs that the deed Ex. A-2 comes within the scope of s. 36(6). It came to the conclusion that an award decree is not an award within the meaning of s. 36(6). In arriving at that conclusion, it relied on the decision of that Court in *Parameshwari* G *Hangsu and ors.* v. *Venkappa Shetty and ors.*(3). *Parameshwari Hengsu's* case (*supra*) first came up for hearing before at Division Bench consisting of Sadasivayya and Mir Iqbal Husain JJ. Sadasivayya J. held that the expression "award" in s. 36(6) does not take in an award decree. But Iqbal Husain J. differed from that view and opined that the term "award" includes also an award dec- H ree. In view of that difference of opinion, the question whether the expression "award" includes an award decree was referred to

(1) A.I.R. 1932 Mad. 689. (2) A.I.R. 1935 Mad. 33.

(3) [1961] Mys. L. J. 686.

Somnath Iyer J. That learned judge agreed with the view taken by Sadasivayya J. The decision in *Parameshwari Hengsu's* case (*supra*), was binding on the bench which heard this case. Hence naturally that controversy was not again gone into by the High Court in this case. The learned counsel for the appellants challenged the correctness of the decision of the Mysore High Court in *Parameshwari Hengsu's* case (*supra*). He contended that the expression 'award" in s. 36(6) includes also an award decree. He urged that in the case of an award decree, the court merely accepts the award made and makes it a decree of the court and hence award decrees have also to be considered as awards for the purpose of s. 36(6). In examining the correctness of the conclusion reached by the Mysore High Court in *Parameshwari Hengsu's* case (*supra*), we must first examine the principle underlying s. 36(6). As mentioned earlier, the legislature was evidently anxious not to disturb certain permanent arrangements made in the kutumbas either by means of any registered family settlements or by awards. That being the case one fails to understand why the legislature should be held to have excluded from the scope of s. 36(6) award decrees while bringing within its scope awards. Dealing with this aspect both Sadasivayya J. and Somnath Iyer J. opined that "it is possible that with a view not to disturb finality resulting from a decree (of whatever kind) that the legislature intentionally refrained from referring to decrees in sub-s. (6) thereby confining the scope of that sub-section only to the registered family settlements and awards expressly mentioned therein. If that be so, no court would be justified in equating an award to the decree passed on it."

This reasoning appears to us to be fallacious. It must be remembered the only decrees that could possibly have been included within the scope of s. 36(6) were award decrees. We have earlier noticed that compulsory partition was not permissible under the aliyasantana law. Hence there could not have been any partition decrees, nor could there have been decree making permanent arrangements in the matter of enjoyment of kutumba properties in aliyasantana kutumbas. We can think of no decree regulating the affairs of kutumba which cannot be disturbed under the Act. We agree with those learned judges that the principle underlying s. 36(6) was not to disturb the finality of arrangements made. That very principle runs counter to the reasoning adopted by those learned judges. If permanency of an arrangement is the principle underlying s. 36(6) that permanency should be available in a larger measure to an award decree. On the other hand if the view taken by those learned judges is correct, while s. 36(6) provides permanency for some awards, no such permanency is available to any award decree. Parties could enforce partition ignoring award decrcs while they are bound by awards. This could hardly have

A been the intention of the legislature. There is yet another compelling reason not to accept the majority view in *Parameshwari Hengus's* case (*supra*). After the coming into force of the Arbitration Act, 1940, all awards had to be compulsorily made decrees of the courts if they were to have any force. The Act came into force in 1949. Many awards coming within the scope of s. 36(6)
B would have been made between 1940 and 1949. The legislature would not have denied to those awards the benefit of s. 36(6). The basis of every award decree is an award. Evidently the legislature by using the expression "award" intended to include both awards simpliciter as well as awards which had been made the decrees of courts. Whether we consider the principle underlying
C s. 36(6) or the language of s. 36(6), we see no justification to exclude award decrees from the scope of s. 36(6). In our opinion *Parameshwari Hengsu's* case (*supra*) in so far as it interpreted s. 36(6) has not been correctly decided. But that conclusion of ours does not help the appellants. One of the conditions that are necessary to be satisfied before a deed can be deemed to be a partition under s. 36(6) is that it must be shown that all the
D major members of the kutumba were parties to it. Admittedly Brahmiah did not join the mutchallika A-1 on the strength of which Ex. A-2, was rendered. In other words he was not a party to the award. But it was said on behalf of the appellants—the same view was taken by the learned trial judge—that Brahmiah had acquiesced in the arrangements made under Ex. A-2. A person
E by merely submitting to an arrangement made may be bound by the arrangement but thereby he does not become a party to the arrangement. Herein we are dealing with a deemed partition and not an actual partition. Before an arrangement can be deemed to be a partition under s. 36(6), all the conditions prescribed under that provision should be fully satisfied. In such a case, substantial compliance with the provision is not sufficient.

F As we are of the opinion that all the major members of the kutumba were not parties to Ex. A-2, it is not necessary to examine whether the remaining conditions prescribed under s. 36(6) were satisfied.

In the result this appeal fails and the same is dismissed. But
G in the circumstances of the case, we direct the parties to bear their own costs in this Court.

V.P.S. *Appeal dismissed.*