

# **BOMBAY HIGH COURT**

Ramsingh Bhagiratha Navle

Vs.

Fakira Ramsing Navle

Second Appeal No. 225 of 1937

(Macklin and Wassoodew, JJ.)

09.09.1938

## **JUDGMENT**

### **Wassoodew, JJ.**

1. This is a second appeal from the decision of the District Judge of Nasik. The suit was originally instituted by a Hindu minor through his next friend against his father defendant No. 1 and grandmother for partition of the joint family property. The parties are Beldars, that is, stonecutters. Their property, the subject-matter of the suit, consisted of two houses at Nasik and a third house at Poona, certain ornaments and donkeys used for carrying stone. Although at one time the nature of the property was disputed by the father who maintained that a greater part of it was his self-acquisition, there is no controversy in that respect in this appeal as the Courts below have held that it is the joint ancestral property of the parties, and that finding being one of fact is conclusive in second appeal. The mother and the step-mother were not impleaded at first. The former had merely acted as the plaintiff's next friend. Notwithstanding that defect the trial Court passed a decree for partition of the plaintiff's share. In appeal, by agreement of the parties, the case was remanded for a de novo trial after impleading the mother and the step-mother. They were impleaded along with a sister and also a step-brother born after the suit. The learned trial Judge after hearing the newly added defendants has passed a decree in favour of the plaintiff allotting to him a share equal to that given to his father and the two mothers. The step-brother, defendant No. 7, was refused a share in the family property. One of the contentions of the father, that some properties were improved by him after raising a loan on the security thereof after the suit and that therefore the plaintiff was liable to contribute towards that debt, was negatived. The plaintiff was given one-fourth share in all the properties and ornaments, and the animals of the family used in the trade. The order of costs was as follows:

Defendant No. 1 do pay plaintiff's costs and defendant No. 4's costs incurred in these proceedings after remand and bear his own costs. Costs of defendants Nos. 3 and 4 to come out of the estate.... Having regard to the appellate Court's order on the point of costs I direct that the costs of defendant No. 2 incurred prior to the remand do come out of the estate. He should bear the rest of his costs if any after remand.

The decree also made provision for the maintenance and residence of the grandmother and the sister of the plaintiff, two rooms being set apart for each-the grandmother being allowed to continue in possession of those rooms for life, and the sister until her marriage.

2. Against that decree the father and the step-mother of the plaintiff filed an appeal to the District Court at Nasik. That Court confirmed the decree of the trial Court, and dismissed the appeal with costs. Against that decree this second appeal has been filed by the father and step-brother.

3. Mr. Kane for the appellants has conceded that both the mother and stepmother of the plaintiff are entitled to a share equal to that of the plaintiff and his father. But his main object is to establish that the step-brother, born after the institution of the suit for partition but before the decree, is entitled to a share in the family property equal to that of the plaintiff. The learned trial Judge held that as the step-brother was born during the pendency of the suit he was not entitled to a share in the family property. The learned District Judge in appeal upheld that view relying upon *Krishnaswami Thevan v. Pulukaruppa Thevan*<sup>1</sup>

4. Mr. Kane's argument is that the institution of a suit for partition on behalf of a Hindu minor by his next friend does not effect a severance of interest from the date of the filing of the plaint, that, inasmuch as partition cannot be demanded on behalf of the minor as of right, the decree being entirely within the discretion of the Court to be passed if the circumstances disclose a benefit to the minor from partition, the minor must continue till the decree a member of the coparcenary, there being no alternative state conceivable till then, and that therefore severance must take place from the date of the decree for partition. It has been conceded that as soon as severance takes place, the minor's share is not liable to decrease by the birth thereafter of other coparceners. Mr. Kane has laid stress on the point that it is for the minor's benefit to continue to be a coparcener and take the chance of augmentation of his share by casualties in the family. That argument which cuts both ways could always be urged with a degree of plausibility against the minor ever securing a division. It is now well settled that a clear expression of intention to become divided made by any adult coparcener and communicated to the other members of the family effects a severance of the joint status-see *Suraj Narain v. Iqbal Narain*<sup>2</sup>. Following that decision it has been held that the filing of a plaint by an adult Hindu coparcener claiming partition is tantamount to an unambiguous and unequivocal expression of an intention on the part of the plaintiff to separate-see *Girja Bai v. Sadashiv Dhundiraj*<sup>3</sup> and *Soundararajan v. Arunachalam Chetty*<sup>4</sup> That view was confirmed by the decision of the Privy Council in *Kawal Nain v. Budh Singh*<sup>5</sup> where it was observed that (p. 498)-

A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not. That may now be regarded as settled law with regard to a major coparcener instituting a suit for partition of his share in the

<sup>1</sup> I.L.R. (1924) Mad.465

<sup>3</sup> I.L.R. (1916) Cal. 1031 : 18 Bom. L.R. 621 : L.R. 43 IndAp 151

<sup>2</sup> I.L.R. (1912)All. 80 : 15 Bom. L.R 456      <sup>4</sup>I.L.R. (1915) Mad. 159.

<sup>5</sup> I.L.R. (1917) All. 496 : 19 Bom. L.R. 462 P.C.

ancestral property. The question is whether the same effect must follow if a minor coparcener institutes a suit for partition through his next friend.

5. There is no authority of this Court directly bearing on the point and there is considerable divergence of judicial opinion in India on the subject. The only ruling of this Court to which reference was made in argument was *Chhotabhai v. Dadabhai*<sup>6</sup>, There a suit for partition was instituted on behalf of a minor coparcener. But before it could mature into a decree it was withdrawn without proper leave of the Court. The minor died subsequently whilst still a minor, and thereafter his son and brother instituted another suit on various causes of action for redemption and possession and setting aside the trusts created by the father. Upon a hypothetical argument as to the probable effect of the illegal withdrawal Divatia J. thought that if the withdrawal was illegal and the suit therefore treated as pending, it could be regarded as having abated on the authority of *Chelimi Chetty v. Subbamma*<sup>7</sup> There is no reference to that argument in the concurring judgment of Murphy J., and it seems it was not necessary to decide that point for determination of the claim.

6. The case in *Chelimi Chetty v. Subbamma* is the earliest reported case of the Madras High Court on the point. There the question of the effect of a minor's suit on, his status was discussed in connection with the right of the legal representative of the minor to continue the suit after the minor plaintiff's death, he having died after the institution of the suit for partition but before the written statement was filed. The question that the Court had to decide was whether the cause of action survived on the basis that the institution of the suit effected a severance of status. It was held that if a minor plaintiff dies during the pendency of the suit, his legal representatives are not entitled to continue the suit. Mr. Justice Abdur Rahim in coming to that conclusion had in mind the possible danger of entrusting to a person constituting himself as a guardian of a minor to decide whether the minor should continue or not as a member of the coparcenery, the minor himself being incapable of exercising sound discretion in the matter. If that can be one of the decisive factors in such a case, I confess, if I may say so with respect, it is possible to share the same feeling. But the decision was not and could not be founded on that ground alone. The real basis for decision was that the Court had to exercise its discretion to pass a decree for partition only if it was for the benefit of the minor, and that therefore until that decree was passed the minor's status was not altered. I feel no hesitation in holding that the mere filing of a plaint on behalf of a minor cannot ipso facto constitute a severance of status, for, it is in the discretion of the Court to grant a decree only if it is for the minor's benefit-see *Bachoo v. Mankorebai*<sup>8</sup> In that respect the case of a minor is distinguishable from that of an adult coparcener. But that is not decisive of the matter in controversy. The question is, if the Court is led to hold upon all the circumstances brought to its notice that the severance would be in the interest of the minor and pass a decree for partition, whether the minor plaintiff should be regarded as having been divided from the rest of the members on the date when he filed the plaint or when the decree was passed.

7. The above point was not directly decided in *Chelimi Chetty v. Subbamma*. It will not, in my opinion, follow from the fact that a minor cannot demand partition as of right, that

<sup>6</sup> AIR 1935 Bombay 54 : (1934) 36 BOM LR 738 : 152 Ind. Cas. 715

<sup>7</sup> I.L.R. (1917) Mad. 442

<sup>8</sup> I.L.R. (1907) 31 Bom. 373 : 9 Bom. L.R. 646

the severance must take place not from the date of the plaint but from the date of the decree. That

point was considered by a full bench of the Madras High Court in *Rangasayi v. Nagarathnamma*<sup>9</sup> In dealing with the question referred to it as to whether a suit by a minor for partition abates upon his death before the Court has found that the partition is for his benefit, it overruled the decision in that respect in *Chelimi Chetty v. Subbamma* by holding that the severance is effected from the date of the suit it being merely conditional on the Court being able to find that the suit was for the benefit of the minor. One of the anomalies referred to as involved in the counter-supposition was thus stated by Ramesan J, If a suit is filed by a father for himself and his minor son for partition, if the son did not follow the father except in special circumstances, the father might become divided from the date of the plaint and the son might not become divided till after the Court recorded a finding that the suit filed was beneficial to the minor. The distinction, as pointed out therein, between the maintainability of such a suit and the limitation of the Court's power to pass a decree, there being the possibility of the dismissal thereof on the ground of absence of proof of benefit to the minor, cannot be ignored; for, logically non-maintainability of such an action would be irreconcilable with the recognition of private partitions agreed upon by the minor's representative. It has to be borne in mind that the status of a minor in a coparcenery does not always depend upon the Court's decree, nor upon the question of the minor's benefit. Any adult member of the family may separate his share by expressing his intention to sever from the joint family even against the wishes of the minor or contrary to his interests. It may be noted that Courts have refused to set aside a private arrangement entered into by the minor's mother or a decree for partition passed in a suit against a minor represented by his guardian unless fraud were proved-see *Balkishen Das v. Ram Narain Sahu*<sup>10</sup>, *Chanvirapa v. Danava*<sup>11</sup> and *Narainikutti Amma v. Achuthankutti Nair*<sup>12</sup> To hold that a relief should be granted upon the basis of the circumstances existing at the date of the decree, is opposed to the elementary rule that the decision of a Court in a suit must rest on the cause of action as it existed at the date of the commencement thereof. The relief must be restricted to the circumstances existing at the time when the suit is instituted. It may be that no division in fact can result unless a decree sets a seal on the prayer made. But that ought not to create a departure from recognized principles on which relief is ordinarily granted. As I have already remarked the right of action for partition rests upon the assertion of a right to separate by a Hindu coparcener. The cause of action for a minor's suit is not essentially different, for the assertion is made on his behalf by his guardian. The Court grants relief on that cause provided it is established by proof that the assertion was beneficial to the minor. That is, the relief is really based upon the claim founded upon a cause of action stated in the pleading.

8. The above consideration seems to have influenced the decision in *Krishna-swami Thevan V. Pulukaruppa Thevan*. I agree with respect with the reasoning in that case. There the suit was instituted by a Hindu minor represented by his next friend against his father for partition. Another son of the father conceived after the date of the plaint and born before the preliminary decree was subsequently impleaded. The question there directly in issue was whether that decree affected the share of the minor at the date when the suit was instituted by the birth of the second son to the father. The Court refused to allow a share to the latter son born after the suit.

<sup>9</sup> I.L.R. (1933) Mad. 95

<sup>11</sup> I.L.R. (1894) 19 Bom. 593

<sup>10</sup>(1903) L.R. 30 I.A. 139

<sup>12</sup> I.L.R. (1918) Mad. 292

9. The other judgments of the Madras High Court, principally *Sri Ranga Thathachariar v. Srinivasa Thathachariar*<sup>13</sup> and *Ganapathy v. Subramanyam Chetty*<sup>14</sup> follow the same view. The

argument of Mr. Kane that the deprivation of a share to a member born in the family at any time is opposed to the notions of Hindu law, if carried to its logical conclusion can never regard a division, even after a decree for partition, as final for there is always the possibility of other persons being born in the family thereafter.

10. The Patna High Court in *Krishna Lal Jha v. Nandeshwar Jha*<sup>15</sup> has gone much further. There the mere institution of a suit by a minor was held to effect a severance of the joint status as much as a suit by an adult. The suggestion made before us, that upon that view a guardian of a minor will have plenty of chances for mischief, ignores the safeguards prescribed by the law prevailing in this presidency. Courts have recognized that the wisdom and experience of the guardian usually supply the deficiencies of the minor in that respect and his acts are in the matter of partition regarded as binding on the minor if they are for his interest and benefit. I do not think that the incapacity of the minor to exercise a sound discretion for himself should be urged as an insuperable obstacle against the view propounded in the recent decisions in Madras-ee also *Atul Krishna Roy v. Lala Nandanji*<sup>16</sup>

11. We were referred to the contrary view expressed in the following three cases : *Lalta Prasad v. Sri Mahadeoji Birajman Temple*<sup>17</sup> *Hari Singh v. Pritam Singh*<sup>18</sup> and *Jethanand v. Kewalram*<sup>19</sup> In the Allahabad case the question as to the effect of a suit which had matured into a decree was not considered by the Court. There although the plaintiff was a minor the suit which was instituted through his mother as his next friend did not actually proceed to trial as the contesting defendant, the grandfather, died pending the action. Mr. Justice Banerji has very clearly expressed that position by approving the view expressed by the Chief Justice with a qualification in the following terms (p. 470):

The rule laid down by their Lordships of the Privy Council in *Girja Bai V. Sadashiv Dhundiraj* to the effect that the institution of a suit for partition of joint family property has the effect of creating a separation of the joint family, cannot be (made) applicable to a suit brought on behalf of a minor which has not matured into a decree.

There is no real divergence of view in regard to the effect of the mere institution of a suit. The possible difference of opinion may arise from the observations of the Chief Justice in regard to the result following) from the decree in such a suit. Consequently *Lalta Prasad v. Sri Mahadeoji Birajman Temple* is not of much assistance in the determination of the question involved in this appeal.

12. The Lahore case merely follows the case of *Lalta Prasad v. Sri Mahadeoji Birajman Temple*, and holds that the institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of a similar suit by an adult member of the family. From the fact that the accounts were ordered to be rendered not from the date of the suit but after the preliminary decree it is clear that the

13 I.L.R. (1927) Mad. 866

<sup>15</sup>(1918) P.L.J.38

<sup>17</sup> I.L.R. (1920) All. 461

14 I.L.R. (1929) 52 Mad. 845

<sup>16</sup> I.L.R. (1935) Pat.732

<sup>18</sup> AIR [1936] Lah. 504

<sup>19</sup> AIR [1926] Sind. 216

view of the Madras High Court was not followed. But no reasons have been given as to what induced the Court to approve the Allahabad view.

13. The Sind case does not refer to the later decisions of the Madras High Court which explain *Chelimi Chetty v. Subbamma* and *Krishnaswami Thevan v. Pulukaruppa Thevdn*. The fact that the reasoning in *Chelimi Chetty v. Subbamma* was not approved of in *Rangasayi v. Nagarathnamma* was not noticed. The judgment of the Judicial Commissioner merely adopts with approval the reasoning in *Chelimi Chetty v. Subbamma*. That reasoning as I have already stated was dissented from in the later cases. The Additional Judicial Commissioner in concurring with the view of the Judicial Commissioner has entered into a discussion of the principle upon which the status of the minor should; be determined as not from the date of the suit but from the date of the decree. One of the reasons given is that "on the principle of justice and equity the minor plaintiff should not be deprived of the advantage which he would derive from the death of coparceners during the interval between the filing of the suit and the preliminary decree therein". That is the argument advanced before us. But that argument overlooks the possible disadvantages resulting to the minor from the birth of additional members in the family. If the minor's good is the trust of the Court, and the rule is conceived in his interests, its sanction in the form of a decree confirming the fact that the suit when it was instituted was for the minor's benefit is sufficient to dispel the fear of probable injury to the minor involved in the argument. As observed by Coutts Trotter C.J. in *Sri Ranga Thathachariar v. Srinivasa Thathachariar*<sup>20</sup>

when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the imprimatur of the Court must be deemed to have been placed on the allegations made in the plaint justifying the effecting of a partition. That being so, the Court must be deemed to have determined that, even on the date of the plaint, it would have allowed a partition to be effected as it was beneficial to the minor. Though the enquiry has necessarily to be made by the Court subsequent to the filing of the plaint, it is the state of affairs that existed on the date of the suit that determine the exercise of the Court's discretion.

If the chances of augmentation of the minor's share are visible when the Court is considering the circumstances in the suit, it would very likely refuse partition, and the minor's interest would thereby be safeguarded. The anomaly which the Additional Judicial Commissioner tries to point out is that an auction-purchaser of an interest of a coparcener would not be able to realize the full extent of his purchase if the minor plaintiff was allowed to contend that his share in the property was unaffected by the sale pending the suit. Now the anomaly pointed out is not real for the auction-purchaser could ascertain the probable extent of the right, title and interest of the judgment-debtor at the date of the attachment, and no serious harm could result if the claim of the plaintiff to severance of status at the date of the institution of the suit was upheld.

14. As a result of the discussion of the decided cases to which our attention has been drawn, we are inclined with respect to agree with the view expressed in the two decisions of the Madras High Court, namely, *Krishnaswami Thevan v. Pulukaruppa Thevan* and

<sup>20</sup> I.L.R. (1927) Mad. 866

*Ranga Thathachariar v. Shrini-vasa Thathachariar*; and also the later full bench decision in *Rangasayi v. Nagarathnamma*. We are of the opinion that although the institution of a suit for

partition by a Hindu minor through his next friend does not ipso facto effect a severance of the joint status, if a decree were passed in that suit, the severance in estate must take effect from the date of the suit. In other words the minor's suit effects a qualified severance in the sense that it is subject to the decree of the Court. Consequently, as in this case, the discretion of the Court is properly exercised, according to our opinion, and, there is no dispute on the point, the minor's share is not liable to decrease by the birth of a member subsequent to the date of the suit. Therefore we think that the learned District Judge was right in the view he took as to the quantum of the share which the plaintiff was entitled to in this suit for partition.

15. But it is urged that as a consequence of the remand by the first appeal Court in January, 1933, the suit should be regarded as having been instituted on the date of the remand, and as the step-brother of the plaintiff was born and conceived before that date, he should be entitled to a share. That is contrary to the reasoning which we have adopted. The basis of our decision is that the minor is capable through his next friend of making up his mind whether there should be a severance of his interest or not when instituting the suit, provided that the discretion exercised by the next friend on his behalf is approved of by the Court. Consequently the date of the filing of the plaint must be looked upon as the date of effecting a severance if the decree for partition is passed in the suit.

16. The second point upon which some argument was advanced was that the decree did not provide for compensation to the father for having improved some of the properties in suit. Now the facts of this case, which are not disputed before us, are these : In or about 1927 when the father of the plaintiff married a second wife he drove away his first wife and made her live apart with her son the plaintiff and his sister. The mother then succeeded in obtaining through a criminal Court an allowance of L 5 per month to meet the expenses of herself and her children. Until the suit was filed in 1930 nothing beyond the sum of L 5 per month was received by the plaintiff's mother. In all these years the father recovered the rent of the ancestral property which was by no means inconsiderable. No account of that rent was kept. It is now said that in the course of the suit the father incurred a debt on the security of one of the family properties to improve it, and that in consequence its income has considerably increased. Now a manager who sets about improving family properties or making investments thereon by borrowing money is prima facie acting beyond his legitimate authority. Assuming that the alleged improvements for which the monies were borrowed were absolutely necessary-of this there is no satisfactory evidence and the finding of the two Courts below is against the father,-there must be some satisfactory proof of the fact that all the amount borrowed was in fact spent for improving the properties in order to enable the Court to do equity. There is conflict of evidence on the point as to what amount was spent on the normal repairs to the estate. The plaintiff's mother has stated that the total costs of the repairs could not have exceeded L 200 to L 300 (exhibit 34). Assuming that to be the maximum amount spent there on, there was the income of the family from its property sufficient to meet those expenses. Therefore we do not think that there is any good reason for disturbing the finding of the lower Courts in that respect. If one property of the family is in a better state of repairs owing to special improvement, it is possible to adjust the claim of the father and the latter's creditor at the time of effecting the division by allotting the improved property to him in order to enable the holder of the charge or the mortgagee to proceed against the father and his share therein. We leave that adjustment to be done in the final decree. That direction will be sufficient to meet the ends of justice in this case.

17. Then there remains the question of costs. As I have already stated, in accordance with the remand order the learned trial Judge gave directions as to costs. His order is somewhat misleading for it might be wrongly interpreted as refusing costs till the date of the remand to the appellant, defendant No. 1-the father. Mr. Pendse has agreed that there should be a clear statement in accordance with the order of remand and the father should get costs till then from the estate. It is also urged that there is no justice done by directing the father to pay the plaintiff's as well as his mother's costs, for there is considerable curtailment of the claim made by the plaintiff as to his share in the property, and, the omission of certain parties to the suit in the first instance has enhanced the ordinary bill of costs. Upon consideration of all the circumstances of this case we think that the trial Court's order in regard to costs should be modified and we order that the costs of the parties in the trial Court after remand shall come out of the ancestral property before that property is subjected to a division in terms of the decree for partition. We do not disturb the order as to costs passed in the first appeal and the order of remand. Subject to that modification the decree appealed from is confirmed. As regards costs of the second appeal, we direct that the appellants, having in substance failed, must bear their own costs and those of the respondents.

**Macklin, J.**

18. I agree.

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