BOMBAY HIGH COURT

Bammangouda Shankargouda Patil

Vs

Shankargouda Rangangouda Patil

(Divatia and Macklin, JJ.)

15.03.1943

JUDGMENT

Divatia, J.

1. [His Lordship after setting out the facts and dealing with the other points in the appeals proceeded :]

2. That brings us to the last point as to the alleged severance of interest between defendant No. 1 and his son on the one hand and defendant No. 2 on the other. The law as now settled by our High Court is that an adoption in order to affect the property in suit must have taken place at a time when the coparcenary was in existence, and if it was made at a time when by death or by partition the coparcenary had come to an end, it would not revive the coparcenary and would not have the effect of divesting property which had vested in a person either as an heir of the last single coparcener or in two different persons by partition of the family property. That rule of law has now been definitely laid down by our High Court in the full bench case of Balu, *Sakharam v. Lahoo*[1] and in Irappa Lokappa v. Rachayya Madiwalayya . It is the case of defendants Nos. 1 and 2 that the coparcenary had come to an end before Shankargouda was adopted in 1936. If, therefore, that case is established, his adoption, although it may be valid for religious and spiritual purposes, cannot be deemed as valid for affecting the family property. The defendants principally rely for their contention on two notices, exhibits 163 and 146, given by the natural father of defendant No. 2 to the Court of Wards. In the first notice given in December, 1934, it is stated that the petitioner, i.e. Guruganesh, had become a coparcener by virtue of his adoption along with Bammangouda and his son and that Bammangouda had incurred various debts which were illegal and avyavaharika and therefore not binding on the estate. It was, therefore, for the benefit of defendant No. 2, who had been recently adopted, to ask for separation of, his share, and the notice ends by stating that the petitioner intended to bring a suit for partition of his share and that any alienation made shall be void as against the interest of the minoir. That notice was followed by another on August 1, 1935. It was a statutory notice under Section 31 of the Court of

Wards Act, which provides that no suit relating to the property of a Government ward shall be brought in any civil Court until the expiration of two months after notice in writing stating the cause of action and the relief claimed, etc. had been delivered to the 'Court of Wards. This notice was necessary if a partition suit had to be filed on behalf of defendant No. 2. It is expressly stated in the notice that on account of debts created by Bammangouda which were not binding on defendant No. 2, it was in the interest and for the benefit of the minor to have a partition of the property, and that therefore a suit would be filed for the reliefs mentioned therein. In pursuance of this notice the suit was filed on December 1, 1938. In the meanwhile, Shankargouda was adopted by the widow of Rangangouda in the last branch on May 4, 1936. It is contended that after the separation between defendant No. 1 and defendant No. 2's branches, which took place by virtue of any of these two notices, the coparcenary came to an end, and Shankargouda's adoption having taken place thereafter, it would not affect the family property. There is no doubt that in the case of an adult coparcener the intention to sever his status from the joint family can be made known by any unequivocal act, either by a suit for partition or even by a notice to the other coparceners that that coparcener desired to separate from the family, and the moment that unequivocal intention is expressed by the coparcener, he must be deemed to have severed his connection with the family even though no actual partition by metes and bounds takes place in future. That proposition has been laid down in a number of cases by the Privy Council beginning with *Appovier v. Rama Subha Aiyan*[2] and it has been re-affirmed from time to time and emphasized in *Girza Bai v. Sadashiv Dhundiraj*[3] The latest case on this point is that of Ram Narayan Sahu v. Makhna But this principle does not entirely apply to the case of a minor coparcener who wants to separate himself from the joint Hindu family. In his case it has been held that a partition cannot be claimed by a minor as a matter of right, and it would be decreed in the minor's favour only if the Court is of the opinion that in the circum stances of the case the partition would be for the minor's benefit and in his interest. That is no doubt a wholesome rule of law inasmuch as the property which would be in the hands of the adult coparceners in the family should not be divided and handed over to a minor at the instance of unscrupulous persons when the minor's share if partitioned would be in danger of being applied to purposes adverse to the minor's interest. This proposition is conceded on behalf of the defendants, but it is contended that if it is held in a particular case that a partition is beneficial to the minor and it ought to be decreed, the decree in such a suit relates back not merely to the date of the plaint when the partition is asked for but even to an anterior point of time when a guardian acting on behalf of the minor has by an unequivocal intention demanded separation of the minor's share from the family property. It is conceded that the mere filing of a plaint in the case of a minor and a fortiori the mere giving of a notice of separation by a guardian would not constitute separation as it would do in the case of an adult. But the contention is that once it is held that a partition is for the minor's benefit, the principle of Hindu law which governs the separation of an estate is the same for

minors as well as for adults. It is on this principle that it has been held that in the case of a partition suit filed on behalf of a minor, if a decree for partition is made, the separation does not take place at the time when the suit is decreed, but when the partition suit is filed, because it is at that time that the intention to separate the minor's estate is expressed by the guardian on his behalf. In *Rangasayi v. Nagarathnamma*[4] this point arose as the minor died after the partition suit was filed on his behalf and the question was whether it was open to his legal representative to proceed with the trial and obtain a decree. If separation is deemed to take place only when the suit is decreed, then the suit would abate as the minor's share would be taken by the other coparceners by survivorship. But if the separation be deemed to have taken place when the suit was filed, the question of his representation would be material because the separation having already taken place his share would not go by survivorship to the remaining coparceners but to his heirs. It was, therefore, necessary to consider from what point of time the separation of interest had taken place, and the opinion of the full bench was that if the suit was decreed on the ground that the partition was for the minor's benefit, the decree must relate back to the date of the suit with the result that the suit did not abate. Our High Court has in *Ramsing v. Fakira*[5] accepted that principle and held that the decree relates back to the date of the suit. There the question arose because after the institution of the suit for partition by a minor, a son was born in the family, and the question was whether the minor's share in the property was affected thereby. If the minor was deemed to have separated at the date of the suit, it would not be affected by the subsequent birth of a son in the family, but if he was considered as having separated at the date of the decree, then it would, and it was held that the birth of the son would not affect the minor's share, because if a decree is passed in the suit it would relate back to the date of the institution of the suit. Incidentally I might state here that in Chhotabhai v. Dadabhai it was observed : by me as regards one of the points discussed during the course of the arguments that in a partition suit filed on behalf of a minor, the severance of joint status was effected at the date of the decree and not at the date of the institution of the suit. That observation was made on the strength of the decision of the Madras High Court in *Chelimi Chetty v. Subbamma*[6] There were several rulings of the other High Courts also to the same effect. But that was only an incidental observation which was not necessary for the purpose of the decision in that case. In *Ramsing v. Fakira (1938) 41 Bom. L.R. 195(SUPRA)* that point directly arose for decision, and it follows the subsequent full bench decision in Rmgasayi's case, in which the previous decision in Chelimi Chetty v. Subbamma has been overruled. That being so, the decision in Ramsing's case (supra) is binding on us, and it must be held, therefore, that in such a case the severance of status takes place at the date of the suit and not at the date of the decree. Mr. Thakor on behalf of the plaintiff Shankargouda admits that position in view of the decision in Ramsing's case (supra), but he says that the principle should not be extended further and applied to the notice of a suit given before the plaint is filed. According to him, even if it be taken that in a minor's suit if a decree is passed, the severance

takes place at the date of the suit, that principle would apply to a person who is admitted to be a coparcener and not to a person whose status as a coparcener is denied by the defendant. He draws a distinction between a suit in which an admitted coparcener wishes to have physical possession of his share by partition and a suit in which a person wants to establish his right by adoption or otherwise to have partition from the members of the family; in the latter case, according to him, he has first of all to establish his right which would come into existence at the date of the decree, and even assuming that a right may be said to arise at any period anterior to the decree, it cannot arise in any case before the date of the plaint, because it is the allegation of separation which is made in the plaint that enables the Court to pass a decree and not any assertion made before the suit was filed.

3. The question is whether the reasoning on which these two decisions proceed is also applicable to any unequivocal assertion of severance of status made in a notice before the suit is filed. It may be stated here that in the present suit the notice is given not merely for expressing an intention to separate but it is a notice of an alleged separation, a notice for partition given for the purpose of and followed by a partition suit. There is also the fact that such notice was necessary in law by virtue of the provisions of Section 31 of the Court of Wards Act.

4. Now, it is relevant to state here briefly the grounds on which it was held in these two cases that the severance of status relates back to the date of the plaint in the case of a minor's suit. Mr. Justice Ramesam who delivered the principal judgment in the full bench case of Rangasayi makes the following observations (p. 122) :-If in the case of a minor the option cannot be exercised by him but should be done by somebody else on his behalf, why should not the exercise of that option on his behalf effect a severance as in the case of an adult? ...As I said, this is a rule conceived in the interests of minors. It does not mean that the exercise of the discretion is totally inoperative until the Court records its finding. In such a case it seems to me that the proper way of describing the situation is that the exercise of the option on behalf of the minor effects a severance conditional on the Court finding that it was for the benefit of the minor.

5. It was on this ground that it was held that the separation was effected at the date on which the option was exercised and not at the date of the decision of the suit. In that case the question as to whether the severance took place at the date of the notice did not arise, because it does not appear that a notice for separation was given before the suit was filed. Similarly in Ramsing's case Wassoodew J. makes the following observations (p. 200) :-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.

6. In that case also it does not appear that a notice was given before the suit, and therefore there was no question as to whether the separation began at the date of the suit or at the date of the previous notice. But it is clear from the observations of both these learned Judges that in their opinion the separation must be deemed to have taken place at the date of the institution of the suit because the assertion was made in the plaint on behalf of the minor that a severance of the minor's share was desired. That being so, it is difficult to see why logically the same principle should not apply to any notice given before the suit in which the same intention is unequivocally expressed, especially if such a notice results in a suit for partition. In fact, if such direct expression of intention is made in the notice, it would not, in our opinion, be logical to say that although in such a easel the intention to separate could be deduced from the plaint, it could not be deduced from the notice previously given. What is required is an unequivocal assertion for severance of status on behalf of a minor, and whether it occurs in a plaint or in a notice would, in our opinion, be immaterial. In fact, one of the learned Judges in Rangasayi's case (supra) was of the opinion that the principle could be extended to the case of a notice given before the suit on behalf of the minor. The same reasoning which forms the basis of the decisions in Rangasayi's case (supra) and Ramsing's case (supra) must lead to the conclusion that the severance relates back to the notice of the suit in which the intention to separate is unequivocally expressed. There can be no doubt about this in the case of an adult coparcener, and there is no reason why it should not be the same in the case of a minor also if a partition is granted in the minor's suit either on the express finding that it was for his benefit or in circumstances which showed that it was in his interest The same principle which would apply to an adult's intention to separate would also apply to the guardian's intention expressed on behalf of the minor. The rule that a partition should not be granted in a minor's suit as a matter of course but only if it was for his benefit is one of prudence and expediency and does not affect the fundamental rule of Hindu law that a coparcener can sever his status merely by expressing a dear intention to do so. The only difference in its application is that while an adult can himself express that intention whenever he likes, a minor cannot do so himself but only through his guardian and that tool by following the expression of that intention by a suit for partition.

7. The lower Court has granted partition to defendant No. 2 in this suit, but the learned Judge has observed that he would have been most reluctant to grant it if the management of the Court of Wards had not been withdrawn in 1940 after the suit was filed. It is difficult to appreciate why this reasoning affects the date of separation in status of defendant No. 2. If the partition was allowed, it must be because the relief is deemed to be for the minor's benefit. The circumstance that the Court of Wards was in management at the date of the suit as well as at the date of the notice and that partition would not have been probably granted if the management had continued

up to the decision of the suit does not affect the fact that the intention to separate expressed in the notice followed by the suit has fructified into a decree for partition, and it is the intention that is the real test, no matter how and for what reasons the partition was allowed.

8. The fact that the lower Court has allowed partition after the management of the Court of Wards had ceased clearly indicates that the partition was in the minor's interest. The lower Court observes that defendant No. 1 could not be trusted with the management of the property which was wasteful and tending to the destruction of the estate. The plaintiff Shankargouda had himself alleged the same in the plaint, and so too had defendant No. 2. They had asked for partition on that very ground, and therefore, if the partition was properly allowed on that ground, it must relate back to the date on which it was demanded. We think for these reasons that the coparcenary terminated at the date of the notice and that therefore Shankargouda does not get any interest in the property.

9. It is however urged by Mr. Thakor that the principle of the decision of the full bench in the case of Balu Sakharam v. Lahoo (supra) has been unduly extended by this Court in Irappa Lokappa v. Rachayya Madiwalyya (supra) to a case where it is held that a coparcenary terminates on a partition among the members of that family, and that after such partition no adoption could be made to affect property; It is contended that although that principle, which was enunciated in a case where the property went to an heir, has been extended to a case where the coparcenary has terminated by partition, it should not be further extended to a case where it is alleged that the coparcenary had come to an end not by a partition but by the mere expression of an intention to sever status from the family. It is true that the full bench case of Balu Sakharam v. Lahoo was the case of a sole surviving coparcener dying and his property going to his heir, but in the subsequent case of Irappa Lokappa v. Rachayya Madiwalyya, that principle has been applied in a case of partition, because the real question is not how or in what manner the coparcenary had come to an end but whether it had ceased to exist at the date of adoption. A coparcenary can come to an end in various ways, either by the death of the last surviving coparcener or by a partition or by severance of status. There is, therefore, nothing illogical in extending the principle of the full Bench case of Balu Sakharam v. Lahoo to a case where the coparcenary has come to an end by severance of status and not by partition by metes and bounds. In fact as observed in Girja Bai v. Sadashiv Dhundiraj (1916) L.R. 43 I.A. 151, 159 : s.c. 18 Bom. L.R. 621 a partition under Hindu law includes both division of title as well as division of property, and a severance of status is the same as division of title. We do not think, therefore, that it would be an improper extention of the principle of the full bench decision in Balu Sakharam v. Lahoo to apply it to a case where the coparcenary has come to an end by mere severance of status between the members of the family. [The remainder of the judgment is not material.]

Cases Referred.

1(1936) 39 Bom. L.R. 382, F.B
2(1866) 11 M.I.A. 75
3(1916) L.R. 43 I.A. 151 : s.c. 18 Bom. L.R. 621
4(1933) I.L.R. 57 Mad. 95, F.B
5(1938) 41 Bom. L.R. 195
6(1917) I.L.R. 41 Mad. 442.