NAGPUR HIGH COURT

Mandli Prasad Ramcharanlal

Vs

Ramcharanlal

(Bose, CJ. and Sen J.)

03.02.1947

JUDGMENT

Bose, CJ.

1. This appeal arises out of a suit for partition. For a proper understanding of the case it is necessary to set out the genealogical the given below.

2. Respondent 8, Deviprasad is the son of respondent 1, Ramcbaranlal by his first wife who is dead. Respondent 4, Chandramukhi is the second wife of Ramcharanlal. Respondent 2, Dioeshchahdra and appellant Mandliprasad are their sons who are minors. Ramcharanlal has three daughters from Chandramukhi but we are not concerned with them in the present appeal. Chandramukhi filed Civil Suit No. 6-A of 1937 on 27-9-1937 in the Court of the Subordinate Judge, 1st Class, Bilaspur, for partition of movable and immovable property on behalf of herself and as a next friend of her son Dineshchandra, who was described as a child of 7 years, against her husband Ramcharanlal and her stepson Deviprasad. She claimed that each of the par-ties was entitled to 1/4th share in the property and prayed for partition. The property sought to be partitioned consisted of 16 share of Bagbamunda which was ancestral property in the hands of Ramcharanlal, tenancy land at mauza Fandwani, houses at Mungeli and Baghamunda, grain, cattle, pots and pans. The family had also to pay debts to the extent of ₹ 2250/- to creditors whose names were mentioned in the schedule filed along with the plaint. The reason alleged for seeking partition was that the property was being mismanaged and wasted on account of the frequent quarrels of Ramcharanlal with his son Deviprasad and that partition was necessary to protect the interest of her minor son Dineshchandra. Deviprasad contested the right of Chandramukhi to a share and stated that she was merely entitled to maintenance. He stated that he had no objection to the partition being effected and a share allotted to Dineshchandra.

3. The trial Court found that Chandramukhi was also entitled to a quarter share and passed a preliminary decree for partition on 7-12-1987 and specified that each of the parties was entitled to a quarter share and directed that partition of landrevenue paying estate be effected by the Collector and of the rest of the property by a commissioner. Commissioners were appointed successively to make a partition but no partition was actually effected. On 8-8-1938 the trial Court granted time to the parties as they stated that they were going to compromise and effect a

partition out of Court.

4. Further time was granted on 24-8-1988 and the case was fixed for 31 8-1938. In the mean time, the parties effected a division of property through arbitrators who delivered' their award on 28-81988. Under that award Dineshchandra (plaintiff) and Ramcharanlal {his father) and Deviprasad (his half brother) were each given 1/3rd share. On the application of the plaintiffs, the Court; granted permission to Chandramukhi to compromise the case but directed that the terms of the compromise be intimated to the Court in order to enable it to find out if the compromise was for the benefit of the minor. The case was fixed for 2-4-1938. On that date the parties filed an application under Order 23, Rule 8, Civil Procedure Code for drawing up a decree in accordance with the terms of the award. The application was signed by Chandramukhi for herself and as a guardian of her minor son Dineshchandra and by the defendants.

5. The defendants filed in Court the award dated 28-3-1988 delivered by the arbitrators. In the order sheet of that date the Court recorded that an application had been made for sanctioning the compromise and that it would persue the terms of the compromise and pass orders. On 22-4-1938 the Court recorded the statements ' of the parties regarding the compromise and passed an order that the compromise was for the benefit of the minor as he was getting a quarter share and accordingly sanctioned it. A final decree for partition was passed as per terms of the compromise on that date.

6. The property was divided by metes and. bounds into three shares and Ramcharanlal was to discharge the entire debt and he was to remain in possession of the 1/3rd share of Deviprasad in the property for six years from 81-5-1938 to 81-51944. Under the terms of the decree, Ramcharanlal was to deliver certain quantities of grain and ₹ 120/- in cash annually on 15th May each year from 1989 to 1944 with a condition that in case of default Deviprasad was entitled to resume possession of his share and realise the balance by a suit.

7. One of the terms of the decree based on the terms of the compromise and the award was to this effect: In case of any sons being born to Bamcbaranlal in future their share be carved out of the share of plaintiff 2 and defendant 2 and they shall have no right in the 0-5-4 share of defendant 1 and the burden of debts will also be on their shoulders. Ramcharanlal was defendant 2 and his son Dinshchandra was plaintiff 2 in the suit. The effect of the decree was that a son born to Ramcharanlal after the partition was entitled to a share out of the 2/3rd share of the property allotted to them and had no right to olaim anything out of the 1/3rd share allotted to Deviprasad.

8. The appellant Mandliprasad was not born when civil Suit No. 6-A of 1937 was filed on the 27-9-1937, or on 7-12-1937 or on 22-4-1938 when the preliminary and the final decree for partition were made. Mandliprasad was born on 16-8-1938 on the 323rd day after the institution of civil Suit No. 6 A of 1987, 252nd day after the preliminary decree and 116th day after the final decree.

9. On 17-11-1939 Shyamprasad as next friend of his brother-in-law, Mandliprasad, filed civil Suit No. 93-A of 1938 on his behalf in the Court of 1st Subordinate Judge 2nd class, Bilaspur, against his father Ramcharanlal and mother Chandramukhi, brother Dineshchandra and half brother Deviprasad for reopening the partition made in civil Suit No. 6-A of 1937 and for a fresh

partition of the family property. In the plaint the age of Mandliprasad was stated to be 1 year The plaintiff stated that as no share had been reserved for him at the partition made in the previous suit though the parties must have known that Chandramukhi was then enceinte, he was not bound by that partition and was entitled to have a re-partition of the property. He stated that each of the parties was entitled to 1/5th share and claimed a decree for partition and separate possession of his 1/5th share. He also claimed a decree for ₹ 160/- against Deviprasad on the allegation that he had removed grain worth ₹ 300/- and he was entitled to 1/5th share of the amount.

10. Shyamprasad, the next friend of the plaintiff, is his sister's husband and is a resident of Bodla in Kawardha State which is outside British India. On the application of Deviprasad the trial Court ordered the plaintiff on 6-1-1940 to furnish security for ₹ 50/- for the costs of Dineshchandra and Deviprasad (defendants 2 and 3). On 15-1-1910 the plaintiff agreed to furnish security for costs and Ramcharanlal agreed to be his surety. In compliance with the directions of the Court Ramcharanlal executed the security bond. Ramcharanlal (defendant 1) admitted the claim of the plaintiff and stated that the" condition in the award that any issue of Ramcharanlal born after the award was to get his share out of the property in the hands of Ramcharanlal and Dineshchandra, was not legal and not binding on him. Chandramukhi also admitted the claim of the plaintiff and Btated thLt she was entitled to a share equal to that of the sons of Ramcharanlal and that the award could not take away her share which she got under the preliminary decree dated 7-12-1937. There can be no doubt that the suit has been filed at the instance of the parents of Mandliprasad in order that the 1/3rd share which Deviprasad obtained at the previous partition may be reduced to the 1/5th share which he would obtain in case the previous partition is set aside and a fresh petition effected.

11. Deviprasad contested the claim of the plaintiff and stated that he was separate from Ramcharanlal and Dineshchandra as he had expressed his intention in clear and unequivocal terms to separate from them about 6 years before the institution of civil Suit No. 6-A of 1937. He pleaded that Mandliprasad was bound by the partition which took place before he was born and begotten and was not entitled to reopen it and that oh the death of Ramcharanlal Mandliprasad would be entitled to inherit the share allotted to Ramcharanlal and any separate property which he might possess. Deviprasad denied the removal of the grain or his liability for the payment of ₹ 160/.

12. Dineshchandra was represented by the Court reader as his guardian. He denied the claim of the plaintiff and his defence was the same as of Deviprasad.

13. The trial Court framed a preliminary issue on 6-1-1940 and decided it against the plaintiff by the order dated 31-14940. The trial Court held that the plaintiff was not entitled to re-open the partition and accordingly dismissed the suit on that date. The claim for ₹ 160/- was also not decreed and the plaintiff did not make that a ground of appeal either in the first appeal or in second appeal. The decree of the trial Court was affirmed by the Court of the Extra Additional District Judge, Bilaspur, by the decree dated 1-4-1941 in Civil Appeal No. 68-A of 1940. It is against this decree that the plaintiff has filed the present appeal.

14. Ramcharanlal, Chandramukhi and their son Dineshchandra were not represented before us. As already stated there can be no doubt that the present suit for partition by Mandliprasad has been filed at the instance of his father Ramcharanlal through his son-in-law as the next friend of the minor. Ramcharanlal admitted the claim of the plaintiff and furnished security on his behalf for the costs of Deviprasad incurred in the suit. Ramcharanlal paid fee of the counsel of the appellant: see the certificate of fees dated' 28-8-1946 which recites that ₹ 25/- had been remitted by Ramcharanlal by money order on 5-7-1945 towards payment of fee. Ramcharanlal is interested in the litigation and is taking keen interest in it although he is not represented in appeal.

15. Deviprasad filed copies of the order sheets dated 27-9-1937 and the 10-11-1937 in civil Suit No. 6 A of 1937 (Ex. D. l) and of his written statement dated 10-11-1937 (EX. D. 2) in that suit. Reference was made by the parties in their pleadings to the award dated 18-3-1938, the preliminary decree dated 7-12-1937 and the final decree dated, 22-4-1938 passed in that suit but their copies were not filed in the trial Court by either of the parties. The trial Court as well as the lower appellate Court have referred in their judgments to the pleadings and the decrees in the previous case.

16. On 18-2-1942, the appellant Mandliprasad and the respondent Deviprasad made a joint application in this Court asking that the record of civil Suit No. 6-A of 1937 be sent for and admitted in evidence and the preliminary and the final decree for partition and a copy of the endorsement dated 27-9-1937 made at the time of the presentation of the plaint in that suit be included in the supplementary paper book. This has been done and counsel have referred to them without any objection. Reference has accordingly been made to the pleadings and the decrees for partition in the previous suit in giving a resume of the case.

17. The question for decision in this appeal is whether the appellant, Mandliprasad is entitled to re-open the partition made in the previous suit (Civil Suit No. 6-A of 1937). The decision of this question turns on the determination of the point when did the partition take place in the previous suit, whether on 27-9-1937 when the suit was filed by Dineshchandra for partition or on 7-12-1937 or on 22-4-1938 when the preliminary and the final decrees for partition were respectively made.

18. Mandliprasad was born on 16-8-1938 more than three months after the final decree for partition had been made on 22-4-1938. The normal period of gestation is 280 days. Conception must have taken place sometime in November 1937 long rafter 27-9-1937 when the civil Suit No. 6-A of 1937 for partition was filed. The trial Court was doubtful whether the plaintiff was conceived even on 10-11-1937 when the written statement of Deviprasad was filed. The plain, tiff's case as stated in para. 6 of the plaint was that he was in his mother's womb on 28-3-1938 when the award was made and also on 22-4-1938 when the final decree for partition was 'passed-in that suit but did not allege that he was in the womb on 27-9-1937 when the previous suit for partition was filed. The Courts below have decided the case on the basis that Mandliprasad was not in his mother's womb at the' time when the previous suit for partition was filed. This assumption was not disputed by the appellant before the District Court and has' also not been contested before us.

19. Mandliprasad was thus not en ventre sa mere on 27-9-1937 when the previous suit for partition (civil Suit No. 6-A of 1937) was filed.

20. Under the Hindu law, a son begotten but not born is equal in all respects to a son actually in existence except for the purposes of adoption. His membership with the family is considered as commencing from the date of conception: *Yekemian v. Agniswarin*[1] A son in utero becomes (if he is born alive) a coparcener with all his rights as from the date of his conception as if he were in actual existence. He has, therefore, the right to take the joint family property by survivorship *Nawal Singh v. Bhagwan Singh*[2] *Ganpat Venkates v. Gopalrao Venkatesh*[3] *Krishna v. Sami*[4] to impeach alienations prior to his birth: *Deo Narain Singh v. Ganga Prasad*[5] *Sabapathi v. Somasundaram*[6] and *Ramarao v. Venkata Subbayya*[7] and to re-open a partition to have a share allotted to him: *Kalidas Das v. Krishnan Chandra*[8] *Yekemian v. Agniswarian (69) 4 Mad. H.C.R. 307* and *Hanmant Ramchandra v. Bhimacharya (88) 12 Bom. 105(Supra)*. The only exception to the rule is in regard to adoption: *Hanmant Ramchandra v. Bhimacharya (88) 12 Bom. 105(Supra)* (see Dr. Jolly, Tagore Law Lectures, page 182; Mayne's Hindu Law, Edn. 10, para. 419 at pages 532, 533; Mulla's Hindu Law, Edn. 9, para. 28 at pages 20 and 21, para. 270 at page 318 and para. 309 at page 380; and Gupte's Hindu Law, Article 14 pages 46-47.)

21. In an elaborate and comprehensive judgment in *Kusum Kumari v. Dasarathi Sinha A.I.R. 1921(Supra)* Mookerjee, J. has reviewed the law regarding the position of a son in utero under the Hindu and other systems of law. He has referred to ancient Hindu law texts and their commentaries in discussing the rights of a son born after partition. In that case the question was whether a posthumous son could challenge the settement made by his mother with her step-daughter during the time he was in the womb. The decision was that he had a' right to do so.

22. In para. 419 of Mayne's Hindu Law, Edn. 10, reference has been made to the ancient Hindu law texts and their commentaries in notes (t)(u) and (v). The law regardnig the rights of a son born after partition has been accurately and concisely summarized in these terms:

> 419.... Where a father has, at a partition with his sons, reserved a share for himself, a son begotten after partition is not entitled to have the partition reopened, but is exclusively entitled both to the father's share and to his separate or self-acquired property.A son who was in his mother's womb at the time of partition but was born subsequent to it, it however entitled to reopen the partition and to receive a share equal to that of his brothers. For, a son in the womb is in point of law in existence.20. If the father had divided the whole property having his sons, retaining no shar for: himself, then the sons, with whom partition was made, must allot from their shares a portion equal to their own to an after-born son This proceeds on the principle that the unborn ion cannot be deprive of his share in the paternal estate by a prior partition.

23. In the privious suit for partition (civil Suit No. 6-A of 1987) Ramcharaulal was allotted a shire. Mandliprasad was not conceived on 97-9-1937 when the suit was filed. He was born on 16-8 1938 after the final decree for partition was made on 22-4-1938. He was, however, in utero on 7-12-1937 or on 22-4-1938 when the preliminary and the final decree for partition were respectively made. According to the law stated above, Mandliprasad would be entitled to reopen

the partition in case the severance of status took place on, 7-12-1937 or on 22-4-1938 as he was then in his mother's womb. If, however, the severance took place on 27-9-1937, the date when the previous suit for partition was filed, he was not entitled to reopen the partition because his father was allotted a share. The question for decision, therefore, is what is the critical date, the 27-9-1937 when the suit was filed for partition or the 7-12-1937 or the 22-4-1938 when the preliminary and the final decree for partition were respectively made.

24. In order to decide this question, it is necessary to set out briefly a few propositions of Hindu law which are well settled.

> (1) According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definte share: *Appovier v. Rama Subba Aiyan*[9]
> (2) Any one of several members of a joint family is entitled to require partition of ancestral _ property, and his demand to that effect, if it be not complied with, can be enforced by legal process: *Madho Prasad v. Mehrban Singh*[10] (3) A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention rast be unequivocal and clearly expressed: *Suraj Naranin v. Iqbal Narain*[11]
> (4) Partition is used in two different senses : division of title or severance of status and division of property. By division of title, the coparcenary property ceases to be joint property and it is converted from a joint into a separate ownership. Severance of the joint status so far as the separating member is concerned, with all its legal consequences resulting there from is quite distinct from the de facto division into specify shares of the property held until then jointly: *Appovier v. Rama Subba Aiyan*[12] and *Mt. Girja Bai v. Sadashio Dhundiraj*[13]

25. In *Soundararajan v. Arunachalam Chetti*[14] a minor illegitimate son of a Sudra filed a suit for partition against a legitimate son. The trial Court held that the paternity was not established and dismissed the suit. On appeal the High Court held that the paternity of the plaintiff was established and on reference to a Full

Bench it was decided that he was entitled to the share of an illegitimate son in his father's property. The decision of the Full Bench is reported in *Soundararajan v. Arunachalam Chetti*[15] while the appeal was pending in the High Court the legitimate son died unmarried and in his place his mother was brought on the record as his legal representative. This order was contested by the appellant who contended that he was entited to the entire property by survivorship on the death of his brother who died joint. The contention of the respondent was that by the presentation of the plaint for partition the plaintiff became a divided member and that consequently he was not entitled to succeed to his legitimate brother by survivorship. The question for decision was whether the plaintiff became separated from the other members by the fact of suing them for partition. It was held that the plaintiff became a separated member when be filed the suit for partition and that he was not entitled to succeed to his brother by survivorship. The decision is

reported in *Soundararajan v. Arunachalam Chetti*[16]

26. The case was argued by distinguished counsel and decided by eminent Judges and it is curious that there is no reference in that case to the question whether the fact that the plaintiff was a minor made any deference as regards the date of separation of status, whether from the date of the suit or from the date of the decree. As Jockson, J. stated in *Akanna v. Rangaraja*[17] the learned Judges of the Full Bench in *Soundararajan v. Arunachalam Chetti*[18] could not have overlooked the fact that the plaintiff was a minor and if the minority of the plaintiff affected the date of severance of status they would have distinghished the case in *Suraj Narain v. Iqbal Narain*[19] especially as the majority of the Judges of the Full Bench stated that they would have decided otherwise if the matter had not been concluded by the decision of the Privy Council.

27. In *Ashiv Dhundiral v. Mt. Girjabai*[20] the Court of the Judicial Commissioner, Nagpur, held that severance of status could only be effected with the consent of all the cepareersrs or by decree of the Court, There the plaintiff Harihar Bapuji Talatule gave a notice to the other members of the family in which he expressed his intention to separate from the joint Hindu family and claimed partition of his share. As this was not done, he filed a suit for partition. The other defendants admitted that he had 1/3rd share in the property and that he was entitled to have that share partitioned. The case was fixed for settlement by the parties as regards the best mode of the division of the property. Before that question could be settled, Harthar died and in his place his widow Girja Bai was brought on the record as his legal representative and untimately a decree for partition was passed in her favour. The defendants filed appeals in the Court of the Judicial Commissioner against the order bringing Girja Bai on the record as a legal representative of the deceased plaintiff and against the decree for partition. The Court of the Judicial pommissioner held that partition could only be made by agreement of parties or by decree of the Court and as before that could be done Harihar died he must be deemed to have died as a member of joint Hindu family and as such the other brothers were entitled to the entire property by survivorship and the widow was not entitled to a decree for partition and accordingly reversed the decree of the trial Court and dismissed the suit.

28. On appeal the Privy Council reversed the decree of the Court of the Judicial Commissioner and restored the decree of the trial Court. The judgment of the Judicial Committee is reported in *Mt. Girja Bai v. Sadashio Dhundiraj*[21]

29. The statement of law contained in their previous decision, *Suraj Narain v. Iqbal Narain*[22] was re-affirmed and their Lordships discussed the principle more fully than was in *Suraj Narain v. Iqbal Narain*[23] After, a discussion of the relevant Hindu texts on the question of partition their Lordships of the Judicial Committee at page 160 held:

> Separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting there from, is quite distinct from the de fact division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilist the other is the natural resultant from his decision, the division and

> Separation of his share, which may be arrived at either by private agreement among the patties, or on failure of that by the intervention of the Court. Once the decision has been unquivocally expressed and clearly intimated to hip co-shares, his right to obtain and possess the sharp to which he admittedly has a title is unimpeachable; neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has simply to give effect to his tight to have his share allocated separately from the others.

30. Their Lordships pointed out at page 161 that the District Court had confused the two considerations, namely, the serverance of status, which is a matter of individual volition, with the allotment of shares, which may be effected by different methods: by private agreements, by arbitrators appointed by the parties, or, in the last resort by the Court. This is now the including case and has been follower in numerous cases: *Kawal Nain v. Budh Singh*[24] *Palani Ammal v. Muthuvenkatachala Moniagar* 1. *Bal Krishna v. Ram Krishna*[25], and *Ram Narain Sabu v. Mt. Makhna*[26],

31. In *Kawal Nain v. Budh Singh*[27] the question was whether a morgage executed by Prabhu Lal was enforceable. If was joint at the time he executed the mortgage he had no power to execute it and the mortgage was void and unmemorable. If, however, he was separate the mortgage of his 1/5th share was valid and enforceable. The decision of the question turned on determination of the point whether he was joint or separate. In order to arrive at a decision the legal effect of a previous suit for partition filed by him had to be construed, Their Lordships held that notwithstanding the dismissal of the suit for partition the claim in the plaint amounted to an intimation to the defendants, his co-aharers, of the unequivocal desire of the plaintiff for separation from the joint family and they "held that the commencement of the suit for partition effected a separation from the joint family and that it was immaterial in such case, whether' the co-sharers assent. Their Lordships observed at page 161: 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. As the mortgage was executed by Prabhulal after separation it was binding on him.

32. In *Palani Ammal v. Muthunenkatachala Moniagar*[28], their Lord-ships of the Judicial Committee stated at p. 86 that the fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted.

33. In each of the Privy Council cases referred to above, with the exception of *Ram Narain Sabu v. Mt. Madhna*[29], their Lordships of the Judicial Committee had to consider the effect of a suit for partition filed by an adult male coparcener. It may be taken as settled that where an adult coparcener clearly and unequivocally gives a notice of his intention to separate from the joint Hindu family he becomes separate in status from the date of the notice and if no previous notice is given, the filing of a suit for partition amounts to an expression of an intention to separate and if the claim is decreed the date of severance relates back to the date of the institution of the suit and not the date of the decree

34. The learned Counsel for the appellant contended that these principles are not applicable to the case of minor plaintiff suing for partition and in his case the severance of the joint status takes place not from the date the suit for partition is filed on his behalf but on the date when the decree for partition is made in his favor. On that point there was a divergence of judicial opinion but the weight of authority is in favor of the view that even in the case of minor, if his claim for partition is decreed the date of severance is the date of suit and not the date of decree.

35. There are three cases of this Court which are however, inconclusive as in none of these cases the point was decided. In *Nathusingh v. Annudrao*[30], the conflict of views was noted but it was not decided as it was not necessary. In that case, the question was whether the mortgage executed by Ratan Singh on 23-7-1980 was binding on his wife and minor son who claimed 'that they had separated before the date of the mortgage and that the mortgage was not binding on them. Prior to the execution of the mortgage the minor had filed a suit for partition through his next friend but that was filed in a wrong Court and the plaint was returned for presentation to the proper Court on 4-10-1930 and it was re-presented in the proper Court in 1931.

36. On those facts, it was held that the suit for partition must be deemed to have been

instituted in 1931 when the plaint was filed in the proper Court and as the mortgage was effected before that date the mortgage was binding. The question whether the severance took place on the date when the suit for partition was filed or on the date when the preliminary decree for partition was made, was not material in that case because the mortgage was executed before either of the dates.

37. Reference in that case was made to *Chhotabhai v. Dadahai*[31] and *Lalta Prasad v. Shiam Singh*[32], but no reference was made to the later cases *Krishnaswami Thevan v. Pulukarppa*[33] *Ranga Thathachariar v. Srinivasa Thathachariar*[34] *Rangasayi v. Nagarathanamma*[35] and *Ramsingh v. Fakira*[36] where it was decided that the mere filing of a suit by a minor does not ipso facto cause severance of the joint status but that if the Court considers that the partition is for the benefit of the minor and decrees the claim, the partition relates back to the date of the institution of the suit and not to the date of the decree.

38. In *Laxminarayan v. Dinkar*[37] the cases in *Ramsingh v. Fakira*[38] *Ranga Thathachariar v. Srinivasa Thathachariar*[39] and *Nathusingh v. Annudrao*[40], were incidentally note but the point was not decided as the plea had not been raised in the Courts below. There was no reference to *Krishnaswami Thevan v. Pulukarppa*[41] *Ranga Thathachariar v. Srinivasa Thathachariar*[42] and *Rangasayi v. Nagarathanamma*[43]

39. In *Shanker Singh v. Gulabchand*[44] it was held that the mere commencement of a suit for partition is sufficient to effect a severance in interest before the decree No minors were involved in the case and it was not necessary to consider the effect of a suit filed by a minor plaintiff for partition, whether severance of status takes place from the date of the suit or the date of the decree. The statement at p. 450 is a part of the argument of counsel and not a, part of the decision. This was pointed out by one of us (Bose, J.) who had delivered the judgment in that case. The learned Counsel for the appellant did not stress the matter further and did not contend that the decision is an authority in support of the proposition he contended, So far as this Court is

concerned, the matter is res Integra and can be decided on first principles.
40. In *Mt. Deo. Wanti Kunwar v. Dwarkanath*[45] Mitter, J. stated:
Now it is settled doctrine of the Hindu Law that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not. This statement was cited with approval by their Lordships of the Judicial Committee in *Mt. Girja Bai v. Sadashio Dhundiraj*[46] their Lordships of the Judicial Committee observed: Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has amply to give effect to his right to have his share allocated separately from the others.

41. In *Balkisan Das v. Ram Narain Sahu* [47]the Privy Council had to consider the effect of an Ikrarnama executed on 21-6-1888 by adult coparceners. Under that agreement the parties agreed to divide the co-parcenery property in certain defined shares. The question was whether the agreement to separate executed by the guardians on behalf of the minor coparceners was effective to cause a severance of status. The decision was that it did. Their Lordships of the Judicial Committee observed at p. 150: There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition, and (as has been said) if an agreement for partition could not be made binding on minors a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself.

42. This was applied in *Parbati v. Naunihal Singh*[48] and an agreement entered into during the minority of some of the coparceners was upheld and it was held that there was a severance of status. The mere fact that one of the coparceners is a minor does not affect the right of an adult coparcener to separate if he chooses: *Bali v. Mt. Girji*[49] and *Dnyaneshwar vishnu v. Anant Vasudeo*[50]. It is now settled that a valid partition may be made during the minority of one or more coparceners: Mayne's Hindu Law paras. 426, 539. If a guardian can represent a minor in effecting a partition, there is no reason why he should not have the right to separate the minor from the family by giving a notice and if that right is denied, to enforce the claim by a suit for partition.

43. In *Ram Narain Sabu v. Mt. Madhna*[51], the question was whether' the claim by the guardian of a lunatic for separation of his share effected a severance of his status. The decision was that it did. The question arose in this way. Two of the coparceners Earn Das and Parsotam filed a suit for partition and claimed half share. The defendants were the other two coparceners Ram Narain and Deo Narain. Deo Narain was a lunatic and he was represented in the suit by his wife as his guardian. Deo Narain filed a written statement but there was no demand for separation from Earn Narain, the other defendant. On 23-4-1924 the trial Judge ordered partition and directed the am in to divide the properties into two lots. On 10-5-1924, the guardian of Deo Narain filed an application that his share be separated by the am in and stated that there was an apprehension of loss in future if the said share was allowed to remain joint.

44. The trial Court passed a final decree for partition in which 1/4th share was allotted in severalty to Deo Narain. Bamnarain and his son filed an appeal in the High Court on 27-7-1925.

During the pendency of the appeal, Deo Narain died on 3-8-1927 leaving behind him a widow and a daughter. The widow was brought on the re-cord in his place as his legal representative. The High Court held that after the preliminary
decree the trial Court was not competent to entertain an application that Deo Narain's share should be separated, and accordingly reversed the decree granting a share to Deo Narain but left the question open as regards the legal effect of the application of the guardian upon the status of the family property or the constitution of the family qua Ram Narain and Deo Narain which was left to be determined in a properly framed suit.

45. Ram Narain and his son filed a suit for declaration that Deo Narain died joint and that they were entitled to the entire property by survivorship. The trial Court dismissed the suit which was affirmed by the High Court in *Ram Narain v. Mt. Madhna*[52], The High Court held that the guardian ad litem of Deo Narain did clearly ex. press an intention by means of an application to have the share of Deo Narain separated from the share of Ram Narain and the application had the approval both of the trial Court and of the High Court and had the legal effect of bringing about separation between Ran Narain and Deo Narain even if they were joint up to the time that the petition was filed in Court. At p, 882 their Lordships observed: A member of a joint family who is a minor or of unsound mind in incapable of giving' expression to an effective intention to separate, but such intention can be expressed by his guardian and has the legal effect of bringing about disruption of the joint family, provided the Court is of the opinion that it is to the benefit of the minor or the person of unsound mind to separate. Once the Court has recorded a finding to that effect the separation follows as a matter of law.

46. The decision of the High Court was affirmed by the Privy Council in *Ram Narain Sabu v. Mt. Madhna*[53], their Lordships of the Judicial Committee observed that the ordinary right of a coparcener to effect a separation of his estate, interest or title as distinct from a partition by metes and bounds by proper declaration of his desire to sever, is not abrogated by the mere fact that he has not claimed to exercise it prior to the preliminary decree. As the demand by the guardian for separation of the estate and interest of. the lunatic had the approval of the trial Judge and apparently of the High Court, and as it was not shown to have been in any way contrary to the interests of the lunatic, it was held that the application of the guardian amounted to severance of status. The principle underlying this decision is equally applicable to the case of a notice given by a guardian on be half of a minor to separate from the joint family or by his filing a suit for partition on his behalf.

47. In the case of a minor the right to separate has to be exercised on his behalf by a person acting as his guardian. There are special considerations why a Court must scrutinized the reasons given by the guardian for separation of the minor to find out whether they were well founded or sufficient and if the Court is satisfied that the partition is for the benefit of the minor, to give effect to his right to have his share allocated separately from the others. The Court exercises this power because it has supervisory jurisdiction over the property of the minor and to control the action of a person who purports to act on his behalf.

48. Story in para. 1769 of vol. 3 of his Equity Jurisprudence; 14th Edition, states the
law regarding infants thus: Properly speaking, a ward of chancery is a person, who is under a guardian appointed by the Court of Chancery. But wherever a suit is instituted in the Court of Chancery relative to the person or property of an infant, although he is not under any general

guardian appointed by the Court, he is treated as a ward of the Court and as being under its especial -cognizance-and protection.

49. In java. 1771 it is stated that in all cases where an infant is a ward of chancery no act can be done affecting the person or property or state of the minor, unless under the express or implied direction of the Court itself. The principle stated by Story has been applied in several Indian cases: *Karmali Rahimbhoy v. Rahimbhoy Habibbhoy*[54] *Doraswami Pillai v. Thungaswamy Pillai*[55] *Rangasayi v. Nagarathanamma*[56] and it has been held that a suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court and that being so, no act can be done affecting the property of the minor unless under the express or implied direction of the Court itself.

50. Under order 32, Civil Procedure Code a Court has ample power to remove the next friend of a minor if he acts to his prejudice and to make him liable for costs of the suit in case the suit filed by him on behalf of the minor for partition was frivolous or vexatious or not for the benefit of the minor. In suitable cases, a suit may be stayed in order to enable the minor to decide on his attaining majority whether he elects to proceed with the suit or to abandon it. The guardian purporting to act on behalf of a minor may do so out of hostility to the family of which the minor is a member and may be actuated by considerations other than the benefit of the minor and he need not necessarily be a person who is interested in the welfare of the minor. That is the reason why the Court has to determine whether a suit for partition filed on behalf of a minor is for his benefit and if satisfied to decree his claim.

51. As stated in *Kamakshi Ammal v. Chidambara Reddi*[57] an action will not indeed lie, unless there is something clearly indicating that the interests of the infant will be advanced by partition, because, ordinarily speaking the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and as a general rule, therefore it is more profitable for an infant parcener, that his share should continue an integral portion of the whole estate in the hands of kinsmen. At page 98, Innes, J. observed: that it often may not be for the benefit of a minor that he should have a partition; if his rights are not denied or the property not mismanaged, it might not be so, he would lose for instance the possible benefit of survivorship, and generally so great a change in the condition of a minor as a partition "Operates, ought not to be allowed to take place, unless it is clearly for his benefit that it should be so.

52. Accordingly, it has been the settled practice not to decree a suit for partition filed on behalf of a minor plaintiff unless the Court is satisfied that the partition is for his benefit. This does not in any way affect the right which a minor has to separate from the joint Hindu family if it is for his benefit and that power can be exercised on his behalf by a person purporting to act as his guardian. Any person can file a suit for

partition on behalf of a minor and a change in his legal status which affects his right
to property in various ways should not be permitted unless the Court is satisfied that the partition is for his benefit. That was laid down in *Kamakshi Ammal v. Chidambara Reddi*[58] and has been followed in numerous cases.

53. In *Bachoo v. Man Korebai*[59] Tyabji, J. refused to decree partition because it was not for the

benefit of the minor and that decree was affirmed in appeal by the High Court and also by the Privy Council in *Bachoo HUrkisondas v. Mankore Bai*[60]

54. In deciding whether partition is in the interest and for the benefit of the minor a Court is not restricted to considerations purely personal to the minor but may take into consideration matters concerning his mother, or his wife or his daughter in whom he may be interested. The power which the Court exercises in decreeing or refusing partition at the instance of a minor plaintiff is not in denial but in protection of his right which he undoubtedly has to separate from the joint Hindu family if it is in his interest and for his benefit. This aspect of the case has been considered in some Madras cases to which reference will be made later. When, however, the Court decrees a suit for partition filed on behalf of a minor, there is no reason why the separation or severance of status should not be from the date of the plaint as in the case of an adult coparcener.

55. The right of action for partition rests upon the right to separate by a Hindu coparcener. The cause of action for a minor's suit is not essentially different froth the one by an adult. The only difference is that in the case of a minor the right to separate is asserted on his behalf by his guardian. The Court grants relief on the cause of action stated in the plaint if it is satisfied that the assertion by the guardian was properly made and that partition was in the interest of and for the benefit of the minor. The right to partition is a right relating to property. It is not a case of a personal action which dies with the person--action personalis moritur cum persona. A suit if properly instituted, should not abate, but On plaintiff's death his legal representatives should be in a position to carry on the litigation. The cause of action survives on the death of a minor plaintiff] and it cannot be said that if a minor dies before a decree for partition is passed that he dies joint.

56. Two principles are well recognised in the matter of grant of relief to suitors and have been stated with precision by Mookherjee, J. in *Raicharan Mandal v. Biswa Nath* [61]in these terms. A suit must| be tried in all its stages on the cause of action as it existed at the date of its commencement. The Court, however, may in suitable oases take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. This doctrine is of an exceptional character and is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or, that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. If these two principles are borne in mind many of the difficulties raised by
Reilly J. in his order of reference in *Rangasayi v. Nagarathanamma*[62] and oh which great stress was laid by the learned Counsel for the appellant, can be resolved.

57. In *Chelimi Chetty v. Subbamma*[63] two propositions were stated. The first proposition was that the rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor; for, in such suit, it is for the Court to determine whether a decree for partition will be beneficial to the minor. The second proposition was that where a minor plaintiff dies during the pendency of the suit before a decree for partition is passed his legal representatives are not entitled to continue the suit. The first proposition was followed in latter cases but the question whether the second proposition was correct was not decided in those cases. The contention of the appellant in that case, that the mere filing of a suit for partition on behalf of a minor effects a severance of joint status, was negatived and it was held that the mere fact of the filing of a suit does not cause a severance of a status and

that it is for the Court to determine whether in the special circumstances of the case partition was for the benefit of the minor and in case it was so, the Court is to decree the claim for partition. As the minor plaintiff died before a decree for partition was passed it was not necessary to decide when the severance of status takes places, whether from the date the suit for partition is filed or from the date of the decree. A suit for partition on behalf of', a minor, if properly instituted, should not abate en his death but his legal representative should be in a position to carry on the litigation. There is no justification for the assumption that the cause of action does not survive on the death of a minor plaintiff after the suit for partition has been filed on his behalf.

58. The decision in *Chelimi Chetty v. Subbamma A.I.R. 1918 Mad. 376* (SUUPRA) was in conflict with the earlier Pull Bench decision in *Soundararajan v. Arunachalam Chetti*[64] and has been overruled by the Full Bench decision in *Rangasayi v. Nagarathanamma*[65]

59. In *Krishnaswami Thevan v. Pulukarppa*[66] it was held that the suit by a minor for partition, if it ends in a decree for partition, has the effect of cheating a division of status from the date of the plaintiff. In that case after the institution of a suit for partition on 31-1-1919, another son was born in May or June 1920 before the preliminary decree for partition was passed. It was held that the birth of a son subsequent to the filing of the suit for partition did not affect the share of the plaintiff which had to be determined on the state of affairs as existed on the date of the suit and not on the date of the decree. Spencer, J. at p. 468 stated that it is a sound principle to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint and though there can be no division unless the Court sees fit to decree it, there is no reason why the Court should not make its decree take effect from the date of the institution of the suit. In the case of a suit by an adult coparcener for partition his share is not liable to be altered by the birth of a coparcener after filing of the suit for partition. There is no reason why a distinction should be made between adults and minors so far as their shares are subject to alteration in consequence of

events that occur between the commencement and the end of a partition suit.

60. In *Ranga Thathachariar v. Srinivasa Thathachariar*[67] a minor plaintiff sued for partition on 14-8-1918 and a preliminary decree for partition was passed on 7-4-ipai. The question for decision was when did the severance of status take place whether on 14 8-1918 when the suit was filed or on 7-4-1921 when the preliminary decree for partition was passed. That was necessary in order to determine the extent and share of the liability of the manager to render account. It was held that when a suit for partition is instituted on behalf of a Hindu minor and if the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, it must be deemed that the divided status of the plaintiff dates from the date of the plaint and not from that of the preliminary decree,

61. In *Akanna v. Rangaraja*[68] it was held that where in a suit for partition a minor defendant claimed a share and subsequently died his mother was entitled to continue the suit as his legal representative. The principle underlying the decision was that a guardian can on behalf of a minor exercise the discretion to separate from the joint Hindu family and if the Court approves, a decree for partition can be made at the instance of a guardian. Jackson, J. pointed out that the Court acts as a super guardian in there matter and when once it is assumed that the Court may act for the minor and vicariously exercise his volition, there is nothing in logic to prevent the

gmrdian doing the same.

62. In *Rangasayi v. Nagarathanamma*[69] the question for decision was whether on the death of a minor plaintiff in a suit for partition the suit abated or whether it could be continued by his legal representative. The case came on for bearing before Venkatasubba Sao and Reilly JJ. They made separate orders for reference to a Pull Bench. Venkatasubba Rao, J. was of opinion that the suit did not abate and that the mother of the plaintiff was entitled to proceed with the trial of the suit. Reilly J. took a contrary view. The Pull Bench case was decided by three Judges and it was held that it was open to his legal representative to proceed with the trial and obtain a decree on her showing that when the partition suit was instituted it was for the benefit of the minor and that a suit by a minor for partition does not abate if he dies before the Court has found that the partition is for his benefit.

63. The Pull Bench case in *Rangasayi v. Nagarathanamma A.I.R. 1933 Mad. 890(Supra)* was followed in *Ramarao v. Venkata Subbayya*[70] *Official Receiver East Godavari v. Veerareddi* [71]and in *Kotayya v. Krishna Ray*[72] In the last case the doctrine was further extended and it was held that the severance takes place on the date the guardian communicates his intention on behalf of the minor to separate and that if the Court holds that the partition is for the benefit of the minor the severance relates back to the date of the notice given on behalf of the minor.

64. In *Krishna Lal v. Nandeswar Jha*[73]*,* Nandeshwar, a minor, filed a suit for partition on 11-8-1913 against his parents, step-mother Aina and grandmother for partition. During the pendency of the suit, the plaintiff attained majority. The trial Court held on 4-8-1915 that each of the parties was entitled to 1/5th share and accordingly decreed the claim for partition, Against this decree, his father Krishna Lal Jha filed an appeal in the High Court. During the pendency of the appeal, a son was com to him on 21-11-1915 by his 2nd wife Aina. The question for decision was whether the birth of a half-' brother after the suit was filed affected the share of the plaintiff. The half-brother had not been conceived when the suit for partition had been filed on 11-8-1918 but was in utero on 4-8-1915 when the decree was made. If severance of t status of the plaintiff took place, on 11-8-1913 when the suit was filed, he was entitled to 1/5th share and the subsequent birth of a half-brother who was not conceived at the date of the suit would not have affected the share of the plaintiff.

65. If, on the other hand, the severance took place on 4-8-1915 when the decree for partition was made the plaintiff was entitled only to 1/5th share as the half-brother who was in the womb was also entitled to a share. The date of s save rance was thus material as that would have determined the share of the plaintiff. It was held that the severance of status took place on 11-8-1918 when the suit for partition was filed, that the plaintiff was entitled to 1/5th share and that his share was not diminished by the subsequent birth of a half-brother during the pendency of the litigation.
66. The cases in *Krishna Lal v. Nandeswar Jha*[74]*,* and *Krishnaswami Thevan v. Pulukarppa A.I.R. 1925 Mad. 717(Supra)* were followed by Agarwala, J. in *Atul Krishna Roy v. Nandanji A.I.R. 1935 Pat. 275(Supra)* who held that when a partition suit, instituted by a minor, is decreed, the partition is effective from the date when the suit was instituted.

67. In *Ramsingh v. Fakira*[75] a Hindu minor through his next friend filed a suit for partition against his father and grand mother. The mother and the step-mother were not impleaded as defendants. Notwithstanding the defect the trial Court passed a decree for partition. On appeal

the case was remanded for a de novo trial after impleading the mother and the step-mother. A half-brother who was born after the institution of the suit was also added as a defendant after remand.

68. The question was whether the after-born son was entitled to a share and whether the share of the plaintiff was affected. The High Court approved of the decisions in *Krishnaswami Thevan v. Pulukarppa*[76] *Ranga Thathachariar v. Srinivasa Thathachariar*[77] and *Rangasayi v. Nagarathanamma*[78] and held 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. Consequently the share of the plaintiff was not diminished by the birth of a son after the institution of the suit.

69. In *Bammangouda Shankargouda v. Shankarouda Rangangouda*[79], it was held that a partition cannot be claimed by a minor as a matter of right and it is to be decreed in the minor as favor only if the Court is of opinion that in the circumstances of the case
partition is in his interest and for his benefit. Divatia, J. pointed out that this rule was one of prudence and expediency and did not affect the fundamental rule of Hindu law that a coparcener can sever his status merely by expressing a clear intention to do so. The decisions of the Madras High Court in *Krishnaswami Thevan v. Pulukarppa A.I.R. 1925 Mad. 717(supra)*. *Ranga Thathachariar v. Srinivasa Thathachariar A.I.R. 1927 Mad. 801(Supra)* and *Rangasayi v. Nagarathanamma A.I.R. 1933 Mad. 890(Supra)* and the decision in *Ramsingh v. Fakira A.I.R. 1939 Bom. 169(Supra)* were followed and it was held that where a notice to separate is given by a guardian on behalf of a minor and the Court finds that the separation was for the benefit of the minor, the severance of status dates back from the date when the notice was given. The decision was the same as was taken in *Kotayya v. Krishna Ray A.I.R. 1945 Mad. 290(Supra)*.

70. The learned Counsel for the appellant relied on a few oases in support of his contention that the severance of status in the case of a minor takes places when a decree for partition is made and not when a suit is filed. In *Lalta Prasad v. Shiam Singh, AIR 1920 Allahabad 116 : 58 Ind. Cas. 667(supra)* the plaintiff, a minor, through his mother as his next friend, filed a suit for partition against his grandfather on 18-11-1914. The grandfather made a will on 22 11-1914 and died on 25-11-1914. There was nothing to show that the grand-father knew of this suiji. The question involved was as regards the validity of the will. The decision was that the grand-father died joint with the plaintiff and that the will made by him was inoperative in law. The decision was based on *Chelimi Chetty v. Subbamma A.I.R. 1918 Mad. 376(supra)* which has been distinguished in later eases and subsequently over, ruled in *Rangasayi v. Nagarathanamma A.I.R. 1933 Mad. 890(Supra)*.

71. In the Allahabad case a decree had not been passed and it was in the interest of the minor that there should be no decree for partition as he got the property by survivorship on the death of his grand-father. Banerji, J. at p. 470 stated that the rule laid down by the Privy Council in *Mt. Girja Bai v. Sadashio Dhundiraj A.I.R. 1916 P.C. 104* (Supra)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 applicable to a suit brought on behalf of a minor which has not matured into a decree. This aspect of the case has been elaborated in the Madras cases where it has been laid down that once & decree is passed, the severance of status takes place from the date of suit and not from the date of the decree.

72. In. *Jethanand v. Kewalram A.I.R. 1926 Sind 216(Supra)* the minor plaintiffs through their mother filed a suit for partition and claimed 1/4th share against their uncle and other members of the family. During the pendency of the suit, their uncle died bequeathing certain legacies to his daughter-in-law and the residuary estate to the defendants. The question was about the validity of the will. If the defendant died joint he had no power to bequeath the property and the plaintiffs were entitled to half share. The decision of that point depended on the date of severance of status. It was held following the decision in *Chelimi Chetty v. Subbamma A.I.R. 1918 Mad. 376(supra)* and *Official Receiver East Godavari v. Veerareddi (41) 28 A.I.R. 191(Supra)* that the mere institution of a suit by a miror does not effect a partition of the family but separation takes place only when the suit is decreed. We have already given reasons why this view is not sound and we respectfully dissent from the decision.

73. In *Chhotabhai v. Dadahai A.I.R. 1935(Supra)* observations at p. 61 of Divatia, J. based on *Chelimi Chetty v. Subbamma A.I.R. 1918 Mad. 376(supra)* were obiter and not necessary for the decision of the case. No reference was made by him to later cases: *Krishnaswami Thevan v. Pulukarppa A.I.R. 1925 Mad. 717(Supra)*. *Ranga Thathachariar v. Srinivasa Thathachariar A.I.R. 1927 Mad. 801(Supra)* and *Rangasayi v. Nagarathanamma A.I.R. 1933 Mad. 890(supra)*. Murphy J. who delivered a concurring judgment did not refer to *Chelimi Chetty v. Subbamma A.I.R. 1918 Mad. 376(Supra)* or base his decision on it. This was 'pointed out by Wassoodew J. In *Ramsingh v. Fakira .I.R. 1939 Bom. 169(Supra)* and by Divatia J. himself in *Bammangouda Shankargouda v. Shankarouda Rangangouda, AIR 1944 Bombay 67 : (1943) 45 BOM LR 1021(Supra)*. *Chhotabhai v. Dadahai A.I.R. 1935(Supra)* cannot be quoted as an authority in support of the proposition contended by the learned Counsel for the appellant, especially as a contrary view was taken in later cases in the same Court

74. In *Hari Singh v. Pritamsingh A.I.R. 1936 Lah. 504(Supra)* it was held that the mere institution of a suit does not effect a separation of the family but separation only takes places when the suit is decreed and that consequently the liability to render account to the plaintiff is from the date of the preliminary decree. No reference was made to the Pull Bench case in *Rangasayi v. Nagarathanamma A.I.R. 1933 Mad. 890(Supra)*. In the judgment the conflict between the Allahabad view and the Madras view is noted but no reasons have been given for accepting the Allahabad view.

75. The learned Counsel for the appellant commended the opinion of Reilly, J. in his order of reference in *Rangasayi v. Nagarathanamma A.I.R. 1933 Mad. 890(Supra)* for our acceptance. The opinion of Reilly J. apparently did not meet with the approval of the learned Judges of the Pull Bench. No useful purpose will be served in discussing his opinion because the Judges of the Pull Bench dealt with every aspect of the case and have given reasons both on principle as well as on authority why the severance of status, even in the case of a minor, takes place from the date on which the suit for partition is filed and not from the date of the decree. We respectfully agree with the Pull Bench decision and do not, therefore, cover the same ground over again.

76. The view taken by the Madras High Court in *Krishnaswami Thevan v. Pulukarppa A.I.R. 1925 Mad. 717(Supra)*. *Ranga Thathachariar v. Srinivasa Thathachariar A.I.R. 1927 Mad. 801*(Suupra) and *Rangasayi v. Nagarathanamma A.I.R. 1933 Mad. 890(supra)* and followed by the Bombay High Court in *Ramsingh v. Fakira A.I.R. 1939 Bom. 169(Supra)* is not only the

more logical view but is also the better one from the point of view of convenience: it safeguards the interests of the minor, avoids anomalies and makes for consistency. We approve these decisions and hold that even in a suit filed by a minor the severance of status takes place from the date of the suit and not from the date of the decree.

77. Accordingly, the critical date was 27-9-1937 when civil suit No. 6-A of 1937 for partition was filed by Dineshchandra As or that date Mandliprasad was not in under, he was not entitled to reopen the partition made in that suit. Ramcharanlal was given a share and the plaintiff was entitled under law to claim a portion out of his share and not out of the share given to Deviprasad.

78. The plaintiff did not claim in the alternative that if he was not entitled to reopen patition, he may be given a share out of the 1/3rd share allotted to his father or out of the 2/3rd share allotted to him and Dineshchandra us stateu in the final decree. This case was not set up or tried in the Courts below. This has not been made a ground in the memorandum of appeal in this Court. If partition is allowed now Chandramukhi will be entitled to a share and the plaintiff will lose the right to claim by survivorship, and he will need somebody to look after his share during his minority. He was of 1 year when he filed the suit for partition and may be now about 8 years of age He is living with his father. Nothing has been alleged against him. The object of the suit was to reduce the share of Deviprasad from 1/3rd to 1/5th. That has failed. Partition in the circumstances of the case will not be in the interest and for the benefit of the plaintiff and is accordingly refused. The appeal fails and is dismissed with costs.

Cases Referred.

[1]4 Mad. H.C.R. 307
[2](82) 4 All. 427
[3](99) 23 Bom. 636
[4](86) 9 Mad. 64
[5] A.I.R. 1915 All. 65
[6](93) 16 Mad. 274
[7](37) 24 A.I.R. 1937
[8](69) 2 Bom. 105
[9](66) 11 M.I.A. 75
[10](91) 17 I.A. 194
[11](13) 40 I.A. 40
[12](66) 11 M.I.A. 75
[13] A.I.R. 1916 P.C. 104, 161
[14] A.I.R. 1916 Mad
[15](16) 39 Mad. 159
[16] A.I.R. 1916 Mad. 1170
[17] A.I.R. 1930 Mad. 486
[18] A.I.R. Mad. 1170
[19](13) 40 I.A. 40
[20] F.A. Nos. 16 and 25 of 1911
[21](16) 43 I.A. 151
[22](13) 40 A.I. 40
[23](13) 40 A.I. 40
[24] A.I.R. 1917 P.C. 39

[25] AIR 1931 PC 154 : 1931-34-LW 13
[26] AIR 1939 PC 174 : 1939 AWR (P.C.) 9 113 : 1939-50-LW 75
[27] A.I.R. 1917 P.C. 39
[28] AIR 1925 PC 49 : 87 Ind. Cas. 333 : 1925-21-LW 439
[29] AIR 1939 PC 174 : 1939 AWR (P.C.) 9 113 : 1939-50-LW 75
[30] AIR 1940 Nag 185
[31](35) 22 A.I.R. 1935
[32] AIR 1920 All 116 : 58 Ind. Cas. 667
[33] A.I.R. 1925 Mad
[34] A.I.R. 1927 Mad. 801
[35] A.I.R. 1933 Mad. 890
[36] A.I.R. 1939 Bom. 169
[37]30 A.I.R. 1943 Nag. 101
[38] A.I.R. 1939 Bom. 169
[39] A.I.R. 1927 Mad. 801
[40] AIR 1940 Nag185
[41] A.I.R. 1925 Mad. 717
[42] A.I.R. 1927 Mad. 801
[43] A.I.R. 1933 Mad. 890
[44] A.I.R. 1945 Nag. 138
[45](68) 10 W.R. 273
[46] A.I.R. 1916 P.C. 25
[47](03) 30 I.A. 139
[48](09) 36 I.A. 71
[49](13) 9 N.L.R. 111
[50] AIR 1936 Bom 290
[51] AIR 1939 PC 174 : 1939 AWR (P.C.) 9 113 : 1939-50-LW 75
[52] AIR 1935 All 875 : 1935 AWR (H.C.) 996
[53] AIR 1939 PC 174 : 1939 AWR (P.C.) 9 113 : 1939-50-LW 75
[54](89) 13 Bom. 137
[55] (04) 27 Mad. 377
[56] A.I.R. 1933 Mad. 890
[57](66) 3 Mad. H.C.R. 94
[58](66) 3 Mad. H.C.R. 94
[59](05) 29 Bom. 51
[60](07) 34 I.A. 107
[61] A.I.R. 1915 Cal. 103
[62] A.I.R. 1933 Mad. 890
[63] A.I.R. 1918 Mad. 376
[64] A.I.R. 1916 Mad. 1170
[65] A.I.R. 1933 Mad. 890
[66] A.I.R. 1925 Mad. 717
[67] A.I.R. 1927 Mad. 801
[68] A.I.R. 1930 Mad. 486
[69] A.I.R. 1933 Mad. 890
[70] A.I.R. 1937 Mad. 247
[71] A.I.R. 1914
[72] A.I.R. 1945 Mad. 290
[73] AIR 1918 Patna 91 : 44 Ind. Cas. 146
[74] AIR 1918 Patna 91 : 44 Ind. Cas. 146
[75] A.I.R. 1939 Bom. 169
[76] A.I.R. 1925 Mad. 717
[77] A.I.R. 1927 Mad. 801
[78] A.I.R. 1933 Mad. 890
[79] AIR 1944 Bom 67 : (1943) 45 BOM LR 1021