NARASIMHAYA v. VEERARAGHAVULU. — ABDUR RAHIM J.

Begam(1), which were cited by the District Judge in support of his view were not under the Insolvency Act at all. They were rulings in connexion with questions arising in the execution of decrees under the Civil Procedure Code. On the other hand there is a ruling of the Allahabad High Court in *Cheda Lal* v. *Lachman Parshad*(2), which enunciates the same view as we have suggested.

The appeal is allowed and the judgment of the District Judge must be set aside and the first respondent's petition dismissed with costs throughout.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

1917 August 29.

CHELIMI CHETTY AND FIVE OTHERS (RESPONDENTS NOS. 1 AND 3 TO 6), APPELLANTS,

v.

SUBBAMMA (PETITIONER, SEVENTH DEFENDANT), RESPONDENT.*

Hindu Law—Joint family—Suit for partition on behalf of minor—Death of minor before the filing of written statement—Severance of the joint status, if effected—Legal representative of minor, right of, to continue the suit.

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.

Where a minor plaintiff dies during the pendency of the suit his legal representatives are not entitled to continue the suit.

Girja Bai v. *Sadashiv Dhundira* (1916) I.L.R., 43 Calc., 1031; *Sundara Rajan* v. *Arunachalam Chetti*(1916) I.L.R., 39 Mad., 159, referred to.

SECOND APPEAL against the decree of J. N. ROY, the District Judge of North Arcot, in Miscellaneous Appeal No. 18 of 1915, preferred against the order of K. KRISHNAMA ACHARIYAR, the Subordinate Judge of North Arcot, Civil Miscellaneous Petition No. 67 of 1915 in Original Suit No. 59 of 1914.

The material facts and contentions appear from the judgment.

A. Krishnaswami Ayyar for the appellants.

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(1) (1910) 6 I.C., 300. (2) (1917) 37 I.C., 830.

* Second Appeal No. 1543 of 1917.

N. S. Rangaswami Ayyangar for *T. Narasimha Ayyangar* for the respondents.

The judgment of the Court was delivered by

Abdur Rahim, J.—This matter arises in connexion with a suit instituted on behalf of a minor member of a joint Hindu family for partition. The minor plaintiff died after the institution of the suit but before the written statement was filed. The respondent before us, who is the mother of the plaintiff, applied to the first Court to be brought on record and for permission to continue the suit as legal representative of the deceased plaintiff. That Court held that no cause of action survived and refused the application of the respondent. On appeal, however, the District Judge set aside the order of the first Court holding that the respondent was entitled to continue the suit as legal representative of the plaintiff. The contention before us on behalf of the defendants in the suit is that when the minor died whatever rights he had in the family property survived to the other members of the family as there was no partition. A rather interesting question was discussed before us as to whether an appeal lay to the District Judge from the order of the Court of first instance, but the learned vakil for the respondent did not mean to persist in the objection as to whether the proper remedy of the defendants in this Court was by way of second appeal or by way of moving us in revision. We need not therefore decide any such question.

On the merits the question that requires our decision is whether by the filing of the plaint severance was effected of the joint status of the family. This is an important point, but there is no authority expressly dealing with it. It is now settled law especially after the recent Privy Council decision in *Girja Bai* v. *Sadashiv Dhundiraj*(1) and the Full Bench decision of this Court in *Sundara Rajan* v. *Arunachalam Chetti*(2) that it is open to a member of a joint Hindu family to effect a division of his status by a clear and unequivocal expression of his intention without the necessity of any concurrence on the part of the other co-parceners. The last case laid down that the filing of the plaint is such an unambiguous and unequivocal manifestation of intention within the meaning of the ruling of the Privy Council. It is curious, as has been pointed out to us by the

(1) (1916) I.L.R., 43 Calc., 1031. (2) (1916) I.L.R., 39 Mad., 159 (P.C.).

CHELIMI CHETTY v. SUBBAMMA.

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learned vakil for the respondent, that in the Full Bench case the plaintiff who instituted the suit was a minor. Apparently however no question such as has been raised before us was raised before the Full Bench for decision. There can be no doubt that what the Privy Council decided and what the Courts have followed is that it depends upon the discretion of a member of a joint Hindu family whether he is to continue the joint status or whether there should be a separation. That *prima facie* implies that the member who exercises such discretion must be of an age capable of exercising discretion in law. That will not be the case with a minor at least if he is of an age when discretion cannot be imputed to him. In the case of a suit instituted on behalf of a minor member of a Hindu family for partition, it has been laid down that it depends upon the discretion of the Court whether to make a decree for partition or not, that is to say, the Court has to consider in such cases whether a decree for partition would be for the benefit of the minor. If it is satisfied that it is not for the benefit of the minor to give a decree for partition the Court will dismiss the suit. This is laid down by the Privy Council in *Bachoo* v. *Mankosi Bai*(1) approving the decision of the Bombay High Court on this point. This has also been the law in this Presidency as stated in *Kamakshi Ammal* v. *Chidambara Reddi*(2) and that position has not been contested before us. If it is left to the discretion of the Court to say in a suit instituted on behalf of a minor whether there should be a division of the family or not, it seems to us *prima facie* to follow that the matter does not depend on the choice or option of any person who chooses to act on behalf of a minor member of a Hindu family. Any person is at liberty to institute a suit on behalf of a minor as the next friend and it is forcibly urged upon us by Mr. A. Krishnaswami Ayyar that it would lead to great hardship and inconvenience, if it were left to the discretion of any person who chooses to file a suit on behalf of a minor to decide whether the family of which the minor is a member shall continue joint or become separate. The institution of a suit so far as it expresses the intention of a member of the family to divide, depends on principle on the same basis as any other expression of intention

(1) (1907) I.L.R., 31 Bom., 373 (P.C.). (2) (1866) 3 M.H.C.R., 94 at p. 96.

of a competent member of the family. If we are to hold that the filing of a plaint on behalf of a minor *ipso facto* constitutes a severance of the family status, then logically one would be driven to hold also that a notice given by such a person on behalf of the minor to the other members of the family of the intention to divide would also effect a severance of the joint status. This seems to us to be a position which we would not like to uphold without authority and no authority has been cited to us in support of it. It was strongly argued by the learned pleader for the respondent that as the plaint states facts and circumstances which, if proved, would be good justification for the Court decreeing partition, therefore at this stage we must proceed on the basis that there was a good cause of action and there was thus a severance of status effected by the institution of the suit. This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance. What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition, but it is the exercise of the option which the law lodges in a member of the joint family to say whether he shall continue to remain joint or whether he shall ask for a division. In the case of an adult he has not got to give any reasons why he asks for partition but has simply to say that he wants partition, and the Court is bound to give him a decree. In the case of a minor the law gives the Court the power to say whether there should be a division or not, and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor. It is urged that there might be cases in which it would be desirable that partition should be effected in the best interests of the minor and as soon as possible. In such cases those who are interested on behalf of the minor are entitled to institute a suit, but having regard to the decision in *Bachoo* v. *Mankosi Bai* (1) and *Kamakshi Ammal* v. *Chidambara Reddi*(2), it must be left to the Court to decide whether there should be a partition or not.

(1) (1907) I.L.R., 31 Bom., 373 (P.C.). (2) (1866) 3 M.H.C.R., 94 at p. 96.

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We treat the Civil Revision Petition as a Second Appeal and set aside the order of the District Judge with costs here and in the Courts below. The respondents' petition will stand dismissed. This decree will not be drawn up unless the learned pleader for the appellants pays court fee within a week.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1917, August 10, 13, 16, 17 and 30.

P. L. A. PALANIAPPA CHETTIAR (PLAINTIFF), APPELLANT,

v.

V. L. A. R. VEERAPPA CHETTIAR AND NINE OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), ss. 13, 19 and 20—Loan to a partnership—One of the partners absent from British India—Suit for loan more than three years after loan but within three years after return of partner, whether barred and against whom—Release by some partners of a partnership debt, whether binding on legal representative of a deceased partner—Entries in debtor's accounts, whether payment of interest or acknowledgment.

The plaintiff's father was a partner along with the third, the sixth and the eighth defendants, of a firm at E, which advanced certain loans in 1903 and 1904 to a firm at S of which the first defendant and the former defendants were partners; the first defendant was out of British India from 1903 to 1908. The plaintiff sued in 1909 to recover his share of the loans from the partners of the firm at S. The defendants pleaded that the suit was barred by limitation; the plaintiff relied in bar of limitation on section 13 of the Limitation Act and also on certain unsigned entries in defendants' account books in which the interest accruing due were added to principal from time to time; the first defendant further pleaded a release by defendants Nos. 3, 6 and 8 of the claim against him as binding on the plaintiff:

Held, that the suit was not barred by limitation against the first defendant as the plaintiff was entitled to a deduction of the time during which the first defendant was out of British India but was barred against the other defendants under section 13 of the Limitation Act;

that the entries in the debtor's accounts could not be treated as payments of interest under section 20 of the Limitation Act, or as acknowledgments under section 19 of the Act as they were not signed by the debtors.

Held also, that a partner can release a partnership claim, and, after the death of a partner, the surviving partners have a right to release such a claim;

that, if a release by any of the partners is fraudulent the other partners can avoid it and seek to recover their share of the released debt, but the legal

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* Appeal No. 134 of 1911.