

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

KRISHNASWAMI THEVAN AND OTHERS (DEFENDANTS
1 AND 4 TO 6), APPELLANTS

1924,
December
11.

v.

PULUKARUPPA THEVAN AND OTHERS (PLAINTIFF AND
DEFENDANTS 1 AND 24), RESPONDENTS.*

*Hindu Law—Partition—Suit by minor son against his father—
Birth of another son, conceived after date of plaint but born
before preliminary decree—Quantum of share of plaintiff,
whether affected by birth of the son—Division of status, from
what date.*

Where a Hindu minor, represented by a next friend, sued his father for partition, and another son of the father, conceived after the date of the plaint, was born before the preliminary decree was passed in the suit, the share to which the minor plaintiff was entitled at the date of the plaint was not diminished by the subsequent birth of the son.

A suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint.

Chelimi Chetty v. Subbamma, (1918) I.L.R., 41 Mad., 442, distinguished.

APPEAL against the decree of P. S. SITARAMA AYYAR, Additional Subordinate Judge of Ramnad at Madura, in Original Suit No. 16 of 1919.

In this case the minor plaintiff, represented by his mother as next friend, sued for partition against his father (the first defendant) and other defendants who were alienees from him. After the settlement of issues, another son conceived after the date of the plaint was born and the latter was brought on the record as the twenty-fourth defendant, and an additional issue was framed as to the quantum of the share to which the plaintiff was entitled by reason of the birth of the other

* Appeal Suit No. 188 of 1922.

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son to the father. The Subordinate Judge passed a preliminary decree for partition in favour of the plaintiff holding that the plaintiff's share was diminished by the subsequent birth before the decree of the other son (twenty-fourth defendant) and that he was entitled only to one-third and not to one-half share as at the date of plaint. He also held with regard to certain alienees, first and fourth to sixth defendants, that the sales were not binding on the plaintiff. They preferred an appeal, contending *inter alia* that the property sold to them should be allotted to the first defendant for his share in the partition. The plaintiff filed a memorandum of objections raising the contention that he was entitled to a half share as at the date of the plaint undiminished by the birth of another son.

ON THE MEMORANDUM OF OBJECTIONS —

K. Raja Ayyar for plaintiff-respondent.—The plaintiff is entitled to a half share as at the date of the plaint. The status of division is effected by the institution of the plaint. In this case a decree for partition had been passed by the Court. The decree effects a division from date of plaint; *Krishna Lal Jha v. Nandeshwar*(1), *Chelimi Chetty v. Subbamma*(2), *Lalta Prosad v. Sri Mahadeoji Birajman Temple*(3), are distinguishable as no decree for partition was passed in those cases. If a guardian of a minor alienates his share, the shares of the alienee are fixed from the date of alienation. Similarly a guardian of a minor, if his act is bona fide, can sue for partition and fix his share by the plaint. The cause of action is to be fixed at the date of suit; see *Rai Charan v. Biswa Nath*(4). The decree takes effect from the date of plaint. The Court accepts

(1) (1919) 4 P.L.J., 38.

(2) (1918) I.L.R., 41 Mad., 442.

(3) (1920) I.L.R., 42 All., 461.

(4) (1914) 20 C.L.J., 107.

the plaint, as in the case of sanction for compromise at any stage of the proceeding; see *Kancherla Kanakayya v. Mulpuru Kotayya*(1). If a major sues for partition, the share is fixed as on the date of the plaint; so also in a suit for partition on behalf of a minor, which is accepted by the Court as a fit case and a share is awarded on partition.

K. S. Champakesa Ayyangar for respondent, relied on *Chelimi Chetty v. Subbamma*(2). *Lalta Prosad v. Sri Mahadeoji Birajman Temple*(3). The Court can take cognizance of altered circumstances and subsequent events and can decree relief appropriate to the altered conditions at the date of the decree.

The judgment on the appeal is omitted as unnecessary for this report.

The memorandum of objections filed by the first respondent coming on for hearing the Court delivered the following:—

JUDGMENT.

SPENCER, J.—This suit was brought by a minor plaintiff represented by his mother as next friend for partition of the properties belonging to the undivided Hindu family consisting of himself and his father the first defendant. It involves a new and interesting point of Hindu Law. After the institution of the suit on 31st January 1919, another son was born in May or June 1920 to the first defendant by a second wife. Conception must have taken place about August 1919, certainly after the filing of the plaint. This after-born son has been brought on the record as the twenty-fourth defendant.

On the principle that if a suit for partition is instituted by a co-parcener who is *sui juris* the mere

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(1) (1921) 41 M.L.J., 75.

(2) (1918) I.L.R., 41 Mad., 442.

(3) (1920) I.L.R., 42 All., 461.

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filing of the plaint effects a severance of the joint status of the family, but that in the case of a minor it is the Court that decides whether there is to be a division or not, the lower Court has found the twenty-fourth defendant to have come into existence before there was any change of status and has awarded the minor plaintiff a one-third share instead of one-half. The Subordinate Judge quotes *Chelimi Chetty v. Subbamma*(1) and *Lalta Prosad v. Sri Mahadeoji Birajman Temple*(2) as his authorities for so deciding. The learned Judges (ABDUR RAHIM and OLDFIELD, JJ.) who decided the former case, were, if I may say so, perfectly right in saying that it should not depend on the choice or option of any person calling himself the next friend of a minor to say whether the family to which the minor belongs shall in future be joint or separate and that the law has left it to the Court that hears the minor's partition suit to decide whether it is in the interest of the minor that he should become divided. But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement—vide *Bai Charan v. Biswa Nath*(3). Therefore in my judgment the only sound principle will be 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. It is true that there can be no division of status unless the Court sees fit to decree it, but there is no reason why the Court should not make its decree take effect from the date of the institution of the suit.

(1) (1918) I.L.R., 41 Mad., 442.

(2) (1920) I.L.R., 42 All., 461.

(3) (1914) 20 C. L.J., 107.

If a suit abates owing to the death of the only other co-parcener as in *Latta Prosad v. Sri Mahadeoji Birajman Temple*(1), or if the plaintiff comes of age during the pendency of the suit and elects to abandon or repudiate it under Order 32, rules 12 and 13, of the Code of Civil Procedure, no change of status takes place because the suit does not proceed to the stage of decree, not because the filing of a partition suit by a minor has not by itself the effect of causing a division of status. It does have that effect when it ends in a partition decree.

In *Krishna Lal Jha v. Nandeshwar*(2) it was held that even a minor might make through his next friend an unequivocal expression of his intention to become separate and that, if he did so, the subsequent birth of another member into the family would not cause any diminution in his share of the family property. In that case the birth took place after the passing of the preliminary decree, but in the view taken by the learned Judges, who were not referred to the decision in 41 Madras, it was not that date but the date of the institution of the suit that was the date when severance took place, if at all. That is the law as regards major co-parceners—vide *Soundararajan v. Arunachalam Chetty*(3) and *Ramalinga Annavi v. Narayana Annavi*(4).

As soon as severance takes place, the plaintiff's share is not liable to decrease by birth thereafter of other co-parceners—vide *Chinnu Pillai v. Kalimuthu Chetti*(5). As regards the date from which divided status begins, I fail to see why any 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.

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(1) (1920) I.L.R., 42 All., 461.

(2) (1919) 4 P.L.J., 38.

(3) (1916) I.L.R., 39 Mad., 159 (F.B.).

(4) (1922) I.L.R., 45 Mad., 439 (P.C.).

(5) (1912) I.L.R., 35 Mad., 47 (F.B.).

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As my learned brother agrees with me upon this point, the memorandum of objections is allowed and plaintiff's right to a one-half share will be declared in the preliminary decree. He will consequentially be entitled to an account from first defendant of profits from the date of suit and the lower Court's decree will be modified accordingly with costs of the memorandum of objections.

DEVADOSS, J.

DEVADOSS, J.—The main question raised by the first respondent in the memorandum of objections is, whether the share of a minor plaintiff who sues his father for partition is liable to be diminished owing to the birth of another son conceived after the date of the filing of the plaint but born before the date of the preliminary decree?

The plaintiff, who is a minor, is the son of the first defendant. The suit was filed on 31st January 1919. The twenty-fourth defendant was born to the first defendant in June 1920. Issues were settled in the case on 8th October 1919 and after the birth of the twenty-fourth defendant an application was made to bring him on record. That application was filed on 26th September 1920 and an additional issue was framed on 21st July 1921. The Subordinate Judge gave a decree to the plaintiff for one-third of the family properties. The contention of Mr. Raja Ayyar is that the twenty-fourth defendant having been born after the suit was filed, the plaintiff's share is not liable to be diminished to one-third.

It is well settled that an unequivocal unilateral declaration of a member of a joint family of his intention to be separated from the other members is sufficient to give him a divided status; *Musammat Girja Bai v. Sadashiv Dhundiraj*(1) and *Suraj Narain v. Ikbal*

(1) (1916) 20 C.W.N., 1085.

Narain(1). It was decided by a Full Bench of this Court in *Soundararajan v. Arunachelam Chetty*(2), that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. On the strength of this decision Mr. Raja Ayyar contends that on the filing of a plaint by a minor through his next friend he becomes divided from the other members of the family. If the plaintiff were a major no doubt on the filing of a plaint or on the sending of a proper notice he would become divided from the other members of a family. But the law is quite clear that a minor cannot enter into a valid contract and cannot enforce a partition by his mere volition. In an action for partition by a minor through his guardian or next friend, the Court has to see whether there are circumstances which would justify granting relief to the minor and whether it would be in the interests of the minor and to his advantage to separate him from the family. Till the Court determines the question whether a partition should be effected in favour of a minor, the joint status of the minor with the other members of the family is not in any way severed. It is only by the decree of the Court that a minor becomes divided from the other members of the family. No doubt, in the case of a suit by an adult member or in a partition at the instance of an adult member, a minor may become separated from the other members, but where the minor himself comes into Court with a prayer for partition from the other members of the family, it is the Court that determines whether he should be divided or not and therefore it is not the act of the next friend or the guardian that determines the issue whether there should be division or not, but it is

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(1) (1913) I.L.R., 35 All., 80; 40 I.A., 40.

(2) (1916) I.L.R., 39 Mad., 159 (F.B.).

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the judgment of the Court which determines the issue, and therefore the mere filing of a plaint cannot bring about a divided status so far as a minor plaintiff is concerned. This question was decided by a Bench of this Court in *Chelimi Chetty v. Subbamma*(1). The facts in that case were : a minor brought a suit for a partition of his share. Pending the suit, the minor plaintiff died and the mother applied to be brought on record as the legal representative of the minor plaintiff and asked for permission to continue the suit. The Subordinate Judge held that no cause of action survived to the mother and rejected her application. On appeal the District Judge set aside the order of the Sub-Court holding that the mother was entitled to continue the suit as the legal representative of the plaintiff. ABDUR RAHIM and OLDFIELD, JJ., held that the cause of action did not survive to the mother. ABDUR RAHIM, J., observes at page 445 :

“ In the case of an adult he has not 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.”

Mr. Raja Ayyar wanted to contend that this decision is wrong and that on the filing of the plaint by a minor he becomes divided from the other members of the family. Such a contention is opposed to the principle that it is the Court that determines whether there should be a partition of the family property at the instance of the minor plaintiff and not any relation, guardian or next friend. Whatever may be the circumstances which justify a guardian in bringing a suit on behalf

(1) (1918) I.L.R., 41 Mad., 442.

of a minor, there is no warrant for saying that it is his view that should prevail. The matter is entirely for the decision of the Court and therefore it is opposed to principle as well as to policy to hold that a minor or anybody on his behalf, has the power to give him a divided status without the decree of a competent Court. Mr. Raja Ayyar relied for his contention upon a decision in *Krishna Lal Jha v. Nandeshwar*(1). In that case the learned Judges remark at page 48 :

“ We are unable to accede to the proposition that under Hindu Law a minor cannot express either himself or through his guardian an intention to do what was clearly not against his own interests.”

With due respect to the learned Judges, I am unable to accept the argument. When the law is clear that there cannot be a partition at the instance of a minor except under a decree of Court, it is not proper to hold that the guardian or the next friend could do what the Court alone is competent to do. The decision in *Chelimi Chetty v. Subbamma*(2), though of August 1917, was evidently not brought to the notice of the learned Judges of the Patna High Court. There is no reason to doubt the soundness of the decision in *Chelimi Chetty v. Subbamma*(2).

An argument was advanced by Mr. Raja Ayyar that in a partition action by a minor the Court acts upon the representation of the guardian or next friend and in a way approves of the action of the guardian ; in other words, the Court approves of the conduct of the guardian and grants his prayer and therefore it sanctions what the minor through his guardian or next friend wished to be done ; and he relied upon *Kancherla Kanakayya v. Mulpuru Kotayya*(3) and others as supporting his contention. In that case the next friend of a minor

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(1) (1919) 4 P.L.J., 38.

(2) (1918) I.L.R., 41 Mad., 442.

(3) (1921) 41 M.L.J., 75.

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transferred a decree obtained on behalf of a minor without the leave of the Court. The High Court held that the leave to transfer the decree might be given at any time. This case does not support Mr. Raja Ayyar's contention. In a partition action, the Court does not merely sanction what the guardian or next friend has done; it hears and determines on the evidence whether the minor plaintiff should be given his share of the family property by effecting a partition or not. It does not merely sanction what the minor wants, but it comes to a conclusion on the evidence as to whether the prayer of the minor plaintiff should be granted or not.

But the question whether the plaintiff's share is liable to be diminished by the birth of the twenty-fourth defendant is not concluded by the decision in *Chelimi Chetty v. Subbamma*(1). Though the minor plaintiff becomes divided in status from the first defendant only by reason of the decree of the Court, yet his share in the family property is what it was on the date of the plaint. The Court determines on the evidence before it whether on the date of the plaint the minor plaintiff was entitled to partition or not. In the case of an adult plaintiff, his share is not liable to be diminished by the birth of a member who was not conceived at the time of the filing of the plaint. If a member of a joint Hindu family alienates his share, the alienee is entitled to the share of his alienor as on the date of the alienation and not as on the date on which he obtains a decree for partition. It is difficult to see why in the case of a minor plaintiff a different principle should prevail. In the case of an adult plaintiff suing for partition the Court has not to determine whether he is entitled to partition or not. It is his undoubted right to claim partition. No body has a right to deny him his share if he is entitled to

(1) (1918) I.L.R., 41 Mad., 442.

one. In the case of a minor plaintiff, he is entitled no doubt to a share. All that the Court is asked to determine is whether in the circumstances of the family it is advantageous to the minor plaintiff to be separated from the other members of the family or not. Though it is the Court that determines that question, its determination does not affect the share of the minor plaintiff which was his on the date when he filed his plaint. If the twenty-fourth defendant had been conceived before the date of the filing of the plaint, no doubt the plaintiff would be only entitled to one-third share, but the twenty-fourth defendant was born only in June 1920. So he could not have been *en ventre sa mere* on 31st January 1919, and no such case is put forward on his behalf, so he must have been conceived long after the plaint was filed. On the date when the plaintiff filed his suit, he was entitled to a half share, and the mere fact that the Court took two years to decide the suit is not a ground for diminishing his share which was a moiety on the date of the suit. Supposing in a partition suit at the instance of a minor several unnecessary contentions are raised, and the case takes a number of years before it is ready for trial, and before it is decided several members are added to the family, is it reasonable to hold that the plaintiff for no fault of his should be deprived of the share which he was entitled to on the date he filed his plaint either owing to the obstructive conduct on the part of the defendants or to the unavoidable delay in the Courts? I think it is but reasonable to hold that the plaintiff's share is not diminished owing to the birth of the twenty-fourth defendant before the preliminary decree was passed. The plaintiff is therefore entitled to a half share of the joint family property and not to one-third as found by the Subordinate Judge.

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The next question is whether the first defendant is liable to account for the income. In a partition suit the managing member of the family is not liable to account for the income and profits; but in this case the plaintiff was not supported by the first defendant and all the income was enjoyed by the first defendant. The plaintiff had to be maintained by his maternal relations and it is but fair that he should get his share of the income from the date of the plaint. The Court has a discretion in this matter and I think this is a fit case in which the discretion should be exercised in favour of the plaintiff by giving him a moiety of the income from the date of plaint to the date of his being put in possession of his share of the property.

Respondents 2 and 3 were not represented in this Court, but I must say in fairness to Mr. Raja Ayyar that he presented his case very fairly before the Court.

The memorandum of objections is allowed with costs.

K.R.

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Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

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December 5.

VEERAPPA CHETTIAR (PLAINTIFF), PETITIONER,

v.

MUNICIPAL COUNCIL, PALNI (DEFENDANT), RESPONDENT.*

*Madras District Municipalities Act (V of 1920), sec. 95—
“Reside,” meaning of.*

A person who neither himself personally resides nor maintains a residence for himself or his family within the limits of a municipality but merely maintains an office for collection of rent accruing outside such limits does not “reside” within the

* Civil Revision Petition No. 413 of 1923.