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become one which must necessarily be filed in a Subordinate Court or *vice versa*.

For both these reasons, therefore, we hold that in the suit referred to, the appeal lies to the High Court.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice, and Mr. Justice Srinivasa Ayyangar.*

1927, January 6.

SRI RANGA THATHACHARIAR (PLAINTIFF), APPELLANT,

v.

SRINIVASA THATHACHARIAR *alias* SRINIVASA RAGHAVACHARIAR (FIRST DEFENDANT), RESPONDENT.*

Hindu Law—Minor—Suit by minor for partition—Preliminary decree—Division of status, whether from date of plaint or of preliminary decree—Manager, accountability of—Nature of liability of manager to account—Difference as to nature of accountability, prior to and after suit—Civil Procedure Code (Act V of 1908), O. XLI, rule 22—"Decree" in rule 22, meaning of—Respondent's right to support decree on other grounds, in what cases permitted, without filing an appeal or memorandum of objections.

In a suit for partition instituted on behalf of a Hindu minor, 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; and the fact that the preliminary decree was passed on a consent statement of the parties does not make any difference: *Krishnaswami Thevan* v. *Pulukaruppa Thevan*, (1925) I.L.R., 48 Mad., 465, followed; *Chelimi Chetty* v. *Subbamma*, (1918) I.L.R., 41 Mad., 442, distinguished.

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the kartha or manager is liable for is as to the existing state of the property divisible and the parties have no right to look back and claim relief

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* Appeal No. 134 of 1923.

against past inequality of enjoyment or other matters; but it is open to the plaintiff to prove specifically fraud, misappropriation or other improper conduct on the part of the manager with respect to such management; the same rule of accountability of the manager applies in a suit for partition by a minor, as regards his management prior to suit; but subsequent to the date of suit, the plaintiff and the defendant (the manager) are only tenants-in-common or co-sharers, and therefore the manager is strictly bound to account for all receipts and expenses and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided among the sharers according to their shares.

Though the word "*decree*" has been used in Rule 22 of Order XLI, Civil Procedure Code, what the rule contemplates really is the *decision* by the Court below, and it merely enables the decision arrived at to be supported on grounds other than those on which the lower Court proceeded; and under that rule it is not open to a respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections.

APPEAL against the decree of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Coimbatore, in Original Suit No. 93 of 1918.

This is a suit for partition instituted by a minor through his mother as next friend against the first defendant who was his step-brother and other persons. The lower Court passed a preliminary decree for partition on a consent statement of the parties filed in the Court. The Court held that the parties became divided in status on the passing of the preliminary decree, and further held that the first defendant, as manager of the family, was not liable to account, except as manager of a joint family, until the date of the preliminary decree, and subsequent to that date he was liable to account as a tenant-in-common. A final decree was also passed on the basis of the preliminary decree. The lower Court had disallowed certain items of expenses against the

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first defendant, as not properly debitable to the plaintiff. The plaintiff preferred an appeal against the final decree. The defendant, without preferring an appeal or a memorandum of objections, endeavoured to support the decree, by showing that certain items disallowed to him in the lower Court ought to have been allowed in his favour, and thus the decree should not be altered on appeal.

S. Varadachariar and *N. C. Vijiaraghavachari* for appellant.

S. Panchapagesa Sastri and *C. V. Rajagopalachari* for respondent.

JUDGMENT.

This is an appeal preferred by the minor plaintiff against the final decree for partition passed by the Subordinate Judge of Coimbatore in a suit for partition instituted by the minor plaintiff represented by his mother as next friend against the first defendant, who is his step-brother, and several others. The plaintiff is the son of the late Varadachariar, a resident of Coimbatore, by his third wife and the first defendant is the son by his second wife. Both the plaintiff and the first defendant were minors at the time of their father's death which occurred in November 1913. The first defendant became major in December 1916 and since then he was acting as the manager of the family and the plaintiff is still a minor. The plaintiff's suit for partition was instituted on the 14th August 1918 and a preliminary decree for partition was passed on the 7th April 1921. One of the questions involved in this case is, when did the plaintiff and the first defendant become divided in status? The determination of this question is necessary in order to fix the extent and nature of the liability of the first defendant to account for the management of

the family properties and the income derived therefrom. The form of account to be ordered as against the first defendant as manager of the family till severance in status as between him and the plaintiff would be different from the form of account to be ordered against the first defendant after such severance. The learned Subordinate Judge held that it was the preliminary decree for partition passed by the Court on 7th April 1921, that effected a division in status and on that basis he fixed the accountability of the first defendant. The correctness of that view is challenged before us in this appeal.

The contention which was strongly pressed before us by Mr. Varadachariar on behalf of the appellant is, that in a suit for partition launched on behalf of a minor, 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 plaint at least. It is now settled that a clear and unambiguous expression of intention to become divided made by an adult coparcener to the knowledge of the other members of the family effects a severance of the joint status so far as the person who expresses his individual volition is concerned. *Girja Bai* v. *Sadashiv Dhundiraj*(1). In the Full Bench decision of this Court reported in *Soundararajan* v. *Arunachalam Chetty*(2), it has been held that the filing of a plaint claiming partition amounts to an unambiguous manifestation of intention on the part of the plaintiff within the meaning of the ruling of the Privy Council in *Suraj Narain* v. *Iqbal Narain*(3). In a later decision of the Privy Council in *Kawal Nain* v. *Budh Singh*(4), their Lordships reiterated this principle and observed at page 498:—" A decree may be necessary for

(1) (1916) I.L.R., 43 Calc., 1031 (P.C.).
(2) (1916) I.L.R., 39 Mad., 159.
(3) (1913) I.L.R., 35 All., 80.
(4) (1917) I.L.R., 39 All., 496.

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working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not." That is the law as regards a major coparcener filing a suit for partition. But if a minor coparcener institutes such a suit by his next friend, it has been held by this Court in *Chelimi Chetty* v. *Subbamma*(1), that the mere filing of a plaint on behalf of a minor would not *ipso facto* effect a severance of the joint family status, for in such a suit it is for the Court to determine whether the partition asked for will be beneficial to the minor. The same view has been followed in *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*(2). If such a suit proceeds to the stage of a decree in the plaintiff's favour on the Court finding that the partition would conduce to the best interests of the minor, the further question is whether the severance of the joint status takes place only from the date of the preliminary decree or from the date of the plaint. On this question there is the direct authority of a recent decision of a Bench of this High Court reported in *Krishnaswami Thevan* v. *Pulukaruppa Thevan*(3). It has been held in that case, distinguishing the decision in *Chelimi Chetty* v. *Subbamma*(1), that 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. In that case the question to be decided was whether the birth of another coparcener in the family subsequent to the institution of the suit by the minor plaintiff and before the passing of a preliminary decree had the effect of diminishing the share which the plaintiff had on the date of the institution of the suit and for deciding that question it had to

(1) (1918) I.L.R., 41 Mad., 442. (2) (1920) I.L.R., 42 All., 461.
(3) (1925) I.L.R., 48 Mad., 465.

be determined whether the plaintiff became divided in status from the date of the plaint itself or from the date of the preliminary decree for partition. SPENCER, J., in considering the effect of the decree for partition in such a suit stated at page 468 :—

"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."

On the footing that by reason of the Court passing a decree in favour of the plaintiff for partition it effected a severence in the status of the family from the date of the plaint, it was held that the share which the plaintiff owned on the date of the plaint was not liable to be reduced by the subsequent birth of a member in the family. This decision having been given subsequent to the disposal of the suit by the Subordinate Judge, he could not consider the effect of it before arriving at his conclusion.

The view taken in the decision in *Krishnaswami Thevan* v. *Pulukaruppa Thevan*(1) does not appear to be really in conflict with the principle laid down in *Chelimi Chetty* v. *Subbamma*(2). In the latter case the partition suit filed by the minor had not reached the stage of a decree when the question arose for decision as to whether a division in status had been effected by the filing of a plaint on behalf of the minor plaintiff. The only point which directly arose for consideration was whether the filing of a plaint asking for partition *ipso facto* effected a severance of the family status and it was answered in the negative. As to what would be the result if in such

(1) (1925) I.L.R., 48 Mad., 465. (2) (1918) I.L.R., 41 Mad., 442.

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a suit the Court had passed a preliminary decree for partition, there was no necessity to decide in that case. In the 48 Madras case such a question arose directly for decision and was decided. Accepting the principle that in a suit for partition brought by the minor it is for the Court to determine whether the partition would be advantageous to the minor or not and that a severance in the status of the family could not be effected by the individual volition of the minor's guardian or next friend, still, when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the imprimatur of the Court must be deemed to have been placed on the allegations made in the plaint justifying the effecting of a partition. That being so, the Court must be deemed to have determined that, even on the date of the plaint, it would have allowed a partition to be effected as it was beneficial to the minor. Though the enquiry has necessarily to be made by the Court subsequent to the filing of the plaint, it is the state of affairs that existed on the date of the suit that determine the exercise of the Court's discretion. It seems to us therefore that the principle of the decision in *Krishnasami Thevan* v. *Pulukaruppa Thevan*(1), has to be applied to the present case. We hold that the plaintiff must be deemed to have become divided in status from the first defendant from the date of the plaint, namely 14th August 1918, by reason of the Court having passed a preliminary decree in this suit allowing the partition of the family properties.

It is urged on the first defendant's side that the Court passed a preliminary decree in this case on the 7th April 1921 in accordance with a consent statement filed by the parties and not upon an enquiry as to

(1) (1925) I.L.R., 48 Mad, 465.

whether a partition would be for the benefit of the minor or not. The soundness of this argument is open to doubt. The first defendant, who was contesting the plaintiff's claim for partition, subsequently consented to the passing of a preliminary decree in his favour and thereby abandoned the pleas which he raised in opposition to the plaintiff's claim for partition. Virtually the abandonment of his contentions by the first defendant had the effect of leaving unchallenged the allegations made in the plaint for showing that the partition is necessary and beneficial to the minor and therefore the Court thought fit to pass a preliminary decree in plaintiff's favour. The fact that the preliminary decree in this case was passed on a consent statement does not make any difference.

The finding of the lower Court on this point is modified and we hold that the plaintiff became divided in status from the first defendant, not from the date of the preliminary decree (7th April 1921), but from date of the institution of the suit, namely, 14th August 1918.

The form of account to be ordered depends upon this finding. The lower Court directed accounts to be taken on the basis that the plaintiff and the first defendant became divided in status only from 7th April 1921. So long as the family was in a state of non-division the liability to account on the part of the first defendant as the manager or Kartha of the family would be as stated in the decision in *Parameshwar Dube* v. *Govind Dube*(1). It was held in that case that in an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the Kartha or manager is liable for is as to the existing state of the property divisible and the parties have no right to lock

(1) (1916) I.L.R., 43 Calc., 459.

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back and claim relief against past inequality of enjoyment of the members or other matters. With reference to the management of the first defendant prior to the date of the plaint, the mode of his accountability is as stated above and it is open to the plaintiff to prove specifically any fraud or misappropriation or other improper conduct on the part of the first defendant with respect to such management and, in the absence of such proof, what the Court has to proceed upon is the assets of the family as they existed at the date of the suit, but subsequent to the date of the suit, the plaintiff and the first defendant were only tenants-in-common or co-sharers and therefore the first defendant is strictly bound to account for all receipts and expenses and, as observed by the lower Court, can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided equally between him and the plaintiff. As the accounts have to be taken in accordance with the above findings, a remand of the suit is necessitated and the lower Court should give the necessary directions for taking accounts in the light of the above observations and finally determine how much amount should be decreed to the share of the plaintiff or of the first defendant.

This appeal having been posted for being spoken to, the JUDGMENT of the Court was delivered by

SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—On behalf of the respondent it has now been sought to be argued that he would be entitled under the provisions of rule 22 of Order XLI, Civil Procedure Code, to support the decree given by the lower Court for the particular amount even on grounds which may relate to the portion of the adjudication or decision by the lower Court not appealed against or in respect of which no

objections have been filed by the respondent. It is contended that the expression "support the decree" in rule 22 merely refers to the amount for which the decree is passed and because the expression "decree" is used in that rule it authorizes or enables the respondent to make out a case for a decree for that amount by questioning some adjudication by the lower Court with regard to rights found against the party by the lower Court and in respect of which no appeal or objection has been filed. For this purpose the learned Vakil for the respondent has referred to two cases decided by the Chief Court of Punjab *Muhammad Ali* v. *Parma Nand*(1), and *Shankar Lal* v. *Madari Singh*(2). In the former case what was really held was that even though one item in an account may be found by the Court of Appeal against the respondent and on that footing the amount for which a decree has been granted by the lower Court may have to be reduced, still the decree might be supported by showing that in respect of some other item the Court below made a mistake. But when the relief granted depends upon the adjudication by the lower Court with respect to rights or causes of action, it is inconceivable that such decision or adjudication shall be sought to be attacked in the appellate Court without any notice whatever to the other party. Though the word "decree" has been used in rule 22, it is clear that what the rule contemplates really is the decision by the Court below and merely enables the decision arrived at by the lower Court to be supported on grounds other than those on which the lower Court proceeded. We are satisfied that under that rule it is not open to a respondent to have adjudicated by the appellate Court

(1) (1918) 45 I.C., 232. (2) (1910) 7 I.C., 484.

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rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections.

There is however one point to which the learned Vakil for the respondent has drawn our attention. On the decision of this Court it has been directed that the plaintiff would be entitled to have an account from the first defendant from the date of the plaint instead of from the date of the preliminary decree as directed by the lower Court. There are some items which have been allowed by the lower Court to the plaintiff in its judgment, and it is possible that some of those items which have been allowed to the plaintiff relate to the period subsequent to the institution of the suit. If on the taking of the accounts directed by this Court it should be found by the lower Court that any of the items already allowed to the plaintiff relate to the period subsequent to the institution of the suit, those items should be deleted and be merely included in the taking of the accounts and all such items if so found would have to be deducted from the amount already allowed to the plaintiff. Similarly if in respect of any of the other matters it should be found that any items relate to the period subsequent to the institution of the suit and therefore liable to be included in the account ordered to be taken, those items would also be excluded by the Court.

The Court fees paid by the appellant for the appeal and by the respondent for the memorandum of objections will be refunded to them respectively. The appellant will have the costs of the appeal.

K.R.