APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nair.

GANAPATHY (THIRTY-FIRST DEFENDANT), APPELLANT, 1929, January 25.

v.

SUBRAMANYAM CHETTY AND OTHERS (SECOND PLAINTIFF, AND DEFENDANTS 2 TO 5, 9 TO 24 AND 25 TO 30), RESPONDENTS.*

Hindu Law—Suit for partition by a Hindu father and his minor sons against his father and brother and others—Death of grandfather and father pending suit—Election by major son to continue suit for himself and his minor brother—Application by mother of minor plaintiff not to have partition—Minor plaintiff transposed as defendant—Status of minor, whether divided.

A Hindu father, on behalf of himself and his two minor sons, instituted a suit for partition against his father, his brother and his sons. Before a decree was passed, the grandfather, and subsequently, the father, died. One of the sons, having become a major, elected to continue the suit on behalf of himself and his minor brother. The mother of the minor plaintiff applied to the Court to be made his guardian *ad litem* and stated that a partition was not in the interest of the minor and that she did not want a partition for him, and the minor was accordingly transposed as a defendant. The defendants, who were members of the family, thereupon stated that they did not wish to remain united with the minor plaintiff. A decree was passed by the lower Court, awarding one-third share to the major son on behalf of himself and his minor brother. On appeal by the minor son,

Held, that, in a litigation in which a minor is concerned, the Court is bound to look after his interests, and this rule applies where the minor was a co-plaintiff as well as where he was the sole plaintiff;

that the filing of a plaint for partition by the father on behalf of himself and his minor sons did not necessarily effect

* Appeal No. 211 of 1926.

GANAPATHY v. SUBRAMANYAM CHETTY.

a severance in status, as regards the minors, from the defendants who were members of the joint family, until a decree was passed ;

that the election of the major son to continue the suit, on his and the minor's behalf, did not effect a division of status as regards the minor ;

that it was obviously not in the interest of the minor to become divided from the defendants, as his share would be enhanced by the death of the grandfather ;

that, as the minor continued to be joint with the defendants, at any rate until the refusal of the defendants after the grandfather's death to remain joint with him, his share was not affected by such refusal ;

and that a decree should be given to the major plaintiff only for his own share in the joint family property.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad in Original Suit No. 8 of 1920.

This appeal arises out of a suit for partition, instituted by the first plaintiff for himself and his two sons, who were minors at the date of suit, against the father of the first plaintiff, his brother and his sons. Pending suit, the first defendant (the grandfather) died on 26th October 1923 and the first plaintiff (the father) died in June 1924. The second plaintiff, who had become a major (for himself and his brother still a minor), elected to continue the suit. But, on behalf of the third plaintiff (minor), his mother applied to the Court to be appointed his guardian, stating that she did not want a partition as it was not to his interest, and the minor was transposed as the thirty-first defendant. But the Subordinate Judge passed a decree for a third share in favour of the major plaintiff and the minor son (the thirty-first defendant). The latter preferred this appeal.

T. M. Krishnaswami Ayyar (for *K. Raja Ayyar*) for appellant.—The lower Court is wrong in compelling the minor son (thirty-first defendant) to take a reduced share with the major plaintiff. The minor son had not become divided in status either

by his father's unilateral declaration in the plaint or by the act of the major son to continue the suit for his minor brother. Until a decree is passed by the Court, the status of the minor did not become divided. The Court is entitled and bound to look to the interest of the minor plaintiff: See *Doraisami Pillai* v. *Thungasami Pillai*(1), *Ganesha Row* v. *Tuljaram Row*(2). It is the Court's decree that effects the division of status in a suit by a minor for partition, *Chelmi Chetti* v. *Subbamma*(3), and *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple*(4). There is a right of revocation of the declaration as to status in a plaint in a partition suit. That declaration is not an unambiguous declaration nor is it conclusive: *Vemi Reddi* v. *Nallappa Reddi*(5), *Krishnaswami Naidu* v. *Nammayya Naidu*(6), and *Palani Ammal* v. *Muthuvenkatachala Moniagar*(7). If a decree for partition is passed, the division may no doubt take effect from the date of the plaint; see *Krishnaswami Thevan* v. *Pulukaruppa Thevan*(8), and *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar*(9). Even in the case of a major plaintiff, he can revoke his declaration of intention in the plaint as to partition; *a fortiori* in the case of a minor plaintiff, the declaration of the next friend is not conclusive. It is clearly prejudicial to the minor to have a partition under the altered circumstances of this case.

T. R. Ramachandra Ayyar (with *S. R. Muttuswami Ayyar*), for the respondents 2, 3 and 27.—Where a father brings a suit on behalf of his minor sons, it is conclusively for the minor's benefit. Unless the question of benefit is raised, the Court will not inquire if partition is beneficial to the minor in such a case. In the case of a sole plaintiff or all the plaintiffs (all being minors), the suit by a next friend will have to be subject to the discretion of the Court.

Even though the third plaintiff (now thirty-first defendant) wants to remain joint with the defendants, the latter do not want to remain joint with him. They have so stated in their written statement. In *Chelmi Chetti* v. *Subbamma*(3), the minor plaintiff was the sole plaintiff, who died, and his mother applied as his legal representative.

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(1) (1903) I.L.R., 27 Mad., 377. (2) (1913) I.L.R., 36 Mad., 295 (P.C.).
(3) (1917) I.L.R., 41 Mad., 442. (4) (1920) I.L.R., 42 All., 461.
(5) (1920) 11 L.W., 611. (6) (1924) 20 L.W., 540.
(7) (1924) I.L.R., 48 Mad., 254 (P.C.). (8) (1924) I.L.R., 48 Mad., 465.
(9) (1927) I.L.R., 50 Mad., 866.

GANAPATHY v. SUBRAMANYAM CHETTY.

Institution of a suit by a father for himself and his minor sons, effects a severance in status, unless the father acts fraudulently and prejudicially to the minors. The father has power to represent the sons. The father can divide or re-unite the sons without their consent. *Babu alias Govindoss Krishnadoss* v. *Gokuldoss Govardhandoss*(1), *Ramdos* v. *Chabildas*(2), *Alur Lakshmi Narasimha Sastrulu* v. *Venkata Narasimha*(3). Father's release is binding on the sons: see *Balabux* v. *Rukhma Bai*(4).

T. M. Krishnaswami Ayyar for appellant in reply.—The son and grandson can compel partition against the father and the grandfather: see Mayne's Hindu Law, paragraph 471; *Suraj Bunsi Koer* v. *Sheo Persad Singh*(5).

The father's (first plaintiff's) declaration in the plaint is merely a unilateral declaration and not a bilateral transaction, in which case fraud or collusion may have to be shown by the minor to set it aside. The cases relied on by the respondent relate to bilateral transactions and not to mere unilateral declarations. *Jus accressendi* or the possibility of increase in share is sufficient benefit for the minor; see *Kamakshi Ammal* v. *Chidambara Reddi*(6), and *Palani Goundan* v. *Kasi Goundan*(7).

V. Ramaswami Ayyar, *R. Kesava Ayyangar*, and *B. Sitarama Rao*, for other respondents.

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—In this suit the first defendant is the father of the first plaintiff and the second defendant, by different mothers. Plaintiffs 2 and 3 are the minor sons of the first plaintiff and defendants 3 and 30 are the minor sons of the second defendant. The suit was instituted by the first plaintiff on behalf of himself and his minor sons for a partition. It is alleged that the first plaintiff wished to effect a partition in 1915 or 1916, but no partition appears to have been effected before

(1) (1928) 55 M.L.J., 132 (140).
(2) (1910) 12 Bom. L.R., 621.
(3) (1918) 52 I.C., 614.
(4) (1903) I.L.R., 30 Calc., 725 (P.C.).
(5) (1879) I.L.R., 5 Calc., 148 (164) (P.C.).
(6) (1866) 3 M.H.C.R., 94.
(7) (1918) 50 I.C., 552.

this suit was filed in 1920, and it has not been shown that there was any separation in status. During the pendency of this suit, the first defendant died on 26th October 1923, and in June 1924 the first plaintiff died. On the first plaintiff's death, the second plaintiff who had attained majority elected to continue the suit on behalf of himself and his minor brother the third plaintiff. At the end of the trial, the third plaintiff's mother applied to be made guardian of her minor son, the third plaintiff, and stated that the partition was not in the interest of the third plaintiff and that she did not want a partition so far as he was concerned. The third plaintiff was, accordingly, transposed as the thirty-first defendant.

The Subordinate Judge has held that it was not open to the third plaintiff to withdraw from the suit as he was bound by the act of his father and has accordingly decreed the partition and allotted one-third share to the second plaintiff for himself and his minor brother, the thirty-first defendant. The latter now appeals and the only question that arises for consideration is whether the minor third plaintiff was separated in status from the defendants by reason of his father's unequivocal declaration of an intention to be divided in status. It is contended for the appellant that it is not to the third plaintiff's interest to be separated from the family, but the respondents contend that this question cannot now be considered, because the third plaintiff is bound by the father's declaration and became separated from the date of the filing of the plaint. It is well settled that, in a litigation in which a minor is concerned, the Court is bound to look after the interests of such a minor, and this has been recognized so far back as 1866 ; *Kamakshi*

GANAPATHY v. SUBRAMANYAM CHETTY.

PHILLIPS, J.

Ammal v. *Chidambara Reddi*(1), which was followed in *Chelmi Chetti* v. *Subbamma*(2). *Palani Goundan* v. *Kasi Goundan*(3) is to the same effect. It was also held in *Doraisami Pillai* v. *Thungasami Pillai*(4) that a minor's interest must be protected by the Court. In *Ganesha Row* v. *Tuljaram Row*(5) it was held that a compromise entered into by a father on behalf of his minor son without the leave of the Court was not binding on a minor. It is, therefore, clear that it is the duty of the Court to protect the interests of a minor party. The cases referred to were cases in which the minor was the sole plaintiff but this cannot affect the principle. Ordinarily, when a father sues on behalf of his minor son, it may be presumed that he is acting in the interests of that son unless there is anything to show the contrary. If, however, it does appear to the Court that a father is not acting in the best interests of his son, on the principle set forth above, the Court is bound to protect that son's interest even against the acts of his father. I cannot therefore accept the contention of Mr. Ramachandra Ayyar, for respondents, that the Court cannot interfere to protect a minor from the act of his father. Taking that view we have now to consider whether the filing of the partition suit by the father did actually effect a separation not only of himself but also of his minor sons from the rest of the family, or whether it is open to the Court to refuse partition so far as the minor is concerned.

The first point to be considered is whether the filing of this plaint did constitute a final division in the family. When a declaration has been made of an intention to separate by the filing of a plaint for partition

(1) (1866) 3 M.H.C.R., 94. (2) (1917) I.L.R., 41 Mad., 442.
(3) (1918) 50 I.C., 552. (4) (1903) I.L.R., 27 Mad., 377.
(5) (1913) I.L.R., 36 Mad., 295 (P.C.).

and such plaint has resulted in a partition decree, undoubtedly the date of separation would be the date of the filing of the plaint. But the mere filing of the plaint does not necessarily effect a final severance in status, for it has been held that a plaintiff may withdraw his declaration of intention and that then no severance is effected. *Vemi Reddi* v. *Nallappa Reddi*(1), and *Krishnaswami Naidu* v. *Nammayya Naidu*(2). This has been affirmed by the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagar*(3). There is a remark in the judgment in the latter case to the effect that the withdrawal must be before trial, but that that means before a final decree is made clear by reference to *Palaniammal* v. *Muthuvenkatachala Moniagarar*(4), the same case before this Court, from the judgment in which it appears that the withdrawal took place during the pendency of an appeal. In this view it would be difficult to hold that a declaration of intention by the father, which is subject to revocation, must necessarily effect a separation of his sons from that date. There is authority for holding that when a partition has been actually effected either by a decree, or by agreement between the parties, that partition effected by the father is binding on his sons and can only be questioned on some such ground as fraud or collusion. *Ramdas* v. *Chabildas*(5), *Alur Lakshmi Narasimha Sastrulu* v. *Venkata Narasamma*(6), and *Umed Babar* v. *Kushalbhai Kevalbhai*(7). But that does not show that, if the intention to separate has not been carried into effect, the sons will be equally bound. In the present suit, before the intention could be carried into effect by the

(1) (1920) 11 L.W., 611. (2) (1924) 20 L.W., 540.
(3) (1924) I.L.R., 48 Mad., 254 (P.C.). (4) (1917) 33 M.L.J., 759.
(5) (1910) 12 Bom. L.R., 621. (6) (1918) 52 I.C., 614.
(7) (1909) 2 I.C., 426.

GANAPATHY v. SUBRAMANYAM CHETTY.

PHILLIPS, J.

passing of a decree, the father died. It would, therefore, appear that on the date of his death the minor sons had not been irrevocably divided from the rest of the family. In the circumstances of the present case, the inference of non-division is all the stronger because when the suit was filed, the father of the whole family, viz., the first defendant, was alive and was the head of the family. When, therefore, the first plaintiff asked for a partition, the presumption that he would bind his minor sons by his actions is not so strong as if he were filing a suit against his brothers as the head of his own branch. The third plaintiff, as grandson, could himself have maintained a separate suit for partition, as also any one of the members of the first defendant's family. While, therefore, the filing of the plaint by the first plaintiff may be deemed to have effected his separation from the family, because he did not revoke his declaration of intention, yet it does not necessarily effect a division between the third plaintiff and the other members. In *Balabux* v. *Rukhmabai*(1) and *Mst. Jatti* v *Ramvari Lal*(2), the Judicial Committee of the Privy Council has laid down that when one member of the family becomes separate, there is no presumption that the remaining members remain united, and further that when there has been a separation between the members, there is no presumption that there is a separation between one of the members and his descendants. These however are only presumptions, and such presumptions may be rebutted by circumstantial evidence or otherwise, as is evident from the decision of the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagar*(3), where it was held that a separation of one member did not necessarily create a division between all the members, and it was observed

(1) (1903) I.L.R., 30 Calc., 725 (P.C.). (2) (1923) I.L.R., 4 Lah., 350.
(3) (1924) I.L.R., 48 Mad., 254 (P.C.).

that the decree has to be looked to, to show whether the separation was only separation of the plaintiff from his co-parceners or was a separation of all the members from each other. It does not therefore necessarily follow that, when the third plaintiff's father effected a separation between himself and his family, he effected a separation between his sons and their grandfather and uncle, and to decide this point one must consider the circumstances of this case. The observation of the Privy Council in *Ramalinga Annavi* v. *Narayana Annavi*(1), that the separation of the father effected a separation of his branch must be read in connexion with the facts of the case and of the fact that their Lordships were merely considering the question of the date of separation and not of the factum of separation of the junior members. It seems to me, on a consideration of all these authorities, that the filing of the plaint by the first plaintiff did not necessarily effect a separation of the third plaintiff as well. Before the partition was completed by a decree, representation was made to the Court that it would not be in the interests of the third plaintiff to become separated from the other members of the family, and in the interests of the minor third plaintiff, the Court is bound to take that plea into consideration. So far as the third plaintiff's pecuniary interest is concerned, it is obvious that a separation effected before the death of his grandfather would be less beneficial to him than separation after that date; for in the latter case he would be entitled to a larger share. It is pointed out that, when the third plaintiff declared his intention not to become separated, the other members of the family, viz., second defendant and his sons replied that they did not wish to remain united

(1) (1922) I.L.R., 45 Mad., 489.

GANAPATHY v. SUBRAMANIAM CHETTY.

PHILLIPS, J.

with the third plaintiff. Until that date, however, there had been no such expression of intention by the defendants. In fact, in the written statement, the defendants pleaded that the plaintiffs had not been excluded from a share in the family property. The third plaintiff being a member of the joint family must remain so until he becomes separated. If he did not become separated by the filing of the plaint, he remains an undivided member of the family until a separation is effected. There has been no such separation until the declaration by the second defendant at the conclusion of this suit, assuming that that was an unequivocal declaration of intention. That being so, the share to which the third plaintiff was entitled on that date is a larger share than that which has been allotted to the second plaintiff on his behalf and the order of the Subordinate Judge decreeing only one-third share to the second plaintiff and the third plaintiff jointly is prejudicial to the latter's interest. It is also difficult to understand how the order of the Subordinate Judge can be justified after he had allowed the third plaintiff to be transposed as the thirty-first defendant. Having allowed the third plaintiff's plea to that extent, it was not open to him to compel him as defendant to have a decree. As I hold that there had been no separation of the third plaintiff from the family by reason of the filing of a plaint by his father, and as it would be prejudicial to his interests to decree such separation, I must uphold his interests and refuse such a decree. It may be true that the declaration of the second defendant in answer to the third plaintiff's refusal to continue the suit effected a separation, but that, being at a much later date than the plaint, cannot be dealt with in these proceedings, and the third plaintiff is entitled to a finding that, when the suit was filed, he was not a divided member of the family.

The decree will therefore be modified by giving his share to the second plaintiff alone, leaving the other parties to effect a partition with the third plaintiff as and when so advised. Defendants 2, 3 and 30 will pay the costs of this appeal out of the estate.

A memorandum of objections has been filed by respondents 11 to 18 and the advocate who appears for them appears also for respondents 5, 6 and 21. So far as respondents 5, 6 and 21 are concerned, it is contended that they are unnecessary parties in this appeal and therefore they should be allowed their costs. They were necessary parties in the lower Court and have been added as formal parties in the appeal but no relief was asked as against them and it was not necessary for them to be represented here. There is therefore no reason for awarding them costs against the appellant.

The plea put forward on behalf of respondents 11 to 18 who were alienees from the first defendant is, that when a partition is effected the properties alienated to them should as far as possible be allotted to the share of their alienor, the first defendant, and that they should be allowed to retain the properties, as the alienation to them was binding on the first defendant. This equity for which they ask is not opposed either by the second defendant or the third plaintiff and will be allowed, but in the circumstances it is not necessary to pass any order as to costs.

MADHAVAN NAIR, J.—I agree.

K.R.