desire to express any opinion upon this aspect of the matter.

The appeal therefore fails and is dismissed with costs of respondents 9 and 10.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and Mr. Justice Abdur Rahman.

CHIMALAKONDA RAMASUBBARAYA SASTRI AND TWO OTHERS (PLAINTIFFS 3 TO 5), APPELLANTS,

1939, August 25.

v.

GANAPATHIRAJU VENKATA APPALANARASIMHARAJU AND FORTY-SIX OTHERS (DEFENDANTS 1 TO 14, 16 TO 33, 35, 36 AND 38 TO 49 AND SECOND PLAINTIFF), RESPONDENTS.*

Hindu Law—Partition—Declaration of intention to sever—Alienation by coparcener of his share in whole or part of joint family property—Severance in status, if effected by, at least as regards property alienated — Recovery by other coparceners of their shares in property alienated—Effect of—Suit by coparcener to set aside alienation by another coparcener of item of joint family and to recover his share therein—Evidence of explicit declaration by plaintiff to hold share sought to be recovered in severalty, if—Father or other manager—Sale by, of entirety of items of joint family property as manager and for family necessity—Severance in status, if effected by—Suit by son or other member for declaration that alienation is not binding on him and for recovery of his share in property alienated—Suit for partition, if—Severance in status, if effected by.

Where a suit in substance is not one for partition but to set aside an alienation by the father or a managing member other

* Appeal No. 61 of 1936

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

than the father and to recover possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family, which a suit for partition in the technical sense of the term as understood in Hindu law gives rise to, cannot follow. In order that the institution of a suit by a member of a joint Hindu family to set aside an alienation by another member of an item of joint family property as not binding on him and to recover his share therein might be taken as evidence of an explicit declaration by the member to hold the share which he seeks to recover in severalty, there must be a clear indication to that effect in the plaint or there must be some other evidence to show that it was his intention to so hold the share which he seeks to recover. In the absence of any such intention expressed in the plaint, the conduct of the parties either during the course of the litigation or subsequent thereto must be considered in determining this question of intention.

Where a member of a joint Hindu family consisting of himself and his son purports to alienate, not his share in the items of the joint family property, but, the entirety of those items including his son's share therein, as the father and the managing member for family necessity, no question of any severance of status will result from such alienations.

An alienation by a member of a joint Hindu family of his share in the whole of the joint family property or in any part thereof does not sever his status from the family and make him a divided member even in respect of the property alienated and the mere recovery by the other members of their shares therein will not alter the status of the family. It rests on them to signify their intention unequivocally to hold the said shares separate from the alienor. In the absence of such expression of intention, the presumption will be that they intend to hold the shares as joint family property.

Observations of BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(1) and *Kandasamy Udayan* v. *Velayutha Udayan*(2) relied upon.

Interpretation placed upon the observations of BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya* v. *Aiyyagari*

(1) (1902) I.L.R. 25 Mad. 690, 696, 717 (F.B.).
(2) (1926) I.L.R. 50 Mad. 320, 326.

Ramayya(1) by RAMESAM J. in *Lakshmi Achi* v. *Narayanasami Naiker*(2), disapproved.

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Rajahmundry in Original Suit No. 31 of 1929.

P. V. Vallabhacharyulu for appellants.

Advocate-General (*Sir A. Krishnaswami Ayyar*) and *P. Satyanarayanaraju* for respondents 1 to 46.

47th respondent was not represented.

Cur. adv. vult.

VENKATA-RAMANA RAO J.

The JUDGMENT of the Court was delivered by VENKATARAMANA RAO J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Rajahmundry dismissing the plaintiffs' suit for possession of a half-share in certain immovable properties described in schedule B to the plaint. The said properties admittedly belonged to one Suryanarayanaraju and his son Venkatapatiraju. It is the plaintiffs' case that the said properties were leased in 1868 by Suryanarayanaraju as the father and head of the joint family consisting of himself and his son Venkatapatiraju for a period of fifty years, that subsequent to the said lease the said Suryanarayanaraju and Venkatapatiraju became divided in status, that Venkatapatiraju was entitled in severalty to a half share in the said properties, and that on the death of his widow Butchi Bangarayya on 21st January 1927 the first plaintiff became entitled to the said half-share as the next reversioner. The defendants trace their title to the entirety of the said properties to the father Suryanarayanaraju who alienated the reversion in the said lands. Their case is that there was no

(1) (1902) I.L.R. 25 Mad. 690, 696, 717 (F.B.).
(2) (1929) I.L.R. 53 Mad. 188, 195.

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

VENKATA-RAMANA RAO J.

division in status between the father and the son and on the death of the son the whole of the properties survived to the father by survivorship and he was competent to alienate the same and confer a good title upon them. They also deny the relationship of the first plaintiff to Venkatapatiraju. Two questions fell to be decided by the lower Court: (i) whether the first plaintiff was the next reversioner to Venkataptiraju and (ii) whether there was a division in status between Venkatapatiraju and his father Suryanarayanaraju. On the first question the learned Subordinate Judge held that the first plaintiff had not made out his title as the next reversioner; but on the second question the learned Subordinate Judge held that there was a division in status between Venkatapatiraju and his father Suryanarayanaraju by reason of the judgment and decree in Original Suit No. 8 of 1878 on the file of the District Court of Godavari. As an adverse finding on either of the issues entailed a dismissal of the plaintiffs' suit, the learned Subordinate Judge dismissed the suit.

The first plaintiff died during the pendency of the suit. Plaintiffs 2 and 3 are alienees of a portion of the suit properties from the first plaintiff subsequent to the death of Butchi Bangarayya. Plaintiffs 4 and 5 were brought on record as the legal representatives of the first plaintiff. This appeal is by plaintiffs 3, 4 and 5. There is also a memorandum of objections by the alienee-defendants objecting to the finding as to division in status.

The main point urged by Mr. Vallabhacharyulu on behalf of the appellants is that the learned Judge in the Court below in arriving at the finding regarding relationship has not given due effect to two important documents in the case, namely, Exhibits AA and Z-11.

He contends that the oral and documentary evidence were not properly appreciated by the learned Judge.

[His Lordship considered the oral and documentary evidence in the case and held, reversing the finding of the Court below, that the title of the first plaintiff as next reversioner to Venkatapatiraju had been made out, and proceeded:]

The learned Advocate-General who appeared for the alienees did not advance any argument which would enable us to come to a different conclusion on this matter but he contended that apart from this finding if he could show that the son died undivided from his father, the plaintiffs would be out of Court and that the finding of the learned Judge that the decree and judgment in the prior litigation operated as a severance in status was wrong. We are inclined to think that this contention is well-founded. It is now settled law that a coparcener can become separate in estate by an unambiguous declaration of his intention to separate himself from the family. It is enough for us to refer to the latest decision of the Privy Council in *Ram Narain Sahu* v. *Musammat Makhna*(1) where Sir GEORGE RANKIN cites with approval the following passage from the judgment of Sir GEORGE LOWNDES in *Bal Krishna* v. *Ram Krishna*(2).

"It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain* v. *Iqbal Narain*(3). The question was further examined in *Girja Bai* v. *Sadashiv Dhundiraj*(4) and the principle was re-affirmed."

(1) I.L.R. [1939] All. 680 (P.C.).
(2) (1931) L.R. 58 I.A. 220; I.L.R. 53 All. 300.
(3) (1912) L.R. 40 I.A. 40; I.L.R. 35 All. 80.
(4) (1916) L.R. 43 I.A. 151; I.L.R. 43 Cal. 1031, 1047.

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

VENKATA-RAMANA RAO J.

In *Girja Bai's* case(1), after pointing out that a separation involving the severance of joint status is distinct from the *de facto* division into specific shares of the joint property, their Lordships proceeded to explain :

> "The former was 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."

Thus the test laid down is the intention to *sever oneself from the joint family*. The question we have therefore to determine is, did the son intend to sever himself from the father ? As pointed out in *Girja Bai* v. *Sadashiv Dhundiraj*(1), the intention to become separate may be evidenced in many different ways, either by explicit declaration or by conduct. If it is an inference drawn from conduct it will be for the Court to determine whether it was unequivocal and explicit. The institution of a suit for partition by a member of a joint family against the other members has always been taken to be a manifestation of an unequivocal intention to separate himself from the other members of the family. As pointed out in *Kawal Nain* v. *Budh Singh*(2), the commencement of a suit for partition would effect a separation from the joint family. Their Lordships found in that case that by the plaint the plaintiff claimed a fifth share in the joint family property and that the claim amounted to an intimation to the co-sharers of the plaintiff of an unequivocal desire for separation from the joint family. Therefore a suit must in substance be a suit for partition with a desire on the part of the plaintiff to hold his

(1) (1916) L.R. 43 I.A. 151 ; I.L.R. 43 Cal. 1031.
(2) (1917) I.L.R. 39 All. 496 (P.C.).

share in severalty without being subject to the obligations of the joint status. Having these principles in view, we have to see whether the prior litigation was a suit for partition and the decree and judgment therein operated as a severance in status. The prior litigation was commenced by a suit by Venkatapatiraju in the District Court of Godavari in 1878 (Original Suit No. 8 of 1878). A copy of the plaint was not filed in the lower Court because an authentic copy was not available, but, as a printed copy of the said plaint in the said suit which came up in appeal before this Court was available, we had it marked in this appeal. A reference to the plaint shows that the plaintiff sought to set aside several alienations made by his father including the leases which were executed on 1st and 2nd October 1868 in favour of the second defendant and the father of the third and fourth defendants in that suit. The plaint was confined only to the property alienated. No doubt there was an assertion made in the plaint that the alienations comprised the entire joint family property but that was not a correct statement of fact since there was other property which was not alienated but was alienated by the father or the son subsequent to the date of the suit. The plaint alleged that the plaintiff demanded all the defendants to make over his half share in each of the properties and they refused to do so and therefore he claimed possession of a half share therein. The demand for delivery of possession of a half share could only be on the alienees because the father was admittedly out of possession and there was no evidence of any demand made on the father prior to the said litigation. The plaint does not mention whether there was any movable property belonging to the family or whether there were liabilities of the family and it was not framed in the way a plaint in a

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

VENKATA-RAMANA RAO J.

suit for partition would have been framed. In answer thereto, the defendants contended that it was not open to the plaintiff to recover his half share without suing for a partition. The judgment in that suit confirmed all the alienations including the leases and set aside only two gifts of the joint family property made by the father, one made in favour of the plaintiff's sister and the other in favour of the guru of the family. The actual decree in the suit was that the plaintiff as a coparcener with the first defendant be put in possession of a half share of the lands gifted away and in regard to the rest of the properties the suit was dismissed. There was no declaration as in a partition suit that the plaintiff and the first defendant were entitled to equal shares in all the joint family properties and that in regard to lands covered by leases the plaintiff would be entitled to recover possession of a half share on the termination of the leases. No account of joint family property was directed to be taken nor an account of any liabilities and no declaration was given in regard thereto, whereas, if it was intended to be a suit for partition, the Court would have raised an issue as to the assets and liabilities of the joint family and ascertained what they were and effected a division thereof. The case was carried in appeal and the appellate Court confirmed the above decision except in regard to a small item. It is thus clear that the said suit was not a suit for partition. Where a suit in substance is not one for partition but to set aside an alienation by the father or a managing member other than the father and to recover possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family, which a suit for partition in the technical sense of the term as understood in Hindu law gives rise to, cannot follow. But

it is contended by Mr. Vallabhacharyulu that an alienation by a member of his share in the joint family property operates as a severance in status and he becomes a divided member of the family from the date of alienation and if the alienation relates to a share in a particular item, in respect of that item. A suit for recovery by the plaintiff of his share from the alienee would according to him be a clear indication on his part to hold his share in severalty when recovered; and the first plaintiff must therefore be deemed to have become divided in status from his father by suing to recover his share. Before examining the soundness of this contention it may well be stated that the father did not purport to alienate his share in any item but purported to alienate the entirety of the items including the son's share therein as the father and the managing member for family necessity and no question of any severance of status would result from such alienations, assuming that an alienation would entail the legal consequence of division in status as contended for. But in our opinion an alienation by a member of his share in the whole of the joint family property or in any part thereof would not sever his status from the family and make him a divided member in respect of the property alienated. The preponderance of judicial opinion in this Court has been in favour of this view. In *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(1) BHASHYAM AYYANGAR J. expressed himself thus:

"An undivided member of a family, though he may alienate either the whole or any part of his undivided share, will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in

(1) (1902) I.L.R. 25 Mad. 690, 696, 717 (F.B.).

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

VENKATA-RAMANA RAO J.

respect of all the joint family property other than what he has transferred."

In the learned Judge's view he would be an undivided member even in respect of the shares of the other members in the property alienated. This is in accord with the strict theory of Hindu law which does not recognize alienation as a mode of severance of a joint family. The notion that it would operate as a severance was based on the analogy of English law where a joint tenancy would be disrupted by an alienation of his share by the joint tenant. But the concept of a joint tenancy and the legal incidents attaching thereto are not the same as in the case of a joint Hindu family. It is wrong therefore to infer the same legal consequences from an act which operates differently under different systems of law. A Bench of this Court in *Lakshmi Achi* v. *Narayanasami Naiker*(1) has taken the view that a member would become divided in respect of the property alienated by him and Mr. Vallabhacharyulu relies on the observations of RAMESAM J. in that case. Referring to the observations of BHASHYAM AYYANGAR J. in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*(2), RAMESAM J. remarks as follows :

"If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at page 717 amounts to. It almost implies that so far as the properties in which the whole or part of the member's share is sold are concerned, he must be regarded as divided from the other members."

(1) (1929) I.L.R. 53 Mad. 188, 195. (2) (1902) I.L.R. 25 Mad. 690 (F.B.).

With all respect to the learned Judge, the interpretation placed by him on the observations of BHASHYAM AYYANGAR J. does not appear to be correct. In support of his view BHASHYAM AYYANGAR J. referred to *Gurulingapa* v. *Nandapa*(1). On a reference to that case it will be seen that the following observations of the Chief Justice in that case are directly against the view of RAMESAM J :

" It seems to follow from it that the sale of a coparcener's interest in joint family property cannot affect the position of such coparcener in the joint family or alter the rights of the several coparceners *inter se*. . . Basappa's (alientaing coparcener's) rights to succeed to his brother's shares by survivorship were not therefore affected by the sale of his interest in the last item of joint family property to Gurpadappa so long as the purchaser did not proceed to work out his rights by partition."

This is a definite pronouncement that an alienating coparcener continues undivided even in respect of the share of the other members in the property alienated so that on the death of any member he will succeed to his share by survivorship along with the other members. In *Kandasamy Udayan* v. *Velayutha Udayan*(2) a view different from that of RAMESAM J. was expressed by DEVADOSS J :

" When a coparcener brings a suit for a declaration that an alienation by another coparcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share, if it finds that the alienation is not binding on the plaintiff. But his share does not become absolutely his, for, the alienating coparcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it. . . . When a member of a joint Hindu family sues to set aside an alienation made by another coparcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family."

(1) (1896) I.L.R. 21 Bom. 797, 803. (2) (1926) I.L.R. 50 Mad. 320, 326.

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

VENKATA-RAMANA RAO J.

The view of the learned Judge appears to be that the fact that the alienating coparceners recover their shares would not *ipso facto* effect a severance in status in respect of the property alienated because at a final partition the share alienated may be set apart for the alienor's share which would be taken by the alienee. There is authority for the view that the mere recovery by a coparcener of his share in the property alienated would not prevent the alienee from bringing a suit for a general partition and have the property alienated allotted to his share; vide *Hanmandas Ramdayal* v. *Valabhdas*(1). We do not think it necessary to examine the soundness of this view. If the correct principle is that alienation *per se* by a member of his share in joint family property or part thereof does not operate as a severance in status in respect of the property alienated the mere recovery of their shares by the other members would not alter the status of the family. It would therefore rest on them to signify their intention unequivocally to hold the said shares separate from the alienor. In the absence of such expression of intention, the presumption would be that they intend to hold the shares as joint family property. And the same legal consequences do not therefore follow from a suit by a plaintiff to set aside an alienation by his coparcener of a certain item of property as not being binding on him and to recover the plaintiff's share therein, as would follow from a suit for partition, without more. If the institution of such a suit should be taken as evidence of an explicit declaration by the member to hold the share which he seeks to recover in severalty there must be a clear indication to that effect in the plaint or there must be some

(1) (1918) I.L.R. 43 Bom. 17.

other evidence to show that it was his intention to so hold the share which he seeks to recover. The Court will have to determine if there was any such intention expressed in the plaint and come to a conclusion on the point. In its absence, the conduct of the parties either during the course of the litigation or subsequent thereto will have to be considered in determining this question of intention. The decree in this case provides that the plaintiff as coparcener with the first defendant should recover the share. It would seem to indicate that no severance in status between the plaintiff and his father was effected. The judgment of the learned District Judge in Original Suit No. 8 of 1878 was pronounced on 30th September 1879. One of the alienations which have been set aside by the judgment was, as already observed, a gift made by the father in favour of his daughter Venkayya the plaintiff's sister. On 23rd June 1880, Venkayya executed a mortgage with possession (Exhibit XI) in favour of one Ramayya and this document was attested both by the plaintiff and his father. Therefore though the alienations were set aside the plaintiff confirmed the alienation The appellate judgment in the case is Exhibit N, dated 26th October 1880. On 30th August 1882 the plaintiff in Original Suit No. 8 of 1878, by Exhibit DD effected a sale of the joint family property which was not included in the suit. In that sale the recital is : "the house site which has been acquired by our ancestors and which is continuing in our possession", thus clearly indicating the jointness of the family. In Original Suit No. 8 of 1878, as the decree of the learned District Judge confirmed the leases and dismissed the suit as against the lessees, costs were awarded against the plaintiff. The lessees were executing the decree for costs against the son

RAMASUBBA-RAYA v. GANAPATHI-RAJU.

VENKATA-RAMANA RAO J.

Venkatapatiraju but before execution was completed he died. Thereupon the father Suryanarayanaraju was brought on as his legal representative under the description of "undivided father". In execution the reversion in the suit property was sought to be attached. The objection taken by the father was that as the entire interest of the son devolved on him by survivorship the property could not be attached. This objection was upheld and the execution petition was dismissed. Thus the lessees were unable to recover costs. These proceedings probabilize the contention of the defendants that the prior litigation did not effect a partition, that the son and the father were undivided in status and that the persons whose interest it was to assert that they were divided did not do so. It would be hardly likely that if the son was divided in status from the father, the son's widow would not have been brought on record and the son's separate interest would not have been attached and the money due to the lessees for costs would not have been recovered. In 1890 the father effected an alienation of the reversion in the land but no objection was taken by the widow though she lived up to 1927. The conduct of the widow from the date of the death of her husband up to 1927 for a period of over forty years in not asserting any claim to succeed to her husband's interest renders probable that the son and the father were undivided in status. Exhibit III, dated 28th November 1894, lends support to this view. It is a deed of relinquishment executed by the son's widow in favour of one Ramaraju, an alienee from the father of one of the items which was covered by the suit, Original Suit No. 8 of 1878. What was relinquished under the said document was the "maintenance right" owned by her. Further there is evidence in the case on behalf

of the defendants that the father and the son continued to live and mess together. We see no reason why we should not act on that evidence as it is consistent with the testimony afforded by the documentary evidence. On a consideration of the entire evidence we have come to the conclusion that by the litigation in the prior suit the father and the son did not become divided in status and that Suryanarayanaraju, after the death of the son, was competent to alienate the reversion in the lands.

In this view the plaintiff's suit fails and the appeal is dismissed with costs.

The memorandum of objections is dismissed. No costs.

N.S.