1866. May 7. C. P. No. 80 of 1866.

ORDER :—It is clear that there is no provision allowing of an appeal to this Court from the order complained of. It is clear that this order, except so far as it was a refusal to execute the previous order, and that order of the 15th September which preceded it were equally made without jurisdiction, and the conflicting opinions of the two Civil Judges were alike extra-judicial. The first order was made upon a petition, applying, under Section 18 of Act XX of 1863, for leave to institute a suit, and the then Civil Judge, instead of either granting or refusing the leave, disposed at once of the matter in dispute. He had no jurisdiction to do so. The present Civil Judge was equally without jurisdiction to decide by an order upon the rights of the parties, and further, would have been without jurisdiction, if his predecessor's order had been made with jurisdiction, to have reversed such order. But the fact that both orders were made without jurisdiction does not give us jurisdiction to hear this appeal and it must be dismissed.

It is accordingly ordered that this appeal be, and the same hereby is, dismissed.

Appeal dismissed.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 17 *of* 1866.

KÁMÁKSHI AMMÁL.....*Appellant.*

CHIDAMBARA REDDI and others.....*Respondents.*

A suit on behalf of a minor for partition will lie, if the interests of the minor are likely to be prejudiced by the property being left in the hands of the co-parceners from whom it is sought to recover it.

Special Appeals Nos. 286 *of* 1862 *and* 299 of 1862 [1 M. H. C. Reps., p. 105.] distinguished.

1866. May 12. R. A. No. 17 of 1866.

THIS was a regular appeal from the decree of T. I. P Harris, the Civil Judge of Trichinopoly, in Original Suit No. 3 of 1854.

Srinivasa Chariyar, for the appellant, the plaintiff.

Rangaiya Nayudu, for the 1st respondent, the 1st defendant.

(*a*) Present Innes and Collett, J. J.

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The facts of the case and the arguments of Counsel are set forth in the following judgments :—

INNES, J.—This suit was on behalf of an infant to recover from first defendant that share of the estate in defendant's hands which was vested in the infant as adopted son of Yarama Reddi, late husband of the plaintiff.

The first defendant denied the adoption and set up a will by Yarama Reddi giving him exclusive title to the whole estate.

The Civil Judge, on the authority of the *Manual of Hindu Law* by Mr. Justice Strange and the decision in the special appeal cases reported in page 105, Vol. I, M. H. C. Reps., considered that there was no ground for the action, as it was not alleged by plaintiff that the infant's interests were in danger through malversation of the property by the defendants.

In appeal it was urged on behalf of the plaintiff that, following the decisions in Special Appeal Suit 49 of 1850, reported in page 221 of the decisions of the late Sadr Court of 1851, and a decision in 1859, in which the principle acted upon in the decision of 1850 was adhered to, the Courts will entertain suit of the nature of that now in appeal.

I am of opinion that the judgment of the Court below should be reversed. The true rule seems to be, that a suit on behalf of a minor for partition will lie, if the interests of the minor are likely to be prejudiced by the property being left in the hands of the co-parceners, from whom it is sought to recover it. The decisions in the cases above referred to, with the exception of that in the two cases reported in the High Court Reports, obviously went upon this principle, and with respect to the decision in those latter cases, I do not think that it requires to be distinguished from those just referred to. The *ratio decidendi* of the cases in the High Court Reports seems to me to have been, that the interests of the infant were not found to be prejudiced in any way by the property remaining in the defendant's hands. It is true that the words actually used go further and, if taken strictly, would justify the view of the Civil Judge. But the former decisions in 1850 and 1859 show

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that the Sadr Court, which was then presided over by Mr. Justice Strange, did not at that date hold the narrow doctrine of the dictum in the subsequent High Court cases. Mr. Justice Strange was the presiding Judge of the Bench of Judges which decided these latter cases, and nothing is intimated in the judgment in these cases of any change of view since the decisions in 1850 and 1859. There would therefore seem to be no reason for concluding that the Court intended to go beyond the principles of former decisions.

It is scarcely necessary to say that there is no foundation in Hindu Law for the position, that an infant cannot claim partition except when there is malversation of the property in the hands of the co-parceners. An action will not indeed lie, unless there is something clearly indicating that the interests of the infant will be advanced by partition, because, ordinarily speaking, the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and as a general rule, therefore, it is more profitable for an infant parcener, that his share should continue an integral portion of the whole estate in the hands of kinsmen. In the present case it is clear from the conduct of the first defendant before the commencement of the suit, in setting up a sole title to the property both in his application for a certificate under Act XXVII of 1860 and in the suits which he instituted in the District Munsif's Court, that he has assumed a position adverse to the interests of the infant. And certainly his conduct in the present suit is in confirmation of this view, were any confirmation needed. Bringing forward as he does, a will which, if genuine and otherwise valid, is inconsistent with the existence of any rights in the infant, it is impossible that the interests of the infant should be safe in his hands.

I think therefore that the action rightly lies, and that the decision should be reversed and the suit reinstated and proceeded with upon the points in issue.

COLLETT, J.—I am of the same opinion. The first observation is that really the Civil Judge has dismissed the 't on a ground of objection, which, so far as appears, was

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not put forward by any of the defendants. The objection taken is that, in order to justify a suit for partition on behalf of a minor, it must be alleged and shown that the defendants have been guilty of malversation or waste of the joint property, in which the infant is a co-parcener, and that there is in this suit no allegation of malversation. A decision of this Court reported in 1 Madras High Court Reports, 105, and a Section from Mr. Justice Strange's *Manual* were relied on in support of this proposition. As to the case cited, it is very shortly reported and the facts do not appear, it may have been that there was nothing to show in that case that the minor was in any way interested in obtaining a partition, and the only ground that could be suggested was malversation,and that had neither been sufficiently alleged nor proved. The plaint in the present case does set out facts, which, if true, go to show that the minor's interests (if he has any) might be exposed to risk if the suit were not now brought. As to the Section from the *Manual*, it purports to be founded on 1 Strange's *Hindu Law*, 206, but on turning to that authority, it is quite clear that waste by the co-parceners of the joint property is mentioned not as the sole occasion, but as an instance, when it may be for the benefit of a minor that a suit should be brought on his behalf for partition, and when consequently it will be justifiable. So again, in 2 Strange's *Hindu Law*, 360, we have the opinion of Colebrooke that nothing has been found in the law to prohibit the demand of a partition when for the benefit of a minor. So that as we might expect, the benefit of the minor is what justifies such a suit. So also from the texts and commentary in 3 *Digest*, 544, it is clear that the rule is, that a partition during the minority of a co-parcener cannot take place to the damage of his interests, but the motive is the protection of his interests and consequently if it is in fact, as it may very well be, greatly for his benefit and for the protection of his interests that there should be a partition, a suit on his behalf may be brought. It would of course be most unreasonable to say that waste is the only possible way in which his interests can be endangered.

No doubt a suit for partition, or indeed any suit, on behalf of a minor, ought to appear to be for his benefit. In

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this country, as every where else, a guardian or next friend, who sues on behalf of a minor, does in fact undertake that the suit he brings is for the minor's benefit. (See *Jones* v. *Powell*, 2 Meriv. 141). No doubt also it would be a very proper ground of objection to a suit, that it was not for the minor's benefit that the partition should be enforced or generally that the suit should be proceeded with. I am not prepared to say that the Court, having regard to the fact that the interests of a minor were concerned, might not of its own motion require to be satisfied that it was really for the benefit of the minor that the suit should be proceeded with. As examples in England of where such an enquiry has been ordered and suits on behalf of infants suspended or dismissed, I may mention the cases of *Da Costa* v. *Da Costa*, (3 P. Wms. 150) *Fox* v. *Suwerkrop*, (1 Beav. 583) and *Sale* v. *Sale* (1 Beav. 586). It is obvious that it often may not be for the benefit of a minor that he should have a partition; if his rights are not denied or the property not mismanaged, it might not be so, he would lose for instance the possible benefit of survivorship, and generally so great a change in the condition of a minor as a partition operates, ought not to be allowed to take place, unless it is clearly for his benefit that it should be so.

Then in the present case assuming that the minor has the title alleged for him (for of course we are not in the least deciding now that he has any title at all) is it for his benefit that his right (if any) should be now ascertained and enforced? Clearly it is so. He has, it is said, been ousted from all possession, and it is alleged that the first defendant has attempted to get himself recognized as sole heir of Yarama Reddi by taking out a certificate as such and by still attempting as such to collect the debts due to Yarama Reddi. Not a word of this is denied by the first defendant, on the contrary he virtually affirms those allegations by denying that the minor has any right to, or interest whatsoever in Yarama Reddi's property. It seems only common prudence that, if the minor has in truth any such rights and interest as alleged, they should be at once ascertained and enforced. He is already excluded from the benefit of such rights, if he has them, and it may be and

probably will be much easier to establish the validity of his adoption, if he was in truth duly adopted, by a suit at once than by one many years hence at the end of his minority. 1866. *May* 12. *R. A. No.* 17 *of* 1866.

The decree below must be reversed under Section 351, and the suit remanded in order that it may be restored to the file and investigated upon the merits. The first defendant must also pay the plaintiff's costs of the appeal.

Appeal allowed.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 11 *of* 1866.

GOVINDAN PILLAI .....*Appellant.*

CHIDAMBARA PILLAI and others.....*Respondents.*

In a suit to enforce the right to share in property on the ground that it was joint family property :—*Held*, that upon the construction of Clause 13, Section I of Act XIV of 1859, the claimant, in order that the statute shall be a bar, must have been entirely out of possession and excluded from possession by those against whom he claims.

Clauses 12 and 13, Section I of the Limitation Act considered.

THIS was a regular appeal from the decree of T. I. P. Harris, the Civil Judge of Trichinopoly, in Original Suit No. 1 of 1864. 1866. *May* 21. *R. A. No.* 11 *of* 1866.

The suit was for the recovery of one-third share of the family property. The plaint stated that one Anna Pillai had four sons, viz., Veláyudhan Pillai plaintiff's father, the 1st defendant, Muttusámi Pillai the adoptive grand-father of the 2nd defendant, and Nágalingam Pillai. That all the brothers lived undivided. That Muttusámi Pillai the adoptive grand-father of the 2nd defendant, and plaintiff's father about 45 years ago left for Nagpore. That subsequently plaintiff's father returned and lived jointly with the defendants at their house until his death, which took place in the year 1861. That the plaintiff and the 1st and 2nd defendants not agreeing, the plaintiff asked for a division. That thereupon disputes arose, and in consequence mediators were nominated and a deed of agreement drawn up, but 1st and 2nd defendants held back in the matter —Hence this suit.

(*a*) Present Holloway and Collett, J.J.