Appellate Jurisdiction. (*a*)

Special Appeal No. 162 *of* 1869.

PARVATHI..... { *Special Appellant. (Supplemental 3rd Plaintiff.)*

MANJAYAKARANTHA..... { *Special Respondent. (Supplemental 3rd Defendant.)*

A suit for a partition of family property was, upon the death of the plaintiff, revived on behalf of his minor sons with the permission of the Court of First Instance and a decree for a partition given. The Appellate Court reversed the decree upon the ground that as a partition can be enforced on behalf of minors only when it can be proved to be necessary for the protection of the minors' interest such suit did not survive to minors. *Held* by the High Court that, the Court of First Instance having allowed the suit to be revived considering that it had been brought on grounds which entitled the minors to the partition, the competency of the plaintiff to proceed with the suit was not open to objection in the Lower Appellate Court.

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THIS was a special appeal against the decision of Srinivassa Rao, the Principal Sadr Amin of Mangalore, in Regular Appeal, No. 119 of 1867, reversing the decree of the Court of the District Munsif of Barkur, in Original Suit No. 79 of 1863.

The plaintiffs brought the suit for a division of family property.

The 1st and 2nd plaintiffs and the 2nd defendant died during the pendency of the suit. The 3rd plaintiff, who is the widow of the 1st plaintiff and mother of the 1st plaintiff's two sons, contended that the 2nd plaintiff and the 2nd defendant were issueless; that the 1st plaintiff's two sons being minors, are under her (3rd plaintiff's) protection; that as the said minors are entitled to a share in the estate and do so possess a right to a moiety of the whole estate, the same should be caused to be given over to the 3rd plaintiff on account of the said minors.

The District Munsif of Barkur gave a decree for the plaintiffs.

The 1st and 3rd defendants appealed.

The Judgment of the Principal Sadr Amin contained the following observations:—

The defendant's vakil contends that as the 1st and 2nd plaintiffs who preferred this suit died during the middle

(*a*) Present: Scotland, C. J. and Innes, J.

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stage thereof, the 3rd plaintiff is incompetent to conduct the same with reference to the right of her minor boys. They also base their argument on the decision passed by the late Sadr Court, in Special Appeal Suit No. 148 of 1859, and which is in page No. 263 of the Decree Book for 1859 and state as follows :—A reference to that decree will show that the plaintiff of that suit brought the same in order to obtain his share, that decision was passed in that original suit in his favor; that then the said plaintiff having died when appeal suit was pending, his widow came forward as his representative, and the Principal Sadr Amin passed his decision in her favor; that during the execution of the decision, she alleged the right of her adopted son and maintained that plea, and that the Sadr Adalat Court dismissed that suit, holding that if a person who brought a suit for a share dies in the middle stage thereof, he is to be considered to be an undivided person and his widow cannot be entitled to claim share, and so the widow of that plaintiff will have no right to claim share; that even though the right of the adoption urged by that widow may be considered to be genuine, still if a suit were to be brought for share on behalf of a minor it would be necessary, in case of the estate having remained in charge of the co-parcener holding the management, to prove that such an act as was prejudicial and injurious to his (minor's) right was done, but this question has nothing to do with the above suit brought by that plaintiff whose form and cause are different, the same cannot be disposed of therein.

The defendant's vakils also stated that the present suit is similar to the above one.

In explanation to the above, the vakils for the 3rd plaintiff urged as follows: That the 1st and 2nd plaintiffs should be considered to be divided members, inasmuch as they stated in the plaint of the present suit that the 1st and 2nd defendants did not allow them any interference in the household affairs but ousted them (from the house), and they (the said plaintiffs) have ever since been living separately; that moreover this suit was brought only for recovery of the estate, and the heirs of the deceased plaintiffs are entitled to obtain the same in lieu of the deceased plaintiffs, and as the 3rd plaintiff and her sons are regular heirs, and as her

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sons are minors, it is just that the 3rd plaintiff should carry on proceedings (on their behalf); that the present suit was not brought on account of the minors,—hence the form and cause of the present action do not differ (as mentioned above); that besides this, the Sadr Adalat Court had, at the time of passing the above decision, come to the conclusion that though shares were allotted and decree obtained on that account, still the parties should be considered to be undivided in case of the estate not having been taken possession of, but the said conclusion was set aside by the decree passed by the High Court subsequently in Regular Appeal No. 40.—Vide *page* 40, *Volume III of Madras High Court Reports.* That consequently the decree abovementioned is not applicable to the present suit. However, the plea set forth at present by the 3rd plaintiff's vakils is a fresh one opposed to the proceedings carried on in the original suit, for in the original plaint presented by the plaintiffs 1 and 2, they stated that themselves and the defendants were living unitedly and holding the enjoyment of the estate, but that as the 1st and 2nd defendants colluded together and ousted them (from the house) without allowing them interference in the family affairs, they have been living separately since Magha of Kalitakshi. They cannot, from the statement made simply in the plaint as aforesaid, be considered to be divided members, but they appear to be undivided. Moreover, the 3rd plaintiff's vakil did not urge her own right. The decree passed in Regular Appeal No. 40, alluded to by the 3rd plaintiff's vakils, shows on a perusal thereof that a kara was passed separately among the parties as regards division; that as the same was enforced to a certain extent it has been held (in that decree), though estate was not taken possession of, that division took place. Such transaction did not take place in the present suit. According to the nature of the proceedings carried on by the defendants in the present suit, there are strong reasons to consider that the defendants have done acts prejudicial and injurious to the 1st plaintiff's sons the minors. The 1st defendant has not only maintained that all the lands with the exception of two were his paternal acquisition, and that the share in those two lands had already been given to the 1st and 2nd plaintiff's father, but he sold some lands to his own brother-in-law, Sankaranarayana Adigi, for so large an

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amount as Rupees three thousand. The Principal Sadr Amin does not feel any doubt to consider that all these transactions are certainly fraudulent. However, the Principal Sadr Amin is unable to dispose of the said minor's right in this suit, inasmuch as the same (such disposal) will be in direct contrariety to the meaning of the decree passed by the late Sadr Court. There is no obstacle for the 3rd plaintiff bringing a separate suit for the share of her children.

The plaintiff preferred a special appeal to the High Court against the decree of the Principal Sadr Amin, for the following reasons:—

1. The Principal Sadr Amin wrongly held that the 3rd plaintiff cannot proceed in this suit to recover the shares of her minor sons.

2. It is found that the 1st defendant is doing various acts highly injurious to the interest of the minors, and under these circumstances it is clear that this suit is beneficial to the minors and must be allowed to be proceeded with.

3. The father of these minors having instituted the suit, they are entitled to obtain a decree for all the shares which might have been awarded to him.

Srinivasa Chariyar, for the special appellant, (supplemental 3rd plaintiff.)

Parthasarathy Aiyangar, for the special respondent, (supplemental 3rd defendant.)

The Court delivered the following

JUDGMENT:—This is a suit for a partition of family property. The two plaintiffs by whom the suit was instituted were brothers and they died during the pendency of the suit in the Court of First Instance, the second plaintiff issueless, and the 1st plaintiff leaving a widow and two infant sons. After their deaths the widow as guardian on behalf of her sons who were the legal representatives of the original plaintiffs was made plaintiff in the record, and the suit proceeded to a decree adjudging to her as guardian and trustee possession of the share of the family property to which her sons were held to be entitled.

The Lower Appellate Court, acting on the authority of a decision of the Sadr Court, reported in *Sadr Decisions* for

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1851, *page* 263, reversed that decree and dismissed the suit upon the ground that the suit was not one which could be revived on behalf of the minors, and therefore the decree of the Court of First Instance was illegal. The question raised for determination on special appeal is whether this decision is erroneous, and we are of opinion that it is.

Had the sons been of age the cause of action would unquestionably have completely survived to them as the legal representatives of the original plaintiffs, and it would have been quite proper to allow them to be made parties and to proceed with the suit; and we think that their minority did not necessarily prevent the suit being revived by the widow on their behalf. The reason put forward to support the decision of the Lower Appellate Court is, that as a partition can be enforced by a guardian or next friend on behalf of co-parceners who are minors only when it can be proved to be necessary for the protection and security of the minors' interests, a suit by a co-parcener who has a general right to partition does not survive to his sons if minors.

But this, we think, is not maintainable as a general rule; it may or may not be so according to the circumstances of the particular case. In some instances the deceased co-parcener may have brought the suit because of acts and dealings on the part of his co-parcener or co-parceners in possession of the property which clearly make a partition necessary for the security of the minors, and in every case in which there appear reasonable grounds for believing the fact to be so, the Court in which the suit is pending may properly consider that the suit had survived and allow it to be proceeded with by the guardian on behalf of the minors. On the hearing the evidence may fail to prove enough to justify a partition, but that can be no objection to the revival of the suit when there appears reasonable ground for the alleged right of the minors to the relief prayed in the plaint.

In the present case the Court of First Instance appears to have allowed the suit to be revived considering that it had been brought on grounds which entitled the minors to the partition prayed for, and we are of opinion, for the reasons given, that the competency of the widow to proceed with the suit as the guardian of the minors was not open to objection in

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the Lower Appellate Court. Consequently the decree of that Court must be reversed and the record remanded in order that a decree in the appeal may be passed on the merits of the case.

The costs hitherto in this and the Lower Courts will abide the decree.

Appeal allowed.

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Special Appeal No. 222 *of* 1869.

SRI RAJAH PAPAMMA ROW GARU and another..... } *Special Appellants.*

TOLETI VENKAIYA and another..... } *Special Respondents.*

When a sum of money is payable under a bond by instalments with a condition that, in default in paying one instalment, the whole amount shall then become due, and default is made but the obligee subsequently accepts payment of one or more sums as an instalment or instalments due under the bond, such acceptance amounts to a waiver of the condition of forfeiture and puts an end to the cause of action which had accrued, so that the bond is set up again as a bond payable by instalments and no cause of action under the condition arises until some fresh default is made in the payment of a subsequent instalment.

1870. *February* 21. *S. A. No.* 222 *of* 1869.

THIS was a special appeal against the decision of H. Morris, the Civil Judge of Rajahmundry in Regular Appeal No. 112 of 1868, modifying the decree of the Court of the Principal Sadr Amin of Rajahmundry in Original Suit No. 19 of 1866.

Ráma Row, for the special appellants, the defendants.

Mayne, for the special respondents, the plaintiffs.

The facts are sufficiently mentioned in the following

JUDGMENT:—This is a suit upon a razinamah, to recover a certain sum as interest due under the terms of the document. The main question for decision is whether the suit is barred by the Law of Limitations. The razinamah was for a time treated as a decree and execution issued upon it, but no decree had in fact been passed and the refusal of the Court to continue to execute it led to this suit being brought. The amount of the razinamah was made payable by instal-

(a) Present: Scotland, C. J. and Collett, J.