

be, as Farran, J., says in the above case, to leave the guardian to do on his own responsibility what he thinks right and proper under the circumstances of the case.

Attorneys for petitioner :—Messrs. *Mulji and Baghowji.*

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RE
JAGANNATH
RAMJI.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice M. G. Ránade.

MAHA'DEV BALVANT AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. LAKSHMAN BALVANT (ORIGINAL DEFENDANT), RESPONDENT.*

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February 1.

Hindu law—Partition—Suit by minors for partition—In what cases such a suit can lie—Malversation.

Under the Hindu law a minor co-parcener cannot sue for partition unless his interests are likely either (1) to be advanced thereby, or (2) protected from danger.

Where an adult co-parcener has taken up a hostile position to the interests of minor co-parceners and denied their rights, or sets up his own independent title, or where the minors live separately and the adult co-parcener does not support them, in all these cases it is in the interest of the minors that their share shall be partitioned and set apart.

The plaintiffs, who were minors, sued by their next friend for a partition of their ancestral property in the possession of their step-brother, the defendant. It appeared that soon after their father's death disputes and differences arose between plaintiffs' mother and their step-brother, which led to their separation in food and residence. The defendant managed the family property, but did not support the minors out of the rents and profits thereof. Hence the suit.

Held, that though no malversation was alleged or proved, the allegation, in the plaint, of disputes and separate residence and defendant's failure to support the plaintiffs were sufficient to justify the Court in permitting the plaintiffs to maintain the suit.

APPEAL from the decision of Ráo Bahádur Chuniálál Máneklál, First Class Subordinate Judge of Poona, in Suit No. 382 of 1889.

Suit for a partition of joint family property.

One Balvant Karandikar died on 23rd April, 1886, possessed of considerable moveable as well as immoveable property. He left behind him a widow by name Jánkibái, two minor sons (the plaintiffs) by Jánkibái, and an adult son (the defendant) by his first wife.

Within a few months after Balvant's death, disputes arose in his family, in consequence of which Jánkibái and her two minor

*Appeal, No. 145 of 1892.

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sons separated from the defendant in food and residence. The defendant took possession of the whole of the family property, both moveable and immoveable.

In 1889 the minor sons of Balvantráo brought this suit by their next friend to recover by partition their two-thirds share of the family property, alleging that their step-brother, the defendant, had after their father's death taken possession of the whole of the ancestral property, moveable as well as immoveable, and had refused to support them out of the rents and profits of the estate in his hands. The plaintiffs also asked for an account of the income of the property since the date of their father's death.

The defendant pleaded (*inter alia*) that plaintiffs' mother Jánki-bái had taken away cash and ornaments belonging to the family of the total value of Rs. 10,000, which should be brought into hotchpot; that he had no objection to a partition of the property in dispute, except a house, which he had redeemed with funds belonging to his deceased mother and forming part of her *stridhan*, and that the plaintiffs were bound to contribute their share of the mortgage-debt which had been thus paid off.

The Subordinate Judge dismissed the suit on a preliminary point, holding that under the Hindu law the minors were not entitled to sue for partition without showing that their interests in the joint property would be seriously prejudiced if a partition were not forthwith ordered.

The following extract from his judgment gives the reasons for dismissal of the suit:—

“ This suit seems to have been filed either in ignorance or in forgetfulness of the salutary rule of Hindu law, which does not allow of partition at the instance of a minor co-parcener without good grounds to believe that the minor co-parcener's interests in the joint family property would be prejudiced seriously if a partition were not forthwith decreed. The plaint discloses not a single ground to satisfy the requirements of the Hindu law on this point; The officer who registered the plaint seems to have taken no notice of this material omission. The defendant's pleader did not raise the point in his *kafiyat*, and my predecessor in office did not raise that issue. At the close of the trial, however, the defendant's pleader saw the point and asked for a short time to enable him to find authorities on the subject. In addressing the Court both pleaders argued the point, and the defendant's pleader cited some authorities in support of his contention. He cited I. L. R., 8 Calc., 537; S. A. No. 148 of 1871; and 3 Mad. H. C. Rep., 94. The rule of Hindu law, upon which the defendant's pleader has

relied, is so well known that it does not require the help of any decided cases. A minor is unfit to attend personally to his affairs, and his (minor's) estates must be managed by somebody else. The Hindu law under the circumstances wisely presumes that a manager of a joint Hindu family is the best person to be entrusted with the management of the shares of the minor members of that family, and until and unless this presumption is rebutted by strong evidence showing that the interests of the minor members cannot be safely entrusted to the manager of the joint family, the law will not allow a partition at the instance of a minor co-parcener. Such being my view of the law applicable to this case, and the plaint being altogether silent as to the existence of any of the grounds required by Hindu law, I proceed to see whether the evidence has made out a case for the sustenance of a partition suit on behalf of the minor plaintiffs.

* * * * *

“ There is not a shadow of ground to contend that defendant has been guilty of mismanagement or malversation or has done anything which has prejudiced or is likely to prejudice the interests of the minor plaintiffs.

“ I dismiss the plaintiffs' suit with costs.”

Against this decision the plaintiffs appealed to the High Court.

Shivram Vithal Bhandárkar for appellants:—The lower Court has rejected the plaintiffs' claim for partition on a technical point which is not to be found in the pleadings, or covered by any of the issues in the case. The lower Court holds that a minor cannot demand partition unless he alleges and proves mismanagement or malversation on the part of the adult co-parceners. We contend that this is an erroneous view and is not warranted by any texts of Hindu law. The rule is correctly laid down in placitum 544 of Colebrook's Digest, Vol. III. If a minor's interests are likely to be prejudiced by the property being left in the hands of the adult co-parcener, he is entitled to claim partition—*Thangam Pillai v. Suppa Pillai*⁽¹⁾. See also *Kamakshi Ammal v. Chidambara Reddi*⁽²⁾. We go further, and say and contend that if a minor would benefit by partition, the Court would allow it, even though no specific act of malversation be alleged against the adult co-parcener—*Govind Rámchandra v. Moro Rághunáth*⁽³⁾. Refers to *Damoodur Misser v. Senabuttu*⁽⁴⁾; *Svámiyar Pillai v. Chokkalingam Pillai*⁽⁵⁾; West and Bühler's Digest (3rd Ed.), pp. 674, 815; and Mayne's Hindu Law (5th Ed.), sec. 435. In the present case

(1) I. L. R., 12 Mad., 401.

(2) 3 Mad. H. C. Rep., 94.

(3) P. J. for 1875, p. 261.

(4) I. L. R., 8 Calc., 537.

(5) 1 Mad. H. C. Rep., 105.

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the minors have been excluded from all participation in the income of the family property ever since their father's death. The defendant is their step-brother. Their interests are not safe in his hands. A partition is, therefore, not only desirable, but necessary, to protect their interests.

Daji Abaji Khare for respondent:—There is no allegation in the plaint that the minors' interests would be prejudiced by the property being left in our hands. The lower Court has found that we are not guilty of mismanagement or malversation, or have done anything which is likely to prejudice the minors' interests. That being so, the minors are not entitled to claim partition—*Dámoodur Misser v. Senábutty*⁽¹⁾; *Alimel Ammal v. Aruna Chellam Pillai*⁽²⁾; West and Bühler (3rd Ed.), 74, 75; Mayne's Hindu Law (5th Ed.), secs. 400 and 432; 2 Vyavastha Darpan, 338. A partition, like a contract, depends upon the agreement and consent of all parties concerned. A minor cannot give such consent. The sovereign as *parens patriæ* acts for him, if his interests are in danger. This is a condition precedent to a minor's suit for partition. This objection to the suit was not indeed taken by the defendant in his written statement. But as it goes to the root of the case, the Subordinate Judge was competent to raise it of his own motion.

RA'NADE, J.:—In this case the minor plaintiffs by their next friend, brought a suit for a partition of their paternal property against their step-brother, the defendant. Defendant filed a written statement, in accordance with which issues were laid down, and evidence received in regard to the same. The lower Court, however, disposed of the suit on a somewhat technical point of law, not raised by the defendant, and not involved in the issues, namely, that, under Hindu law, minor co-parceners cannot sue for partition without showing good ground to lead the Court to believe that the minor co-parceners' interest in the joint property would be seriously prejudiced if a partition were not forthwith decreed. The lower Court held that plaintiffs failed to show that defendant was guilty either of mismanagement or malversation, or that he had done anything which prejudiced, or was likely to prejudice,

(1) I. L. R., 8 Calc., 537.

(2) 3 Mad. H. C. Rep., 69.

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the interests of the minor plaintiffs, and on this ground, plaintiffs' claim was dismissed with costs.

The chief point argued before us by the appellants' pleader related to this view of the lower Court that the manager of a joint Hindu family is the best person to be entrusted with the care of the interests of its minor members, and that partition should not be allowed unless this presumption was rebutted by strong evidence showing that the minors' interests could not be safely entrusted to the managing member. The lower Court appears to have assumed that the presumption mentioned above cannot be rebutted unless malversation is proved. In one place it is stated in the judgment that "there is nothing to show that defendant has made away with any of the moveable property, and *in the absence of such proof, the partition suit will not lie.*"

It appears to us that the lower Court has placed a too narrow construction on the rule of the Hindu law referred to by it. It is true some of the earlier decisions required proof of malversation or mismanagement; but the more recent decisions have laid down both a positive and a negative test, namely, that no suit by a minor co-parcener for partition should be allowed, unless his interests are either likely (1) to be advanced thereby, or (2) protected from danger. The decision in *Swamiyar Pillai v. Chokkalingam Pillai*⁽¹⁾ no doubt states malversation as the ground which should be proved before a minor's suit for partition can be allowed. In *Kamakshi Ammal v. Ohidambara Reddi*⁽²⁾, however, the Madras High Court took note of Sir T. Strange's dictum and the case in the first volume, and ruled that "there was no foundation in Hindu law for the position that an infant cannot claim partition except when" malversation is proved. The true doctrine laid down in that case was that an action will not lie "unless there is something clearly indicating that the interests of the infant will be advanced by partition." The test laid down is thus whether or not the suit was for the benefit of the minor. This view of the Madras High Court was re-affirmed by it in *Thangam Pillai v. Suppa Pillai*⁽³⁾, and also by the Calcutta High Court in *Damoodur Misser v. Senabutty Misra*⁽⁴⁾ where it was held

(1) 1 Mad. H. C. Rep., 105.

(2) 3 Mad. H. C. Rep., 94.

(3) I. L. R., 12 Mad., at p. 401.

(4) I. L. R., 8 Calc., 537.

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that unless either malversation, or some other circumstances which made it for the minor's interest that his share should be set aside, are proved, a minor plaintiff cannot sue for partition. In West and Bühler (3rd Ed.), Vol. 2, Partition, p. 675, mention is made of a case in which the High Court of Bombay directed the District Judge to report after inquiry whether the minor would benefit by a suit for partition against his uncle, against whom no special instance of malversation had been alleged: see also *Govind Rámchandra v. Moro Raghunáth*⁽¹⁾. Some of these cases are referred to in the judgment of the lower Court, but it does not appear to have correctly apprehended the true spirit of these decisions of the three High Courts on this point.

The lower Court, therefore, was bound to consider the question, not so much as though it had only a negative aspect, and rested upon proof of malversation, but also from the positive point of view, namely, whether or not the partition suit would benefit the minor's interests. In the cases quoted above, it has been held that when the defendant has taken up a hostile position to the minors' interests, and denied their rights, or set up his own independent title, or where the minors live separately, and defendant does not support them, in all these cases it is in the interest of the minors that their share should be partitioned and set apart. If the minor's rights are not denied, or the property is not mismanaged, it would generally not be in the minor's interest to sue for partition. In the Bengal case, the existence of disputes and differences was held to be a sufficient ground to justify the partition suit. In the present case, the evidence shows that plaintiffs and their mother have been living separately from defendant for many years, and that there have been many disputes between plaintiffs' mother and defendant. Plaintiffs also allege, and defendant does not deny, that the defendant does not support the plaintiffs out of the family property. These facts appear to us to furnish sufficient grounds for holding that, as between plaintiffs and their step-brother, the defendant, the partition suit brought by plaintiffs would promote the interests of the minor plaintiffs, and that the partition of plaintiffs' two-third share would benefit them materially. Even though no mal-

(1) P. J. for 1875, p. 261.

versation was alleged or proved, the allegation in the plaint of disputes and separate residence, and defendant's failure to support the plaintiffs are, therefore, sufficient to justify the Court in permitting plaintiffs to maintain this suit. Under these circumstances, the decision of the lower Court must be set aside; and as it recorded findings without giving reasons on the issues laid down by it, we must reverse the decree, and remand the case for full inquiry and fresh decision on the merits. Costs to follow the final decree.

One of the minor plaintiffs has in the meanwhile become a major, and has applied to have his name inserted, and to be allowed to sue in his own right, as also guardian of his minor brother, in place of the next friend. This application has been granted by this Court.

Decree reversed.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ránade.

QUEEN-EMPRESS v. GANPATRA'O RAMCHANDRA.*

Penal Code (Act XLV of 1860), Secs. 109, 115, 148, 302—Abetment—Abetment in British India of an offence committed in foreign territory—Not an offence under the Penal Code—Offence—Criminal Procedure Code (Act X of 1892), Sec. 188.

An abetment in British India by a British subject of an offence committed in foreign territory is not an offence punishable under the Indian Penal Code (XLV of 1860), and cannot, therefore, be tried by a Court in British India.

Regina v. Elmstone(1) and *Empress v. Moorga Chetty*(2) followed.

The accused, a Native Indian subject of Her Majesty, was committed to the Court of Sessions for abetting the commission of murder or of rioting under sections 302 and 147 of the Indian Penal Code. The alleged abetment consisted of words spoken in British territory by the accused, inciting certain Portuguese subjects to kill one Bháná if he attempted to remove the produce of certain lands situate in the Portuguese territory of Daman. A disturbance afterwards occurred at Daman in connection with this matter, in which one man was killed and another wounded. Thereupon the Governor General of Portuguese India moved the Government of Bombay to bring the accused to justice as the instigator of the murder. The Government of Bombay being of opinion that section 188 of the Code of Criminal Procedure (Act X of

*Criminal Revision, No. 11 of 1894.

(1) 7 Bom. H. C. Rep., 89, Cr. Ca.

(2) I. L. R., 5 Bom., 338, 347.

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