PETITIONER:
KAKUMANU PEDA SUBBAYYA ANDANOTHER

Vs.

RESPONDENT:
KAKUMANU AKKAMMA AND ANOTHER

DATE OF JUDGMENT:
04/09/1958

BENCH:
AIYYAR, T.L. VENKATARAMA
BENCH:
AIYYAR, T.L. VENKATARAMA
GAJENDRAGADKAR, P.B.
SARKAR, A.K.

CITATION:
1958 AIR 1042 1959 SCR 1249

ACT:
Hindu Law-Partition-Suit for Partition on behalf of minor -Severance of joint status-Death of minor pending suit-Abatement-Right of legal representative to continue suit.

HEADNOTE:
In a suit instituted on behalf of a Hindu minor for partition of the joint family properties, the minor plaintiff died during the pendency of the suit and his mother as the legal representative was allowed to continue the suit as the second plaintiff, and the suit was decreed as it was found that the defendants had been acting against the interests of the minor and that the suit for partition was therefore beneficial to him. It was contended for the appellants that the suit had abated by reason of the death of the minor before the suit was heard and before the Court could decide whether the institution of the suit was for his benefit.
Held, that when a suit is instituted by a person acting on behalf of a minor for the partition of the joint family properties, a declaration made by him on behalf of the minor to become divided brings about a severance in status, subject only to the decision of the Court that the action is beneficial to the minor. The true effect of the decision of the Court is not to create in the minor a right which he did not possess before but to recognise the right which had accrued to him when the action was instituted.
Rangasayi v. Nagarathnamma, (1933) I. L. R. 57 Mad. 95, Ramsingh v. Fakira, I. L. R. [1939] Bom. 256 and Mandilprasad v. Ramcharanlal, I.L.R. [1947] Nag. 848, approved.
Case law reviewed.
Accordingly, the suit did not abate and the legal representative was entitled to continue the suit and obtain a decree on showing that when the suit was instituted it was for the benefit of the minor.
Held, further, that the suit did not abate on the ground either that the cause of action for a suit for partition by a minor was one personal to him, because such a suit is one relating to property.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 326 of 1955.
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Appeal by special leave from the judgment and decree dated April 10, 1953, of the Madras High Court in Second Appeal No. 1815 of 1949, arising out of the judgment and decree dated January 28, 1949, of the Court of Subordinate Judge, Bapatla, in A. S. No. 188 of 1947, against the judgment and decree dated December 23, 1946, of the District Munsif, Ongole, in O. S. No. 139 of 1946.
M. C. Setalvad, Attorney-General for India and R.Ganapathy Aiyar, for the appellants.
A. V. Viswanatha Sastri, M. R. Rangaswami Aiyangar, T. S. Venkataraman and K. R. Choudhury, for the respondents.
1958. September 4. The Judgment of the Court was delivered by
VENKATARAMA AIYAR J.-This appeal arises out of a suit for partition of joint family properties instituted on April 2, 1942, in the Court of the District Munsif, Ongole, on behalf of one Kakumanu Ramanna, a minor of the age of about 2 1/2 years by his material grandfather, Rangayya, as his next friend. The first defendant is his father. The second and third defendants are the sons of the first defendant by his deceased first wife. The fourth defendant is the second wife of the first defendant and the mother of the plaintiff-. The fifth defendant is the daugther of the first defendant by the fourth defendant.
In the plaint, three grounds were put forward as to why the minor plaintiff should have partition: (1) It was said that the mother of the plaintiff was ill-treated, and there was neglect to maintain her and her children. Both the District Munsif and the Subordinate Judge on appeal, held that this had not been established, and no further notice need be taken of it. (2) It was then said that there had been a sale of the family properties to one Akkul Venkatasubba Reddi for Rs. 2,300, that there was no necessity for that sale, and that its object was only to injure the plaintiff. That sale is dated May 9, 1939. (3) Lastly, it was alleged that item 2 had been purchased on June 1, 1938, and item 11 on June 14, 1939, with joint family
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funds, but that the sale deeds had been taken in the names of the second and third defendants with a view to diminish the assets available to the plaintiff. In addition to these allegations, it was also stated in the plaint that the family was in good circumstances, and that there were no debts owing by it. On June 20, 1942, the defendants filed their written statements, wherein they claimed that the purchase of items 2 and 11 had been made with the separate funds of the second and third defendants, and that the joint family had no title to them. They further alleged that the family had debts to the extent of Rs. 2,600. Sometime in January 1943, the minor plaintiff died, and his mother who was the fourth defendant was recorded as his legal representative, and transposed as the second plaintiff.
The suit was in the first instance decreed, but on appeal, the Subordinate Judge remanded the case for trial on certain issues. At the rehearing, it ",as proved that the first plaintiff was born on December 20, 1939. On that, the District Munsif held that the sale of the family properties to Akkul Venkatasubba Reddi and the purchase of items 2 and II in the names of the second and third defendants having been anterior to the birth of the minor plaintiff, no cause

of action for partition could be founded thereon. The District Munsif also held on the evidence that the purchase of items 2 and 11 was not shown to have been made with separate funds, and that therefore they belonged to the joint family and further that the family owed no debts and that the allegations contra in the statements were not made out. But he held, however, that this did not furnish a cause of action for partition. In the result, he dismissed the suit. There was an appeal against this judgment to the Court of the Subordinate Judge of Bapatla, who affirmed the findings of the District Munsif that items 2 and 11 belonged to the joint, family, and that there were no debts owing by it. But he also agreed with him that as the sale and purchases in question were prior to the birth of the minor plaintiff, the suit for

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partition based thereon was not maintainable. He accordingly dismissed the appeal. The second plaintiff took the matter in second appeal to the High Court of Madras, and that was heard by Satyanarayana Rao J. who held that as the defendants had falsely claimed that items 2 and 11 were the separate properties of the second and third defendants, their interest was adverse to that of the minor and that the suit for partition was clearly beneficial to him. He accordingly granted a preliminary decree for partition. The present appeal has been brought against it on leave granted by this Court under Art. 136.

The learned Attorney-General who appeared for the appellants advanced two contentions in support of the appeal: (1) that there was a concurrent finding by both the courts below that the suit was not instituted for the benefit of the minor, and that the High Court had no power to reverse it in second appeal; and (2) that, in any event, as the minor plaintiff had died before the suit was heard and before the court could decide whether the institution of the suit was for his benefit, the action abated and could not be continued by his mother as his legal representative.

On the first question, the contention of the appellants is that it is a pure question of fact whether the institution of a suit is for the benefit of a minor or not, and that a finding of the courts below on that question is not liable to be interfered with in second appeal. But it must be observed that the finding of the Subordinate Judge was only that as the impugned sale and purchases were made before the minor plaintiff was born, no cause of action for partition could be founded by him thereon, and that, in our opinion, is a clear misdirection. The transactions in question were relied on by the minor plaintiff as showing that the defendants were acting adversely to him, and that it was therefore to his benefit that there should be a partition. It is no doubt true that as the plaintiff was not born on the date of those transactions, the defendants could not have entered into them with a view to injure him, though even as to this it should be noted that in May and -June,

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1939 when the transactions were concluded, the first plaintiff was in the womb, and the first defendant admits knowledge of this, in his evidence. But assuming that there was no intention to defeat the rights of the first plaintiff at the time when the transactions in question were entered into, that does not conclude the matter. The real point for decision is whether the defendants were acting adversely to the minor, and if, after he was born, they used documents which might have been innocent when they came into

existence, for the purpose of defeating his rights to the properties comprised therein, that would be conduct hostile to him justifying partition. Now, what are the facts ? In the written statements which were filed shortly after the institution of the suit while the first plaintiff was alive, defendants I to 3 combined to deny his title to items 2 and I 1, and at the trial, they adduced evidence in support of their contention that they were the separate properties of defendants 2 and 3. Even in the Court of Appeal, the defendants persisted in pressing this claim, and further maintained that the joint family had debts, and both the courts below had concurrently held against them on these issues. These are materials from which it could rightly be concluded that it was not to the interest of the minor to continue joint with the defendants, and that it would be beneficial to him to decree partition. In holding that as the transactions in question had taken place prior to his birth the minor could not rely on them as furnishing a cause of action, the courts below had misunderstood the real point for determination, and that was a ground on which the High Court could interfere with their finding in second appeal. We accept the finding of the High Court that the suit was instituted for the benefit of the minor plaintiff, and in that view, we proceed to consider the second question raised by the learned Attorney-General-and that is the main question that was pressed before us-whether the suit for partition abated by reason of the death of the minor before it was heard and decided.

The contention on behalf of the appellants is that while in the case of an adult coparcener a clear and

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unambiguous expression on his part of an intention to become divided will have the effect of bringing about a division in status and the filing of a suit for partition would amount to such an expression, that rule can have no application in the case of a minor, as under the law he is incapable of a volition of his own. It is conceded by the appellants that a suit for partition could be entertained on behalf of a minor plaintiff, and decreed if the court decides that it, is in the interests of the minor. But it is said that in such a case, the court exercises on behalf of the minor a volition of which lie is incapable, that it is not until that volition is exercised by the court that there can be a division in status, and that, therefore, when a minor plaintiff dies before the court adjudicates on the question of benefit to him, he dies an undivided coparcener and his interest survives to the other coparceners and does not devolve on his heirs by inheritance. The contention of the respondents, on the other hand, is that a suit for partition instituted on behalf of a minor coparcener stands on the same footing as a similar suit filed by an adult coparcener, with this difference that if the suit is held by the court not to have been instituted for the benefit of the minor it is liable to be dismissed, and no division in status can be held to result from such an action. In other words, it is argued that a suit for partition on behalf of a minor effects a severance in status from the date of the suit, conditional on the court holding that its institution is for the benefit of the minor.

The question thus raised is one of considerable importance, on which there has been divergence of judicial opinion. While the decisions in Chelimi Chetty v. Subbamma (1), Lalta Prasad v. Sri Mahadeoji Birajman Temple (2) and Hari Singh v. Pritam Singh(3), hold that when a suit for partition is filed on behalf of a minor plaintiff there is a division in

status only if and when the Court decides that it is for his benefit and passes a decree, the decisions in Rangasayi v. Nagarathnamma (4), Ramsing v. Fakira (5) and Mandliprasad v. Ramcharanlal (6), lay down that when such a

(1) (1917) I.L.R. 41Mad. 442.
(2) (1920) I.L.R. 42 All. 461.
(3) A.I.R. 1936 Lah. 504.
(4) (1933) I.L.R. 57 Mad. 95.
(5) I.L.R. [1939] Bom. 256.
(6) I.L.R. [1947] Nag. 848.

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suit is decreed, the severance in status relates back to the date of the institution of the suit. While Chelimi Chetty v. Subbamma (1) decides that when a minor on whose behalf a suit is filed dies before hearing, the action abates, it was held in Rangasayi v. Nagarathnamma (2) and Mandliprasad v. Ramcharanlal (3) that such a suit does not abate by reason of the death of the minor before trial, and that it is open to his legal representatives to continue the suit and satisfy the court that the institution of the suit was for the benefit of the minor, in which case there would be, a division in status from the date of the plaint and the interests of the minor in the joint family properties would devolve on his heirs. To decide which of these two views is the correct one, we shall have to examine the nature of the right which a minor coparcener has, to call for partition and of the power which the court has, to decide whether the partition in question is beneficial to the minor or not.

Under the Mitakshara law, the right, of a coparcener to share in the joint family properties arises on his birth, and that right carries with it the right to be maintained out of those properties suitably to the status of the family so long as the family is joint and to have a partition and separate possession of his share, should he make a demand for it. The view was at one time held that there could be no partition, unless all the coparceners agreed to it or until a decree was passed in a suit for partition. But the question was finally settled by the decision of the Privy Council in Girja Bai v. Sadashiv Dhundiraj (4), wherein it was held, on a review of the original texts and adopting the observation to that effect in Suraj Narain v. lqbal Narain (5), that every coparcener has got a right to become divided at his own will and option whether the other coparceners agree to it or not, that a division in status takes place when he expresses his intention to become separate unequivocally avid unambiguously, that the filing of a suit for partition is a clear expression of such an intention, and that, in consequence,

(1) (1917) I.L.R. 41 Mad. 442.
(2) (1933) I.L.R. 57 Mad. 95.
(3) I.L.R. [1947] Nag. 848.
(4) (1916) L.R. 43 I.A. 151.
(5) (1912) L.R. 40 I.A. 40,45.

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there is a severance in status when the action for partition is filed. Following this view to its logical conclusion, it was held by the Privy Council in Kawal Nain v. Prabhu Lal (1), that even if such a suit were to be dismissed, that would not affect the division in status which must be held to have taken place, when the action was instituted. Viscount Haldane observed:

"A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains

consequential judgment or not."
The law being thus settled as regards coparceners who are sui juris, the question is whether it operates differently when the coparcener who institutes the suit for partition is a minor acting through his next friend. Now, the Hindu law makes no distinction between a major coparcener and a minor coparcener, so far as their rights to joint properties are concerned. A minor is, equally with a major, entitled to be suitably maintained out of the family properties, and at partition, his rights are precisely those of a major. Consistently with this position, it has long been settled that a suit for partition on behalf of a minor coparcener is maintainable in the same manner as one filed by an adult coparcener, with this difference that when the plaintiff is a minor the court has to be satisfied that the action has been instituted for his benefit. Vide the authorities cited in Rangasayi v. Nagarathnamma (2 ) at p. 137. The course of the law may be said, thus far, to have had smooth run. But then came the decision in Girja Bai v. Sadashiv Dhundiraj (3) which finally established that a division in status takes place when there is an unambiguous declaration by a coparcener of his intention to separate, and that the very institution of a suit for partition constituted the expression of such an intention. The question then arose how far this principle could be applied, when the suit for partition was instituted not by a major but by a minor acting through his next friend. The view was expressed that
(1) (1917) L.R. 44 I.A. 159. (2) (1933) I.L.R. 57 Mad. 95.
(3) (1916) L.R. 43 I.A. 151.
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as the minor had, under the law, no volition of his own' the rule in question had no application to him it was not, however, suggested that for that reason no .suit for partition could be maintained on behalf of a minor, for such a stand would be contrary to the law as laid down in a series of decisions and must, if accepted, expose the estate of the minor to the perils of waste and spoliation by coparceners acting adversely to him. But what was said was that when a court decides that a partition is for the benefit of a minor, there is a division brought about by such decision and not otherwise. It would follow from this that if a minor died before the court decided the question of benefit lie would have died an undivided coparcener of his family and his heirs could not continue the action.
In Chelimi Chetty v. Subbamma (1), the point directly arose for decision whether on the death of a minor plaintiff the suit for -partition instituted on his behalf could be continued by his legal representatives. It was held that the rule that the institution of a suit for partition effected a severance of joint status was not applicable to a suit instituted on behalf of a minor, and that when he died during the pendency of the suit" his legal representative was not entitled to continue it. The ground of this decision was thus stated:
" It was strongly argued by the learned pleader for the respondent that as the plaint states facts and circumstances which, if proved, would be good justification for the court decreeing partition, therefore at this stage we must proceed on the basis that there was a good cause of action and there was thus a severance of status effected by the institution of the suit. This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance. What causes the severance of a joint Hindu family is not the existence

of certain facts which would justify any member to ask for partition, but it is the exercise of the option which the law lodges in a member of the joint family to say whether he shall continue to remain

(1) (1917) T.L.R. 41 Mad. 442.

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joint or whether he shall ask for a division. In the case of an adult he has not got to give any reasons why lie asks for partition but has simply to say that he wants partition, and the court is bound to give him a decree. In the case of a minor the law gives the court, the power to say whether there should be a division or not, and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor."

This decision was cited with approval in Lalta Prasad v.Sri Mahadeoji Birajman Temple (1), wherein it was observed:

" The effect, therefore, we think, of an action brought by a minor through his next friend is not to create any alteration of status of the family, because a minor cannot demand as of right a separation; it is only granted in the discretion of the court when, in the circumstances, the action appears to be for the benefit of the minor. See Chelimi Chetty v. Subbamma (2)."

In Hari Singh v. Pritam Singh (3), a suit for partition instituted on behalf of a minor was decreed, the court finding that it was for the benefit of the minor. The question then arose as to the period for which the karta could be made liable to account. It was held, following the decisions in Chelimi Chetty v. Subbamma (2 ) and Lalla Prasad v. Sri Mahadeoji Birajman Temple (1), that as the severance in status took place only on the date of the decision and not when the suit was instituted, the liability to account arose only from the date of the decree and not from the date of the suit. It may be mentioned that in Chhotabhai v. Dadabhai (4) Divatia J. quoted the decision in Chelimi Chetty v. Subbamma (2) with approval, but as pointed out in Ramsing v. Fakira (5) and by the learned judge himself in Bammangouda v. Shankargouda (6), the point now under consideration did not really arise for decision in that case, and the

(1) (1920) I.L.R. 42 All. 461.
(2) (1917) I.L.R. 41 Mad. 442.
(3) A.I.R. 1936 Lah. 504.
(4) A.I.R. 1935 Bom. 54.
(5) I.L.R. [1939] Bom. 256.
(6) A.I.R. 1944 Bom. 67.

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observations were merely obiter. It is on the strength of the above authorities that the appellants contend that when the minor plaintiff died in January 1943, the suit for partition had abated, and that his mother had no right to continue the suit as his heir.

Now, the ratio of the decision in Chelimi Chetty v. Subbamma (1)-and it is this decision that was followed in Lalta Prasad's Case (2 ), Hari Singh v. Pritam Singh (3) and Chhotabhai v. Dadabhai (4)-is that the power to bring about a division between a minor and his coparceners rests only with the court and not with any other person, and that, in our judgment, is clearly erroneous. When a court decides that a suit for partition is beneficial to the minor, it does not itself bring about a division in status. The court is not in the position of a super-guardian of a minor expressing on his behalf all intention to become divided.

That intention is, in fact, expressed by some other person, and the function which the court exercises is merely to decide whether that other person has acted in the best interests of the minor in expressing on his behalf ail intention to become divided. The position will be clear when regard is had to what takes place when there is a partition outside court. In such a partition, when a branch consisting of a father and his minor son becomes divided from the others, the father acts on behalf of the minor son as well; and the result of the partition is to effect a severance in status between the father and his minor son, oil the one hand and the other coparceners, on the other. In that case, the intention of the minor to become separated from the coparceners other than his father is really expressed on his behalf by his father. But it may happen that there is a division between the father and his own minor son, and in that case, the minor would normally be represented by his mother or some other relation, and a partition so entered into has been recognised to be valid and effective to bring about a severance in status. The minor has no doubt the right to have the partition set aside if it is shown to have been prejudicial to him but if that is not established, the partition

(1) (1917) I.L.R. 41 Mad. 442.
(3) A.I.R. 1936 Lah. 504.
(2) (1920) I.L.R. 42 All. 461.
(4) A.I.R. 1935 BOM. 54.

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is binding on him. Vide Balkishen Das v. Ram Narain Sahu (1). And even when the partition is set aside on the ground that it is unfair, the result will be not to annul the division in status created by the partition but to entitle the minor to a re-allotment of the properties. It is immaterial that the minor was represented in the transaction not by a legal guardian but by a relation. It is true, as held in Gharib- Ul-Lah v. Khalak Singh (2) that no guardian can be appointed with reference to the coparcenary properties of a minor member in a joint family, because it is the karta that has under the law the right of management in respect of them and the right to represent the minor in transactions relating to them. But that is only when the family is joint, and so where there is disruption of the joint status, there can be no question of the right of a karta of a joint family as such to act on behalf of the minor, and on the authorities, a partition entered into on his behalf by a person other than his father or mother will be valid, provided that person acts in the interests of and for the benefit of the minor.

If, under the law, it is competent to a person other than the father or mother of a minor to act on his behalf, and enter into a partition out of court so as to bind him, is there any reason why that person should not be competent when he finds that the interests of the minor would best be served by a division and that the adult coparceners are not willing to effect a partition, to file a suit for that purpose on behalf of the minor, and why if the court finds that the action is beneficial to the minor, the institution of the, suit should not be held to be a proper declaration on behalf of the minor to become divided so as to cause a severance in status? In our judgment, when the law permits a person interested in a minor to act on his behalf, any declaration to become divided made by him on behalf of the minor must be held to result in severance in status, subject only to the court deciding whether it is beneficial to the

minor; and a suit instituted on his behalf if found to be beneficial, must be held to bring about a division in status. That

(1) (1903) L.R. 30 I.A. 139. :
(2) (1903) L.R. 30 I.A. 165.

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was the view taken in a Full Bench decision of the Madras High Court in Rangasayi. v. Nagarathnamma (1), wherein Ramesam J. stated the position thus:

" These instances show that the object of the issue whether the suit was for the benefit of the minor is really to remove the obstacle to the passing of the decree. It is no objection to the maintainability of the suit. In my opinion therefore in all such cases the severance is effected from the date of the suit conditional on the court being able to find that the suit when filed was for the benefit of the minor."

The same view has been taken in Ramsing v. Fakira (2) and Mandliprasad v. Ramcharanlal (3), and we agree with these decisions.

On the conclusion reached above that it is the action of the person acting on behalf of a minor that brings about a division in status, it is necessary to examine what the nature of the jurisdiction is which the courts exercise when they decide whether a suit is for the benefit of a minor or not. Now, the theory is that the Sovereign as parens patriae has the power, and is indeed under a duty to protect the interests of minors, and that function has devolved on the courts. In the discharge of that function, therefore, they have the power to control all proceedings before them wherein minors are concerned. They can appoint their own officers to protect their interests, and stay proceedings if they consider that they are vexatious. In Halsbury's Laws of England, 3rd Edn., Vol. XXI, p. 216, para. 478, it is stated as follows:

" Infants have always been treated as specially under the protection of the Sovereign, who, as parens patriae, had the charge of the persons not capable of looking after themselves. This jurisdiction over infants was formerly delegated to and exercised by the Lord Chancellor; through him it passed to the Court of Chancery, and is now vested in the Chancery Division of the High Court of Justice. It is independent of the question whether the infant has any property or not."

(1) (1933) I.T.R. 57 Mad. 95.
(2) I.L.R. [1939] Bom. 256.
(3) I.L.R. [1947] Nag. 848.

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It is in the exercise of this jurisdiction that courts require to be, satisfied that the next friend of a minor has in instituting a suit for partition acted in his interest. When, therefore, the court decides that the suit has been instituted for the benefit of the minor and decrees partition, it does so not by virtue of any rule, special or peculiar to Hindu law but in the exercise of a jurisdiction which is inherent in it and which extends over all minors. The true effect of a, decision of a court that the action is beneficial to the minor is not to create in the minor proprio vigore a right which he did not possess before but to recognise the right which had accrued to him when the person acting on his behalf instituted the action. Thus, what brings about the severance in status is the action of the next friend in instituting the suit, the decree of the court merely rendering it effective by deciding that what the next friend has done is for the benefit of the minor.

It remains to consider one other argument advanced on behalf of the appellants. It was urged that the cause of action for a suit for partition by a minor was one personal to him, and that on his death before hearing, the suit must abate on the principle of the maxim, actio personalis moritur cum persona. But that maxim has application only when the action is one for damages for a personal wrong, and as a suit for partition is a suit for property, the rule in question has no application to it. That was the view taken in Rangasayi v. Nagarathnamma (1) at pp. 137-138 and in Mandliprasad v. Ramcharanlal (2) at p. 871, and we are in agreement with it.

All the contentions urged in support of the appeal have failed, and the appeal is accordingly dismissed with costs.

The amounts paid by the appellants to the respondents in pursuance of the order of this Court dated March 7, 1958, will be taken into account in adjusting the rights of the parties under this decree.

(1) (1933) I.L.R. 57 Mad. 95.

Appeal dismissed.

(2) I.L.R. [1947] Nag. 848.

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