## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

1896.
January 30.
August 7.

KUNHI PENNU (PLAINTIFF), APPELLANT,

*v.*

CHIRUDA (DEFENDANT), RESPONDENT.*

*Makkatayam law—Thiyyas of Calicut—Succession.*

Among the Thiyyas of Calicut governed by the Makkatayam Law, the widow of the deceased owner is a preferential heir to his mother.

APPEAL against the decree of A. Venkataramanapai, Subordinate Judge of Calicut, in original suit No. 4 of 1894.

The facts of the case were as follows :—

"Suit for a declaration that plaintiff is entitled to succeed to "the plaint properties left by her deceased son Sankaran in pre- "ference to his widow, the defendant.

"Defendant pleads that the suit is precluded by the pro- "visions of section 42 of the Specific Relief Act I of 1877, that "plaintiff had been divorced by her husband Raman, and that "she (the defendant) is heir to the plaint property left by her "husband Sankaran.

"Issues for determination are—

"(1) Whether the suit for a mere declaration of title is maintainable ?

"(2) Whether the plaintiff had been divorced by her husband Raman ?

"(3) Whether plaintiff is entitled to succeed to the properties left by her son Sankaran in preference to his widow, the defendant ?

"Plaintiff is the widow of one Edathodi Raman and defendant "is the widow of their son Sankaran. The plaint property was "acquired by Raman, on whose death it descended to his son "Sankaran, who held it until his death in July–August 1893. "The question is whether Sankaran's mother the plaintiff or his "widow the defendant is the preferential heir. The parties are "Makkatayam Thiyyas of Calicut."

* Appeal No. 50 of 1895.

The Subordinate Judge did not record a finding on the first issue; as to the second issue, he found that the plaintiff had not been divorced by her husband Raman; and as to the third, that the plaintiff was not entitled to succeed to the properties left by her son in preference to his widow, the defendant. He accordingly dismissed the suit with costs.

Plaintiff appealed.

*Govindan Nambiar* for appellant.

Mr. *Krishnan* for respondent.

The Court (COLLINS, C.J., and PARKER, J.) made the following

ORDER.—The Subordinate Judge has decided the suit on the ground that, in the absence of proof of a special custom, the ordinary Hindu law must be followed, and hence that the widow will succeed in preference to the mother.

But he holds at the same time that the family property belonging to Raman and Sankaran was impartible on the strength of the decision in *Raman Menon* v. *Chathunni*(1). If this be so, a special custom in deviation of the ordinary rule of Hindu law has so far been proved.

The question then arises—if the property be held as tarwad property in the marumakkathayam sense—who is to hold it on the death of the last male? Is it the senior surviving female, the property being impartible; or the widow of the last male-holder as in Hindu law? When once the Hindu law has been deviated from as to the nature of the property, it may be that the succession would go as in a tarwad. See *Raichan* v. *Perachi*(2).

We think the following issues should be tried:—

(1) Was the property held by Raman and Sankaran as impartible tarwad property?

(2) If so, does the succession pass on the death of the survivor to his widow, or to the senior female in the family, or to both?

There should also be a finding on the first issue.

Further evidence may be taken.

The findings will be returned in three months from the date of the receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

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(1) I.L.R., 17 Mad., 184. (2) I.L.R., 15 Mad., 281.

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In compliance with the above order, the Subordinate Judge submitted the following

"FINDING:—I am directed to try the following two additional "issues and to submit my findings thereon, and also on the first "issue tried at the original hearing:—

"(1) Was the property held by Raman and Sankaran as impartible tarwad property?

"(2) If so, does the succession pass on the death of the survivor to his widow, or to the senior female in the family, or to both?

"Plaintiff sues for a declaration that she is entitled to succeed "to the plaint property left by her late husband Raman and in- "herited on his death by their son Sankaran, who died in July- "August 1893. Plaintiff states (and the defendant admits) that "the property belonged to Raman as his self-acquired property "(see paragraph 1 of the plaint). It is the case of neither party "that the property was held by Raman and his son Sankaran "jointly whether as impartible tarwad property or otherwise. The "son inherited the property on the death of his father, its sole "owner.

"The argument seems to be that in the hands of Sankaran the "property was family property, *i.e.*, property belonging to the "family of his father Raman, who was its sole owner, and that, as "such family property, it was impartible tarwad property. On "Raman's death, his family consisted of his widow, the plaintiff, "and his son Sankaran, deceased husband of defendant. The son "inherited the estate, subject, of course, to the interest possessed "by the widow in her deceased husband's property. To this ex- "tent the property must be deemed to have been held by San- "karan as family property.

"It has been held that among Makkatayam Thiyyas of Cali- "cut there can be no compulsory partition of family property— "*Raman Menon* v. *Chathunni*(1). In the present case the defend- "ant attempts to prove that partition is enforcible, but there is "no satisfactory evidence as to the custom. Defence witnesses "6, 7 and 8 depose that partition can be enforced, but the 8th "witness gives no instances of such partition, and though the "remaining two witnesses refer to some cases, their evidence can

(1) I.L.R., 17 Mad., 184.

"hardly be accepted as sufficient. The omission to call the parties "to any such partition or their successors is not explained. De- "fendant cites three cases in which partition has been decreed "by Courts, but these are inconclusive. One is a case of 1876 "(exhibit XIX) in which an arbitrator's award was ordered to be "passed into a decree of Court. In the other two cases (of 1887) "in which partition was decreed no question appears to have "been raised as to the right to seek compulsory partition. I am "of opinion that the evidence adduced in this case is insufficient "to support a finding, in opposition to the ruling quoted above, "that partition is enforcible in respect of the property in dispute "in this case.

"It follows, therefore, that the plaint property which belonged "to Raman as his separate property, and inherited on his death by "his son Sankaran, was held by the latter subject to the interest "of his widow the plaintiff. Now what is the nature of plain- "tiff's interest in the property? It can scarcely be contended "that property left by a Makkatayam Thiyya belongs to his "widow and son jointly. The very term makkatayam signifies "that the 'dayam' or succession belongs to the 'magan' or son.

"Assuming for the sake of argument that the plaint property "was held by Raman and Sankaran as impartible tarwad property, "and that on the death of the former the latter took it as the "survivor, the question is whether, on the death of the survivor, "it descends to his widow, or to her and to her mother-in-law, "or to the senior of them. Is there any custom governing the "succession? Neither party has cited any decision bearing on the "point. The oral evidence in the case is not important. Plain- "tiff's witnesses depose that the property left by the son belongs "to the mother in preference to the widow. On the other hand, "the defendant's witnesses state that, according to custom, the "widow takes the estate to the exclusion of the mother. Plain- "tiff's witnesses give no instances of the succession of the mother "in preference to the widow. Defendant's witnesses 3, 6 and 7 "do refer to some instances, but the parties concerned have not "been called. I am unable to hold that this evidence is sufficient "to prove the custom.

"In these circumstances, it appears to me that the question "has to be decided on general principles assisted by any judicial "decision in the case of communities similarly situated. In

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"Malabar the bulk of the population (chiefly Nayars) follow the "marumakkathayam law of inheritance under which the tarwad "holds the property as impartible family property. The Nam- "budri Brahmans, who are of course subject to the Hindu law of "inheritance, have, since their settlement in Malabar, adopted "special customs modifying the Hindu law rules in certain "matters. They have, for instance, adopted the local rule of "impartibility of family property. The makkatayam Thiyyas of "Calicut are also held to have adopted that rule; but the funda- "mental basis of the makkatayam or Hindu law of inheritance, "viz., that the succession belongs in the first instance to males "(magans or sons) to the exclusion of females, does not appear to "have been abandoned by either community in favour of the "marumakkathayam rule, according to which male and female "members have equal rights to family property. Thus, even "where a widow was the sole surviving member of a (Nambudri) 'family, it was held that she is not at liberty to alienate the "family property at her pleasure, and that it is not at her abso- "lute disposal—*Vasudevan* v. *The Secretary of State for India*(1). "This ruling implies that the widow has no equal rights of "property with males. I do not see why the principle upheld "in this ruling in the case of Nambudris should not be held to "apply to makkatayam Thiyyas of Calicut, who, though subject "to the Hindu law rule of succession from father to son (makkat- "ayam), have, like the Nambudris, adopted the marumakkatha- "yam rule of impartibility of family property.

"The position of females being thus substantially that of "females under the ordinary Hindu law, and the inheritance "being found to belong to males to the exclusion of females, it is, "I think, reasonable to hold that the widow takes the inheritance "in preference to the mother.

"I find, then, that the plaint property was not held by Raman "and Sankaran as their joint tarwad property, though among "these people joint family property would be impartible (first "issue), and that, on the death of Sankaran, the succession passed "to his widow the defendant (second issue).

"I have now to record my finding on the first issue raised at "the original trial, viz., whether the suit for a mere declaration of

(1) I.L.R., 11 Mad., 157.

"title is maintainable. I find that the suit is not maintainable. "Plaintiff's own sixth witness states that the property is held by "defendant. Defence first witness, Chathu Kutti, who has been "karyastan since Sankaran's time, deposes that defendant is in "possession, and that the taxes due on the property are paid by, "or in behalf of, defendant. Defendant's brother (ninth witness), "who manages her affairs, gives evidence to the same effect. This "evidence is amply supported by documentary evidence. Im- "mediately after Sankaran's death, the defendant appears to have "paid assessment (see revenue receipts V) and granted leases (see "exhibits VI to XII) in respect of his properties. The patta has "also been transferred to defendant's name (exhibits XIII to "XV). Plaintiff is thus in a position to seek further relief than "a mere declaration, and her suit is unsustainable."

This appeal coming on again for final hearing on return to the order of this Court dated 30th January 1896, the Court delivered the following

JUDGMENT.—There being no memorandum of objections, we accept the findings and dismiss the appeal with costs.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

ZAMINDAR OF VALLUR AND GUDUR, PLAINTIFF,

1896. August 1894.

*v.*

ADINARAYUDU, DEFENDANT.*

*Civil Procedure Code, s. 649—Provincial Small Cause Court's Act—Act IX of 1887, s. 35(1)—Withdrawal of powers—Civil Courts Act—Act III of 1873 (Madras), s. 28.*

Under Madras Act III of 1873, s. 28, a Munsif was invested with the powers of a Small Cause Court's Judge for the trial of suits cognizable by such Court up to Rs. 200 in value. Subsequent to decree but prior to execution, his powers as Small Cause Court's Judge were withdrawn by notification in the Gazette:

*Held*, that application for execution must be made to the Court in which the Small Cause Court's jurisdiction vested at the date of the application.

* Referred Case No. 4 of 1896.